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## Sanctions as Virtue-Signaling: Transitioning from Symbolism to Reparation for Rohingya Genocide Victim

Kelsey Peden

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# SANCTIONS AS VIRTUE-SIGNALING: TRANSITIONING FROM SYMBOLISM TO REPARATIONS FOR ROHINGYA GENOCIDE VICTIMS

KELSEY PEDEN \*

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\* Juris Doctor from the University of California, Berkeley School of Law and Master of Public Policy from the London School of Economics. This article was researched and drafted in 2020 and 2021, prior to the Russian invasion of Ukraine in February 2022. Since the invasion, international discussions about targeted sanctions, asset recovery, and repurposing of assets have grown exponentially, with some nations taking legislative steps to codify sanctions repurposing in the context of Ukraine. This article mentions but does not go into detail on Ukraine reparations schemes in Part IV, simply because legislation was, and still is, evolving throughout this article’s publication process. However, it is worth noting that the idea of repurposing seized assets for victims has gained popularity over the previous months, and larger conversations about this exist now than this article is able to reflect.

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## I. INTRODUCTION

Kyi sat on the banks of the Inya Lake, saying goodbye to the place they said was no longer her home.<sup>1</sup> The government of Myanmar<sup>2</sup> had given her an option: leave or be arrested. She felt lucky to leave; most activists she knew did not get a warning first. A few kilometers away, her parents' graves sat cleaned, adorned with fresh flowers. She hoped her sister would keep up the task in her absence, but she hadn't been able to get ahold of her in quite some time. The feeling of the country was getting more concerned—"frantic" she explained, laughing, "everyone is afraid to answer the phone," as if the doors that had swung open to the world a decade earlier were showing signs of slamming closed again.<sup>3</sup>

A small group of organizers gathered to say goodbye to Kyi, but

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1. Name and identifying information changed for the safety of those involved. Interview with Kyi, Rohingya Activist (Feb. 24, 2021) (July 8, 2019) (notes on file with author). Kyi was allowed to leave Myanmar prior to the 2021 Military coup. The location and safety of many of her friends and fellow activists are now unknown.

2. Debate exists on the name of this country with some nations, such as the U.S. and U.K., referring to the nation only by its previous name "Burma" instead of "Myanmar." The name of the nation was officially changed from "Burma" to "Myanmar" in 1989 by the ruling military junta, in an attempt to break from the nation's colonial past. In the Burmese language, the names are used interchangeably, with Myanmar being the more formal of the two. For the sake of this article, the author will use "Myanmar" as the country name out of both recognition of colonization and in accordance with the United Nations country title. The choice between the two is not a policy decision, nor an implicit approval of the military junta rule. For more on the conflict in title, see *Who, What, Why: Should it be Burma or Myanmar?*, BBC News (Dec. 2, 2011), <https://www.bbc.com/news/magazine-16000467> [hereinafter *Should it be Burma or Myanmar?*] (stating that both terms have been used interchangeably for years. Myanmar is the formal term, while Burma is the informal term).

3. Interview with Kyi, *supra* note 1.

the symbolism of having her farewell at Inya Lake escaped no one. A different kind of goodbye happened on this bank in the 1980s, when troops cornered local college students protesting the military rule, opening fire on the crowds fleeing into the waters, and drowning those who the bullets didn't reach.<sup>4</sup> There are no signs or plaques commemorating this tragedy, no indication of the massacre or acknowledgment of those who did not make it out of the water.<sup>5</sup> Instead, it is the job of the group standing on the shore, and those who came before, to pass down this story and keep the memory alive.<sup>6</sup> At that very moment, similar stories were being created on the western side of the nation as the Myanmar military led the largest modern genocide against its own Rohingya people,<sup>7</sup> an ethnic Muslim minority group who have inhabited the Rakhine state for hundreds of years.<sup>8</sup> These are the people Kyi has been advocating for, organizing protests and sit ins.<sup>9</sup> This is the reason she no longer has a home.<sup>10</sup>

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4. Megan Clymer, Min Ko Naing, "Conqueror of Kings": Burma's Student Leader, 8 J. BURMA STUD. 33, 39 (2003). (discussing the March Movement of 1988 that happened as a result of the riot police's response to a teashop brawl that resulted in the death of three students). REFUGEE REV. TRIBUNAL, AUSTRALIA, MMR35154, RRT RESEARCH RESPONSE 2 (July 29, 2009) [hereinafter REFUGEE REV. TRIBUNAL] (stating that nearly 100 students were shot by riot police or drowned in Inya Lake, adjacent to the White Bridge, when soldiers trapped them between barbed wire barricades, the lake, and the walls of nearby houses.)

5. Interview with Kyi, *supra* note 1.

6. *Id.*

7. For more on the Rohingya genocide, see, e.g., Ariella Victoria Levine, *A Modern Day Holocaust: The Genocide of the Rohingya Muslims of Myanmar*, 19 RUTGERS J. L. & RELIGION 398, 407–08 (2018) (discussing a report in 2017 that told the stories of the Rohingya Muslims. The report told devastating tales of death by fire, close range shootings, stabbings, burnings, beatings to death, killing children, kidnapping, and all types of sexual violence). Ryan Mitra, Book Note, 3 LIBERAL STUD. 141, 141, 144 (2018) (reviewing AZEEM IBRAHIM, *THE ROHINGYAS: INSIDE MYANMAR'S HIDDEN GENOCIDE* (2017)).

8. Rey Ty, *The Rohingya Refugee Crisis*, 29 SUR - INT'L J. ON HUM. RTS. 49, 51 (2019) (stating that from 1429 to 1785, the independent Kingdom of Mrauk-U ruled over what is now known as the Rakhine State in Myanmar and the Chittagong Division in Bangladesh, where Muslims and Buddhists of different ethnicities coexisted. During this same period, this region was a protectorate of the Sultan of Bengal at different points in time. By the 18th century, it became part of the Burmese Empire).

9. Interview with Kyi, *supra* note 1.

10. *Id.*

On August 25, 2017, one of the most horrendous military campaigns in modern history began, as the Myanmar army invaded its own Rakhine state, telling soldiers to enter civilian villages and “kill all you see.”<sup>11</sup> As the military bore down on civilians, hundreds of thousands were brutally murdered, raped, burned alive, or forced to flee to their homes.<sup>12</sup> As one refugee told Human Rights Watch, “we witnessed thousands of people being killed. Bodies were floating in the river in Tula Toli, but no justice has been served.”<sup>13</sup>

On February 1, 2021, as civilians continue to be slaughtered in the Rakhine state, a woman 264 Kilometers away in the capital city of Naypyitaw accidentally captures a military coup occurring in the background of an aerobics class she is recording.<sup>14</sup> The new military leader, Min Aung Hlaing, is credited by many as the instigator of the 2017 genocide.<sup>15</sup> The question of what nations can do to prevent

11. Hannah Beech, et al., *‘Kill All You See’: In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>.

12. *Id.*; see also Beech, *supra* note 11.

13. *Myanmar: Rohingya Await Justice, Safe Return 3 Years On*, HUM. RTS. WATCH (Aug. 24, 2020, 12:52 AM), <https://www.hrw.org/news/2020/08/24/myanmar-rohingya-await-justice-safe-return-3-years> [hereinafter *Rohingya Await Justice*] (stating that Myanmar has failed to address the root causes of widespread abuses against the Rohingya and has refused to create the necessary conditions for their safe, dignified, and voluntary return.)

14. The video, posted on the website Reddit, may be the only recording of the military Junta available to the outside world. See u/juanTressel, *This women from Myanmar was recording her aerobics class. Unbeknownst to her, she records the military Junta arriving to the parliament for a coup d’etat in the background*, REDDIT (Feb. 1, 2021, 10:26 AM), [https://www.reddit.com/r/PublicFreakout/comments/laa59v/this\\_woman\\_from\\_myanmar\\_was\\_recording\\_her](https://www.reddit.com/r/PublicFreakout/comments/laa59v/this_woman_from_myanmar_was_recording_her); Rachel Treisman, *Coup Caught On Camera: Myanmar Woman Goes Viral For Dance Video With Surreal Backdrop*, NPR (Feb. 2, 2021, 3:10 PM), <https://www.npr.org/2021/02/02/963300568/coup-caught-on-camera-myanmar-woman-goes-viral-for-dance-video-with-surreal-back>.

15. See Lila Hassan, *‘Serious Threats’ Ahead: Human Rights Experts Voice Concern for Rohingya Muslims in Myanmar Following Military Coup*, FRONTLINE (Feb. 2, 2021), <https://www.pbs.org/wgbh/frontline/article/human-rights-experts-concern-rohingya-muslims-myanmar-january-31-military-coup>; Daphne Psaedakis & Simon Lewis, *U.S. Slaps Sanctions on Myanmar Military Chief over Rohingya Atrocities*, REUTERS (Dec. 19, 2019, 7:47 AM), <https://www.reuters.com/article/us-usa-myanmar-sanctions/u-s-slaps-sanctions-on-myanmar-military-chief-over-rohingya-atrocities-idUSKBN1YE1XU> (stating that Burmese military forces had committed “serious human rights abuse” under Min Aung Hlaing’s

further death bounces across every international headline.<sup>16</sup> No answer is given.

In the months since the coup, thousands of Burmese citizens have taken to the streets to protest the government takeover, and other human rights concerns including the treatment of the Rohingya.<sup>17</sup> Civil disobedience is rampant.<sup>18</sup> Hospital and medical staff sport red ribbons to show solidarity with marching students, teachers, and government groups.<sup>19</sup> These protests, however, have been met with violent repression.<sup>20</sup> Hundreds of activists and protestors have been murdered and thousands have been arbitrarily imprisoned, with many subjected to torture, rape, or enforced disappearance.<sup>21</sup> Individuals

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command).

16. See, e.g., *Myanmar: Military Coup Kills Democracy*, HUM. RTS. WATCH (Feb. 1, 2021, 4:38 PM), <https://www.hrw.org/news/2021/02/01/myanmar-military-coup-kills-fragile-democracy> (arguing that Governments worldwide should together demand that the Myanmar military respect the results of recent national elections and relinquish power); Jessie Yeung, *Myanmar's Military Has Detained Leader Aung San Suu Kyi in a Coup. Here's What You Need to Know*, CNN, <https://www.cnn.com/2021/02/01/asia/myanmar-military-coup-explainer-intl-hnk-scli/index.html> (Mar. 10, 2021, 4:59 AM) (reporting that US President Joe Biden called on Myanmar's military leaders to "immediately relinquish the power they have seized, release the activists and officials they have detained, lift all telecommunications restrictions, and refrain from violence against civilians.").

17. *Timeline: The Month since Myanmar's February 1 Coup*, AL JAZEERA (Feb. 23, 2021), <https://www.aljazeera.com/news/2021/2/23/timeline-of-events-in-myanmar-since-february-1-coup>. (stating that The February 1 coup has triggered nationwide protests, with hundreds of thousands taking to the streets to demand the release of elected leader Aung San Suu Kyi and the restoration of civilian rule.)

18. *Id.* (stating that in Myanmar's largest city, Yangon, people banged pots and pans and sounded car horns in protest, while doctors and student groups call for civil disobedience campaigns).

19. *Id.* (stating that on February 3, 2021, staff at seventy hospitals and medical departments across Myanmar stopped work and others wore red ribbons as part of a civil disobedience campaign).

20. *Id.* (stating that between February 20 and February 28 2021, security forces opened fire on striking workers and other protesters at a Mandalay shipyard, launched a sweeping crackdown, arrested hundreds and killed at least 18 people).

21. These activists post-coup are not directly protesting the Rohingya genocide. However, this does show an active and continued violence by the Myanmar government against its own people, including those who would protest the genocide. See *Myanmar: Coup Leads to Crimes Against Humanity*, HUM. RTS. WATCH (July 31, 2021, 4:42 PM), <https://www.hrw.org/news/2021/07/31/myanmar-coup-leads-crimes-against-humanity>. The Tatmadaw, which has not carried through a death penalty sentence in decades, shocked the world by recently

who speak out against the military government, for the Rohingya or broader human rights reasons, are met with violent reprisals which includes the recently revived use of the death penalty.<sup>22</sup> Internal accountability and justice in Myanmar is simply not possible.<sup>23</sup> At the same time, the Rohingya genocide and exclusion continues, and fears of escalation under military control grow.<sup>24</sup>

International concern continues to reverberate through hundreds of nations, with each condemning the genocide and violence against protestors, and taking steps to signal disapproval without resorting to violent intervention.<sup>25</sup> The most common international response is sanctions, using negative financial incentives against the nation or

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executing four democracy activists including former lawmaker Phyo Zeya Thaw and protest organizer Ko Jimmy. *Myanmar: First Execution in Decades Mark Atrocious Escalation in State Repression*, AMNESTY INT'L (July 25, 2022) <https://www.amnesty.org/en/latest/news/2022/07/myanmar-first-executions-in-decades-mark-atrocious-escalation-in-state-repression>.

22. Wai Wai Nu, Argument, *The World Has Failed to Stand With Myanmar*, FOREIGN POL'Y (Feb. 1, 2022, 2:07 PM), <https://foreignpolicy.com/2022/02/01/myanmar-coup-military-anniversary-rohingya-violence-protests-un-security-council> (discussing how her family was imprisoned for seven years due to her father's democracy activism under the military dictatorship).

23. Hassan, *supra* note 15 (discussing how the military has systemically dismantled the rights of the Rohingya Muslims enabling ethnic cleansing).

24. Author interview with Rohingya Activist (Feb. 24, 2021) (on file with author); Maria Siow, Bleak Ramadan for Myanmar's Rohingya Muslims, in *Danger of Further Abuses by the Military*, Analysts Warn, S. China Morning Post (Apr. 18, 2021, 5:00 PM), <https://www.scmp.com/week-asia/politics/article/3129930/bleak-ramadan-myanmars-rohingya-muslims-danger-further-abuses> (stating that while the country's majority ethnically Bamar population have become more sympathetic to the plight of the Rohingya since the February 1 coup, there appears to be little they can do to protect the Rohingya from the military).

25. See Edith Lederer, *UN Calls for Reversal of Myanmar Coup and Condemns Violence*, AP NEWS (Mar. 10, 2021), <https://apnews.com/article/aung-san-suu-kyi-asia-pacific-myanmar-united-nations-4d0b4e78b8b740784c7ed5adb0aec3b4> (stating that the U.N. Security Council unanimously called for a reversal of the military coup in Myanmar on Wednesday, strongly condemning the violence against peaceful protesters and calling for "utmost restraint" by the military. The U.S. Ambassador agreed with the U.N. Security Council); *Global Condemnation of Myanmar Military's 'Reign of Terror' After Deadliest Day Since Coup*, FRANCE 24 (Mar. 28, 2021), <https://www.france24.com/en/asia-pacific/20210328-global-condemnation-of-myanmar-military-s-reign-of-terror-after-deadliest-day-since-coup> [hereinafter *Global Condemnation*] (stating that the defense chiefs of 12 countries including the United States, Britain, Japan and Australia condemned the Myanmar military's use of lethal force against civilians.)

individual citizens, by freezing assets, restricting travel, and more.<sup>26</sup> For the last 60 years, sanctions have been the main form of international action against Myanmar human rights violations, but their success in *preventing* genocide in Myanmar is widely debated.<sup>27</sup>

For Kyi, international condemnation and sanctions were a step forward, but not the answer she was looking for.<sup>28</sup> While recognition of human rights abuse is important, recognition without action comes across as mere virtue signaling. “People just look at my country and say, ‘that’s bad – what they are doing, the government, we don’t approve’ but then don’t help those affected.”<sup>29</sup> The use of sanctions leaves Kyi feeling abandoned, even as nations recognize the atrocities committed; “because the outside world sees no way forward, they sanction our leaders and say ‘this is bad’”, but “they’ve stopped trying to help those of us fighting and hurting within.”<sup>30</sup>

How to enforce human rights standards in Myanmar’s ever-changing landscape has been debated by international lawyers for decades.<sup>31</sup> With changing leadership, multiple ongoing genocides, and increasing rates of poverty, traditional state efforts to impact

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26. Tim McDonald, *Myanmar Coup: Could Sanctions on the Military Ever Work?*, BBC NEWS (Apr. 9, 2021), <https://www.bbc.com/news/business-56248559>; Leon T. Hadar, *U.S. Sanctions Against Burma: A Failure on All Fronts*, 1 CATO INST. TRADE POL’Y ANALYSIS (Mar. 26, 1998), <https://www.cato.org/trade-policy-analysis/us-sanctions-against-burma-failure-all-fronts> (stating that State and local sanctions against Burma have compounded the problem caused by federal sanctions and raised troubling constitutional questions); *Myanmar, Sanctions, and Human Rights*, HUM. RTS. WATCH (Feb. 18, 2021, 11:19 AM), <https://www.hrw.org/news/2021/02/18/myanmar-sanctions-and-human-rights> (discussing detailed information about sanctions and other legal and diplomatic measures that have been or can be imposed on the Myanmar military and its leaders in response to the coup on February 1, 2021, as well as Human Rights Watch’s general position on sanctions).

27. Interview with Kyi, *supra* note 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See generally*, Hadar, *supra* note 26 (arguing that present U.S. policy toward Burma will not bring meaningful change in the human rights practices of the regime); *Myanmar, Sanctions, and Human Rights*, *supra* note 26 (stating that the Human Rights Watch supports the use of certain types of sanctions that aim to affect the actions of policymakers and perpetrators of abuses while minimizing negative effects on the general population).



change through sanctions have arguably failed to help victims in the context of this nation.<sup>32</sup> Myanmar's unique socio-economic challenges, geopolitical alliances, isolated population, and military control pose unique problems for sanctions regimes.<sup>33</sup> Sanctions imposed on Myanmar have focused on prevention and punishment, but have yet to bring lasting change, and therefore demand a new approach.<sup>34</sup> Over the last year, the Biden Administration continued to level targeted sanctions against members of the Myanmar military, including under the Global Magnitsky Sanctions Act ("Magnitsky Sanctions"), in the name of human rights.<sup>35</sup> While targeted sanctions can have positive preventative effects, it is necessary to reevaluate how the U.S. and other nations implement Magnitsky sanctions in the context of Myanmar, and redefine the goals of sanctions to address concerns like those voiced by Kyi. A reimaging of sanctions as a tool of reparation and restoration, instead of singularly focusing on prevention, could change the course of the conflict in Myanmar

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32. Hadar, *supra* note 26 (stating that the sanctions' main victims are the Burmese people themselves because the presence of U.S. companies abroad helps to promote the values we as a nation espouse, including human rights and fair labor standards); Interview with Kyi, *supra* note 1.

33. See generally Joshua L. Savey, Comment, *Unilateral Sanctions: An Effective Foreign Policy Tool in Myanmar?*, 50 WILLAMETTE L. REV. 371 (2014) (describing an improved strategy for using unilateral sanctions known as constructive engagement. Constructive engagement uses sanctions that target specific individuals rather than the country).

34. See, e.g., Savey, *supra* note 33, at 384–85 (arguing that economic sanctions reduces the potential for Myanmar's citizens to demand a strong democracy. Additionally, Myanmar has been without significant foreign investment for two decades which it makes creatin the type of strong economy required for change nearly impossible); Hadar, *supra* note 26 (stating that state and local sanctions against Burma have compounded the problem caused by federal sanctions and raised troubling constitutional questions); Yvan Cohen, *US Sanctions Fail to Bring Democracy to Burma*, CHRISTIAN SCI. MONITOR (Jan. 29, 1998), <https://www.csmonitor.com/1998/0129/012998.intl.intl.5.html> (reporting the general consensus that people feel that unilateral sanctions never worked and that the U.S. gave up its right to have influence in Burma).

35. Global Magnitsky Human Rights Accountability Act, P.L. 114-328, div. A, tit. XII, subtit. F, §§1261–65, 130 Stat. 2533, 22 U.S.C.S. §2656 [hereinafter Global Magnitsky Sanctions Act]; MICHAEL A. WEBER & EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., IF10576, THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT (2020), <https://crsreports.congress.gov/product/details?prodcode=IF10576> (providing background information about the Global Magnitsky Human Rights Accountability Act).

and set precedent for future international intervention against genocide.

This article addresses potential sanctions reform in three parts: First, it describes the creation of human rights sanctions, the existing laws, and how they are used.<sup>36</sup> Second, it critiques the history of sanctions used against Myanmar from the 1960s to the present, focusing on human rights enforcement sanctions.<sup>37</sup> Finally, it suggests a path forward through the creation of a new reparations fund, which can directly aid victims of human rights abuses through the existing channels of fines and asset seizures in the United States.<sup>38</sup> Ultimately, the goal of sanctions reform is to move sanctions in Myanmar from mere virtue signaling to achieving transitional justice, creating greater support for those in need from resources available at existing institutions.

## II. DEFINING HUMAN RIGHTS SANCTIONS

Economic sanctions<sup>39</sup> are defined as, “the detriment, loss of reward, or coercive intervention annexed to a violation of a law as a means of enforcing the law.”<sup>40</sup> Simply put, economic sanctions allow nations to pull trade and aid levers to create harmful incentives and costs for those who violate norms.<sup>41</sup> Nations use economic sanctions to influence foreign policy, protect national security, and impose moral obligations on states.<sup>42</sup> Sanctions can be achieved through

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36. See discussion *infra* Part II.

37. See discussion *infra* Part III.

38. See discussion *infra* Part IV.

39. The term “sanctions” is used for many different areas, including court ordered sanctions against lawyers, criminal justice-imposed sanctions, trade sanctions for environmental protections, etc. The root of the term is the same – imposing a cost to achieve a goal. This article focuses on government imposed economic sanctions for human rights abuses.

40. *Sanction Definition & Meaning*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sanction> (last visited Apr. 1, 2020).

41. Justin D. Stalls, Comment, *Economic Sanctions*, 11 U. MIAMI INT’L & COMP. L. REV. 115, 120 (2003) (stating that States have endeavored to “protect human rights, to halt nuclear proliferation, to settle expropriation claims, and to combat international terrorism”)

42. *Id.* (stating that economic sanctions have been used throughout history to bring about desired behavioral changes among groups of people by inflicting some sort of sustained loss upon them).

either international collective action or unilateral sanctions.<sup>43</sup> Collective action sanctions are the grouping of states, all imposing sanction regimes, through an international body like the United Nations.<sup>44</sup> Conversely, unilateral sanctions occur when an individual state specifies the terms of their sanctions.<sup>45</sup> Individual nations can use sanctions to block trade, freeze or potentially seize assets,<sup>46</sup> and prevent travel, severely limiting contact between a sanctioned actor and the imposing nation.<sup>47</sup> This section examines 1) the history of economic sanctions and the creation of the “human rights sanction,” 2) how unilateral economic sanctions work, and 3) current debates on the effectiveness of human rights sanctions in a global context.

### A. A BRIEF HISTORY OF SANCTIONS

#### *i. Trade Embargos and the Creation of Sanctions Regimes*

The use of economic power to control the actions of another nation is as old as governments itself.<sup>48</sup> Formal economic sanctions

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43. *Targeted Human Rights and Anti-Corruption Sanctions – A General Overview*, HUM. RTS. FIRST (Nov. 2020), <https://www.humanrightsfirst.org/sites/default/files/Sanctions%20Fact%20Sheet%20No.%201%20-%20General%20Overview.pdf> (describing how US targeted sanctions programs create accountability for human rights abusers and corrupt officials across the globe by enacting country-specific programs with relevant human rights and anti-corruption prongs).

44. See U.N. Charter art. 41 (creating Security Council collective sanctions).

45. Rahmat Mohamad, *Unilateral Sanctions in International Law: A Quest for Legality*, in *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW* 71, 75–76 (Ali Z. Marossi & Marisa R. Bassett eds., 2015) (stating that unilateral sanction pose serious challenges to the efforts of the international community to establish an equitable multilateral, nondiscriminatory, rule-based trading system and challenge the very basis of the primacy of international law).

46. Asset freezing occurs in most national sanctions programs. Asset seizing, however, is widely varied nation to nation, and usually requires additional judicial processes. Asset seizing in the United States regimes is where this article will largely focus

47. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-145, *ECONOMIC SANCTIONS* 4 (Oct. 2019) [hereinafter GAO ECONOMIC SANCTIONS REPORT] (describing comprehensive and targeted sanctions).

48. The oldest recorded instance of western ‘sanctions’ has been identified as “when Pericles issued the Megarian import embargo against the Greek city-states which had refused to join the Athenian-led Delian League during the Peloponnesian War” in 432 BC, Greece. KERN ALEXANDER, *ECONOMIC*

regimes, however, and the institutionalized policy of penalization through trade, began to first appear in the 20<sup>th</sup> Century<sup>49</sup> when powerful European nations began using economic sanctions as an alternative to armed combat.<sup>50</sup> This did not begin as the formal unilateral or collective sanctions we know today, but rather simply as a choice in trade policy.<sup>51</sup> Pre-World War I, economic sanctions took the form of trade embargoes.<sup>52</sup> The British Navy, for example, created a shipping blockade as a means to avoid a future war with Germany by preventing its access to the London markets and the high seas as a whole.<sup>53</sup> The economic theory behind the embargo was that preventing trade would stunt the German economy, making the budding conflict both unpopular among its citizens, and arguably make it economically impossible to justify the cost of a future fight.<sup>54</sup> England was, in essence, attempting to force German compliance with its standards through sanctions; using coercive intervention as a way of enforcing British laws.<sup>55</sup> Other nations followed similar methods, preferring the implementation of adverse trade policy over

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SANCTIONS: LAW AND PUBLIC POLICY 8–9 (2009) (describing the origins and use of economic sanctions).

49. Benjamin Coates, *A Century of Sanctions*, ORIGINS (Dec. 2019), <https://origins.osu.edu/article/economic-sanctions-history-trump-global> (describing the evolution of economic sanctions in the 20th century a prominent tool to collectively deny economic access to enforce global order).

50. See Lance Davis & Stanley Engerman, *History Lessons: Sanctions: Neither War nor Peace*, 17 J. ECON. PERSP. 187, 188 (2003) (stating that sanctions as compared to war may provide a lower-cost method of punishing departures from international standards of conduct and of resolving disputes between countries); Coates, *supra* note 49.

51. Coates, *supra* note 49 (describing how Britain used their dominance in merchant shipping and the dependence of global trade to defeat Germany in WWI).

52. *Id.*

53. Davis & Engerman, *supra* note 50, at 190 (stating that between 1914 and 1945, sanctions were typically used to disrupt militate adventures).

54. Coates, *supra* note 49; Davis & Engerman, *supra* note 50, at 188.

55. Coates, *supra* note 49; Natalino Ronzitti, COERCIVE DIPLOMACY, SANCTIONS & INTERNATIONAL LAW 2 (2016) (describing economic sanctions efforts to project influence across frontiers by denying or conditioning access to a country's resources, raw materials, semi- or finished products, capital, technology, services or consumers); A. Cooper Drury, *Sanctions as Coercive Diplomacy: The U.S. President's Decision to Initiate Economic Sanctions*, 54 POL. RES. Q. 485, 486 (Sept. 2001) (stating that governments impose sanctions with the intent of coercing the target to modify its policies).

physical altercation.<sup>56</sup> This was, objectively, not successful—World War I still occurred.<sup>57</sup>

The notion of sanctions as non-violent deterrence grew, despite its failure to prevent war.<sup>58</sup> Post-World War I, the newly formed “League of Nations” introduced the first international collective sanctions with the similar goal of preventing further mass international conflict.<sup>59</sup> This moved sanctions from unrecognized trade policy to a formalized method of international intervention.<sup>60</sup> Article 16 of the League’s Covenant required automatic collective sanctions from “all other Members of the League,” bound to undertake:

The severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.<sup>61</sup>

British Foreign Secretary Austen Chamberlain stated in the League of Nations: “The great advantage of economic sanctions, is . . . they do not involve the resort to force.”<sup>62</sup> Woodrow Wilson heralded it as a “terrible remedy,” worth being avoided.<sup>63</sup> Benito Mussolini, quickly sanctioned under these laws for the invasion of Ethiopia, thought rather negatively of the invention of sanctions – stating they encouraged war, and possessed “the danger of recasting the map of Europe.”<sup>64</sup> Soon after he spoke these words, World War II

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56. Davis & Engerman, *supra* note 50, at 188–89. (providing the history of the first recorded Pacific blockade in 1827 imposed by Britain, Turkey, France, and Russia.)

57. Coates, *supra* note 49.

58. *Id.*

59. This desired outcome was also not successful for a variety of reasons. *Id.*

60. League of Nations Covenant art. 16, para. 1 (Apr. 28, 1919), <https://www.refworld.org/docid/3dd8b9854.html>.

61. *Id.*

62. DAVID W. HUNTER, WESTERN TRADE PRESSURE ON THE SOVIET UNION: AN INTERDEPENDENCE PERSPECTIVE ON SANCTIONS, 14 (1991).

63. *See also* Coates, *supra* note 49.

64. *The Covenant of the League of Nations (Art. 1 to 26)*, OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1>

broke out.<sup>65</sup>

Whether the early day sanctions were successful in preventing global war—or answering the questions of if that was even truly their goal—is beyond the scope of this article. However, from these roots evolved not only human rights regimes, but also human rights sanctions as a method of non-violent enforcement; the same type used against Myanmar today.<sup>66</sup> With the post-World War II creation of the United Nations, and the rapid globalization of the world economy during the cold war, sanctions protocols became common place and were quickly adopted into U.S. law.<sup>67</sup>

### ii. *The Birth of U.S. Unilateral Sanctions*

U.S. unilateral sanctions were created for the same reasons that trade embargoes and collective sanctions were—to prevent violations of norms using a non-violent approach.<sup>68</sup> These are defined by the

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[hereinafter *Covenant of the League of Nations*] (“The Fascist Government of Italy had cooperated to a limited extent at Geneva for some years before the members of the Council of the League on October 7, 1935, found that the Italian Government had violated article 12 of the Covenant by invading Ethiopia. This finding eventually brought sanctions into operation under article 16, paragraph 1. The application of the sanctions which were employed did not prevent Italy from occupying Ethiopia and replacing the Ethiopian Government with a regime of its own. The sanctions were lifted on July 15, 1936.”); *Sanctions Mean War, Mussolini Repeats; The Paris Matin Quotes Il Duce as Questioning Motives of Britain in Warning*, N.Y. TIMES (Sept. 17, 1935), <https://www.nytimes.com/1935/09/17/archives/sanctions-mean-war-mussolini-repeats-the-paris-matin-quotes-il-duce.html> [hereinafter *Sanctions Mean War*].

65. See generally Cristiano Andrea Ristuccia, *1935 Sanctions Against Italy: Would Coal and Crude Oil Have Made a Difference?*, 4 EUR. REV. ECON. HIST. 85, 85–89 (2000) (explaining the inefficacy of sanctions against Italy to halt its invasion of Ethiopia in the events leading to WWII); *Embargoes and Sanctions – World War ii*, AM. FOREIGN REL., <https://www.americanforeignrelations.com/E-N/Embargoes-and-Sanctions-World-war-ii.html>, (last visited Feb. 20, 2020) (explaining how U.S. sanctions against Japan failed to halt and even aggravated events leading to Japan’s declaration of war).

66. See *infra* Part III.

67. Export Control Act of 1949, Pub. L. No. 81–11, ch. 11 (Feb. 26, 1949).

68. See *Use and Effect of Unilateral Trade Sanctions: Hearing on H.R. 66–565 Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 106<sup>th</sup> Cong. 1–75 (2000) (discussing the United State’s use and rationale of unilateral sanctions in relation to proposed legislation on U.S. legislative and executive sanction procedures).

government as “any restriction or condition on foreign economic activity that is imposed solely by the United States for reasons of foreign policy or national security.”<sup>69</sup> Unlike unilateral sanctions, however, the U.S. government can act alone in sanctioning countries, entities, or individuals, without international oversight or approval.<sup>70</sup>

Like collateral sanctions, the formalization of the U.S. sanction began in earnest as a result of war.<sup>71</sup> During World War I the U.S. Government passed the Trading with the Enemy Act (TWEA),<sup>72</sup> creating unilateral sanctions in section 5(b) that granted presidential power to “investigate, regulate, and prohibit” foreign financial transactions that touch the U.S.<sup>73</sup> This authority was used between 1917 and 1918—the years of U.S. involvement in the war—to prevent trade with Germany and seize foreign property within the United States’ borders.<sup>74</sup> During World War II, President Roosevelt used this same act to freeze the assets of nations invaded by Germany as the war progressed.<sup>75</sup> In 1941, for example, the President froze all assets of Danish or Norwegian citizens found in the U.S. after Nazi invasion of those nations created fear those assets would be used to further the German cause.<sup>76</sup> After World War II, U.S.

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69. *Id.* (discussing the 1997 Sanctions Reform Bill).

70. *See* INTERNATIONAL CORPORATE ACCOUNTABILITY ROUNDTABLE & ENOUGH, U.S. SANCTIONS REGIMES & HUMAN RIGHTS ACCOUNTABILITY STRATEGIES: TOOLS OF TRADE, 8–9 (June 2020), [https://enoughproject.org/wp-content/uploads/2018/06/ToolsofTrade\\_Enough\\_ICAR\\_June2018.pdf](https://enoughproject.org/wp-content/uploads/2018/06/ToolsofTrade_Enough_ICAR_June2018.pdf) [hereinafter U.S. SANCTIONS REGIMES & HUMAN RIGHTS ACCOUNTABILITY STRATEGIES] (explaining how the United States has used sanctions as an alternative to other diplomatic or covert actions to reach its own foreign policy goals).

71. *See* Coates, *supra* note 49 (explaining the history of the Trading with the Enemy Act created in response to World War I).

72. Trading With the Enemy Act, 50 U.S.C. app. §§ 1-39, 41-44 (1970). Later limited to only apply during times of war. International Emergency Economic Powers Act, 50 U.S.C.A. ch. 35 §§ 1701–1708 (1977).

73. *Id.* at 5(b).

74. *Id.*; *see also* Coates, *supra* note 49 (explaining section 5(b)’s use during the war and, unlike other wartime powers, section 5(b) remained after the war’s end).

75. Coates, *supra* note 49 (noting that implementation of these sanctions set precedent as they occurred while the United States was still at peace).

76. *Id.* (noting that these sanctions continued to follow German conquests across Europe); *see generally* David Lektzian & Mark Souva, *Institutions and International Cooperation: An Event History Analysis of the Effects of Economic Sanctions*, 45 J. CONFLICT RESOL. 61 (2001).

sanctions continued, but they advanced with the times.<sup>77</sup> All out warfare, and the truly international aspects of WWI and WWII gave way to more nuanced political structure and a need for more nuanced sanctions.<sup>78</sup> During the Cold War, Congress passed legislation allowing presidential sanctions of Cold War rivals under the Export Control Act.<sup>79</sup> In the following years, Soviet bloc import and export were drastically limited by the U.S. government,<sup>80</sup> and complete trade sanctions were introduced on North Korea and China.<sup>81</sup> Iranian assets in the U.S. were frozen after the 1979 revolution and economic sanctions blocked the building of a gas pipeline from Siberia to Western Europe after Poland's communist government repressed activists.<sup>82</sup>

It's with these roots in place that the modern U.S. sanctions regime grew. In 1977, the United States passed the International Emergency Economic Power Act (IEEPA) to clarify the powers previously given to the president under the 1917 TWEA, authorizing the president to regulate commerce of any source declared an unusual or substantial threat to the U.S., with a basically unlimited scope that was subsequently curtailed by the Supreme Court.<sup>83</sup>

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77. See GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 5–9 (2d ed. 1990).

78. See Sarabeth Egle, *The Learning Curve of Sanctions - Have Three Decades of Sanctions Reform Taught Us Anything?*, 19 INT'L TRADE L.J. 34, 36–37 (2011) (explaining how complicated Cold War tensions fed a fear of sanctions unintentionally destabilizing the balance between nations).

79. Coates, *supra* note 49; HUFBAUER ET AL., *supra* note 77.

80. Export Control Act of 1949, 50 U.S.C. app. §§ 2021–32 (1949); Coates, *supra* note 49 (explaining how the sanctions effort, in partnership with Western Europe, failed in its goals to constraint Soviet arms buildup).

81. See *Embargoes and Sanctions – Cold War Sanctions*, AM. FOREIGN REL., <https://www.americanforeignrelations.com/E-N/Embargoes-and-Sanctions-Cold-war-sanctions.html> (last visited Feb. 18, 2020) (explaining how the United States' severe sanctions on China had minimal effect and were eventually lifted but those on North Korea have been only nominally reduced).

82. Sasan Fayazmanesh, *The Politics of the U.S. Economic Sanctions Against Iran*, 35 REV. RADICAL POL. ECON. 221, 221–225 (2003); see also Richard Nephew, *Transatlantic Sanctions Policy: From the 1982 Soviet Gas Pipeline Episode to Today*, COLUM. SIPA (Mar. 22, 2019), <https://www.energypolicy.columbia.edu/research/report/transatlantic-sanctions-policy-1982-soviet-gas-pipeline-episode-today>.

83. International Emergency Economic Powers Act, 50 U.S.C.A. ch. 35 §§ 1701–1708 (1977); *Youngtown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)



However, this decision did not limit the President's power to issue emergency declarations for threats outside the United States, allowing the President to have virtually unregulated power to create unilateral sanctions regimes under IEEPA, which is the foundational law used for sanctions regimes today.<sup>84</sup> An administrative agency, the Treasury Department's Office of Foreign Assets Control (OFAC), was additionally formed to manage the ever-growing list of sanctioned nations, review sanctions requests, and recommend sanctions for executive orders.<sup>85</sup>

While U.S. unilateral economic sanctions have existed for a century, the use of sanctions has increased drastically in the last two decades, rising in number after the September 11th World Trade Center terrorist attacks.<sup>86</sup> The focus of the sanctions has also moved away from all out global warfare prevention. The majority of U.S. international sanctions are now focused on anti-terrorism<sup>87</sup> and

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(limiting presidential power to seize assets without a proper scope, statute, or valid emergency).

84. *Id.*

85. *Id.*; see *Foreign Assets Control Office*, FED. REG., <https://www.federalregister.gov/agencies/foreign-assets-control-office> (last visited Feb. 1, 2021) (explaining the role of the OFAC in managing U.S. sanctions under Presidential emergency powers and specific legislation); see also *What a President Can Do Under the International Emergency Economic Powers Act*, NPR (May 31, 2019), <https://www.npr.org/2019/05/31/728754901/what-a-president-can-do-under-the-international-emergency-economic-powers-act>.

86. See U.S. DEPT. OF THE TREASURY, THE TREASURY 2021 SANCTIONS REVIEW 3 (Oct. 2021), <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf> (reporting that OFAC sanctions designations have increased a net 933 percent over the last 20 years, growing from 912 designations in 2000 to 9,421 designations in 2021); Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, ATLANTIC (May 3, 2019), <https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625> (“After 9/11, the U.S. accelerated and expanded its use of sanctions to go after terrorist financing; President George W. Bush took a first step in the weeks immediately after the attacks, with an *executive order* freezing any U.S.-based assets of a range of groups and people, including Osama bin Laden and al-Qaeda.”).

87. It is absolutely crucial to separate out that categories of human rights sanctions and anti-terrorism sanctions in this discussion, even if they appear to overlap in the U.S. sanctions context. This article does not discuss anti-terrorism sanctions in detail, but must note that that the U.S. use of “anti-terrorism” sanctions, and in general anti-terrorism language, has been used as an excuse since 2001 to violate human rights of individuals seen as unfriendly to the U.S. government. This is in itself a topic for a full additional article, but for more

human rights enforcement – the problems of our modern times.<sup>88</sup> As Human Rights Watch writes, U.S. human rights sanctions exist “to condemn situations involving grave or widespread human rights abuses or humanitarian law violations, to assert pressure to end those abuses, to hold those responsible to account, and as a means to deter other parties from becoming complicit in abuses.”<sup>89</sup> Thus, the modern form of the “human rights sanction” was born.<sup>90</sup> These include sanctions that target entire countries for human rights abuses.<sup>91</sup> More importantly, the changed focus from war prevention to human rights has caused a boom in individual targeted sanctions, discussed below.<sup>92</sup> Sanctions post 9-11 became the standard path to enforcing human rights norms—a path which is heavily walked today.

As of 2021, the United States held more than 9,421 sanctions, making it the largest unilateral sanctioning nation in the world.<sup>93</sup>

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information on anti-terrorism sanction language, see *Counterterrorism*, HUM. RTS. FIRST, <https://www.humanrightsfirst.org/topics/counterterrorism> (last visited Apr. 14, 2022, 11:22 AM); U.N. OFF. OF THE HIGH COMM’R, *USA: “Rewards for Justice” Program Violates Human Rights, Say UN Experts* (Apr. 14, 2021), <https://www.ohchr.org/en/press-releases/2021/04/usa-rewards-justice-program-violates-human-rights-say-un-experts> [hereinafter “*Rewards for Justice*” Program Violates Human Rights] (reporting the concern of the U.N. Special Procedures of the Human Rights Council on a U.S. monetary reward system for information on individuals associated with terrorism).

88. Interview with OFAC Officer (Feb. 19, 2021).

89. *Myanmar, Sanctions, and Human Rights*, *supra* note 26.

90. See GEOFFREY ROBERTSON, *BAD PEOPLE AND HOW TO BE RID OF THEM: A PLAN B FOR HUMAN RIGHTS* 102–03 (2021) (explaining the recent development of targeted sanctions for humanitarian purposes).

91. *OFAC Sanctioned Countries*, PRINCETON UNIV., <https://orpa.princeton.edu/export-controls/sanctioned-countries>

92. *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, U.S. DEP’T OF THE TREASURY (Feb. 23, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists> [hereinafter *Specially Designated Nationals and Blocked Persons List*] (providing lists on individuals associated with targeted nations or non-associated terrorists and narcotics traffickers for asset restrictions); Arthur B. Culvahouse, Jr., *A Practical Guide to International Sanctions Law and Lore: Mamas, Don’t Let Your Children Grow up to Be Sanctions Lawyers*, 32 HOUS. J. INT’L L. 587, 591 (2010) (explaining how the George W. Bush Administration preferred to utilize sanctions against individuals and specific entities over sanctions against countries).

93. TREASURY 2021 SANCTIONS REVIEW, *supra* note 86.

Unilateral economic sanctions have become a bedrock of U.S. foreign policy.<sup>94</sup> This is due, in part, to the United States' position as an economic power: "The strength of American sanctions, after all, comes from the centrality of the United States financial system in the global economy, and the dollar's status as the world's dominant reserve currency."<sup>95</sup> This is the same notion witnessed throughout history, from trade embargos to now: the idea that economic sanctions can enforce norms without requiring military "boots on the ground." The next section examines how U.S. unilateral economic sanctions work, specifically country-wide and targeted human rights sanctions, in their attempt to influence foreign actions.

### B. HOW UNILATERAL SANCTIONS WORK

Unilateral sanctions by the United States government takes many forms and have many consequences.<sup>96</sup> While the administrative processes behind federal unilateral sanctions may seem complex, the reality is that federal unilateral sanctions usually take one of two forms: Broad country-wide sanctions or the thematic "targeted sanctions" regimes.<sup>97</sup> Currently, five nations are subject to U.S.

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94. See *id.* (explaining how historical trends and the ability to influence foreign policy without military action contribute to the heavy use of sanctions by the U.S.); Kimberly Ann Elliot, *Trends in Economic Sanctions Policy: Challenges to Conventional Wisdom*, in INTERNATIONAL SANCTIONS: BETWEEN WARS AND WORDS 3, 3–4 (Carina Staibano & Peter Wallensteen eds., 2005) (explaining the growth of U.S. sanction policy since the 1990s).

95. Gilsinan, *supra* note 86.

96. See *id.* (identifying various forms of U.S. sanctions and recognizing that their economic impacts differ); JAMES PATTISON, THE ALTERNATIVES TO WAR: FROM SANCTIONS TO NONVIOLENCE 40–42, 57–58 (2018) (identifying, specifically, economic sanctions, military sanctions, and political sanctions as distinct forms with varying effects and arguing that proportionality of sanctions is key to valuating their moral and practical use); William H. Kaempfer & Anton D. Lowenberg, *Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective*, 43 INT'L STUD. Q. 37, 39–40 (1999) (arguing that unilateral sanctions are more effective than multilateral sanctions in achieving political goals); Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOB. STUD. L. REV. 455, 457–63, 466–67 (2008) (arguing that while unilateral sanctions have consequences though, as in the case of Myanmar, they are ineffective in achieving desired policy goals).

97. See *Sanctions Are Now a Central Tool of Governments' Foreign Policy*, ECONOMIST (Apr. 24, 2021), <https://www.economist.com/finance-and-economics/>

country wide sanctions, while the majority of sanctions work falls under thematic regimes; there are approximately 38 different targeted sanctions regimes used by the government, focused on roughly 25 different nations and an increasing number of ‘thematic’ programs including counter narcotics sanctions, cyber-related sanctions, hostage and wrongfully detained U.S. Nationals sanctions, and more.<sup>98</sup> This section briefly examines the logistics behind statewide and targeted human rights sanctions, and the criticisms offered of each, before discussing the applicability of unilateral sanctions to human rights violations – and more importantly – what is left out.

*i. Country-Specific Human Rights Sanctions*

Country-specific sanctions target a whole nation; not just the government, but also individuals and businesses formed in the sanctioned nation.<sup>99</sup> They are, at their root, closest to the origin of sanctions through the use of complete trade embargoes; those used prior to World War I.<sup>100</sup> The President of the U.S. can implement broad economic restraints under the International Emergency Economic Power Act (IEEPA).<sup>101</sup> These restraints can include, but are not limited to, tariffs, trade quotas on import and exports, complete embargoes, non-tariff barriers (NTBs),<sup>102</sup> and asset freezes or seizures.<sup>103</sup> Country-specific sanctions can prohibit all trade in

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2021/04/22/sanctions-are-now-a-central-tool-of-governments-foreign-policy (reporting on the United States’ recent use of targeted sanctions).

98. *OFAC Sanctioned Countries*, supra note 91; *Sanctions Programs and Country Information*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information> (last visited April 14, 2022).

99. See Kerim Can Kavakli et al., *The Power to Hurt and the Effectiveness of International Sanctions*, 82 J. POL. 879, 880 (2020) (analyzing the effectiveness of sanctions by the breadth of a nation’s trading partners and export industries).

100. See *id.* (analyzing broad sanctions in the sense of imports and exports and preventing access to international trade and resources).

101. International Emergency Economic Powers Act, supra note 72, §§ 1701–1708.

102. This nebulous term covers all restrictions on goods that are not tariff or quota related, which can include licensing, packaging, and product quality standards. For more information on NTB’s, see *Non-Tariff Barriers to Trade*, TRADE BARRIERS (last visited May 1, 2021), [https://www.tradebarriers.org/ntb/non\\_tariff\\_barriers](https://www.tradebarriers.org/ntb/non_tariff_barriers).

103. See generally Taehee Whang et al., *Coercion, Information, and the Success*

general or target a specific type of trade, for example, an oil-embargo.<sup>104</sup>

Country specific sanctions aim to isolate a nation from resources, encourage public resistance to the sanctioned government, and force change in policy without violent intervention.<sup>105</sup> Unilateral country-specific sanctions, as explained above, create barriers between a singular nation and another.<sup>106</sup> The most powerful examples of U.S. unilateral country-specific sanctions are those that were imposed against Cuba and Iran.<sup>107</sup>

On February 3<sup>rd</sup>, 1962, then President John F. Kennedy announced full trade sanctions (also called a trade embargo) against Cuba, preventing U.S. corporations and individuals from conducting any trade with the nation.<sup>108</sup> In response to growing tensions with the nation, and possibly shame over the failure of the attempted invasion of Cuba known as the Bay of Pigs, the U.S. government turned to non-violent action in hopes of curbing Cuba's communist leanings without nuclear repercussions.<sup>109</sup> It is, to date, the most enduring

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*of Sanction Threats*, 57 AM. J. POL. SCI. 65 (2013) (analyzing the effectiveness of sanctions threats based on a variety of economic considerations).

104. See Kavakli et al., *supra* note 99, at 879 (noting the effects of 2014 sanctions on Russia's oil industry); Susan S. Gibson, *International Economic Sanctions: The Importance of Government Structures*, 13 EMORY INT'L L. REV. 161, 166–68, 230 (1999) (noting the varied, and often precise, forms sanctions can take).

105. See Kavakli et al., *supra* note 99, at 879 (analyzing the effectiveness of sanctions with consideration of economic isolation and noting renewed interest and discussion of sanction benefits after the 2014 Russia sanctions).

106. See Daniel W. Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13 INT'L STUD. REV. 96, 100 (2011) (noting international approval of precision sanction regimes that avoid excessive costs and risks to others than the targets).

107. See, e.g., William M. LeoGrande, *A Policy Long Past Its Expiration Date: US Economic Sanctions Against Cuba*, 82 SOC. RSCH. 939, 939–40 (2015) (Cuba); Daniel Fisk, *Economic Sanctions: The Cuba Embargo Revisited*, in SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE 65, 65–66 (Steve Chan & A. Cooper Drury eds., 2000) (Cuba); Erica S. Moret, *Humanitarian Impacts of Economic Sanctions on Iran and Syria*, 24 EUR. SEC. 120, 120, 125–26 (2015) (Iran and Syria); Akbar E. Torbat, *Impact of the US Trade and Financial Sanctions on Iran*, 28 WORLD ECON. 407, 407–08 (2005) (Iran).

108. Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 6, 1962).

109. The subsequent Cuban Missile Crisis may or may not have happened differently without this full embargo in place, but history cannot be rewritten to

country-specific sanctions regime in history.<sup>110</sup> Later, the U.S. imposed similar country wide sanctions against Iran following the public seizing of the U.S. Embassy in Tehran in 1979.<sup>111</sup> This program was not, however, a full trade embargo as was used in Cuba.<sup>112</sup> Instead, the U.S. government implemented sanctions on Iranian oil imports, and froze the assets of all Iranian citizens in the United States.<sup>113</sup> The goal was to induce compliance with human rights objectives and to obtain the release of hostages by increasing Iranian citizen political pressure on its new government, as well as putting economic pressure on the government by forcing the loss of oil revenue.<sup>114</sup> The U.S. government expanded country-specific sanctions in Iran (and Libya) to full trade embargoes in the 1990's, more recently put an embargo on dealings with the country by the US, and a ban on selling aviation components to the nation.<sup>115</sup>

While enforcing human rights norms is desirable, in many cases country-specific sanctions have been criticized for having the opposite effect, as has been the case in Iran and Cuba.<sup>116</sup> The reality

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allow for hypotheticals.

110. See LeoGrande, *supra* note 107, at 942–52 (noting that the sanctions and embargo have persisted through at least nine presidents, from John F. Kennedy to Barack Obama, though the Obama administration began lifting some travel and remittance restrictions); Fisk, *supra* note 107, at 65–66 (explaining the political and legislative decisions behind the enduring sanctions on Cuba).

111. Sasan Fayazmanesh, *The Politics of the U.S. Economic Sanctions Against Iran*, 35 REV. RADICAL POL. ECON. 221, 223 (2003) (noting, additionally, that conditions or plans to invoke IEEPA sanctions against Iran had existed before the embassy seizure and that the act had served as a trigger for government measures); see also Jamal Ibrahim Haidar, *Sanctions and Export Deflection: Evidence from Iran*, 32 ECON. POL'Y 319, 328 (2017) (noting that the 1979 sanctions remained the toughest against Iran until more unilateral sanctions in 2007).

112. See Fayazmanesh, *supra* note 111, at 221–22 (listing the various sanction measures imposed on Iran from 1979).

113. *Id.* at 223–25 (explaining sanction methods and the relation to financial interests).

114. See *id.* (noting the United State's association of sanction implementation with the seizure of the embassy).

115. See *id.* (noting that sanctions against Iran expanded beyond the 1979 sanctions); see ASIAN PAC. ENERGY RSCH. CTR., *GEOPOLITICAL IMPLICATION OF IRAN NUCLEAR AGREEMENT* 37 (2017) (remarking on the consistent sanctions and even intensification of sanctions against Iran over the years until the Iran Nuclear Deal).

116. See Dursun Peksen & A. Cooper Drury, *Coercive or Corrosive: The*

of country-specific sanctions is that their effect is felt by *all* citizens of the country.<sup>117</sup> This is by design, hoping to inspire political pressures against the government and force a change in its actions.<sup>118</sup> However, many of the countries sanctioned under country-specific sanctions are not free democratic nations.<sup>119</sup> Imposing costs on the working class in Iran in 1979 did not result in citizens going to the polls – that was never an option.<sup>120</sup> Instead, living conditions were worsened for those already suffering and government perpetrators abusing human rights norms continued as normal, passing the costs of the sanctions to their citizenry.<sup>121</sup> Even worse, country-wide sanctions can effectively block humanitarian aid and make medical imports through exemption processes difficult, as is the case in Iran and Cuba, “leaving [those] who have rare or complicated diseases unable to get the medicine and treatment they require.”<sup>122</sup>

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*Negative Impact of Economic Sanctions on Democracy*, 36 INT'L INTERACTIONS 240, 241–44 (2010) (summarizing various studies and scholarship that provided information on potentially harmful and counterproductive aspects of sanctions).

117. See Kavakli et al., *supra* note 99, at 892–93 (analyzing the effect of sanctions on a country's market situation).

118. See *id.* (noting the effectiveness of targeted sanctions over broad sanctions in achieving goals).

119. See *id.* at 888 (finding that most targets of sanctions were autocracies, with implications as to sanction effectiveness); Peksen & Drury, *supra* note 116, at 247–48 (noting the relationship between sanctions and political violence in target countries).

120. See Moret, *supra* note 107, at 125–28 (noting the damaging effects of Iran sanctions); see also Fatemeh Kokabisaghi, *Assessment of the Effects of Economic Sanctions on Iranians' Right to Health by Using Human Rights Impact Assessment Tool: A Systematic Review*, 7 INT'L J HEALTH POL'Y MANAG. 374 (2018); Ali Fathollah-Nejad, *Why Sanctions Against Iran Are Counterproductive: Conflict Resolution and State-Society Relations*, 69 INT'L J. 48 (2014).

121. See Moret, *supra* note 107, at 125 (noting the harm of the 2012 sanctions on the Iranian populace); Kokabisaghi, *supra* note 120, at 385 (“The sanctions imposed on Iran have had significant effects on the general population, including an escalation in inflation, a rise in commodities and energy costs, an increase in the rate of unemployment and a shortage of necessary items, including medicine. . . . The sanctions also appear to be affecting humanitarian operations in the country. . . . Even companies that have obtained the requisite license to import food and medicine are facing difficulties in finding third-country banks to process transactions.”) (omissions in original) (quoting U.N. General Secretary Ban Ki Moon).

122. *Iran: Sanctions Threatening Health: US Should Ensure Effective Humanitarian Exemptions*, HUM. RTS. WATCH (Oct. 29, 2019),

For nations that genuinely hope to achieve human rights norms through sanctions: country-specific sanctions largely fail.<sup>123</sup> While country-specific sanctions allow for naming and shaming, and publicly identifying victims so they are recognized, they ultimately shift the economic burden to the very victims they purport to seek to help.<sup>124</sup> In the end, these sanctions often result in greater harm to human rights.<sup>125</sup> Moreover, the fact these sanctions have been largely used by the global north against the global south – and not other northern human rights abusers – leads to the argument that country-specific sanctions were never designed to prioritize victims.<sup>126</sup> Instead, they were designed to signal to the world an action the government disagreed with, impose costs without violent repercussions, but not to meaningfully invoke change.<sup>127</sup>

As of today, OFAC still has country-specific sanctions programs in place, but Myanmar is not on the list.<sup>128</sup> The U.S., however, has

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<https://www.hrw.org/news/2019/10/29/iran-sanctions-threatening-health> [hereinafter *Sanctions Threatening Health*] (quoting Human Rights Watch, Middle East Director Sarah Leah Whitson).

123. See Peksen & Drury, *supra* note 116, at 241–42 (noting research that suggest country-wide sanctions are ineffective or even worsen human rights conditions); Kavakli et al., *supra* note 99, at 888 (concluding sanctions against autocracies with a focused market frequently fail).

124. See Peksen, *supra* note 116, at 242 (suggesting that economic coercion can lead to unintended human consequences).

125. See generally Thomas Biersteker, *UN Targeted Sanctions as Signals: Naming and Shaming or Naming and Stigmatizing?*, in *The POLITICS OF LEVERAGE IN INTERNATIONAL RELATIONS: NAME, SHAME, AND SANCTION* 165, 165–185 (H. Richard Friman ed., 2015) (explaining how the material consequences of “naming, stigmatizing, or shaming” are more than “merely symbolic”).

126. See Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 *FORDHAM INT’L L.J.* 577, 610 (“If the United States fails to work toward greater recognition of human rights through multilateral efforts and instead continues to act unilaterally in its enforcement efforts then it could find itself increasingly isolated from the international community and the subject of increased resentment from those same countries that it once sought to lead”).

127. *Id.* (stating multilateral sanctions are more desirable than unilateral in effecting change for human rights, but unilateral sanctions show countries political interests).

128. *Targeted Human Rights and Anti-Corruption Sanctions – A General Overview*, HUM. RTS. FIRST (Nov. 2020), <https://www.humanrightsfirst.org/sites/default/files/Sanctions%20Fact%20Sheet%20No.%201%20-%20General%20Overview.pdf> (listing countries sanctioned under country-specific sanctions are Belarus, Burundi, Central African Republic, China (Hong Kong), Democratic



implemented country-specific trade restrictions on Myanmar in the past, which is addressed in Section II.<sup>129</sup> In all instances, Myanmar activists accused the U.S. of doing more harm than good and prioritizing its own virtue signaling.<sup>130</sup> Currently, the world is moving away from country-specific sanctions, including the U.S.,<sup>131</sup> recognizing their failings to aid and protect victims.<sup>132</sup> Instead, nations have turned to individual “smart sanctions” regimes, also called targeted sanctions, which target perpetrators directly.<sup>133</sup>

*ii. Targeted Human Rights Sanctions and the “Global Magnitsky Act”*

The last two decades have seen a shift from the use of country-wide sanctions to individually targeted “smart sanctions,”<sup>134</sup> and the recent introduction of the Global Magnitsky Sanctions Act.<sup>135</sup> Rather than targeting import and exports for a nation as a whole, these sanctions are implemented against an individual or entity—restricting them with travel bans, freezing or potentially seizing of assets, embargos, and trade restrictions associated with the actor.<sup>136</sup> This

Republic of the Congo, Iran, Lebanon, Libya, Mali, Nicaragua, North Korea, Russia, South Sudan, Sudan, Syria, Ukraine, Venezuela, and Zimbabwe).

129. See discussion *supra* Part III.

130. See Myo Nyun, *supra* note 96, at 484 (outlining the shortcomings of the Burmese Freedom and Democracy Act of 2003); interview with Kyi, *supra* note 1.

131. See interview with OFAC officer (Feb. 19, 2021) (notes on file with author) (stating that the U.S. government is having an internal conversation about country-wide sanctions repercussions).

132. Interview with OFAC officer (Feb. 19, 2021) (notes on file with author); see Cristiane Lucena Carneriro & Laerte Apolinario Jr, *Targeted Versus Conventional Economic Sanctions: What is at Stake for Human Rights?*, 42 INT'L INTERACTIONS 565, 566 (2016) (noting that studies have identified adverse consequences in the areas of human rights, economic development, politics, and so forth).

133. See Drezner, *supra* note 106, at 100 (explaining how smart sanctions targeting individuals would be more successful than those that hurt a country's general public).

134. See *id.* (explaining the evolution of targeted sanctions); Robertson, *supra* note 90, at 102; see Alexandra Hofer, *The Proportionality of Unilateral “Targeted” Sanctions: Whose Interests Should Count?*, 89 NORDIC J. INT'L L. 399 (2020) (noting that these smart sanctions prevent unintended collateral damage).

135. Global Magnitsky Sanctions Act, *supra* note 35.

136. Robertson, *supra* note 90, at 103; Uri Friedman, *Smart Sanctions: A Short History*, FOREIGN POL'Y (Apr. 23, 2012, 2:33 AM), <https://foreignpolicy.com/>

type of sanction began to be developed by the United Nations right before the turn of the century as more and more criticism of the negative effects of country-wide sanctions grew.<sup>137</sup> One of the first large example of this type of targeted sanction include the financial sanctions imposed against individual members of Haiti's military junta in 1993.<sup>138</sup> In 1997, when attempting to address the spread of human trafficking and enslavement in the blood diamond industry, the United Nations introduced specific sanctions targets on Angolan rebels, to which the Russian Ambassador to the U.N proclaimed, "[w]e will propose sanctions with no humanitarian consequences."<sup>139</sup>

In the United States, the growth of individual smart sanctions came largely after September 11, 2001.<sup>140</sup> In the weeks following the terrorist attacks on the World Trade Center, President George Bush signed a series of executive orders freezing the assets of 'known terrorists' through direct sanctions, and thus the modern regime of unilateral individual sanctions came to be.<sup>141</sup> However, as targeted

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2012/04/23/smart-sanctions-a-short-history.

137. See Friedman, *supra* note 136 (describing the United Nations' decision to impose sanctions against Angolan rebel group UNITA and allowing a committee to monitor violations).

138. *Id.* ("Following *Washington's lead*, the Security Council slaps *financial sanctions* on members of Haiti's military junta—the first time it targets specific leaders rather than government assets.").

139. Coates, *supra* note 49; see *Human Rights and Armed Conflict World Report: 2004*, HUM. RTS. WATCH 285 (2004) ("[A] March 2000 report on violations of an embargo then in place against Angolan rebels, various U.N. investigations by panels of experts have given new legitimacy and a name—"naming and shaming"—to efforts to hold arms suppliers and traffickers responsible for their behavior. These investigations have largely focused on the private traffickers who are a crucial link in the sanctions-busting chain. But the panels also have named governments, including heads of governments. For example, the president of Burkina Faso was accused of directly facilitating Liberia's arms-for-diamonds trade, to the benefit of the RUF in Sierra Leone.").

140. Interview with OFAC officer (Feb. 19, 2021) (notes on file with author); see Gilsinan, *supra* note 86 (referring to the last two decades as "boom time" for sanctions).

141. Exec. Order No. 13224, 3 C.F.R. 786 (2001); Exec. Order No. 13354, 3 C.F.R. 214 (2004); Exec. Order No. 13243, 3 C.F.R. 819 (2001); Nina Crimm, *High Alert: The Government's War on the Financing of Terrorism and Its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1345–47 (2004) (discussing president Bush's enactment of the Patriot Act and a financial war on terrorism after

sanctions grew, country-wide sanctions were still largely in use.<sup>142</sup> For example, in 2011 unilateral individual sanctions were used by the U.S. against Gaddafi and his followers during the Libyan uprising, while country-wide sanctions were imposed on Iran and Syria.<sup>143</sup>

In reality, formalized unilateral individual sanctions for *human rights abusers* – not anti-terrorism - gained the most traction in the last decade.<sup>144</sup> In 2009, tragic events in Russia triggered the enactment of the U.S. Magnitsky Act, and the subsequent Global Magnitsky Sanctions Act, used widely for human rights enforcement today.<sup>145</sup> Sergei Magnitsky, a Russian tax lawyer, was hired by a U.K. asset management firm, Hermitage Capital, to investigate corruption and economic fraud committed by Russian Interior Ministry officials.<sup>146</sup> As other members of Hermitage Capital fled abroad fearing their safety, Sergei Magnitsky stayed in Russia and uncovered that Russian officials had used a system of fraudulent tax rebates and business take overs to rob the public of an estimated \$230 million raised through corporate taxes.<sup>147</sup> However, rather than Russian officials facing charges for their violations, Magnitsky was jailed, beaten, tortured, denied medical treatment, and eventually died through a combination of the above.<sup>148</sup> An investigation by

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9/11).

142. See Coates, *supra* note 49 (highlining the sanctions still in place against Cuba).

143. *Sanctions against Libya*, GLOB. POL'Y F. ARCHIVES, (last visited Feb. 17, 2021), <https://archive.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/libya.html>.

144. See Elizabeth G. Silver, *International Coalition Takes Shape to Coordinate Economic Sanctions on Human Rights Violators*, NAT'L L. REV. (Oct. 28, 2021), <https://www.natlawreview.com/article/international-coalition-takes-shape-to-coordinate-economic-sanctions-human-rights> (explaining how western countries have developed human rights sanctions regimes following high profile cases, including the killings of Sergei Magnitsky and Jamal Khashoggi).

145. Russia and Moldova Jackson–Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (Magnitsky Act), Pub. L. No. 112–208, 126 Stat. 1496, 1503–05 (2012); Global Magnitsky Sanctions Act, *supra* note 35.

146. Robertson, *supra* note 90, at 107.

147. *Id.*

148. See *id.* at 120 (discussing that “when family members were finally allowed to see Magnitsky’s body, the day it was to be buried, they noticed injuries to his hands and wrists, as if he had struggled for his life.”).

Russia's Presidential Human Rights Council found that Magnitsky had been hit repeatedly with pipes, and denied treatment for pancreatitis that developed as a result of torture, leading him to die painfully both from his injuries and from toxic shock.<sup>149</sup>

Bill Browder, the chief executive officer of Hermitage Capital who hired Magnitsky for the investigation, brought his story to the attention of the U.S. Congress, through Senators Cardin and McCain, and Representative McGovern.<sup>150</sup> While Browder had sought justice through traditional criminal channels, like the International Criminal Court, no one had yet been held accountable for Magnitsky's murder.<sup>151</sup> Moreover, Browder did not believe justice could be achieved under Russian domestic law.<sup>152</sup> In 2012, the U.S. Government responded by passing the "Magnitsky Act,"<sup>153</sup> named after Magnitsky himself. This act, signed by President Obama with bipartisan support, applied travel bans preventing U.S. entry, and imposed asset freezes against the officials deemed responsible for Magnitsky's murder.<sup>154</sup> In response, Russian President Vladimir Putin claimed the U.S. was resorting to "cold war tactics"<sup>155</sup> and

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149. *Id.*; Sergei Magnitsky's story deserves more justice than this article can provide in this short space. It is important to note, however, that after Magnitsky's death, Russia held its first ever posthumous trial, finding Magnitsky guilty of "tax evasion" in 2013. The European Court of Human Rights found in 2019 that Russian officials had violated several articles of the European Convention on Human Rights and ordered the Russian government to pay Magnitsky's widow and mother 34,000 Euro. This decision is currently on appeal. *See Case of Magnitsky and others v. Russia*, Eur. Ct. H.R. (2019), <https://hudoc.echr.coe.int/eng?i=001-195527>; *see also Magnitsky wins Russian rights battle 10 years after his death*, BBC NEWS (Aug. 27, 2019), <https://www.bbc.com/news/world-europe-49481471> (explaining the strong reactions to Magnitsky's case in Russia in addition to the ruling of the European Court of Human Rights).

150. BILL BROWDER, RED NOTICE: A TRUE STORY OF HIGH FINANCE, MURDER, AND ONE MAN'S FIGHT FOR JUSTICE 359–390 (2015).

151. *Id.* at 202, 314.

152. *See generally id.*

153. Magnitsky Act, *supra* note 145.

154. *See id.* (outlining the inadmissibility of certain noncitizens and financial measures taken against them); *see also* Robertson, *supra* note 90, at 107 (describing Magnitsky's arrest, alleged torture, and subsequent death).

155. *See* Mariam Elder, *Russia Accuses US of Using 'Cold War Tactics' Over Magnitsky Act*, GUARDIAN (Dec. 7, 2012, 7:02 AM), <https://www.theguardian.com/world/2012/dec/07/russia-us-cold-war-tactics> (explaining the Russian reaction to the bill banning Russian officials accused of human rights abuses from

banned U.S. adoption of Russian children.<sup>156</sup> Interestingly, to many in the west, this reaction from President Putin alone was a sign the sanctions had teeth.<sup>157</sup> This goes back to the root of sanctions as non-violent methods of insuring conformity, here through economic inconvenience and naming and shaming.

Accordingly, for many in Congress these initial sanctions were seen as a huge success.<sup>158</sup> Magnitsky sanctions allowed the U.S. to directly target human rights abusers, without the need for violent action.<sup>159</sup> The original act, however, only applied to Russian officials.<sup>160</sup> That is, until 2016 when Congress passes the subsequent Global Magnitsky Sanctions Act, creating a system where the President can sanction individuals for violations of human rights norms worldwide.<sup>161</sup> The new act allows OFAC to “freeze the assets of, ban entry to, and prohibit dealings with human rights abusers

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travelling to the United States).

156. See, e.g., Greg Myre, *What Really Irritates Vladimir Putin? The Magnitsky Act*, NPR (July 14, 2017, 5:03 PM), <https://www.npr.org/2017/07/14/537247838/what-really-irritates-vladimir-putin-the-magnitsky-act> (stating that days after the Magnitsky Act passed, Russia responded by banning Americans from adopting Russian orphans); Cindy Saine, *What's Behind Putin's Hate for the Magnitsky Act?*, VOA NEWS (July 18, 2017, 3:30 PM), <https://www.voanews.com/usa/whats-behind-putins-hate-magnitsky-act> (explaining the relationship between the Magnitsky Act and U.S. citizens adopting Russian children); Julia Iofe, *Why Does the Kremlin Care So Much About the About the Magnitsky Act?*, ATL. GLOB. (July 27, 2017), <https://www.theatlantic.com/international/archive/2017/07/magnitsky-act-kremlin/535044> (describing how in retaliating against the enactment of the Magnitsky Act, “the Russians vowed they were punishing Americans who violated the human rights of Russians, after an adopted Russian toddler died of a heat stroke in a Virginia family’s car”).

157. Iofe, *supra* note 156.

158. Jhanisse Vaca Daza, *Magnitsky Rule of Law Accountability Act: Success and Impact*, 6 IMPUNITY WATCH L. J. 30, 40 (2015–2016) (noting that to Bill Browder the success of the Magnitsky Act was the fact that the bill is against the individuals and not the entire country); Amal Clooney, *Geoffrey Robertson and Brill Browder on a Plan B for Human Rights*, INTEL. SQUARED (Apr. 13, 2021), <https://www.intelligencesquared.com/events/amal-clooney-geoffrey-robertson-and-bill-browder-on-a-plan-b-for-human-rights> [hereinafter *Plan B for Human Rights*].

159. Magnitsky Act, *supra* note 145.

160. *Id.*

161. This “can” is different from the language of the Magnitsky Act, which said the President “should” sanction Russian officials but has not turned out to be prohibitive. Global Magnitsky Sanctions Act, *supra* note 35.

wherever they may be located.”<sup>162</sup> Moreover, many of these sanctions, including travel bans, apply to the families of human rights abusers as well.<sup>163</sup> As of January 2021, the same type of human rights sanction law has been adopted in various forms by the UK, EU, and Canada.<sup>164</sup>

Under the new Magnitsky sanctions, it is also possible for the United States to gain financial benefits.<sup>165</sup> Under current sanctions regimes, can potentially seize previously frozen assets with judicial review.<sup>166</sup> Unlike asset freezing, which is within the sole discretion of OFAC, asset seizure requires a formal and separate legal action brought by the U.S. Government against the sanctioned individual, in violation of a predicated offence.<sup>167</sup> Currently, Department of Justice is bringing one such case against the Ex-President of the Gambia, attempting to seize sanctioned assets in the US valued at 3.5 million USD.<sup>168</sup>

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162. Hagar Chemali, *The European Magnitsky Law – A Milestone with a lot of Potential*, ATL. COUNCIL (Dec. 10, 2020), <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-european-magnitsky-law-a-milestone-with-a-lot-of-potential>.

163. *Id.*; *Plan B for Human Rights*, *supra* note 158.

164. *Plan B for Human Rights*, *supra* note 158; see Meredith Lilly & Delaram Arabi, *Symbolic Act, Real Consequences: Passing Canada’s Magnitsky Law to Combat Human Rights Violations and Corruption*, 75 J. INT’L L. 163 (2020) (stating that Canada introduced Magnitsky acts to enable the government to act unilaterally to impose sanctions against foreigners for gross human rights violations); Maxence Dumas, *The Protection of Human Rights in the EU Sanction Mechanism: a New Hope with the Magnitsky Act (2020)* (Thesis, University of Nottingham) (explaining the Dutch introduction of the Magnitsky to the European Union); Robertson, *supra* note 90, at 148–49 (detailing the United Kingdom’s version of the Magnitsky Act).

165. *The Global Magnitsky Act*, HUM. RTS. FIRST (Apr. 2019), <https://www.humanrightsfirst.org/sites/default/files/hrf-global-magnitsky-faq.pdf>.

166. See *Global Magnitsky Sanctions Act*, *supra* note 165 (explaining how Global Magnitsky works with the IEEPA to seize and forfeit assets and the role U.S. courts play in that process).

167. *Id.*

168. See *Press Release: Department of Justice Seeks Recovery of Approximately \$3.5 Million in Corruption Proceeds Linked to Ex-President of The Gambia*, U.S. DEP’T OF JUSTICE (July 15, 2020), <https://www.justice.gov/opa/pr/department-justice-seeks-recovery-approximately-35-million-corruption-proceeds-linked-ex> (adding that a civil forfeiture “is merely an allegation that money or property was involved in or represents the proceeds of a crime. The allegations are not proven until there is a judgment in favor of the U.S.”).

Additionally, these sanctions also allow for the U.S. government to fine individuals, corporations, and entities with ties to the U.S. for trading or dealing with sanctioned individuals.<sup>169</sup> “Penalties for violations include civil and criminal penalties. . . . Criminal penalties are up to twenty years imprisonment, \$1,000,000 in financial fines, or both per violation. Civil penalties are up to the greater of \$307,922 or twice the amount of the underlying transaction.”<sup>170</sup> This path also requires judicial review for due process concerns but can have some heavy costs.<sup>171</sup> Some previous fines for violating sanctions include the recently overturned fine against Exxon Mobile, for 2 million USD.<sup>172</sup>

This marks a fundamental shift away from country wide sanctions. In effect, Magnitsky sanctions not only raise awareness of issues<sup>173</sup> and create economic incentives to enforce human rights, but they also do so on a specific individual level that makes it difficult—though not impossible—to pass the costs to victims, or avoid economic pressures altogether.<sup>174</sup> Individuals who are sanctioned are

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169. Global Magnitsky Sanctions Act, *supra* note 35. For an example of sanction violation fines, see Alan Burkitt-Gray, *Ericsson Warns Shareholders: Be Prepared for Penalties*, CAPACITY (June 10, 2022, 11:50 AM), <https://www.capacitymedia.com/article/2a7m79ij1m2cjaq3jjo5c/news/ericsson-warns-shareholders-be-prepared-for-penalties> (outlining how Ericsson was forced to pay \$1,060,570,432 in civil and criminal penalties under a deferred prosecution agreement for sanctions violations).

170. *See Epsilon Elec. Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913 (D.C. Cir. 2017).

171. *See* Global Magnitsky Sanctions Act, *supra* note 35 (highlighting human rights groups concerns related to due process and IEEPA procedures).

172. *See Exxon Mobil v. Steven Mnuchin*, 430 F. Supp. 3d 220 (D. N.D. Tex. 2019); *District Court Overturns OFAC's \$2 Million Fine Against Exxon Mobil*, CROWELL & MORING LLP (Jan. 7, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/District-Court-Overturns-OFACs-2-Million-Fine-Against-Exxon-Mobil> (stating the question the court reviewed which was “whether Exxon had received fair notice that it was prohibited for U.S. persons like Exxon to deal with companies that are not designated by engaging with designated persons acting in their capacity as officials of the non-designated company”).

173. *See* Biersteker, *supra* note 125, at 170–71 (describing the areas impacted by these sanctions).

174. There are some loopholes where individual sanctions still can be passed on to the public, especially in instances where the sanctioned individual runs state aid or medical companies. However, this has not been sufficiently researched enough to come to a strong conclusion. *See* CONG. RSCH. SERV., RS20871, IRAN

unable to hide behind positions or titles and face direct international condemnation for their roles in human rights atrocities.<sup>175</sup> Companies who continue to deal with sanctioned individuals face not only fines, but public backlash which hurts their bottom line.<sup>176</sup> For example, Hugo Boss and Volkswagen both face consumer boycotts for their continued purchasing of cotton and other materials made by enslaved Uyghur Muslims in China, even after Chinese officials that were deemed responsible were sanctioned by the U.S.<sup>177</sup> This fosters the goal for sanctions, making it impossible for individuals to justify the cost of abuse or use their economic power to further injure victims.<sup>178</sup>

When a person is added to the Magnitsky list, their financial access to USD becomes almost nonexistent.<sup>179</sup> Assets in the U.S. are frozen and credit cards and banks which operate with U.S. currency

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SANCTIONS (April 6, 2021), <https://crsreports.congress.gov/product/pdf/RS/RS20871/312> (explaining how “secondary sanctions have had an adverse effect on Iran’s economy”); Global Magnitsky Sanctions Act, *supra* note 35; Sarah Allis & Joy Hammer, *Global Magnitsky: Using Sanctions in Cooperation with National Authorities*, HUM. RTS. FIRST (May 12, 2021) <https://www.humanrightsfirst.org/blog/global-magnitsky-using-sanctions-cooperation-national-authorities> (“Based on the practice of past U.S. administrations, the U.S. government will undoubtedly continue to use targeted human rights and anti-corruption sanctions in antagonistic contexts such as against China and Myanmar, where local authorities oppose the sanctions. Sanctions will remain a valuable means of naming and shaming the perpetrators of major abuses, signaling U.S. commitment to human rights and democratic norms in authoritarian countries and other closed societies, and shutting malign actors out of the licit international dollar market.”)

175. *Id.*

176. *See, e.g.*, Nury Turkel & Abraham Cooper, *Hugo Boss and Volkswagen Repeat History Exploiting Enslaved Uyghurs (Opinion)*, NEWSWEEK (Apr. 1, 2021, 2:50 PM), <https://www.newsweek.com/hugo-boss-volkswagen-repeat-history-exploiting-enslaved-uyghurs-opinion-1580531>.

177. These corporations are not facing fines, since they are not directly conducting business with sanctioned individuals, but this aspect of naming and shaming is kept when discussing market incentives and economic bottom lines. *See id.* (describing the criticisms Hugo Boss and Volkswagen have faced for conducting business in Xinjiang); *Chinese celebs, netizens slam ‘two-faced’ Hugo Boss over Xinjiang*, REUTERS (Mar. 26, 2021, 9:26 PM), <https://www.reuters.com/article/us-china-xinjiang-hugo-boss/chinese-celebs-netizens-slam-two-faced-hugo-boss-over-xinjiang-idUSKBN2BJ03V> (reporting that celebrities were dropping Hugo Boss for their businesses in Xinjiang and Hugo Boss’ efforts to do damage-control).

178. Global Magnitsky Sanctions Act, *supra* note 35.

179. Robertson, *supra* note 90, at 174.



ban use.<sup>180</sup> The U.S. has a particularly powerful role to play in sanctions.<sup>181</sup> As Geoffrey Robertson, human rights barrister, noted, “the [U.S.] dollar is the basic currency of global businesses. It’s difficult to do [business] with sanctions from the U.S. treasury.”<sup>182</sup> Travel is limited, trade restricted, and business connections severed at the fear of receiving U.S. fines.<sup>183</sup> Families of abusers are denied access as well, including schooling abroad.<sup>184</sup> This is a devastating punishment for those sanctioned, and serves as a warning to those nearby who could fear being sanctioned for similar involvement in human rights violations.<sup>185</sup> Bill Browder advocated for Magnitsky sanctions by highlighting that “the point of this is not so much to punish, but to prevent future death.”<sup>186</sup>

However, there are concerns about the long-term effectiveness and legality of Magnitsky sanctions.<sup>187</sup> Those interested in the

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180. See Tom Firestone & Kerry Contini, *The Global Magnitsky Act*, 29 CRIM. LAW F. 617, 619 (2018) (noting that most USD payments are “cleared” through the U.S. financial system).

181. *Plan B for Human Rights*, *supra* note 158.

182. *Id.*

183. See Firestone & Contini, *supra* note 180, at 619 (noting the consequences of engaging with Specially Designated Nationals).

184. See Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act of 2008, P.L. 110–286, § 5(a)(1), 122 Stat. 2632 (2008) (“The following persons shall be ineligible for a visa to travel to the United States: (A) Former and present leaders of the SPDC, the Burmese military, or the USDA.13 (B) Officials of the SPDC, the Burmese military, or the USDA involved in the repression of peaceful political activity or in other gross violations of human rights in Burma or in the commission of other human rights abuses, including any current or former officials of the security services and judicial institutions of the SPDC. (C) Any other Burmese persons who provide substantial economic and political support for the SPDC, the Burmese military, or the USDA. (D) The immediate family members of any person described in subparagraphs (A) through (C)”).

185. Robertson, *supra* note 90, at 160; see Geneive Abdo, *Trump’s Right: Individual Sanctions Actually do Work*, *Opinion*, THE HILL (Aug. 4, 2019, 5:00 PM), <https://thehill.com/opinion/international/456114-trumps-right-individual-sanctions-actually-do-work> (stating that another benefit of the sanctions is that it creates a stigma on the individuals facing sanctions).

186. *Plan B for Human Rights*, *supra* note 158, at 20:36; see also Geneive Abdo, *Trump’s right: International sanctions actually do work*, THE HILL (Aug. 4, 2019, 5:00PM), <https://thehill.com/opinion/international/456114-trumps-right-individual-sanctions-actually-do-work> (discussing sanctions as an effective tool in the modern political landscape).

187. Kim Van der Borch, *From Jackson-Vanik to Magnitsky: Continuing a*

intersection of cryptocurrency and human rights have meaningfully pointed out that individual sanctions require knowing where an individual's assets are, which is not possible if abusers operate by using bitcoin, similar financial tech, or hiding assets through unknown corporate entities.<sup>188</sup> Additionally, there are concerns that imposing such severe sanctions without trial violates Due Process norms.<sup>189</sup> Sanctions are implemented against individuals when "credible evidence" shows they have abused human rights norms, which is below the international criminal court standard of "beyond a reasonable doubt."<sup>190</sup> To be removed from the sanctions list, individuals must show that "credible information exists" that they were innocent of the allegations that had them listed . . . 'prosecuted appropriately' for them, or else that they had reformed, paid compensation, and were unlikely to behave in the same way again."<sup>191</sup> Removing members of the list, however, is largely within the discretion of the U.S. Government—listed actors can appeal their listing directly to the government, and if it is upheld only then can they seek judicial review.<sup>192</sup> Valid concerns of due process exist when it comes to asset seizure, but with judicial safeguards in place, this cannot be an excuse for non-action.<sup>193</sup> Asset seizure, and the

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*Tradition of Ineffective Human Rights Bolt-Ons to Trade Bills*, 7 HUM. RTS. & INT'L LEGAL DISCOURSE 237, 254 (2013).

188. See generally Thomas Erdbrink, *How Bitcoin Could Help Iran Undermine U.S. Sanctions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html> (discussing Bitcoin and other innovative financial technologies used by regimes under sanction).

189. Michael Nesbitt, *Canada's 'Unilateral' Sanctions Regime under Review: Extraterritoriality, Human Rights, Due Process, and Enforcement in Canada's Special Economic Measures Act*, 48 OTTAWA L. REV. 507, 513, 569–70. (2017).

190. *Plan B for Human Rights*, *supra* note 158, at 20:36.

191. Robertson, *supra* note 90, at 132–33.

192. *Id.*

193. See John Binns, *Magnitsky Sanctions in the UK: What about Due Process?*, BCL SOLICITORS LLP (Jul. 2020), <https://www.bcl.com/magnitsky-sanctions-in-the-uk-what-about-due-process> (discussing a general outline of how the Magnitsky sanctions were applied); Marc Limon, *Rapid expansion of 'Magnitsky-style' human rights sanctions regimes underlines need for international coordination and norms*, UNIVERSAL RTS. GRP. (Aug. 27, 2020), <https://www.universal-rights.org/blog/rapid-expansion-of-magnitsky-style-human-rights-sanctions-regimes-underlines-need-for-international-coordination-and-norms> (discussing the European Parliament's 2019 Motion to clearly define scope of sanctions in appreciation of due process norms. "It is vital, at this early formative stage of the

imposition of fines, does allow for judicial review, diminishing some of the due process concerns when it comes to permanent asset taking.<sup>194</sup>

Finally, while Magnitsky sanctions are increasingly seen as the new path forward, and an improvement from country wide sanctions which harmed victims and activist groups, they still do not go far enough to include victims' voices.<sup>195</sup> In the U.S., human rights groups are invited to nominate targets and submit evidence showing why individuals should be sanctioned.<sup>196</sup> This is more progressive than EU and UK which are black box models.<sup>197</sup> However, the U.S. still balances the interests of foreign policy with human rights and does not actively have NGO's or impacted peoples involved in the development of the sanctions themselves.<sup>198</sup> Moreover, like the history of country wide sanctions, thus far all nations that have adopted Magnitsky sanctions lay in the global north.<sup>199</sup> Concerns about lack of victim representation are therefore twofold: (1) how do we help victims if we are not including their voices in the process, and (2) how do we guarantee these new sanctions move past western symbolism and virtue signaling into actual human rights enforcement?

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global Magnitsky 'wave', that democratic and pro-human rights States begin to consult and coordinate their work – in order to ensure that these vital new tools remain credible, and to ensure that they serve universal accountability and justice, rather than narrow political or economic interests.”).

194. Binns, *supra* note 193.

195. See HOGAN LOVELLS, FINANCE FOR RESTORATIVE JUSTICE: USING SANCTIONS AND TERRORIST FINANCING LEGISLATION TO FUND REPARATIONS FOR VICTIMS OF SEXUAL VIOLENCE IN CONFLICT 26 (Jan. 2020), <https://www.hoganlovells.com/en/publications/finance-for-restorative-justice-using-sanctions-and-terrorist-financing-legislation-to-fund-reparations-for-victims-of-sexual-violence-in-conflict>. (discussing victim representation in the process).

196. Interview with OFAC Officer, *supra* note 88.

197. *Id.*; *Plan B for Human Rights*, *supra* note 158, at 53:29.

198. Interview with OFAC Officer, *supra* note 88; *Plan B for Human Rights*, *supra* note 158, at 31:30; Robertson, *supra* note 90, at 145.

199. Martin Russell, *Global Human Rights Sanctions Mapping Magnitsky Laws: The US, Canadian, UK and EU Approach*, EUR. PARLIAMENTARY RSCH. SERV., 1, 2 (Nov. 16, 2021), [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)698791](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698791); Interview with Human Rights NGO Lawyer – Myanmar Division (Apr. 30, 2021).

## C. DEFINING SUCCESS

“They have promised to the powerless a world free of war and discrimination while giving the powerful tools for domination.”<sup>200</sup>

When it comes to sanctions, the first question consistently asked is, “are they effective?” The “effectiveness” of sanctions is itself debatable, and a full discussion of that debate is impossible to cover here; it is simply beyond the scope of this article. It is, however, worth discussing the two views in order to discuss why the conversation about ‘effectiveness’ is, at its root, flawed.<sup>201</sup>

Pro-sanctions advocates argue they are beneficial methods of non-violent confrontation that can force nations to fall in line with global standards.<sup>202</sup> On its face, sanctions do appeal as a rational, non-violent choice.<sup>203</sup> Since sanctions are purely economic, many scholars rationalize that sanctions avoid violence and instead effect change through global and national political pressure.<sup>204</sup> A recent study by the University of Chicago discusses this view, highlighting the notion that the symbolism of sanctions—the knowledge that other nations condemn a leader—could increase political pressure within an informed nation.<sup>205</sup>

Many others, however, have pushed back against the idea of sanctions as harmless.<sup>206</sup> Sanctions against an entire nation, for example, are criticized as passing the economic burden onto the nation’s poorest, while powerful perpetrators syphon the limited resources for their own gain.<sup>207</sup> Conversations around sanctions also include the concept of global policing, and the imposition of western values onto global south nations.<sup>208</sup> Individual sanctions have been

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200. Coates, *supra* note 49.

201. *Id.*

202. Kavakli et al., *supra* note 99, at 879.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Van Tran, *To Understand Post-Coup Myanmar, Look to Its History of Popular Resistance – Not Sanctions*, BROOKINGS (Feb. 9, 2021), <https://www.brookings.edu/blog/order-from-chaos/2021/02/09/to-understand-post-coup-myanmar-look-to-its-history-of-popular-resistance-not-sanctions>.

208. *Id.*

criticized as easily circumvented, and inherently symbolic when no larger support is given.<sup>209</sup> This is an increasing concern under the previously highlighted issues of asset tracing and the evolving markets for cryptocurrency, allowing for violators to have symbolic sanctions levied against them, yet never feel the sting.<sup>210</sup>

Both sides of the sanctions debate have merit, but the question of sanction 'success' is inherently flawed. Success in this conversation is defined on almost every level through induced compliance with a norm, but the definition lacks a retroactive or victim-centered perspective.<sup>211</sup> Simply put, the question of effectiveness of sanctions ignores the *current* realities for victims.<sup>212</sup> Country-specific sanctions were used for decades without proper analysis or an examination of how costs were passed on to victims and the non-privileged classes.<sup>213</sup> As the world turns to Magnitsky sanctions to provide the answer to non-violent intervention, we must define success not only in terms of stopping further abuse but as also providing for victims of harm after the harm has occurred.<sup>214</sup> This is especially crucial to the Rohingya in Myanmar, whose harm has been on going, regardless of sanctions regimes, for decades.<sup>215</sup> Both country wide sanctions and targeted sanctions have been levied against those perpetuating the Rohingya Genocide, without large long-term success.<sup>216</sup> This leaves many victims and activists feeling abandoned by the same nations implementing the sanctions.<sup>217</sup> Incorporating a victim's reparation fund into the Magnitsky regime would redefine sanctions success, creating a path to aid victims even if human rights abuses continue.<sup>218</sup> The next section examines the history of human rights abuses, and the correlating timeline of sanctions in Myanmar to establish the need for a victim reparations fund, redefining successful

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209. See Kavakli et al., *supra* note 99, at 879.

210. Erdbrink, *supra* note 189.

211. Myo Nyun, *supra* note 96, at 467.

212. *Id.*

213. See *id.* (discussing sanctions and the lack of research on actual victims of the sanctions).

214. Myo Nyun, *supra* note 96, at 513–14.

215. *Id.* at 513.

216. *Id.*

217. Interview with Rohingya Refugee (Apr. 12, 2021).

218. *Id.*

sanctions not only in terms of coercive prevention, but also by their ability to provide victim aid.

### III. MYANMAR, HUMAN RIGHTS ABUSES, AND SANCTION RESPONSES

Since the 1960s, Myanmar has been embroiled in global conflict stemming from its mistreatment of the nation's ethnic and religious minority groups.<sup>219</sup> In the previous decade, hope for change has fallen flat, as democratic elections have seemingly supported continued military rule.<sup>220</sup> On the ground, activists continue to advocate for change while international governments search for methods to prevent further genocide by the military regime.<sup>221</sup> As sanctions evolve, so have the methods the U.S. employs to enforce human rights norms, moving from loose country wide sanctions to individual sanctions.<sup>222</sup> Yet, the genocide continues.<sup>223</sup> This section outlines the history of the Rohingya genocide in Myanmar and the correlated unilateral sanctions by the U.S., building on the notion that to be “successful,” sanctions must be more than non-violent condemnation.

#### A. BUILDUP, GENOCIDE, AND CONTINUED OPPRESSION OF THE ROHINGYA IN MYANMAR

The “Rohingya” are an ethnic group in Myanmar, the majority of whom identify as Muslim and live in the Rakhine state.<sup>224</sup> Their roots

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219. Lindsay Maizland, *Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict*, COUNCIL ON FOREIGN RELS, <https://www.cfr.org/background/Myanmar-history-coup-military-rule-ethnic-conflict-rohingya> (last updated Jan. 31, 2022).

220. Trevor Wilson, *The Significance of Myanmar's 2010 election*, NEW MANDALA (Dec. 15, 2010), <https://www.newmandala.org/the-significance-of-myanmar%E2%80%99s-2010-election>.

221. Kelsey Peden, *A System without Representation: Legal Rights for Activists in Myanmar*, BERKELEY J. OF INT'L L. BLOG (Aug. 31, 2019), <https://www.berkeleyjournalofinternationallaw.com/post/a-system-without-representation-legal-rights-for-activists-in-myanmar>.

222. See *Burma's Path to Genocide: Timeline*, U.S. HOLOCAUST MEM'L MUSEUM, <https://exhibitions.ushmm.org/burmas-path-to-genocide/timeline>.

223. See generally *Rohingya*, HUM. RTS. WATCH, <https://www.hrw.org/tag/rohingya> (last visited May 3, 2021) (updating on the experiences of the Rohingya).

224. *Burma's Path to Genocide: Timeline*, *supra* note 222; Michael Charney,

to the land go back centuries, as Rohingya peoples occupied the Arakan region (now Rakhine state) until it was taken over by neighboring Burma in 1785.<sup>225</sup> The earliest recording of the term “Rohingya” appears in an article by a British geographer in 1799, explaining “the Mohammedans, who have long settled in Arakan, call themselves ‘Rooinga’, or natives of Arakan.”<sup>226</sup> While conflict in the region has existed throughout history, the rise of the Myanmar military regime in the last decade resulted in a drastic rise in violence and oppression of the Rohingya, culminating in the current genocide.<sup>227</sup>

Myanmar gained freedom from British colonization in 1948, establishing itself as an independent nation.<sup>228</sup> In 1949, the new Burmese government issued identification cards to its citizens, including the Rohingya minority.<sup>229</sup> Before 1962, Rohingya citizens had the right to vote and flexed political influence, electing several Rohingya as members of Parliament.<sup>230</sup> In 1962, however, the Tatmadaw—the Myanmar military rule—came to power.<sup>231</sup> Thereafter, anti-minority sentiment began to grow.<sup>232</sup> The Tatmadaw gained support from the religious Buddhist community by incorporating Theravada Buddhism principals into the government and tying together religion and nationality.<sup>233</sup> Religious minorities, like the Muslim Rohingya, were now seen as enemies of the state.<sup>234</sup>

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*Myanmar's Democratic Transition and the Rohingya Persecution*, Presented at the “Myanmar’s Democratic Transition and the Rohingya Persecution” Conference, OXFORD UNIV. (May 11, 2016).

225. Charney, *supra* note 224.

226. Francis Buchanan, *A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire*, 1 SOAS BULL. BURMA RSCH 40, 55 (2003).

227. Charney, *supra* note 224.

228. *Id.*; see also *Burma's Path to Genocide: Timeline*, *supra* note 222 (noting the general historical trajectory of the conflict in Burma).

229. *Burma's Path to Genocide*, *supra* note 222.

230. *Id.*

231. *Id.*

232. *Id.*; *History of the Rohingya*, ROHINGYA CULTURAL CTR, <https://rccchicago.org/history> (last visited Feb. 3, 2021).

233. *History of the Rohingya*, *supra* note 232.

234. See generally Jobair Alam, *The Current Rohingya Crisis in Myanmar in Historical Perspective*, 39 J. MUSLIM MINORITY AFFS. ONLINE 1, 1–18 (2019) (discussing the historical and modern view of the Rohingya people in Myanmar); Jacques P. Leider, *History and Victimhood: Engaging with the Rohingya Issues*, 20

In the 1970's, military rule began in the Rakhine state, with "us" and "them" rhetoric portraying the Rohingya as outsiders living on Myanmar soil.<sup>235</sup> In 1975, the government stripped the Rohingyas of their right to vote,<sup>236</sup> and in 1982 the Myanmar government enacted the Citizenship Law which gives rights to 135 recognized ethnic groups recognized by Myanmar, but did not include the Rohingya people.<sup>237</sup> During this time, an estimated 200,000 Rohingya fled to Bangladesh, "forcefully evicted by an army that indulged in widespread brutality."<sup>238</sup>

Then the 8-8-88 uprising occurred, and the political landscape of Myanmar changed forever.<sup>239</sup> In September of 1987, the Tatmadaw government devalued several existing currencies, wiping out most of the country's savings overnight.<sup>240</sup> Previous legal tender was now only worth the paper it was printed on.<sup>241</sup> Moreover, awareness of the increasing violence against minority groups, like the Rohingya, was on the rise.<sup>242</sup> In response, student groups began to organize mass protests, and tension between the army and civilians grew.<sup>243</sup> The Tatmadaw began arresting student leaders at night, torturing, and imprisoning them for their political views.<sup>244</sup> On March 12, 1988, a

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INSIGHT TURKEY 99, 101, 105 (2018).

235. Nick Cheesman, *How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya*, 47 J. CONTEMP. ASIA 461, 463 (2017).

236. *Burma's Path to Genocide: Timeline*, *supra* note 222.

237. The Pyithu Hluttaw Law [Burma Citizenship Law], 1982 (No. 4/1982) (Myan.), <https://www.refworld.org/docid/3ae6b4f71b.html/>

238. See Ashutosh Pandey, *Myanmar's Rohingya: A History of Forced Exodus*, DW (Sept. 9, 2017), <https://www.dw.com/en/myanmars-rohingya-a-history-of-forced-exoduses/a-40427304> (last visited May 1, 2021).

239. Oliver Slow, *The People's Grief and Their Right to Closure*, FRONTIER MYANMAR (July 27, 2020), <https://www.frontiermyanmar.net/en/the-peoples-grief-and-their-right-to-closure>; PASCAL KHOO THWE, FROM THE LAND OF GREEN GHOSTS: A BURMESE ODYSSEY 155 (2002).

240. *Id.*; Wei Yan Aung, *The Day Three Myanmar Banknotes Suddenly Became Worthless*, THE IRRAWADDY (Sept. 5, 2019), <https://www.irrawaddy.com/specials/on-this-day/day-three-myanmar-banknotes-suddenly-became-worthless.html>.

241. Van Tran, *supra* note 207.

242. KHOO THWE, *supra* note 239, at 120.

243. *Id.*

244. *Id.* at 121; see generally Peter A. Coclanis, *Terror in Burma: Buddhists vs. Muslims*, 176 WORLD AFF.S 25, 27 (2013) (discussing the Tatmadaw attacks against students).



fight between students and military sympathizers broke out in a local teashop, resulting in the death of a student activist.<sup>245</sup> Four days later, activists were cornered and trapped at the White Bridge on Inya Lake.<sup>246</sup> Here, one of the most notorious, and heartbreaking moments of the uprising occurred.<sup>247</sup> Thousands of students, protesting for their right to exist, and for the freedoms of others, were trapped between riot police and advancing soldiers, when the army opened fire on the crowd.<sup>248</sup> Protesters had no means to escape over the bodies that piled up.<sup>249</sup> Those who fled into the lake were followed and drowned.<sup>250</sup> By the end of the day, thousand were injured, and an unknown number were killed.<sup>251</sup> The White Bridge turned red with blood, leading to the name “the red bridge massacre.”<sup>252</sup> While this event, and subsequent protests like the hundreds of thousand-person March on Aug 8, 1988 (8-8-88), were not directly tied to the military actions in the Rakhine state,<sup>253</sup> they marked a change in the Tatmadaw.<sup>254</sup> It became clear that anti-government rhetoric would be

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245. See Ronald Francisco, *After the Massacre: Mobilization in the Wake of Harsh Repression*, 9 MOBILIZATION: AN INT'L QUARTERLY 107 (2004).

246. KHOO THWE, *supra* note 239, at 120 (describing that more than one hundred students were killed, disappeared and arrested during the Lake Inya demonstration).

247. See *id.* (discussing the BBC World Service report that detailed the police's violent response to student demonstrations at Inya Lake).

248. See *id.* (detailing how students were trapped by riot police by the side of Lake Inya when they were fired on).

249. *Id.*; *Timeline: Myanmar's '8/8/88' Uprising*, NPR (Aug. 8, 1988), <https://www.npr.org/2013/08/08/210233784/timeline-myanmars-8-8-88-uprising> (explaining that the riot police attack near the White Bridge on the bank of Inya Lake in Rangoon became known as the “Red Bridge” because dozens of people were killed, arrested and imprisoned in the event).

250. *Id.*

251. *Id.*

252. Wei Yan Aung, *When a White Bridge Ran Red With Students' Blood*, IRRAWADDY (Mar. 16, 2019), <https://www.irrawaddy.com/specials/on-this-day/white-bridge-ran-red-students-blood.html>; see KHOO THWE, *supra* note 239, at 156 (describing the riot police's tactics that led to the violent suppression of student protestors near Inya Lake).

253. See *Timeline: Myanmar's '8/8/88' Uprising*, *supra* note 249 (explaining that protests were also prompted by the government declaring several currency denominations worthless).

254. See *id.* (charting the political protests that preceded a “coup” led by Saw Maung and a new government, the State Law and Order Restoration Committee, on September 18, 1988).

quelled with increasing violence and internal accountability and justice could not exist.<sup>255</sup>

In 1991, a new campaign of violence began against the Rohingya.<sup>256</sup> The army, which had been dehumanizing the Rohingya for decades, started violently attacking communities, committing murder and rape, and implementing forced labor.<sup>257</sup> Over a quarter million Rohingya fled to Bangladesh as refugees.<sup>258</sup> The violence was widely condemned by international communities, and for a decade, active violence in the region seemed to end.<sup>259</sup> However, in June 2012, hostilities grew again, after the rape and murder of a young Buddhist woman was blamed on Muslim communities as a whole.<sup>260</sup> The Tatmadaw, and local government authorities, began destroying mosques, massacring and burning villages to the ground, killing hundreds of people.<sup>261</sup> Over the next four years, attacks

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255. See *id.* (establishing that in response to political protests the government returned the country to martial rule, arresting protestors and prompting hundreds of demonstrators to flee Burma).

256. See *Burma's Path To Genocide: Timeline*, *supra* note 222 (explaining that the government created NaSaKa, a special border security force, to persecute the Rohingya); see generally Rohini J. Haar et al., *Documentation of Human Rights Abuses Among Rohingya Refugees From Myanmar*, 13 CONFLICT & HEALTH 1, 2 (2019) (contending that Myanmar's Rohingya people have been victims of state-sponsored ethnic discrimination for decades with several waves of violence breaking out in 1942, 1978, 1991–2, 1996, 2012, 2016 and 2017).

257. See Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PAC. RIM L. & POL'Y J. 683, 710–11 (2014) (discussing the security forces' reasons for perpetuating violence against the Rohingya).

258. See *id.* (explaining that about thirty percent of the total Rohingya population of North Arakan fled for Bangladesh in 1992 and 1993 because of the NaSaKa security forces' abuse).

259. See *id.* (describing violence against the Rohingyas as occurring in several waves, one of which occurred in 1996, and again sixteen years later, in 2012); see Haar et al., *supra* note 256, at 2 (claiming that human rights groups, media outlets, various governmental groups and UN bodies have sought to substantiate charges of crimes against humanity or acts of genocide).

260. See *Burma's Path to Genocide: Targeted*, U.S. HOLOCAUST MEM'L MUSEUM, <https://exhibitions.ushmm.org/burmas-path-to-genocide/chapter-2/the-tipping-point> (stating that June 2012 was a tipping point in Burma's path to genocide because Burmese authorities and police officers participated in the deadly attacks against the Rohingya).

261. See *id.* (reporting that Armed Buddhist civilians attacked the Rohingya and destroyed their homes and mosques while security forces did nothing to stop them and later assisted the attackers); see generally Messner et al., *Qualitative Evidence*

continued, and many Rohingya fled to Bangladesh, with violent clashes along the way.<sup>262</sup> In October 2016, three police posts near the Bangladesh-Myanmar border were attacked, killing six Myanmar officials.<sup>263</sup> According to the Tatmadaw, these attacks were carried out by over 250 Rohingya, setting off the biggest powder-keg in the region.<sup>264</sup> The military, already prepared to act violently against the Rohingya, launched into full warfare.<sup>265</sup> Hundreds of thousands of Rohingya men, women, and children were raped, beaten, tortured, and murdered.<sup>266</sup> As Human Rights Watch reported, this process of genocide was carried out systematically, town to town:

The advancing soldiers trapped several hundred unarmed Rohingya Muslim villagers . . . on the large bank of the river. . . . As they

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*of Crimes Against Humanity: The August 2017 Attacks on the Rohingya in Northern Rakhine State, Myanmar*, 13 CONFLICT & HEALTH 1–14 (2019) (examining the government’s human rights violations from June 2012 to August 2017).

262. See Pandey, *supra* note 238 (stating that 125,000 Rohingya fled Myanmar 2012 – 2015).

263. See, e.g., Gerard McCarthy & Jacqueline Menager, *Gendered Rumours and the Muslim Scapegoat in Myanmar’s Transition*, 47 J. CONTEMP. ASIA 396, 409 n.12 (2017) (stating “In October 2016, Maungdaw was also the site of an attack by Rohingya militants on a police post in which six officers were killed and a cache of weapons stolen. The incident prompted allegedly indiscriminate Myanmar military “clearance operations” which drove thousands of civilians to flee to Bangladesh”); see also INT’L CRISIS GRP., MYANMAR: A NEW MUSLIM INSURGENCY IN RAKHINE STATE 6 (Dec. 15, 2016), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state> (discussing the October 9 attacks that resulted in the death of nine police officers and eight attackers).

264. See Pandey, *supra* note 238 (asserting that the incident brought tensions between the Rohingya and the security force to the fore, triggering waves of violence across the Rakhine state).

265. See *Massacre by the River*, HUM. RTS. WATCH 1, 4 (Dec. 19, 2017), <https://www.hrw.org/report/2017/12/19/massacre-river/burmese-army-crimes-against-humanity-tula-toli> (responding to the attack on the three police outposts, Burmese security forces launched brutal months-long “clearance operations”).

266. See Haar et al., *supra* note 256, at 2 (discussing how the Myanmar military’s campaign of violence caused hundreds of thousands of Rohingya to flee to Bangladesh); see also *Myanmar: Crimes Against Humanity Terrorize and Drive Rohingya Out*, AMNESTY INT’L (Oct. 18, 2017), <https://www.amnesty.org/en/latest/news/2017/10/myanmar-new-evidence-of-systematic-campaign-to-terrorize-and-drive-rohingya-out> (revealing that the Myanmar security forces used crimes against humanity to drive Rohingya out of Myanmar).

approached, some fired at the crowd, others toward people trying to flee. While some Rohingya managed to escape, swimming across the fast-moving river or dashing to the surrounding hills, many terrified villagers could not run away or swim. Families with young children had no chance to flee. . . . [T]he soldiers had then separated the women and children from the men, confined the women to the shallow water of the river, and systematically murdered the men over the course of several hours. The soldiers and Rakhine Buddhist villagers dug several deep pits on the river beach. They dumped the men's bodies inside the pits, poured on gasoline, and set them on fire. The soldiers then turned to the women and children. Soldiers took some women and children away as soon as the men were killed, and others while the soldiers were still digging the pits and disposing of the bodies. They began killing some of the children at the beach, tossing young children into the river.<sup>267</sup>

The treatment of Min Gyi was not unique.<sup>268</sup> Cruelty directed at the Rohingya was widespread, causing many to flee.<sup>269</sup> Currently, almost a million Rohingya live in refugee camps in Bangladesh.<sup>270</sup> Hundreds of thousands more did not escape with their lives.<sup>271</sup>

The genocide of the Rohingya people in Myanmar although a recent event; it comes on the back of years of oppression, dehumanization, and humiliation.<sup>272</sup> It is an ongoing genocide.<sup>273</sup> It is

267. *Massacre by the River*, *supra* note 265, at 1.

268. *See Myanmar: US Recognizes Genocide Against Rohingya*, HUM. RTS. WATCH (Mar. 21, 2022 8:10 AM), <https://www.hrw.org/news/2022/03/21/myanmar-us-recognizes-genocide-against-rohingya>; *see generally Burma's Path to Genocide: Timeline*, *supra* note 222.

269. *See Myanmar: Crimes Against Humanity Terrorize and Drive Rohingya Out*, *supra* note 266 (explaining that 530,000 Rohingya men, women and children fled northern Rakhine State after enduring the Myanmar security forces' widespread and systematic campaign of violence).

270. *See* Pandey, *supra* note 238 (escaping violence in Myanmar, around 700,000 Rohingya Muslims have fled to Bangladesh).

271. *See, e.g., id.* (portraying different instances of Myanmar security forces killing hundreds of Rohingya).

272. *See generally Burma's Path to Genocide: Timeline*, *supra* note 222 (depicting the government's worsening treatment of Rohingya throughout 1970 to 2020); *see also* Zarni & Cowley, *supra* note 257, at 683 (referring to the genocide as "slow burning").

273. *See* John P. J. Dussich, *The Ongoing Genocidal Crisis of the Rohingya Minority in Myanmar*, 1 J. VICTIMOLOGY & VICTIM JUST. 4, 4 (2018) (quoting Kofi Annan, "A genocide begins with the killing of one man—not for what he has done, but because of who he is. A campaign of 'ethnic cleansing' begins with one

important to recognize the definition of genocide as applied to the Rohingya, in part, because it is important to the history and timeline of the U.S response.<sup>274</sup> The phrase “genocide” was created in 1943 by the Jewish-Polish Lawyer Raphael Lemkin, to describe the actions of Germany and ally nations during the holocaust.<sup>275</sup> The United Nations adopted genocide as a crime against humanity in 1948 under the United Nations Genocide Convention.<sup>276</sup> Article II of the convention describes genocide as, “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”: [k]illing members of the group, [c]ausing serious bodily or mental harm to members of the group, [d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group” and “[f]orcibly transferring children of the group to another group.”<sup>277</sup> This has been subsequently interpreted by International Criminal Tribunal for Rwanda in *The Prosecutor v. Jean-Paul Akayesu* to include mass rape, and harm to reproduction.<sup>278</sup> Decades of persecution, dehumanization, and limitations on the Rohingya led to an eventual organized campaign of violence, destruction, and

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neighbour turning on another. Poverty begins when even one child is denied his or her fundamental right to education. What begins with the failure to uphold the dignity of one life, all too often ends with a calamity for entire nations”); *see also* Ashley Westerman, *What Myanmar's Coup Means For The Rohingya*, NPR (Feb. 11, 2021), <https://www.npr.org/2021/02/11/966923582/what-myanmars-coup-means-for-the-rohingya> (offering an updated analysis on the Rohingya and worries for continued genocide post-coup).

274. *See Burma's Path to Genocide: Timeline*, *supra* note 222.

275. Genocide comes from the Greek words “*genos*” which mean race or tribe, and “*cide*” which means to kill. The International definition of genocide as a crime against humanity, however, represents a wider scope of actions.

276. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

277. *Id.*

278. *See Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, ¶¶ 507–08 (Sept. 2, 1998), <https://www.refworld.org/cases,ICTR,40278fbb4.html> (holding that measures intended to prevent births within a group violate Article 2(2)(d)); *see also* Chile Eboe-Osuji, *Rape as Genocide: Some Questions Arising*, 35 INT'L HUMANITARIAN L. SERIES 159, 159 (2007) (recognizing that rape can be an act of genocide).

murder.<sup>279</sup> As one study writes, “genocide is a process, not an event.”<sup>280</sup>

The U.S. sanctions responses in Myanmar followed this timeline, this process towards genocide, aiming to prevent it occurring, but without much success. The next section examines the history of sanctions in Myanmar, emphasizing the unique factors which limit sanctions preventative success and require a new approach.

### B. U.S. SANCTIONS RESPONSE

The United States’ imposition of unilateral economic sanctions on Myanmar tracks the recent timeline of the Tatmadaw oppression and genocide of the Rohingya people, as well as the activists who stood up fighting for government change.<sup>281</sup> As this timeline inherently shows, however, unilateral sanctions have largely been unsuccessful when used as the only tool to promote change in Myanmar,<sup>282</sup> with the genocide continuing to this day.<sup>283</sup>

At the start of the 1900’s, before the rise of the military, Myanmar was one of South East Asia’s wealthiest nations.<sup>284</sup> However,

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279. See Haar et al., *supra* note 256, at 1–2 (studying human rights violations against the Rohingya).

280. Sheri P. Rosenberg, *Genocide Is a Process, Not an Event*, 7 GENOCIDE STUD. & PREVENTION 16, 16–17 (2012) (arguing that the social phenomenon of genocide is a process rather than the outcome of a process).

281. See *Burma’s Path to Genocide: Timeline*, *supra* note 222; see also Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar*, 7 WASH. UNIV. GLOB. STUD. L. REV. 455, 459–60, 479–81 (2008) (contending that after the democracy uprisings in 1988 and their aftermath, the United States imposed comprehensive sanctions to condemn Myanmar’s human rights violations).

282. See Myo Nyun, *supra* note 96, at 480 (claiming that the United States’ sanction policy delayed the democratization process in Myanmar causing needless suffering among the Burmese people).

283. See, e.g., *id.* at 482–92, 512–13 (concluding that the U.S. unilateral sanctions made the Myanmar military government stronger relative to the civilian population and weakened democratic opposition within the country); see generally Hadar, *supra* note 26 (analyzing U.S. sanctions against Burma and concluding that U.S. policy has done nothing to improve the human rights of the people of Burma).

284. See Robert H. Taylor, *Do States Make Nations? The Politics of Identity in Myanmar Revisited*, 13 S.E. ASIA RSCH. 261, 272–73 (2005) (discussing the ties between wealth and immigration, noting that “[a]s Myanmar was relatively wealthier than South India, individuals could earn better wages there and have

isolationism and aid withdrawal in response to the Tatmadaw coup drastically affected Myanmar's national wealth.<sup>285</sup> In 1965, the same year as General Ne Wins coup, the U.S. government removed all aid to the nation, with the exception of a single opioid reduction program.<sup>286</sup> By 1990, 25 years later, Myanmar was added to the United Nations list of "least developed nations" signaling a massive decline while at the same time the region was facing massive economic growth.<sup>287</sup> When the Rohingya genocide started in the 1970's—with the removal of the right to vote, citizenship, and the resulting mass exodus—the reality is that the United States did not employ sanctions to force change.<sup>288</sup> Instead, it stood silent, neither engaging in military action nor non-violent intervention.<sup>289</sup> However, when internal accountability mechanisms failed during the 8-8-88 uprising, and it was clear the situation was devolving further, the U.S. began to implement sanctions hoping to stop the escalating violence, but with little success.<sup>290</sup>

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sufficient surplus to send funds back to their families").

285. See generally Stephen McCarthy, *Ten Years of Chaos in Burma: Foreign Investment and Economic Liberalization under the SLORC-SPDC, 1988 to 1998*, 73 PAC. AFF. 233, 234–35 (2000) (analyzing the Myanmar government's isolationist economic policies and the resulting destruction of the Burmese economy); see also Hadar, *supra* note 26 (discussing the United States' isolationist policy toward Burma and its economic effects).

286. See Myo Nyun, *supra* note 96, at 480 (responding to human rights conditions in Myanmar, the United States suspended anti-narcotics assistance and financial aid, discontinued Myanmar's preferential trade status, imposed an arms embargo and limited diplomatic relations prior to 1996).

287. See U.N. Conference on the Least Developed Countries, *Report of the Second U.N. Conference on the Least Developed Countries*, ¶ 233, U.N. Doc. A/CONF.147/18 (1991) [hereinafter LDC Conference] (examining the conditions in Myanmar that led to its designation as a Least Developed Country).

288. See generally Myo Nyun, *supra* note 96, at 474–80 (explaining that the United States only imposed sanctions after the Myanmar government cracked down on the 1988 pro-democracy uprisings).

289. *Id.*; see also CONG. RSCH. SERV., R44570, U.S. RESTRICTIONS ON RELATIONS WITH BURMA 2–3 (Mar. 18, 2020), <https://crsreports.congress.gov/product/pdf/R/R44570/9>. (describing the United States' diplomatic relationship with the military junta controlling Myanmar from 1962 to 2011 and Congressional diplomatic and economic action between 1989 and 2008).

290. See Myo Nyun, *supra* note 96, at 485 (stating that U.S. unilateral sanctions were imposed against Myanmar in three stages, which "(1) commenced with the suspension of economic aid immediately after the pro-democracy crackdown in 1988, (2) continued with the prohibition of new investment in Myanmar under the

*i. Country-Wide Sanctions Against Myanmar*

Since the 8-8-88 uprising, the U.S. Government has imposed broad sanctions against the Myanmar military, using both country-wide and individual sanctions regimes.<sup>291</sup> In 1990, Congress passed the Customs and Trades Act, allowing for presidential sanctions against Myanmar – but then President Bush declined to impose any such sanctions.<sup>292</sup> President Clinton came into office with similar views, expressing solidarity with the Myanmar public, and supporting senate bills to release Aung San Suu Kyi – but, at first, this support was *only* symbolic.<sup>293</sup> Instead of waiting for the President to act, the Senate implemented the 1995 Free Burma Act.<sup>294</sup> This Act called for the “imposition of stiff economic and trade sanctions on Burma, as well as on countries that trade with and provide aid to that country.”<sup>295</sup> Political pressure grew and calls for the Clinton Administration to finally “do something” increased, prompting Clinton to sign Executive Order 13047 on May 20, 1997.<sup>296</sup> The Executive Order banned economic development and

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federal Burma Statute in 1997, and (3) culminated in the imposition of sanctions under the Burmese Freedom and Democracy Act of 2003”); *see also* U.S. RESTRICTIONS ON RELATIONS WITH BURMA, *supra* note 289 (“During the time Burma was under military rule (1962–2011), restrictions were placed on bilateral relations in an attempt to encourage the Burmese military, or Tatmadaw, to permit the restoration of democracy.”).

291. *See generally* Myo Nyun, *supra* note 96, at 474–80 (analyzing the United States’ response to the events that occurred after the 1988 pro-democracy demonstrations).

292. *See* Hadar, *supra* note 26 (discussing Congressional, Executive and U.S. State initiated policy restrictions toward Myanmar).

293. *Id.*; *accord* Michael Ewing-Chow, *First Do No Harm: Myanmar Trade Sanctions and Human Rights*, 5 NW. J. INT’L HUM. RTS. 153, 156 (2007) (obligating the US President to impose economic sanctions against Myanmar “if specific conditions were not met, including progress on human rights. . .”).

294. *See* S. 1092, 104th Cong. (1995) [hereinafter Free Burma Act of 1995] (imposing sanctions against Myanmar and countries assisting Myanmar, unless Myanmar observes human rights and political freedoms); Myo Nyun, *supra* note 96.

295. *See* Hadar, *supra* note 26 (discussing that President Clinton expressed support for legislation imposing new sanctions on Myanmar, but did not take any steps to implement it until Congress acted).

296. *See id.* (explaining that increasing political repression by Myanmar forces and growing congressional pressure prompted President Clinton to move forward with sanctions); *see also* MICHAEL F. MARTIN, CONG. RSCH. SERV., R41336, U.S.



U.S. investment throughout Myanmar country-wide, stating sanctions would be removed when the Tatmadaw created “a program on democratization and respect for human rights.”<sup>297</sup>

However, as the timeline of oppression shows, these sanctions failed in preventing further conflict or genocide.<sup>298</sup> Arguably, the sanctions worsened the economic situation for the nation of Myanmar, but the costs were then simply passed down to its citizens.<sup>299</sup> As some sanctions’ critics suggest, these sanctions may in fact have pushed Myanmar farther down the rabbit hole of oppression and isolation.<sup>300</sup> The former president of the U.S.-ASEAN council, for instance, was a large anti-sanctions advocate – stating: “[t]he presence of U.S. companies abroad helps to promote the values we as a nation espouse, including human rights and fair labor standards.”<sup>301</sup> It is largely believed that these sanctions regimes failed to take into account the victims, their access to justice, or the human costs.<sup>302</sup>

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SANCTIONS ON BURMA 13–14 (2012), <https://crsreports.congress.gov/product/pdf/R/R41336/17> (listing the five presidential executive orders that currently impose sanctions on Myanmar).

297. *U.S. Policy Toward Burma*, 6 U.S. DEP’T OF STATE DISPATCH 583 (1995); See Steven Erlanger, *Clinton Approves New U.S. Sanctions Against Burmese*, N.Y. TIMES (Apr. 22, 1997), <https://www.nytimes.com/1997/04/22/world/clinton-approves-new-us-sanctions-against-burmese.html>.

298. See *Burma’s Path to Genocide: Timeline*, *supra* note 222.

299. See Hadar, *supra* note 26 (determining that sanctions fell hardest on the people of Myanmar while the military junta remained in control); see also Myo Nyun, *supra* note 96, at 494 (arguing that U.S. sanctions did not impact Myanmar’s political elite, but rather the people of Myanmar who did not have any means to hold the military junta accountable).

300. See Hadar, *supra* note 26 (stating that U.S. sanctions limited the opportunity of individuals in Myanmar to explore economic, social and cultural contact with the West); cf. Myo Nyun, *supra* note 96, at 494–96 (claiming that the overall impact of U.S. sanctions was negligible, but deprived civilians of Western political ideas about freedom, human rights and democracy). But see Yvan Cohen, *US Sanctions Fail to Bring Democracy to Burma*, CHRISTIAN SCI. MONITOR (Jan. 29, 1998), <https://www.csmonitor.com/1998/0129/012998.intl.intl.5.html> (asking junta officials about U.S. sanctions, they stated “I would like to tell my American friends that sanctions will hurt you more than us . . . after all, we virtually imposed sanctions on ourselves for 30 years, and we’re still here”).

301. Ernest Z. Bower, Statement before the Senate Committee on Banking, Housing and Urban Affairs (May 22, 1996).

302. Hadar, *supra* note 26.

*ii. Individual Sanctions*

Recently, as genocide continues against religious and ethnic minorities in Myanmar, governments have turned to individual sanctions as a way to encourage individual compliance with international law.<sup>303</sup> Executive Order 13348, issued in 2006, brought U.S. targeted “smart sanctions” against key members of the Tatmadaw before the modern Magnitsky Sanctions existed.<sup>304</sup> These were expanded under Executive Order 13464 and 13619.<sup>305</sup> The view among those in government, including those working in the Sanction’s Office of OFAC, was that the U.S. needed to move away from country-wide sanctions because they were damaging to Myanmar as a whole, including harming victims and activists.<sup>306</sup>

Interestingly, individual sanctions, as well as country-wide sanctions, were relaxed slightly by President Obama in 2016 when, at the time, the free election and release of Ang San Su Kyi, suggested Myanmar may be bending to international pressures.<sup>307</sup> Sanctions were quickly reinstated by President Obama, and expanded under President Trump as the realities of the Rohingya genocide became clear.<sup>308</sup> As one OFAC officer explained, this displays the true push and pull nature of sanctions, and the complexities specific to Myanmar: “U.S. Sanctions drove Burma

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303. Interview with OFAC officer (Feb. 19, 2021) (notes on file with Author).

304. See Exec. Order No. 13047, 62 Fed. Reg. 28,301 (May 20, 1997) (prohibiting new investment in Burma).

305. See Exec. Order No. 13464, 73 Fed. Reg. 24,489 (Apr. 30, 2008) (blocking property and prohibiting certain transactions related to Burma); see also Exec. Order No. 13619, 77 Fed. Reg. 41,243 (Jul. 11, 2012) (blocking property of persons threatening the peace, security or stability of Burma).

306. Interview with OFAC officer (Feb. 19, 2021) (notes on file with Author).

307. See Timothy J. Lynes et al., *US Sanctions Against Burma Lifted on October 7 With President’s Executive Order*, NAT’ L. REV. (Nov. 1, 2016), <https://www.natlawreview.com/article/us-sanctions-against-burma-lifted-october-7-president-s-executive-order> (proposing that in an effort to boost trade relations with Myanmar and help it transition to civilian rule after decades of military rule, President Obama loosened restrictions).

308. See John Shattuck & Kathryn Sikkink, *Practice What You Preach: Global Human Rights Leadership Begins at Home*, FOREIGN AFF. (2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-20/human-rights-practice-what-you-preach> (discussing support for Trump-issued sanctions against military leaders in Myanmar for their continued human rights violations).

closer into the arms of China, and the Burmese Military over the last decade has then tried to needle between the two nations.<sup>309</sup> [In 2016], the Military gave the U.S. enough freedoms to get the sanctions lifted, but when that didn't accomplish everything they wanted, they snapped back to their previous selves.<sup>310</sup> That made sanctions effective for a moment, then not effective again. But clearly these leaders don't want to be sanctioned, so we can't complain it is not working."<sup>311</sup>

Since the Magnitsky Global Sanctions Act was enacted in 2017, leaders of the Myanmar military have been added to the U.S. Sanctions list in increasing numbers.<sup>312</sup> Six members of the Tatmadaw were added to the Global Magnitsky designation in 2018 and four more in 2019, including Commander in Chief Min Aung Hlaing, all added for their roles in the Rohingya genocide.<sup>313</sup>

Under President Biden, this list has grown, and therefore so has its implications.<sup>314</sup> On February 10<sup>th</sup>, 2021, President Biden signed

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309. Interview with Rohingya Activist (Feb. 24, 2021) (notes on file with author).

310. *Id.*

311. Interview with OFAC Officer (Feb. 19, 2021) (notes on file with author).

312. See *Assessing U.S. Policy Towards Burma: Geopolitical, Economic, and Humanitarian Considerations: Hearing Before the Comm. on Foreign Relations*, 115th Cong. 115-659 (2017) ("The Department of State has identified and announced new and ongoing actions to pursue accountability for those who have committed violence including, among other measures, suspending travel waivers for military leaders, assessing JADE Act authorities to consider economic options available to target individuals associated with atrocities, finding that all units and officers involved in operations in northern Rakhine State are, pursuant to the Leahy law, ineligible for U.S. assistance programs, rescinding invitations for Burmese security leaders to attend U.S.-sponsored events, maintaining an embargo on military sales, consulting on accountability options at the U.N., the Human Rights Council, and other venues, pressing for access for the U.N. fact-finding mission, and exploring accountability mechanisms under U.S. law, including global Magnitsky targeted sanctions.").

313. MICHAEL F. MARTIN, CONG. RSCH. SERV., R44570, U.S. RESTRICTIONS ON RELATIONS WITH BURMA 5 (2020), <https://crsreports.congress.gov/product/pdf/R/R44570/9> (listing the Burmese individuals and entities sanctioned for human rights violations).

314. Nicholas Turner et al., *Biden Administration Announces Sanctions and Export Controls in Response to Myanmar Coup*, STEPTOE (Feb. 12, 2021), <https://www.steptoointernationalcomplianceblog.com/2021/02/biden-administration-announces-sanctions-and-export-controls-in-response-to-myanmar->

Executive Order 14014, named the “Blocking Property with Respect to the Situation in Burma,” creating a new thematic targeted sanctions regime, distinct from Magnitsky sanctions but structured the same.<sup>315</sup> As one report explains,

Although the US government likely could have designated many of the individuals and entities pursuant to designation criteria under the US Global Magnitsky sanctions program, which contains authorities similar to EO 14014 (and indeed, two of the individuals designated under EO 14014 were already designated under the US Global Magnitsky sanctions program), the President decided to introduce a new sanctions program targeting activities specific to Burma.<sup>316</sup>

Some individuals are now sanctioned under both the Burma thematic regime and the Global Magnitsky regime.<sup>317</sup>

Since the February 2021 coup, 70 individuals, including family members of the Tatmadaw, and 27 entities in Myanmar have been added to the Burma thematic regime.<sup>318</sup> Corporations owned by the Tatmadaw have been targeted to ensure the sanctioned individuals cannot practice sanction avoidance.<sup>319</sup> The use of targeted sanctions

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coup; Burma: Implementation of Sanctions, 86 Fed. Reg. 13174 (Mar. 8, 2021).

315. Blocking Property with Respect to the Situation in Burma, 86 Fed. Reg. 9429 (Feb. 10, 2021); *Statement by President Joseph R. Biden Jr. on the Situation in Burma*, The White House Statements and Releases (Feb. 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/01/statement-by-president-joseph-r-biden-jr-on-the-situation-in-burma>.

316. Nicole Erb et al., *Military Takeover in Burma Leads to New Sanctions and Export Controls*, WHITE & CASE (Mar. 9, 2021), <https://www.whitecase.com/publications/alert/military-takeover-burma-leads-new-us-sanctions-and-export-controls>.

317. *Id.*; Simon Lewis, *Factbox: Sanctions Imposed Against Myanmar Generals Since They Seized Power*, REUTERS (Mar. 22, 2021, 11:55 AM), <https://www.reuters.com/article/us-myanmar-politics-sanctions-factbox/factbox-sanctions-imposed-against-myanmars-generals-since-they-seized-power-idUSKBN2BE2PY>.

318. Antony J. Blinken, *United States and Allies Impose Additional Sanctions on the Burmese Military Regime*, U.S. DEP'T OF STATE (Mar. 25, 2022), <https://www.state.gov/united-states-and-allies-impose-additional-sanctions-on-the-burmese-military-regime>. For an example of a similar European Union response, see also Press Release, Myanmar/Burma: EU Imposes Restrictive Measures on 22 Individuals and 4 Entities in Fourth Round of Sanctions (Feb. 21, 2022) [hereinafter EU Imposes Restrictive Measures].

319. Blocking Property with Respect to the Situation in Burma, *supra* note 315;

attempts to avoid the problems that have historically resulted from the imposition of country-wide sanctions.<sup>320</sup> As Secretary of State Antony Blinken clarified, the new Burmese sanctions regime has been narrowly tailored to specifically target those “who played a leading role in the overthrow of Burma’s democratically-elected government.”<sup>321</sup>

Yet, while targeted sanctions evolve and increase in popularity as a form of non-violent intervention, the realities for the victims in Myanmar largely stay the same. A little under a million Rohingya refugees are stuck in Bangladesh without sufficient support and in an area particularly vulnerable to climate change.<sup>322</sup> For those who lost loved ones, no justice has been served.<sup>323</sup> Currently, U.S. sanctions do not provide a place for victim’s voices to be heard, recognized, and helped outside of submitting general sanctions requests.<sup>324</sup> If sanctions are not making a direct change in Myanmar, as this sections timeline indicates they are not, the new Magnitsky sanctions must develop a path forward that includes victim protections, recognizing the need to consider the past, rather than just attempting to change the future.<sup>325</sup> The next section addressed one way this could be done through the existing sanctions regimes—the creation of a victim’s reparation fund.

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Lewis, *supra* note 317.

320. *Myanmar, Sanctions, and Human Rights*, *supra*, note 26 (emphasizing the need to “minimize[e] negative impacts on a country’s population”).

321. Press Statement, Anthony Blinken, Secretary of State, U.S. Dep. of State Designating Officials and Entities in Connection with the Military Coup in Burma (Feb. 11, 2021), <https://www.state.gov/designating-officials-and-entities-in-connection-with-the-military-coup-in-burma>.

322. Interview with Rohingya Refugee (Apr. 12, 2021) (notes on file with author) (discussing how “many don’t know where their families are, or what happened. We wait for them to one day show up. It isn’t fair. We keep hearing about justice and freedom but how is that fair to never know what has happened”).

323. *See generally* EUR. UNION AGENCY FOR FUNDAMENTAL RTS., SANCTIONS THAT DO JUSTICE: JUSTICE FOR VICTIMS OF VIOLENT CRIME PART II (2019) (looking “into whether authorities are committed to conducting effective proceedings, whether victims have a voice in and can contribute to the proceedings, as well as whether state actors pay due attention to the contributions made by victims” as an important aspect of victim recovery).

324. *See* Ewing-Chow, *supra* note 293, 158–59, 169–70, 173–74 (2007).

325. *See id.* at 178–80.

#### IV. A NEW SANCTIONS REGIME: A VICTIM'S REPARATIONS FUND

The final section of this article focuses on how targeted sanctions, including the Global Magnitsky Sanctions program and the Burma-thematic regime, can be improved to better deliver justice and support for victims. Specifically, this article analyzes how money obtained from asset freezes, fines, or other monetary assets obtained from sanctioned individuals can be used to provide reparations to the Rohingya. Using the existing sanctions system, the U.S. Government should create a fund to directly redistribute money to impacted communities. Currently, assets seized, and fines imposed by the government stay within government coffers.<sup>326</sup> Instead, this money should be funneled towards victims, either on an individual claims level within the United States, or a more generalized aid program for Rohingya victims, and other ethnic minorities, currently displaced in Bangladesh.

By approaching sanctions from a justice and victim centered approach, nations can better avoid the issues of global policing, adversely impacting lower socio-economic groups, or 'virtue signaling' without effecting real change, the systemic problems associated with current sanctions approaches. The fund proposed is not without precedent. Similar funds exist, such as the United Nations Trust Funds<sup>327</sup>, the U.S. fund established by the U.S. Justice for Victims of State Sponsored Terrorism Act, and the U.K. BOTA fund.<sup>328</sup> In the wake of the Russian invasion of Ukraine, global conversation around similar asset recovery and reparations schemes has grown, increasing existing models.

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326. Interview with OFAC Officer (Feb. 19, 2021) (notes on file with author).

327. See, e.g., G.A. Res. 35/190, Voluntary Fund of the United Nations for Victims of Gross and Flagrant Violations of Human Rights (Dec. 15, 1980), <https://www.refworld.org/docid/3b00f02610.html>; G.A. Res. 46/122, United Nations Voluntary Trust Fund on Contemporary Forms of Slavery (Dec. 17, 1991), <https://www.refworld.org/docid/3b00efe228.html>; G.A. Res. 36/151, United Nations Voluntary Fund for Victims of Torture, A/RES/36/151 (Dec. 16, 1981), <https://www.refworld.org/docid/3b00f02724.html>.

328. International Terrorism Victim Expense Reimbursement Program, under the Victims of Crime Act (VOCA) of 1984, 28 C.F.R. 94 (Apr. 11, 2011); see discussion *infra* Section IV.A.

Regardless of existing precedent there is merit for a fund in the case of Myanmar. A victims' fund would redefine the definition of sanctions "success," increase the 'effectiveness' of sanctions, and decrease harm to the very communities that sanctions are designed to help.<sup>329</sup> A fund-based approach would move sanctions forward, leaving behind the history of treating sanctions as a narrow alternative to non-violent coercion.<sup>330</sup> Instead, sanctions could be broadened, modernized, and redefined to include a more holistic human rights approach.

#### A. DEFINING THE FUND

Victims' reparation funds that bring together symbolic sanctions and human rights reparations already exist.<sup>331</sup> The most well-known internationally is the United Nations International Criminal Court Trust Fund for Victims (TFV).<sup>332</sup> This fund provides reparations for victims, and assistance through funding nonprofits and aid.<sup>333</sup> Notably, the TFV is not *only* funded through donations, like is true for so many international conflicts; it is also funded through the fines and forfeitures received from those convicted in court.<sup>334</sup> The Court

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329. Joshua Savey, Comment, *Unilateral Sanctions: An Effective Foreign Policy Tool in Myanmar?*, 50 WILLAMETTE L. REV. 371, 383 (2014).

330. See Thihan Myo Nyun, *Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions against the Military Government of Burma/Myanmar*, 7 WASH. U. GLOB. STUD. L. REV. 455, 458 (2008) (explaining foreign policy using unilateral sanctions as non-military remedies to respond to unacceptable behavior of foreign governments).

331. See FINANCE FOR RESTORATIVE JUSTICE, *supra* note 195, at 29 (Jan. 2020), <https://www.hoganlovells.com/en/publications/finance-for-restorative-justice-using-sanctions-and-terrorist-financing-legislation-to-fund-reparations-for-victims-of-sexual-violence-in-conflict>.

332. Rome Statute of the International Criminal Court art. 79, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]; International Federation for Human Rights, DRC: First Decision on Reparation: The International Criminal Court Acknowledges the Right to Integral Reparations for all the Victims of Thomas Lubanga's Crimes, (Aug. 13, 2012), <https://www.refworld.org/docid/502e43771a.html> [hereinafter ICC Acknowledges Right to Reparations].

333. Rome Statute, *supra* note 332, at art. 79; FINANCE FOR RESTORATIVE JUSTICE, *supra* note 195, at 20.

334. David Scheffer, *The Rising Challenge of Funding Victims' Needs at the International Criminal Court*, JUST SEC. (Dec. 3, 2018), <https://www.justsecurity.org/61701/rising-challenge-fundingvictims-international-criminal-court>.

has emphasizes a ‘crime does not pay’ method of accountability, stating the need for financial seizures “in the event that the person is sentenced to the payment of fines and/or the forfeiture of proceeds, property and assets derived directly or indirectly from the crime.”<sup>335</sup> Moreover, the ICC has found jurisdiction under the authorization of the Rome Statute to “order reparations to victims, for which the convicted person is personally liable. Securing an accused’s assets may be crucial for a meaningful award of reparations to victims.”<sup>336</sup> To secure assets, the ICC Office of the Prosecutor can request States, pursuant to Article 93(1)(K) of the Statute<sup>337</sup> for the Purpose of Identifying, Tracing, Freezing and Seizing Assets, seize assets within their borders and redirect them to the court for the purpose of victim use.<sup>338</sup>

The ICC reparations fund is not the same as the proposed sanctions fund, since it is done through court processes, criminal trial, and multilateralization. It does, however, offer insight into how asset recovery for perpetrators of human rights abuses can be used to establish a reparations fund to aid victims of the human rights abuse.<sup>339</sup> Similar international paths have been investigated, with the Working Group for Terrorism reparations suggesting finance through “voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors.”<sup>340</sup>

However, an even clearer precedent exists in the U.S; The Justice for Untied States Victims of State Sponsored Terrorism Act (USVSST Act).<sup>341</sup> The USVSST Act, passed in 2000, created an International Terrorism Victim Expense Reimbursement Program (ITVERP), providing reparations to U.S. citizens, and foreign nations

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335. INT’L CRIMINAL COURT, FINANCIAL INVESTIGATIONS AND RECOVERY OF ASSETS 3 (2017), [https://www.icc-cpi.int/news/seminarBooks/Freezing\\_Assets\\_Eng\\_Web.pdf](https://www.icc-cpi.int/news/seminarBooks/Freezing_Assets_Eng_Web.pdf).

336. *Id.*

337. Rome Statute, *supra* note 332, art. 93(1)(K).

338. *Id.*

339. *Id.* art. 79.

340. COUNCIL OF EUR., HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM: THE COUNCIL OF EUROPE GUIDELINES, 61 (Mar. 2005); S.C. Res. 1566, U.N. SCOR, 59th Sess., 5053rd mtg (Oct. 8, 2004) at 10.

341. Justice for United States Victims of State Sponsored Terrorism Act, 34 U.S.C. § 20144 (2015) [hereinafter USVSST Act].



working for the U.S. government, in instances of terrorism.<sup>342</sup> The fund provides “reimbursement to victims of international terrorism and their families for expenses related to medical and mental health care, funeral and burial, repatriation of the victim’s remains, property loss, and miscellaneous expenses such as emergency travel.”<sup>343</sup> ITVERP is funded through the Crime Victims Fund, which gathers money through “fines, penalties, and forfeitures paid by convicted federal criminal offenders as well as gifts, donations, and private bequests; it does not use tax dollars.”<sup>344</sup> The fund is operated like a trust fund, requiring Congressional updates on credit, status, and disbursements.<sup>345</sup>

Disbursement is “calculated on a pro-rata basis on the amount of available funds based on the outstanding and unpaid amounts on the compensatory damages awarded in the relevant judgment.”<sup>346</sup> This means that individuals that have already received full payment of damages will not receive compensation from the Fund” subject to a cap of \$20 million USD.<sup>347</sup> This fund provides a workable framework for creating a fund within the Magnitsky Act.<sup>348</sup>

Another close example of asset recovery for victim’s aid is the 2008 BOTA fund, which returned profits from corruption in Kazakhstan to the state through a 5-year aid program run through the World Bank.<sup>349</sup> \$115 million in assets seized from individuals in the U.K., U.S., and Switzerland were put into a foundation, which then administered those same funds towards supporting “poor children,

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342. See generally Office for Victims of Crime, *International Terrorism Victim Expense Reimbursement Program (ITVERP)*, U.S. DEP’T OF JUST. (Apr. 2, 2020), <https://ovc.ojp.gov/program/international-terrorism-victim-expense-reimbursement-program-itverp/about-itverp>.

343. See *id.*

344. Office for Victims of Crimes, *International Terrorism Victim Expense Reimbursement Program*, U.S. DEP’T OF JUST. NCJ 248972 (Dec. 2014), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/international-terrorism-victim-expense-reimbursement-program>.

345. See *id.*

346. FINANCE FOR RESTORATIVE JUSTICE, *supra* note 195, at 20.

347. *Id.* at 19.

348. See generally *id.*

349. IREX, RETURNING STOLEN ASSETS: BOTA FOUNDATION FINAL REPORT, <https://www.irex.org/resource/returning-stolen-assets-bota-foundation-final-report>.

youth, and their families” within the impacted nation.<sup>350</sup> Unlike the ITPERP, or the ICC fund, this is an example of the successful use of asset recovery programs going towards generalized, nationwide, aid.<sup>351</sup>

The demand for this type of fund is on the rise.<sup>352</sup> In 2021, the government of British Columbia implemented a program which gives grants, raised from civil forfeiture proceedings, to organizations across the country focused on topics of crime prevention, Indigenous health, restorative justice, gender-based and domestic violence prevent, human trafficking prevention, and child development.<sup>353</sup> France has also introduced this approach, drafting legislative framework in March of 2021 which would seize the “ill-gotten gains” from human rights abusers, and return them to the populations harmed; including in foreign nations.<sup>354</sup> As noted above, post Russian invasion of Ukraine, governments have jumped into action to introduce asset recovery bills, including the recently passed Canadian C-19 bill, which allows for frozen Russian assets to be seized and repurposed to rebuilding Ukraine at the end of the conflict.<sup>355</sup> The U.S. has pending legislation, the Yachts for Ukraine Act, which would allow for seized Russian Yachts to be sold off at auction, with proceeds going to Ukraine.<sup>356</sup> While such conversations

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350. *Id.*

351. *Id.*

352. MICHAEL A. WEBER, CONG. RSCH. SERV., R46981, THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT (Dec. 3, 2021), <https://crsreports.congress.gov/product/pdf/R/R46981/5>.

353. *Grants from Civil Forfeiture Proceedings*, BRITISH COLUMBIA (Oct. 13, 2021), <https://www2.gov.bc.ca/gov/content/safety/crime-prevention/civil-forfeiture-office/grants-compensation>;

354. *See* Loi 2021-1031 du 4 août 2021 de programmation relative au développement solidaire et à la lutte contre les inégalités mondiales [Programming Act 2021-1031 of August 4, 2021 on inclusive development and the fight against global inequalities] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 5, 2021, 180 [hereinafter *Loi 2021-1031*]; Sara Brimbeuf, *The Ill-Gotten Gains of Corruption a Possible Model for Restitution*, MEDIUM (Apr. 27, 2021), <https://medium.com/u4-anti-corruption-resource-centre/ill-gotten-gains-of-corruption-french-model-restitution-932a7452baaa>.

355. *See* Janyce McGregor, *Canada Can Now Seize, Sell Off Russian Assets. What's Next?*, CBC (Jun. 27, 2022 4:00 AM), <https://www.cbc.ca/news/politics/c19-russia-sanctions-asset-seizures-test-case-1.6496047>.

356. Catie Edmondson, *House Passes Bill Urging Biden to Sell Seized Russian*

are on the rise, it is crucial for the U.S. Government to examine its own Myanmar sanctions regimes, including those sanctioned under Global Magnitsky Sanctions, and find a path forward that better aids those most impacted by the actions of the Military regime.

#### B. FITTING THE FUND WITHIN MAGNITSKY, BURMA, AND ITS EFFECTS

Establishing a new victims reparation fund through Magnitsky, and similar targeted sanctions like the Burma regime, could provide guaranteed support for victims while continuing non-violent intervention. Both the TFV and ITVERP introduce ways the U.S. can incorporate victims' reparations into Magnitsky, or "smart" sanctions, and BOTA shows how this could be used for generalized aid.<sup>357</sup> Seized assets and fines for sanctions violations can be set aside in a fund, managed by the U.S. Secretary of the Treasury and monitored by Congress, along with money raised from fining non-complaint companies and money from general human rights reparation donations.<sup>358</sup> Establishing a fund in this manner is permitted under the International Emergency and Economic Powers Act (IEEPA), which allows for presidential asset freezing and seizing, and exists in the Global Magnitsky Act as well.<sup>359</sup> In 2003, for example, President George Bush confiscated Iraqi government property in the U.S. (discussed above) and used the 1.7 billion USD raised "to assist the Iraqi people and to assist in the reconstruction of Iraq."<sup>360</sup> Similar allocations of Iranian assets were reviewed by the U.S. Supreme Court, with the court ultimately upholding the U.S.

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*Yachts to Aid Ukraine*, THE NEW YORK TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/us/politics/biden-russia-sanctions.html>.

357. See discussion *infra* Section IV.A.

358. This would be similar to ITVERP's current program. *International Terrorism Victim Expense Reimbursement Program*, U.S. DEP'T OF JUST. (Dec. 2014), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/international-terrorism-victim-expense-reimbursement-program>.

359. International Emergency Economic Powers Act, 50 U.S.C.A. Ch. 35 §§ 1701–1708 (1977).

360. *Iraq Stabilization and Reconstruction: International Contributions and Resources*, Hearing before the Committee on Foreign Relations, 108th Cong. 165 (2003).

reparations fund as valid under national law.<sup>361</sup>

The nuances of the administrability of that fund is beyond the scope of this article – but it is important to note that asset seizure procedures should incorporate judicial to avoid due process concerns for seized assets and fines, some of which already have judicial safe guards in place.<sup>362</sup> Money gathered can then be distributed to victims as seen fit, under the consultation of victim groups and non-profit organizations similar to the BOTA process.<sup>363</sup> ITVERP provides for victims through individual reparation claims and financial support, which may not be feasible for the Rohingya given the inaccessibility of U.S. courts.<sup>364</sup> However, if the U.S. adopts the funds with the distribution aspects of TVF or BOTA—which provides aid on a community level as a source of reparations, a viable method emerges.<sup>365</sup> This echoes the program development in France, which returns ill-gotten gains to effected countries, or C-19 legislation in Canada around the rebuilding of Ukraine.<sup>366</sup> A Rohingya Victims Fund can provide for those displaced in Bangladesh, support community activists, and move from virtue signaling to tangible support.<sup>367</sup> Such a fund would continue the goals of country-wide and individual sanctions, signaling the U.S.’s disapproval and using economic forces to effect non-militarist change. This approach, however, would do much more, giving a voice and aid to the very victim’s sanctions are designed to help in the first place.

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361. Certain Iranian Assets (Iran v. U.S.), Preliminary Objections, 2019 I.C.J. Rep. 7, ¶ 536 (Feb. 13).

362. Nesbitt, *supra* note 189, at 569 (describing procedural shortcomings in enforcing economic sanctions).

363. Rome Statute, *supra* note 332, art. 93(1)(K).

364. *International Terrorism Victim Expense Reimbursement Program*, U.S. DEPT. OF JUST. (Dec. 2014), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/international-terrorism-victim-expense-reimbursement-program>;

365. Rome Statute, *supra* note 332, art. 93(1)(K).

366. Brimbeuf, *supra* note 354 (“Under the new law, the revenues from [corruption or of laundering embezzled public funds] . . . will be returned ‘as close as possible to the population of the foreign state in question’ . . .”); McGregor, *supra* note 355.

367. Interview with Rohingya Activist, *supra* note 1.

## V. CONCLUSION

What is a 'successful' sanctions program depends on who you ask. As sanctions have evolved over the decades, from country wide to Magnitsky sanctions, so have views on their effectiveness. For many, sanctions are a powerful method of non-violent confrontation, for many more, they are a failure of inaction. The reality is more complex. In Myanmar, both country-wide and individual sanctions programs have failed to bring long-term change to the Tatmadaw - but have undoubtedly increased pressure and awareness of human rights abuses.

The success of sanctions programs as non-violent intervention is up for debate – yet this debate does not center around past victims, their access to justice, or their views on 'success.' As Myanmar activists fill the streets protesting for their rights, and the rights of the Rohingya,<sup>368</sup> what they demand is support and justice, which sanctions alone cannot currently provide. This leaves the U.S. stuck between ineffective symbolism or violent intervention unless a new path is forged. The U.S. must establish a reparations fund for victims, using seized assets to provide for the Rohingya, and for activists, moving from symbolism to support.

As Kyi said, sitting at Lake Inya looking over at the White Bridge “symbolic support alone can't be enough when people are dying in our country, and dying try to get out.”<sup>369</sup> The U.S. must hear these voices. Current sanctions regimes, even if necessary, are not sufficient. A reparation fund alone cannot provide all the financial support victims of human rights abuses need, it creates an avenue for recognition, and an action that – by itself – lets victims know they are not alone. Sanctions are evolving and growing. They must grow to include reparations funds, and in Myanmar, find a path to support the Rohingya using seized assets. Only then will sanctions move from virtue signaling to active aid. Only then, when victims are included in the narrative, can we decide if sanctions are “successful.”

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368. Andrew Nagemson, *'Spirit To Fight': Inside The Labor, Minority Rights Roots Of Myanmar's Protests*, NPR (Mar. 23, 2021, 5:13 PM), <https://www.npr.org/2021/03/23/977818003/spirit-to-fight-inside-the-labor-minority-rights-roots-of-myanmars-protests>.

369. Interview with Rohingya Activist, *supra* note 1.