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Who Asked You?: The Appropriateness of U.S. Leadership in Promoting Religious Freedom Worldwide

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Who Asked You?: The Appropriateness of U.S. Leadership in Promoting Religious Freedom Worldwide

ABSTRACT

Government endorsed and government imposed religious persecution is a growing phenomenon worldwide. From Central America to the Far East, people are arrested, tortured, and even killed for having and expressing their faith, despite the existence of universal covenants expressing acceptance of religious differences as among the most basic of human rights. Seeing the apparent futility of U.N. and other international efforts to curb such persecution, the U.S. Congress in 1998 passed the International Religious Freedom Act. Faith-based religious persecution—and the United States' role in combating it—first took center stage in American politics during the IRFA's passage, and most recently has surfaced again in the debates surrounding China's admittance to the World Trade Organization.

This Note examines the International Religious Freedom Act: its premises, language, function, and goals. It explains the role and actions of the newly-formed Commission on International Religious Freedom, the attempts by the U.S. Administration to explore diplomatic remedies for those suffering from religious persecution internationally, and what the U.S. must—and must not—do in its enforcement of the IRFA to best advocate the cause of religious freedom.

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I. INTRODUCTION

The twentieth century has seen twenty-seven million martyrs, men and women who have died for their religious faith.¹ In contrast, the first nineteen centuries of the Christian era have seen a total of fourteen million.² An estimated two hundred million religious believers live under persecution and an additional four hundred million live under official discrimination today.³

The following is a true account, not one that is ripped from the byline of the latest blockbuster film but instead experienced in the real world. Suffering has a face;⁴ indeed, it has both a real face and a real story.

Throughout his initial fifteen-year incarceration, Catholic Bishop Su Zhimin was subjected to grievous tortures at the

1. Christy Cutbill McCormick, *Exporting the First Amendment: America's Response to Religious Persecution Abroad*, 4 J. INT'L LEGAL STUD. 283, 333 (1998).

2. *Id.* (citing James D. Davis, "Human Tragedy" Millions Gather Today to Engage in the Second International Day of Prayer for the Persecuted Church, FORT LAUDERDALE SUN-SENTINEL, Nov. 16, 1997, at 1A).

3. *Id.*

4. Dr. Robert Seiple, Address at the Annual Report on International Religious Freedom (Sept. 9, 1999).

hands of Chinese authorities.⁵ His captors often beat him with boards and doors until the wood was reduced to splinters from the force of the beatings.⁶ They hung him by his wrists and repeatedly beat him around the head.⁷ They placed him in a cell, filled with water up to his hips, and left him there for days unable to sit or rest.⁸ What had he done to deserve such punishment? Was the Bishop a hardened serial murderer or a master thief? No, his crime was simply his refusal to stop sharing his Christian faith with others.

The Bishop's captors initially released him in 1993, but have since rearrested him on several occasions for the same reason.⁹ Bishop Su Zheming, now age 67, has been missing since October 8, 1997, the date of his last arrest.¹⁰ The Chinese Government persistently denies any knowledge of his whereabouts.¹¹

This bishop is not the only one who suffers. Current reports from secular organizations such as Amnesty International and the United Nations lend support to the truth of these accounts. Amnesty revealed that among the common forms of government-endorsed or government-imposed religious persecution in China is the beating and torture of Christian women by authorities who deny them food and water, hang them by their thumbs from wires where they are beaten with heavy rods, and allow government leaders to shock them with electric probes.¹² According to the Human Rights Watch 1998 World Report, some eighty members of the underground church near Linchuan, Jiangxi Province were detained in December of 1996, where they were beaten and fined by the police simply because the group had plans to hold a large outdoor Christmas mass.¹³ The expressed goal of the Chinese Communist Party (CCP) officials involved in this effort in Jiangxi

5. *Christian Freedom International, Free the Bishops*, at http://www.christianfreedom.org/campaigns/camp_bishops.asp (last visited Feb. 26, 2000).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Additional information concerning Bishop Su Zhimin and other religious colleagues undergoing persecution for standing up for their faith in China can be found at the Christian Freedom International website at <http://www.christianfreedom.org>.

12. For these and additional Amnesty International statistics, see Mona Charen, *Christians Suffer Silently for the Faith*, THE DET. NEWS, Dec. 14, 1995, LEXIS, US News, Combined.

13. *Human Rights Watch World Report 1998*, available at http://www.hrw.org/worldreport/Asia-04.htm#P337_94962 (last modified Mar. 16, 1999). Current web versions of the 2000 Human Rights Watch can be found at <http://www.hrw.org>.

was to register these believers and force them to write letters denying their faith.¹⁴

Once church members are arrested in these situations, authorities often confiscate some or all of their property.¹⁵ They take parents away from their children and instill so much fear of arrest into family and friends that those who would otherwise help the abandoned families of these "enemies of the state" are effectively unable to do so.¹⁶ While this injustice undeniably happens, China officially denies that it restricts religious freedom. When asked, the Chinese government points to a constitution which purports to guarantee a certain level of religious freedom for its citizens.¹⁷ Revealing evidence like the accounts above, however, suggests otherwise.

China is home to as many as fifty to one hundred million Christian believers, all but a fraction of whom are hidden from official eyes in an unregistered house church movement¹⁸ that the Chinese government denies even exists.¹⁹ They meet secretly in places like private homes, caves, and abandoned buildings for worship and prayer. If caught, they face arrest, torture, or years of forced labor. According to internal documents, the Chinese

14. *Id.*

15. Christian Freedom International, *Persecuted Christians in the People's Republic of China*, at http://www.christianfreedom.org/campaigns/camp_china.asp (last visited Feb. 26, 2000).

16. *Id.*

17. Mickey Spiegel, *Religion in China: Regulating the Opium of the People*, China Rights Forum Spring 1995, at <http://www.igc.apc.org/hric/crf/english/95spring/e7.html> (citing Article 36 of the Chinese Constitution: "Citizens of the People's Republic of China enjoy freedom of religious belief No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.") *Id.* But as Spiegel notes, a second clause severely limits state protection to "normal religious activities" and prohibits "the use of religion to engage in activities that disrupt social order, impair the health of citizens or interfere with the educational system of the state." *Id.* It is easy to see how entirely subjective and undefined criterion could be used by this State to exclude and persecute those who attempt to believe in something *other* than what the atheist regime demands.

18. *Persecuted Christians in the People's Republic of China*, *supra* note 15.

19. The Foreign Affairs Committee of China's National People's Congress (NPC) called outside human rights accusations "sheer nonsense" and "absolutely absurd," stating that "In China, there are no 'underground religious organizations' at all. This is something fabricated by some western people." *Chinese NPC Refutes EP Resolution*, XINHUA GENERAL NEWS SERVICE, Jan. 31, 2000, LEXIS, Non-US News, Domestic Political News. In response to a proposed anti-China resolution in the U.S., China's Vice-Foreign Minister and chief of the Chinese delegation for Sino-US human rights talks Wang Guangya insisted that the U.S. was "using human rights as an excuse to undermine China's political stability and development." *China—Anti-China Attempt Would Hurt U.S. Ties*, CHINA DAILY, Jan. 31, 2000, LEXIS, Non-US News.

government aims to "eliminate" both the unregistered churches and every one of their individual members.²⁰

Meanwhile, in spite of these known abuses, the economically-advantaged China currently enjoys open trade relations with the United States pursuant to an annual agreement between the two countries and a long-term U.S. trade deficit with the foreign power.²¹ President Clinton, who criticized President Bush for coddling dictators less than a decade ago, welcomed Chinese President Jiang Zemin as an honored guest to the White House in 1997, and again in 2000.²² As a gesture of friendship and diplomacy, Clinton also welcomed Chinese commander General Chi, the militant general responsible for ordering the deaths of student protesters in the Tiananmen Square massacre, into the White House for lunch.²³ The U.S. President proceeded "with callous audacity" to commemorate the tenth anniversary of that massacre by recommending to Congress "Normal Trade Relations" (PNTR) status for China.²⁴ As of this note's publication date, the U.S. Congress recently passed legislation that provides for permanent normal trade relations with China and supports its admittance to the World Trade Organization (WTO).²⁵ All of this happens in the United States while the unabated persecution and abuse continue abroad and while people like Bishop Su Zhemin and the millions in the persecuted church pray for relief. This is beyond persecution. For many, it has become a matter of life and death.

20. *Free the Bishops*, *supra* note 5.

21. Family Research Council, *Morality in Foreign Policy*, at <http://www.frc.org/faq/faq9.html> (last visited Feb. 26, 2000). The concept of "Normal Trade Relations" was formerly known as "Most Favored Nation" status, a position China has enjoyed despite having one of the world's most atrocious human rights records. *Id.*

22. President Clinton most recently met with Zemin in New York on September 8, 2000 for a 90-minute bilateral meeting, <http://usinfo.state.gov/regional/ea/uschina/chhrts.htm>. See the background briefing on that visit and other information related to U.S.-China relations at the Department of State's "United States and China" website, <http://usinfo.state.gov/regional/ea/uschina>.

23. Melissa McClard & Lorelei Gillaim, *True Persecution*, PROVIDENCE J., Mar. 27, 1997, <http://www.frc.org/articles/ar97edgr.html>. General Chi was the commander who ordered the slaughter of hundreds of demonstrating students at Tiananmen Square on June 4, 1989. *Id.*

24. William Saunders, *What's "Normal" About Free Trade with China?*, at <http://www.frc.org/perspective/pv99gtgr.html> (last visited Feb. 26, 2000).

25. Congress' Permanent Normal Trade Relations vote is expected soon after the legislative session reopens in September 2000, and already has received much support in both the House and Senate. For transcripts of June and July 2000 debates on this issue, see <http://www.igeapweb@exchange.usia.gov>. Web-based transcripts are also on file with author.

Persecution like this is not limited to the Far East. All over the world, people of faith are suffering under predominately Islamic and former Communist governments who ban religious services and Bibles, and imprison missionaries and converts. In at least one nation, Christians are still being crucified for what they believe.²⁶ The stories²⁷ are horrifying:

In Sudan, the present regime eradicates any non-Islamic expressions of people and controls the food supply of refugees dumped in the desert. Non-Muslims are given the choice of converting to Islam or being denied food, clothing and shelter. The unconverted are left to die, naked in the blazing sun. For the converted there is no turning back: Sudan applies the death penalty to anyone who tries to leave Islam.²⁸

In Russia, the government recently passed repressive laws targeting those of religious faith with the backing of the Russian Orthodox Church. As a result, there is increasing official discrimination and violence against religious minorities with Jews, Protestants, Catholics and dissident orthodox groups all falling under attack.²⁹

Claiming to hear their cries, the United States, a world superpower and leading member of the United Nations, has vowed to make international religious freedom a foreign policy priority through potentially powerful domestic legislation. Their latest attempt to curb religious persecution around the world is

26. *Religious Persecution Around the World*, at <http://www.frc.org/podium/pd9661rg.html> (last visited Feb. 26, 2000). Crucifixions have been documented in Ethiopia. *Id.*

27. Dr. James C. Dobson, FAMILY NEWS FROM DR. JAMES DOBSON (Focus on the Family, Colorado Springs, Colo.), Oct. 1999, at 1-2. "Peter Tibi, a southern Sudanese pastor . . . described the injuries inflicted upon his father by the Northern Sudanese: He told us, 'My parents were Christians in Sudan. My father was arrested by the Arabs at that time. They accused him of spying for the southerners. His eyes [were] gouged out . . .'" *Id.* at 1. For the 1995 Peakaboo documentary "The Right to be Nuba," Nuban Kamal Tutu described other Sudanese atrocities, particularly one concerning a government attack on a southern Sudanese church:

They caught the priest . . . and slaughtered him. [They also killed] . . . other priests. Many people were burned in the church. Then they tied me and left me in the sun. After they burned the church with the people inside, the military threw me into the embers of the church and left. *Id.* Because Tutu's hands were so disfigured by the attack, he can no longer even eat on his own.

Id.

28. Paul Marshall, *Religious Freedom and the United Nations' Universal Declaration of Human Rights*, at <http://www.frc.org/insight/is98f4rg.html> (last visited Feb. 26, 2000). Marshall is a leading authority on religious persecution and the author of HUMAN RIGHTS THEORIES and JUST POLITICS.

29. *Id.*

the International Religious Freedom Act of 1998 (hereinafter referred to as IRFA).³⁰ With the IRFA, the United States now has the potential authority to promote both religious tolerance and freedom and to condemn persecution of all religious faiths in every country, including China.³¹

Of course, such a responsibility cannot be effectively assumed without concrete evidence of the size of the task at hand. Pursuant to the terms of the IRFA, the first two Annual Reports on religious freedom were released in September 1999 and September 2000, the first marking the culmination of eighteen months of study on the status of religious freedom in over 180 countries worldwide.³² With all the evidence that has now been obtained as a result, new questions arise over whether the United States was in its right place and doing the right thing when it passed the IRFA. If so, does this Act have any true bite or is it simply political rhetoric which reflects a true commitment on the part of the United States to alleviating religious persecution? How will offending nations respond to the Act, or will they bother to respond at all? What will and should the United States do in response if that occurs?

This Note will address the above questions. Part I will discuss the prior attempts of the United Nations and United States to champion the cause of faith-related international policy. Part II will outline the provisions of the United States' most recent attempt, the IRFA. Part III will reveal the conclusions of the IRFA's first two Annual Reports and discuss the United States' current position with China, which the Reports found to be one of the most egregious offenders of the IRFA. Part IV will expose the strengths and the weaknesses of the IRFA, and what the United States may have to do differently if it proposes to effectively lead in this area of international human rights.

II. THE UNITED STATES TAKES THE CAUSE OF RELIGIOUS FREEDOM UNDER ITS WING: EARLY ATTEMPTS TO CURB INTERNATIONAL PERSECUTION

In 1948, members of the United Nations pledged to cooperate in the promotion of all recognized human freedoms by signing

30. 22 U.S.C.A. § 6401 (West Supp. 2000).

31. Mark O'Keefe, *With religious persecution documented Americans consider how to fight it*, at <http://www.oregonlive.com.todaysnews/9810/st102911.html> (last visited Feb. 26, 2000).

32. See Bureau for Democracy, Human Rights, and Labor, 1999 Report on International Religious Freedom (Sept. 9, 1999) (on file with author).

onto the U.N. Charter and Declaration of Human Rights.³³ Although the Declaration itself was created to be a non-binding instrument, those who signed it pledged in the agreement's language to morally and politically recognize that every human right was deserving of international concern and protection.³⁴

Despite these promising beginnings, however, the United Nation's enforcement of the right to religious freedom has been weak. For example, in its search for implementation instruments that would effectively give an enforcing "bite" to the Declaration, the United Nations Commission on Human Rights completed two additional clarifying covenants in 1954: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The General Assembly, however, did not adopt these covenants until 1966, and the United States did not sign them until 1992.³⁵

The International Covenant on Civil and Political Rights (ICCPR), the legal codification of the 1948 Declaration by treaty, is currently the only global treaty that intends to provide for both the recognition and implementation of worldwide religious freedom.³⁶ The Declaration's original wording, however, was severely watered-down in the language of the ICCPR. In particular, the ICCPR subjected religious freedom to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."³⁷ Contrary to the original Declaration,

33. U.N. CHARTER art. 1, para. 2.

34. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 119 (1996).

35. Hurst Hannum & Dana D. Fisher, *The Political Framework*, in U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 3, 11, 20-23 (Hurst Hannum & Dana D. Fischer eds., 1993).

36. Senator Gordon Smith, *Protecting the Weak: Religious Liberty in the Twenty-First Century*, 1999 BYU L. REV. 479, 480 (1999).

37. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, (1966). Such "limitations" have now become excuses for governments wishing to violate religious freedom, saying that their "culture" neither values nor sees religious freedom in the same way as the Declaration. For an editorial denouncement of the "cultural context" excuse, see Marshall, *supra* note 28. Marshall argues:

It is no defense to say that a culture does not value or see religious freedom in the same way as the Declaration. The whole point of recognizing human rights, and a universal declaration of human rights no less, is to provide protection for rights that transcend cultural differences, and it is precisely for those in a diversity of cultures that the Universal Declaration exists.

the ICCPR did not retain a right to change one's religion, but only a right "to have or to adopt a religion," which means that one could join a religion freely but then did not have the subsequent right to change it. The 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (DEIDRB) further restricted the operative language to include only a right to "have a religion," as evidenced in the revised Article 1(1).³⁸ The DEIDRB, however, provided at the very least for certain religious rights to remain protected, such as the assembly and maintenance of places of worship, observance of holy days and days of rest, the teaching of religion, and the use or distribution of religious materials.³⁹

The international community soon realized that U.N. leadership in protecting religious freedom, as it stood, posed major logistical problems. Even if the United Nations attempted to enforce the original Declaration's religious language, it lacks the resources as an organization to independently respond without the full support of all its members. The United Nations could investigate and report violations, but its international agreements did not provide for any remedies to effectively respond to such violations. According to observers, "beyond the publicity and embarrassment its reports create for the offending nations, the United Nations ha[d] few other tools to fight religious oppression."⁴⁰

Id.

38. Marshall, *supra* note 28.

39. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 436 (1996).

40. Marshall, *supra* note 28. In a related FRC article, former ambassador Alan Keyes, Ph.D. argues that the U.N. necessarily fails with respect to enforcing human rights because it does not incorporate any moral principles into its understanding of politics. Alan Keyes, *Reflections of an Ambassador*, at <http://www.frc.org/insight/is99a3un.html> (last visited Feb. 26, 2000). Keyes says:

It is a failure that derives from a fundamentally wrong understanding of politics—from the view that there can be a political whole that is not ultimately rooted in a community of moral belief. No procedural or organizational cleverness can bring tyrannical countries together with principled ones to form a group that respects human liberty. The naïve expectation . . . reveals a fundamental inclination to accept the social science vision of politics . . . [and results in a] document [that] is a ungrounded moral façade—moral injunctions floating free of any principled reason that would require assent, and thus moral words without a corresponding soul . . . The Universal Declaration of Human Rights, and the United Nations itself, are in a way an enormous bluff. It is as though the founders decided that the moment was right for a large scale effort at pretending that moral agreement existed where it really did not.

Id.

Perhaps the United Nations itself initially recognized these problems, placing in its original Charter and Declaration a provision allowing and encouraging member states—in addition to participation in U.N. sponsored protection—to act either independently, on a regional basis, or both to protect those named rights on an international level.⁴¹

Although treaties failed to reiterate and support this provision for years, it finally reappeared in the Vienna Concluding Document which empowered member states to implement their own measures to “prevent and eliminate discrimination” and “foster a climate of mutual tolerance and respect between believers of different communities.”⁴² While present U.N. leadership is either unwilling or unable to go beyond changing its semantics on a fairly frequent basis to make religious freedom a priority, it has effectively passed the torch to those who can, and would, champion the cause independently. It is under this quasi-mandate that the United States now has chosen to act.

A. *The Problem of Defining “Religion”*

Part of the reason the United Nations has gradually weakened the language protecting religious freedom is the lack of international consensus on what “religion” really means. Stroud’s *Judicial Dictionary* defines religion as “belief in and worship of God . . . [R]eligion is concerned with man’s relation to God, ethics with man’s relation to man.”⁴³ Black’s *Law Dictionary* goes a bit further, describing religion as a human’s “relation to Divinity, to reverence, worship, obedience and submission to mandates and precepts of supernatural or superior beings. In its broadest sense [it] includes all forms of belief in the existence of superior beings

41. BARRY E. CARTER & PHILLIP TRIMBLE, *INTERNATIONAL LAW* 940-56 (1995). As Kristin N. Wuerffel notes, independent action by a state is often a politically dangerous undertaking:

Acting independently, a state may choose which human rights deserve more protection than others, or more specifically, which rights are more important than others. Respect for a ‘common understanding’ of human rights, for which the Declaration calls, may be easily replaced with a state’s own understanding. Thus, a state may create a hierarchy of human rights, independent of international consensus and the United Nations.

Kristin N. Wuerffel, *Discrimination Among Rights?: A Nation’s Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 VAL. U. L. REV. 369, 371 (Fall 1998). See later discussion of the “hierarchy” problem *infra* Parts III and IV.

42. Witte, *supra* note 39, at 437.

43. STROUD’S *JUDICIAL DICTIONARY* 2218 (5th ed. 1986).

exercising power over human beings by volition, imposing rules of conduct, [or] with future rewards and punishments[.]”⁴⁴

Defining religion in the real world, however, is not so simple. First, religious persecution complicates the matter because it often does not occur in isolation of other factors. One’s religious identity alone will seldom be the only indicator of persecution because faith overlaps ethnic, political, territorial and economic concerns as well.⁴⁵ In order to determine whether discrimination or persecution is a violation of a religious human right, one must ask the question: If the victim were of a different religion or held other beliefs, would he or she still be the subject of the persecution?⁴⁶ This is often a difficult question to answer.

Second, issues as to the scope of such freedom exist. Human rights law, by thus far avoiding defining religion beyond the ambiguously-interpreted word “belief,” has left open the question of what qualifies as “religious persecution” to be solved by individual states and individual claimants.⁴⁷ For example, some critics argue that “belief” encompasses both religion and non-religion.⁴⁸ The key is to find a way to strike an effective and

44. BLACK’S LAW DICTIONARY 1292 (6th ed. 1990). Notice that this definition would exclude agnostic or atheist claims of “religious persecution.”

45. Paul Marshall, *The Persecution of Christians in the Contemporary World: Presentation to the Advisory Committee to the Secretary of State on Religious Freedom Abroad* (July 2, 1997), at <http://www.claremont.org/publications/persecution.cfm>.

46. *Id.*

47. Wood, *infra* note 48, Introduction.

48. James E. Wood, Jr., *An Apologia for Religious Human Rights*, RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 455 (Johan D. van der Vyver & John Witte, Jr., eds. 1996). Wood states:

Religious freedom must necessarily guarantee the freedom to choose a religion (or no religion at all) and to live according to the dictates of that religion Religious human rights require the equality of all religions, as well as irreligion, before the law, and that, according to the law, a citizen neither enjoys advantages nor suffers disadvantages because of one’s religious faith or identity.

Id.

Some prominent U.S. scholars like Witte have endorsed the following definition of the “essential liberties” that serve as minimum standards for religious freedom:

[L]iberty of conscience and non-discrimination on grounds of faith; free exercise of religion; accommodation of pluralism in the sense of confessional and institutional diversity; equality of all religions before the law; separation of church and state in order to protect religious bodies and believers from state interference in their internal affairs and private religious lives (respectively); and disestablishment of religion, foreclosing government from singling out any particular religion for preferential treatment.

protective balance. In the interest of fairness, one must look for the broadest possible definition so that every religious claim and claimant has a place to find recourse and remedy. The interest of prudence, on the other hand, demands that a narrower definition of religion than that currently used in the human rights arena be constructed so that the mere concept of religion does not reach the point of meaninglessness.⁴⁹

B. *The U.S. Responds from History*

Many domestic critics oppose state infringement in the international religion arena because of inconsistencies between national and international beliefs on what the operating standard should be.⁵⁰ Others, however, justify U.S. responsive action against religious persecution by citing America's traditional understanding of its own religious liberties.⁵¹ In the United States, citizens enjoy a vast range of protections for religious beliefs and practices under the First Amendment of the Bill of Rights.⁵² Historically, U.S. citizens have known both the freedom

Johan D. van der Vyver, *Introduction to RELIGIOUS HUMAN RIGHTS IN GOLOBAL PERSPECTIVE XI, XLV* (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (commenting on John Witte, Jr. & M. Christian Green, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, *id.* at 497.) This definition is somewhat problematic, however, as it would seem to endorse a nationalistic, rather than an internationally focused view toward religious freedom. For example, the "separation of church and state" and the "free exercise" components should perhaps stay solely within the United States and not unilaterally imposed on the greater U.N. community.

49. Abdullahi A. An-Na'im, *Round Table Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief*, 12 *EMORY INT'L L. REV.* 973, 999 (1998) (remarks of John Witte).

50. *Id.* at 978. During this discussion, Jeremy Gunn argued that:

state establishments of religion are in fact inconsistent with the standards of governmental noninterference with religious conscience [T]he argument that state establishments of religion are in accordance with international standards because several states maintain establishments is like saying that capital punishment is consistent with international standards because some states continue to execute prisoners. When a state maintains an establishment of religion it necessarily discriminates against minority religions either by ostracizing minorities or by giving material advantages to preferred religions. Thus, the only way that one could have a religious establishment consistent with international standards is when the benefits to the established religion are so minuscule as to have no practical effect whatsoever.

Id.

51. 22 U.S.C.A. § 6401(a)(1) (West Supp. 2000).

52. Ralph Reed, *Priorities*, *CHRISTIAN AM.*, Jan./Feb. 1997, at 1. Reed explains:

that comes with thinking freely and the pain that comes from being persecuted for what they believe.⁵³ Members of U.S. religious traditions are particularly sensitive to issues surrounding religious discrimination because of this history.⁵⁴ In fact, it is practically impossible to remove the concept of religion from U.S. politics.⁵⁵

International religious freedom legislation in Congress has received strong bipartisan support despite occasional obstacles placed in its path from other branches.⁵⁶ For example, the Religious Freedom Restoration Act of 1993, although passed by the Senate 97-3, was found by the Supreme Court to be unconstitutional as an infringement on the Court's power to interpret the First Amendment.⁵⁷ Despite this initial setback, the Religious Liberty and Charitable Donation Protection Act of 1998

Although a 'wall of separation between church and state' has evolved over the past 200 years, most Americans believe that the government is obligated to ensure that no one, including the government, interferes with a person's rights to believe as he or she chooses The wall between church and state seems to prevent the U.S. government from interfering in the business of religion. However, 'one would need to take a knife to our history books and cut out the pages on the anti-slavery crusade, the temperance movement, the women's movement, the civil rights struggle, and the anti-Vietnam War protests.'

Id.

53. 22 U.S.C.A. § 6401(a)(1). The statute reads: "The right to freedom of religion undergirds the very origin and existence of the United States From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge to those suffering religious persecution." *Id.*

54. Smith, *supra* note 36, at 482. Senator Smith argues:

Virtually every religious group in the United States has experienced religious persecution at some point in its history This is especially true in light of the growth of secularism and bias against religious institutions that has occurred in the post-war world. Above all, religious individuals are committed to speaking out and preventing such abuses in the future. This, along with the increasingly pluralistic nature of American society, helps to explain the United States commitment to religious liberty in both domestic and international contexts.

Id. at 493.

55. See McCormick, *supra* note 1, at 289.

56. There exists a potential separation of powers problem here that will not be addressed in this Note beyond the following: although it is true that the President, as Senior Executive Official of the U.S. government, holds representative power in foreign policy matters, Congress now—as it has in the past—has passed legislation in the IRFA mandating that human rights issues be addressed in foreign policy matters.

57. 42 U.S.C. §§ 2000bb-000bb-4 (1994), as described in Smith, *supra* note 36, at 482. The RFRA required that the government must prove it had a "compelling interest" before it would be allowed to abridge religious freedoms. 42 U.S.C. § 2000bb-1(b)(1), as discussed in Smith, *supra* note 36, at 482.

passed unanimously.⁵⁸ Most recently the International Religious Freedom Act of 1998 passed the Senate 98-0 and was signed into law on September 9, 1998. As of yet, these measures have not been questioned by the judiciary.

The IRFA is the latest attempt by the U.S. government to unilaterally curb incidents of religious persecution worldwide. John Shattuck, the Assistant Secretary of State for Democracy, Human Rights, and Labor, explained the U.S. administration's convictions toward the issue of religious freedom as an early version of the IRFA was being discussed in Congress. "[T]he United States government," Shattuck stated, "plays a leading role around the world in upholding the principle that the freedom of religion, conscience, and belief is an inalienable and fundamental human right."⁵⁹ Religious freedom is not only an American value [I]t is also a universally recognized human right."⁶⁰ Through the IRFA⁶¹ and its 1999 amendments, Congress imposed on the U.S. government the dual responsibilities of promoting and protecting this important subset of human rights on an international scale.⁶²

58. Smith, *supra* note 36, at 483 (discussing Pub. L. No. 105-183, 112 Stat. 517 (1998)). The Act allowed tax deductions for religious contributions. *Id.*

59. John Shattuck, *Freedom From Religious Persecution Act of 1997*, Sept. 9, 1997, at http://www.state.gov/www/policy_remarks/970909_shattuck_religion.html.

60. *Id.*

61. 22 U.S.C.A. § 6401.

62. *Id.* Section 6401(a)(3) discusses Article 18 of the Universal Declaration of Human Rights, which denoted religious freedom's rightful place as one of the most—if not the most—inalienable human right: "Everyone has the right to freedom of thought, conscience, and religion. This right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, or observance." Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, U.N.G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948). The same section also makes note of Article 18(1) of the International Covenant on Civil and Political Rights, which explains that ". . . governments have the responsibility to protect the fundamental rights of their citizens and to pursue justice for all. Religious freedom is a fundamental right of every individual, regardless of race, sex, county, creed, or nationality, and should never be arbitrarily abridged by any government." ICCPR, *supra* note 37, art. 18(1).

III. THE INTERNATIONAL RELIGIOUS FREEDOM ACT OF 1998
AND INITIAL CONCERNS SURROUNDING THE PROPER ROLE OF
THE U.S. IN FOREIGN FAITH ISSUES

Congress recognized that freedom of religion, established as a “fundamental right” by the several international instruments,⁶³ had come under such brutal attack in certain areas of the world that a cohesive and immediate response to the persecution was deemed necessary.⁶⁴ The IRFA is its latest answer. The act itself describes an unjust and desperate international crisis that not only asks for, but demands, a wholehearted political and humanitarian response.⁶⁵ As the Act’s findings detail:

More than one-half of the world’s population lives under regimes that severely restrict or prohibit the freedom of their citizens to study, believe, observe, and freely practice the religious faith of their choice Among the many forms of [government-sponsored and government-tolerated] violations are state-sponsored slander campaigns, confiscations of property, surveillance by security police, including by special divisions of “religious police,” severe prohibitions against construction and repair of places of worship, denial of the right to assemble and relegation of religious communities to illegal status through arbitrary registration laws, prohibitions against the pursuit of education or public office, and prohibitions against publishing, distributing, or possessing religious literature and materials

Even more abhorrent, religious believers in many countries face such severe and violent forms of religious persecution as detention, torture, beatings, forced marriage, rape, imprisonment, enslavement, mass resettlement, and death merely for the peaceful belief in, change of or practice of their faith. In many countries, religious believers are forced to meet secretly, and religious leaders are targeted by national security forces and hostile mobs.⁶⁶

To combat these atrocities, the IRFA established within the executive branch a new outlook, a new agenda, and a new federal agency, all with an accompanying two-part policy directive: (1) to promote worldwide religious freedom, and (2) to condemn—and

63. The instruments which articulate that religious freedom is a fundamental right include the Universal Declaration of Human Rights, the ICCPR, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the U.N. Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms. See 22 U.S.C.A. § 6401(a)(2).

64. *Id.* § 6401(b).

65. See *id.* § 6401(a)(3).

66. *Id.* § 6401(a)(4)(5).

when necessary, sanction—offending countries for violations of religious freedom.⁶⁷

Acknowledging that religious freedom is a sensitive international issue, Congress accordingly worded the IRFA to be a malleable instrument by dictating that a U.S. or a cooperative response to egregious violations of religious freedom be both “vigorous” and “flexible.”⁶⁸ The IRFA also differentiates between two levels of persecution that the United States and the United Nations plan to combat. The description of “particularly severe violations of religious freedom” targets only the most horrendous offenses, those the statute calls “systematic, ongoing egregious violations of religious freedom.”⁶⁹ On the other hand, the broader “violations of religious freedom” definition encompasses the wide range of less severe offenses or those that lack the emergency and immediacy of the former.⁷⁰

A. *General Department of State and Other Executive Responsibilities Under the IRFA*

The IRFA instills in the President a wide range of powers over enforcement, including, but not limited to, powers of commission appointment, advisory powers, and diplomatic representation in the area of religious freedom.⁷¹ President Clinton delegated these powers to the Secretary of State through a special memorandum.⁷²

67. *Id.* U.S.C.A. § 6401(b)(1).

68. *Id.* § 6401(b)(3).

69. *Id.* § 6402(11). The types of violations defined as “particularly severe” include: (A) torture or cruel, inhuman, or degrading treatment or punishment; (B) prolonged detention without charges; (C) causing the disappearance of persons by the abduction or clandestine detention of those persons; or (D) other flagrant denial of the right to life, liberty, or the security of persons.” *Id.*

70. *Id.* § 6402(13), which includes as simple “violations” offenses such as “(A) arbitrary prohibitions on, restrictions of, or punishment for (i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; (ii) speaking freely about one’s religious beliefs; (iii) changing one’s religious beliefs and affiliation; (iv) possession and distribution of religious literature, including Bibles; or (v) raising one’s children in the religious teachings and practices of one’s choice.” *Id.* § 6402(13)(A). Included as “violations,” emphasized in § 6402(13) are “any of the following acts if committed on account of an individual’s religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.” *Id.* § 6402(13)(B).

71. *Id.* § 6411.

72. 22 U.S.C.A. § 6441, “Delegation of Responsibilities under the International Religious Freedom Act of 1998.” Any reference to the “President” in Part II should be interpreted as a presidential duty delegated to the Secretary of State under this section.

One of the most important and essential components of the IRFA was the establishment of an Office on International Religious Freedom within the U.S. Department of State, directed by the Ambassador at Large for International Religious Freedom.⁷³ The Ambassador's duties include being the President's "principal adviser" in matters pertaining to freedom of religion,⁷⁴ assisting the Secretary of State in preparing the religion-related portions of annual Human Rights Reports,⁷⁵ creating and submitting to Congress an Annual Report on international religious freedom,⁷⁶ and serving as the United States religious freedom diplomat to the nations.

Each Annual Report submitted by the Ambassador is expected to have two main components: (1) a description of those U.S. actions during the past year that have supported and opposed violations of freedom of religion; and (2) recognition of those countries who have improved—in policy, practice, or both—in protecting and promoting this most fundamental right.⁷⁷ To gather the most information about the international status of the right at the least cost, missionary organizations—through the use of an extensive network of non-government religious and human rights groups—take a primary investigative role which removes from the Commission the otherwise extremely expensive and onerous responsibility of literally "going to the ends of the earth" to get the relevant information.⁷⁸

Aside from these and other dictated Department of State Activities,⁷⁹ perhaps the most intricate and integral part of the

73. *Id.* § 6411(a).

74. *Id.* § 6411(2).

75. *Id.* § 6412(a).

76. *Id.* § 6412(b). The first two Annual Reports, which were released on September 30, 1999 and September 9, 2000, will be described in detail along with its implications later in this Note.

77. 22 U.S.C.A. § 6412(b)(1)(i)-(ii). Within the description of U.S. actions, there is also included a list of the most continued, egregious religious freedom offenders, those of "particular concern." *Id.* Regarding the second component of the Annual Report, descriptions of improvement—to be most effective and capable or repetition, contain also a thorough analysis of the nature of and factors surrounding the improvement. *Id.*

78. *Id.* § 6412(c). To assure consistency, the Act requires the responsible U.S. mission organization to maintain reporting standards. *Id.*

79. Other State Department responsibilities include establishing and maintaining a comprehensive religious freedom internet site containing all relevant major international documents, Annual Reports, Executive Summaries, etc., *id.* § 6413, a mandate that requires foreign mission organizations—both U.S. and non-government—to seek whenever possible to meet with imprisoned religious leaders, *id.* § 6414, and to slowly compile complete prisoner lists of those persecuted for their faith, *id.* § 6417. The State Department also has the authority to further encourage religious freedom awareness by allocating funds to those U.S. diplomatic missions that actively develop programs to achieve that result, *id.*

IRFA is Subchapter II, which creates the all-important Commission of International Religious Freedom.⁸⁰ The ten-member Commission includes an Ambassador at Large⁸¹ and nine other members, three of whom are appointed by the House, Senate, and President respectively to serve two-year terms.⁸² The Commission's two primary responsibilities are to annually review reports of violations from the various sources mentioned above, and make appropriate policy recommendations on the basis of those evaluations to the President and State Department.⁸³ The President is then empowered to oppose those violations in accordance with the IRFA and the Commission's

§ 6415. In addition, U.S. executive branch officials are encouraged to promote religious freedom advocacy during meetings with foreign dignitaries, *id.* § 6417(a).

80. 22 U.S.C.A. § 6431. In addition, according to § 6435, the Commission has been granted \$3,000,000 to carry out its duties over the course of its trial five-year existence, which ends on May 14, 2003. *Id.* § 6436.

81. The Ambassador at Large serves "ex officio." Although he is a non-voting member, he carries several unique responsibilities. The current Ambassador-at-Large is Dr. Robert A. Seiple, formerly of World Vision and now with the State Department. Press Release, *Rabbi Saperstein Elected Chair as U.S. Commission on International Religion Freedom Holds Inaugural Meeting*, Religious Action Center of Reform Judaism, at <http://www.rac.org/news/062299.html>. On June 22, 1999, the members of the Commission unanimously elected Rabbi Saperstein as Chair of the Commission. *Id.*

82. *Id.* § 6431(b)(1)(B) and (c)(1). According to §6431(b)(2)(A), "members of the Commission [shall be] selected among distinguished individuals noted for their knowledge and experience in fields relevant to the issue of international religious freedom, including foreign affairs, direct experience abroad, human rights, and international law." The inaugural Commission, which convened on June 21, 1999, was composed of the following members: Rabbi David Sapperstein, Director, Religious Action Center of Reform Judaism; Michael K Young, Dean, George Washington Law Center; Elliot Abrams, Ethics and Public Policy Center; Laila Al-Marayati, M.D., Past President, Muslim Women's League; John R. Bolton, Senior Vice-President, American Enterprise Institute; Dr. Firuz Kazemzadeh, Secretary of External Affairs, National Spiritual Assembly of the Baha'is of the United States; Most Reverend Theodore McCarrick, Archbishop of Newark; Nina Shea, Director, Center for Religious Freedom, Freedom House; Justice Charles Z. Smith, Washington State Supreme Court. See Saperstein, *supra* note 81.

83. *Id.* § 6432(a). The Commission is also required to consider the potential effects of the policies, if implemented, on the involved religious communities. *Id.* § 6432(d). Such recommendations in response to progress may include: private commendation, diplomatic commendation, official public commendation, commendation within multilateral fora, an increase in cultural or scientific exchanges, or both, termination of existing Presidential actions, an increase in certain assistance funds, and invitations for working, official, or state visits. *Id.* § 6432(c). Recommendations in response to violations, on the other hand, may include diplomatic inquiry, diplomatic protest, official public protest, demarche of protest, condemnation within multilateral fora, delay or cancellation of cultural or scientific exchanges, delay or cancellation of working, official, or state visits, reduction of certain assistance funds, termination of certain assistance funds, imposition of targeted trade sanctions, imposition of broad trade sanctions, and withdrawal of the chief of mission. *Id.* § 6432(b).

recommendations, taking the action that “most appropriately respond[s] to the nature and severity of the violations.”⁸⁴

In choosing a proper course of action in each case, the President is required to attempt to “minimize any adverse impact” on the citizens of the violating nation and the U.S. and foreign humanitarian activities therein.⁸⁵ For example, in response to what is deemed to be a “particularly severe” violation, the IRFA requires the President to first designate the offending nation as one “of particular concern” and determine the agency or officials responsible for the violations. Before any action is taken, the President must first request and enter into “consultation” with the offending country regarding the violations and, where appropriate, keep the results of those negotiations private so as not to jeopardize any agreements made pursuant to those negotiations through public disclosure.⁸⁶

The primary objective is not to punish, but instead to enter into a “binding agreement” with the offending foreign government that obligates that government to cease or phase out those practices that are in violation of the IRFA.⁸⁷ The IRFA also provides the President with an exhaustive list of sanctions, including trade-related sanctioning measures against the offending nation, which may be used as a last resort.⁸⁸

84. 22 U.S.C.A. § 6441.

85. *Id.* § 6441(c)(2).

86. *Id.* § 6443(b)(1)(A) and (3). Section (3) reads: “If negotiations are undertaken or an agreement is concluded with a foreign government regarding steps to cease the pattern of violations by that government, and if public disclosure of such negotiations or agreement would jeopardize the negotiations or the implementation of such agreement, as the case may be, the President may refrain from disclosing such negotiations and such agreement to the public, except that the President shall inform the appropriate congressional committees of the nature and extent of such negotiations and any agreement reached.” *Id.*

87. *Id.* § 6445(c). Unfortunately, it is unclear under whose legal authority these “binding agreements” lie.

88. *Id.* § 6445(a). In reference to trade-related sanctions, the President may “direct” the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve the issuance of any (or a specified number of) guarantees, insurance, extensions of credit, or participations in the extension of credit with respect to the specific government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 6441 or 6442 of this title,” or may order “the heads of the appropriate United States agencies not to issue any (or a specified number of) specific licenses, and not to grant any other specific authority (or a specified number of authorities), to export any goods or technology to the specific foreign government, agency, instrumentality, or official found or determined by the President to be responsible for violations under section 6441 or 6442 of this title,” or may prohibit “the United States Government from procuring, or entering into any contract for the procurement of, any goods or services from the foreign government, entities, or officials found or determined by the President

The President must provide a complete report to Congress within ninety days of action. The report must identify the action taken with respect to the offending foreign country, a description of the violations giving rise to such action, the President's purpose behind the specific action, and a thorough evaluation of the action's impact on the offending foreign government, the offending country's general population, and the U.S. economy.⁸⁹ The report must also contain, if applicable, a description of all the prior failed non-economic policy attempts made by the United States to bring about the cessation of the violations, as well as descriptions of any multilateral negotiations involved in the particular case.⁹⁰

B. Recruiting: Enlisting International Support

The United States, which has repeatedly proven itself to be a world-wide trendsetter in various peacekeeping efforts,⁹¹ has declared its hope in the IRFA that it will be only among the first of many nations to recognize and support the need for proactive change.⁹² Accordingly, it is the primary responsibility of the United States to promote the cause of religious freedom worldwide. The language chosen by Congress demonstrates the desire to motivate a multi-national effort to enforce international religious freedom obligations.⁹³ Therefore, one of the IRFA's main objectives is to enlist and engage other countries in an international promotional effort through both binding advocacy agreements and cooperative initiatives.

The IRFA reinforces its international teamwork goal by encouraging additional consultation with other foreign governments "for purposes of achieving a coordinated international policy on actions that may be taken with respect to a[n offending] country."⁹⁴ The President is also charged to consult with the appropriate international humanitarian groups, religious organizations, and interested parties in the United

to be responsible for violations under section 6441 or 6442 of this title." *Id.* § 6445(a).

89. 22 U.S.C.A. § 6444. According to § 6444(a)(4)(B), the President may again withhold from public disclosure the evaluative portion of the report, but must completely disclose this information to Congress.

90. *Id.* § 6444(a)(5) and (6).

91. For further discussion of the U.S. efforts in Desert Storm, Kosovo, and Israel, see *infra* Part IV.

92. 22 U.S.C.A. § 6401(b)(2), which provides for the channeling of U.S. security and development assistance to foreign governments interested in joining the human rights effort.

93. *Id.* § 6401(b)(4).

94. *Id.* § 6443(b)(2).

States to uncover the potential impact of any agreements or actions prior to acting.⁹⁵

C. *Initial Domestic Reaction to the IRFA*

Prior to its passage, domestic reaction to the proposed legislation contained in the IRFA ranged from skepticism to outright opposition. As John Shattuck outlined in legislative hearings on the bill, the Clinton Administration feared that the Act would be more likely to harm than aid persecuted peoples, would likely harm U.S. relations with other international powers, would create a "confusing bureaucratic structure" that would conflict with the Department of States own efforts, or would place religious concerns on a hierarchy above all other civil and political rights.⁹⁶ The National Council of Churches originally refused to support the legislation for many of these same reasons, fearing that the United States would become the "religious police of the world" as a result of the Act.⁹⁷

At the core of these concerns was the IRFA's sanctioning provisions, which called for heavy penalties for countries engaging in continued religious persecution.⁹⁸ These concerns and others were addressed and apparently resolved by the time the IRFA became law in September of 1998.⁹⁹ Its sanctions, however, were watered down by the time the final draft was approved.

The IRFA's current sanctions still appear harsh, a fact which continues to aggravate the Act's critics. A closer look at the adopted language, however, indicates that the threat of sanctions may now be nothing more than aggressive rhetoric. For example, although the Secretary of State is required to "take action," she has considerable flexibility because in reality the U.S. government can choose to do little or nothing in response to violations of the IRFA.¹⁰⁰ According to the Act's sanctioning provisions, a determination that a foreign country has engaged in severe violations does not automatically require the U.S. government to terminate assistance or halt any current activities with that country.¹⁰¹ In addition, the President may even choose to waive

95. *Id.* § 6443(c) and (d).

96. Shattuck, *supra* note 59.

97. *Religious Freedom Act Gets Wide Acclaim*, THE CHRISTIAN CENTURY, Nov. 4, 1998, at 1015.

98. Shattuck, *supra* note 59.

99. 22 U.S.C.A. § 6441 et. seq.

100. *Id.* § 6442.

101. *Id.* § 6442(d).

his power to act if either the foreign government is no longer in violation or it is in the "important national interest of the United States" to do so.¹⁰² This language creates a fairly substantial loophole through which the U.S. government can escape in order to overlook religious violations when other relationships, such as trade, are deemed to be more beneficial, as will be discussed later in the Note.

As Robert Seiple, Ambassador at Large for Religious Freedom, noted upon release of the first Annual Report, the U.S. currently has no intention of imposing sanctions, even upon the most egregious offenders, until some point in the distant and indefinite future.¹⁰³ Despite this expectation and the many penalty alternatives, there remains concern over the watered-down and flexible sanction provisions. For example, the Institute for International Economics claimed that over the last thirty years, sanctions imposed by the United States have only had a thirteen percent success rate due to the current dependency on the developing global marketplace which results in "less vulnerable targets and less unilateral leverage" for the United States.¹⁰⁴ The American Society of International Law echoed these concerns as late as April of 1999:

We . . . believe sanctions will be counterproductive . . . [W]hile the imposition of sanctions is likely to have little direct impact on most governments engaged in abuses, it runs the risk of strengthening the hand of those governments and extremists who seek to incite religious intolerance If the United States does not have the flexibility to determine when and how to condemn violators, we could endanger the well-being of those we are trying to help. This would limit U.S. efforts to work collectively with other nations to promote religious freedom, reconciliation, and peace, not to mention other critical national security objectives.¹⁰⁵

102. *Id.* § 6447 (a)(3).

103. From Dr. Seiple's comments at a State Department briefing in September, 1999, at http://www.state.gov/www/policy_remarks/1999/990909_seiple_koh_irf.html. Seiple assured reporters that "[t]he act itself was never conceived primarily to be a sanctions act. Sanctions are a last resort, and the sanction portion of this act is a very nuanced, a very sophisticated approach. It is essentially a menus approach, fifteen different sanctions, anywhere from a private demarche to withdrawal of economic aid. And the provision allows the secretary a great deal of flexibility and latitude." *Id.*

104. Bob Kolasky, *Religious Persecution: You've Got to Fight*, 3 *IntellectualCapital.com* 18, ¶ 3 (April 30, 1998), at http://www.intellectualcapital.com/issues/98/0430/icissue_b.asp (quoting Kimberly Ann Elliot, *Economic Sanctions Revisited*, an Institute for International Economics Study).

105. Sean D. Murphy, ed., *Contemporary Practice of the United States Relating to International Law: Sanctions Against States Tolerating Religious Persecution*, 93 *AM. J. INT'L L.* 480, 481 (April 1999). *The Oregonian*, an Oregon-based on-line newspaper, cited USA Engage, a coalition of 497 U.S. businesses, for the argument that ineffective sanctions would hurt U.S. business without effectively accomplishing their goals. See

It was the potential economic consequence attached to imposing sanctions on economically-valuable nations, not the potentially bad humanitarian effects, which caused the Clinton Administration to initially oppose an earlier and harsher version of the IRFA.¹⁰⁶ The Administration, believing that U.S. foreign policy should be exclusively focused on trade,¹⁰⁷ claimed that the bill would arbitrarily drop a dark cloak of sanctions on nations, many of which are oil and gas rich, or offer market opportunities that would be politically damaging for U.S. oil companies' relations.¹⁰⁸

Domestic reactions to the IRFA reached beyond the executive branch and into several activist organizations as well. Although many Christian movements applauded the law's passage,¹⁰⁹ as did the well-known Anti-Defamation League,¹¹⁰ the Association of American Atheists (AAA)—at the other extreme—labeled the Act “blasphemy” and challenged the United States on its positions concerning *non*-religious political prisoners like atheist writers Salman Rushdie and Taslima Nasrin.¹¹¹ Still other domestic

O'Keefe, *supra* note 31, at <http://www.oregonlive.com/todaysnews/9810/st102911.html>. Among the members of USA Engage are Apple Computer, the U.S. Chamber of Commerce, AT&T, and the National Association of Manufacturers. See Kolasky, 3 *Intellectualcapital.com* 18, at <http://www.intellectualcapital.com/issues/98/0430/icissue.asp>. This concern, however, mostly results from a failure to understand the Secretary's multifaceted approach to combating violations.

106. Shattuck, *supra* note 59.

107. Jacob Heilbrun, *Christian Rights: The Next Big Conservative Issue*, THE NEW REPUBLIC, July 7, 1997 at 19.

108. Kimberly Music, *Clinton Opposes Religious Persecution Bill*, THE OIL DAILY, Sept. 10, 1997, at 1. An Administration official recently stated that “many . . . still believe that commercial policy is a tool of foreign policy, when it should more often be the other way around—the United States should use all its foreign policy levers to achieve commercial goals.” *Id.*

109. Supporters of the IRFA included the U.S. Catholic Bishops' Conference, the National Association of Evangelicals, the Southern Baptist Ethics and Religious Liberty Committee, the International Campaign for Tibet, the Anti-Defamation League, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations, the Salvation Army, the Christian Coalition, the Family Research Council, Evangelicals for Social Action, Prison Fellowship, the Middle East Christian Committee (who represents Lebanese Christians, Copts, Assyro-Chaldeans, Syriacs, Southern Sudanese, Iranian Christians, and Pakastani-Bangladeshi Christians), and the National Jewish Coalition. Many of these same organizations are also currently members of the Coalition for the Free Exercise of Religion, listed at <http://www.religious-freedom.org/coalition.html>.

110. Press Release, *Anti-Defamation League, ADL Urges Passage of International Religious Freedom Act* (October 2, 1998), at <http://www.adl.org/presrele%5fold2/mise%5F00/3246%500.html>. The Anti-Defamation League was founded in 1913 and is an international presence, fighting Anti-Semitism worldwide through its programs and services. *Id.*

111. American Atheist Forum, *Blasphemy, Religious Persecution and the International Religious Freedom Act* (Oct. 6, 1998), at <http://www.americanatheist.org/forum/blasphemy.html>. Rushdie has reportedly been under a death

critics accuse the United States of being a “global busybody,” claiming that its religious freedom advocacy has nothing to do with the “vital strategic or economic interests of the United States”¹¹² and that it frustrates the separation between church and state.¹¹³

Perhaps the greatest criticism voiced thus far is that the IRFA effectively creates a U.S.-sponsored hierarchy, placing religious freedom above all other human rights.¹¹⁴ According to scholars who adhere to this view, the human right of religious freedom under the IRFA no longer exists on the same level as other rights like political freedom or due process rights; it instead becomes the “highest human right”¹¹⁵ contrary to U.N. assertions as to the indivisibility of human rights. For the purposes of the IRFA, religious freedom is no longer one right among equals, but one above the rest. The special protection afforded to religious freedom skews the nature of the rights itself, because religious freedom moves to the apex of a hierarchy of human rights.¹¹⁶

sentence since 1989 in Iran for writing *The Satanic Verses*, a book the Iranian government considers insulting to Islamic beliefs. *Id.* Nasrin has been hunted by Bangladeshie authorities for speaking out for women’s rights there. *Id.* The AAA cited statements of the Human Rights Committee and the European Court that provisions guaranteeing the right to freedom of religion protect not only religious beliefs, but also other beliefs of a similar fundamental character, including atheism and agnosticism. *Id.* The U.S. government has not yet responded to this particular concern, although by recognizing non-religion as well as religion within the scope of religious human rights would inevitably give rise to serious definitional problems as discussed earlier, and would not protect but instead diminish particularly “religious” human rights concerns to ineffectual meaninglessness. *Id.*

112. John Shattuck, “U.S. Policies in Support of Religious Freedom: Focus on Christians,” Briefing Before the U.S. Department of State (July 22, 1997), http://www.state.gov/www/policy_remarks/970722.

113. *Id.*

114. For foundational theory on the inappropriateness of creating a human rights hierarchy by singling out certain rights above others, see THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 80 (1989). For a more contemporary analysis focusing on the IRFA’s effects in particular, see Wuerffel, *supra* note 41, at 407, 412. Wuerffel argues that the IRFA wrongly established a “de facto preference for religious rights.” *Id.* at 407. Wuerffel also states that “to honor the interdependent nature of human rights, the United States must legislate a way in which to deal with violations of human rights and commit to the protection of all, instead of only one.” *Id.* at 412.

115. Wuerffel, *supra* note 41, at 408.

116. *Id.* Wuerffel finds that interrelatedness is a necessity for human rights, and points to U.N. language in various documents to support that theory. *Id.* at 403, 404. For example, the International Covenant on Civil and Political Rights states:

[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby

IV. THE FIRST TWO ANNUAL REPORTS AND CURRENT U.S. ACTIONS

Almost a full year after the IRFA was passed and the initial attacks ceased, the release of the first Annual Report on Religious Freedom on September 30, 1999 caused many of these original concerns to resurface with a renewed vengeance. This first Report covered the period from January 1, 1998 to June 30, 1999, and reflected eighteen months of "dedicated effort" by the State Department, Foreign Service, and various U.S. embassies. Dr. Robert Seiple, Ambassador at Large for International Religious Freedom, explained that the "simple" goal of the Report was "to create a comprehensive record of the state of religious freedom around the world, to highlight the most significant violations of the right to religious freedom, and to help the persecuted."¹¹⁷

Hailing its release, Ambassador Seiple applauded the "great lengths to which U.S. Foreign Service Officers went to gather such detailed information, investigate reports of human rights abuse, monitor elections, and come to the aid of believers who are at risk in their current situation, the officers doing so often at great personal risk."¹¹⁸ These officers, stationed at various U.S. embassies throughout the world, prepared the initial report drafts and gathered information from a variety of sources including government and religious officials, non-governmental organizations, journalists, human rights monitors, religious groups and academics. Information from the embassies' initial efforts were then forwarded to Washington for careful review by several executive agencies within the Department of State.¹¹⁹ These agencies worked together to create a thorough and objective report, synthesizing the embassies' effort with

everyone may enjoy his civil and political rights, as well as his economic, social, and cultural rights.

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 2(1).

117. Dr. Robert Seiple, Briefing, Release of the 1999 Annual Report on International Religious Freedom (Sept. 9, 1999), http://www.state.gov/www/policy_remarks/1999/990909_seiple_koh_irf.html. The Second Annual Report, released very recently in September 2000, echoes the first Report and re-emphasizes this Note's primary focus: China's continuing religious prosecuting. See Section V for a thorough discussion of this issue. A copy of this most recent Report can be downloaded from the Department of State's website at <http://www.state.gov>.

118. *Id.*

119. These agencies include the Bureau of Democracy, Human Rights, and Labor and its Offices of International Religious Freedom, Country Reports and Asylum Affairs, and Bilateral Affairs, in cooperation with other State Department offices. *Id.*

information obtained by a myriad of other sources including human rights groups, foreign government officials, representatives from the United Nations and other international and regional organizations and institutions, experts from academia and the media, experts on issues of religious discrimination and persecution, religious leaders, and experts on legal matters.¹²⁰

In total, the 1999 Report outlines the relevant activities, both good and bad, of over 180 countries worldwide. The Commission applies IRFA standards to every one of these researched nations, including theocracies, totalitarian states, and democracies, looking for systematic violations where religion has played a substantial role.¹²¹ Regarding the administration and implementation of the Commission's conclusions, Seiple further explained: "There are two points of discernment in this process. One is what is going on . . . [but] the next point of discernment is more difficult: What do you do about it?"¹²² As detailed below, the second point has proven not only to be logistically difficult, but also extremely problematic in both a social and political sense.

A. "What's Going On"

The 1999 Annual Report defines the various barriers to religious freedom, and groups offenders according to the type of barrier they pose to the realization of religious freedom: (1) totalitarian and authoritarian regimes,¹²³ (2) governments hostile

120. See Preface to 1999 U.S. Dept. of State Report on International Religious Freedom, at http://www.state.gov/www/global/human_rights/irf/irf_preface99.html.

121. Seiple, *supra* note 117.

122. *Id.*

123. *Executive Summary*, in 1999 U.S. Dept. of State Annual Report on International Religious Freedom, http://www.state.gov/www/global/human_rights/irf/irf_rpt/1999/irf_exec99.html.

Totalitarian and authoritarian regimes are defined by the degree to which they seek to control thought and expression, especially dissent. It is not uncommon for such regimes to regard minority religious groups as enemies of the State because of the content of the religion, the fact that the very practice of religion threatens the dominant theology (often by diverting loyalties of adherents toward something beyond the State), the ethnic character of the religious group, or a mixture of all three. When this association occurs, the result is often religious persecution directed by the regime.

to minority religions,¹²⁴ (3) “tolerant” countries whose laws and policies facially discourage persecution but allow private violators to go unpunished,¹²⁵ (4) countries whose laws favor certain religions over others,¹²⁶ and (5) countries who indiscriminately identify minority religions as dangerous sects or cults.¹²⁷

B. “What to Do About It”

Once the offenders are determined based on the objective standards set forth in the IRFA, the next step is to decide on an appropriate response based on an understanding of why that nation has imposed these particular barriers to religious freedom. As Congress and the Commission soon recognized, however, this inquiry is much more complicated than the “one-size-fits-all” remedy previous U.N. agreements had adopted. Although the U.S. government as a whole has thus far tried not to stray from this traditional U.N. methodology, Congress in particular has slowly realized that a more subjective approach is necessary to most effectively address the issue of how to advocate the “universal principles” underlying religious freedom, as reflected in the flexible remedy provisions of the IRFA.¹²⁸ Congress’ flexible and more comprehensive approach is now increasingly being integrated into public foreign policy channels via international exchanges, Worldnet and VOA broadcasts, a religious freedom website within the homepage of the Department of State, conferences, public opinion polling, congressional hearings, and

124. *Id.* “Some governments, while not necessarily determined to implement a program of control over minority religions, are nevertheless hostile to certain religions and implement policies designed to intimidate them, cause their adherents to convert to another religion, or cause their members to flee.” *Id.*

125. *Id.* “In some countries governments have laws or policies to discourage religious discrimination and persecution but fail to act with sufficient consistency and vigor against violations of religious freedom by nongovernmental entities.” *Id.*

126. *Executive Summary, supra* note 123.

Some governments have implemented laws or regulations that favor certain religions and place others at a disadvantage. Often this circumstance is the result of the historical predominance of one religion in a country and may reflect broad social skepticism about new or minority religions. Sometimes it stems from the emergence of a country from a long period of Communist rule, in which all religion was prohibited or at best out of favor. In such countries, skepticism or even fear of certain religions or all religions lingers within segments of society. This has led in some cases to a curtailment of religious freedom.

Id.

127. 1999 U.S. Dept. of State International Religious Freedom Report Fact Sheet, http://www.state.gov/www/global/human_rights/irf/irf_rpt/fs_990909_irf.html.

128. *Executive Summary, supra* note 123.

speeches and press conferences by senior U.S. foreign policy officials.¹²⁹

Within the restrictive confines of international human rights law, however, individual states are responsible for sorting out competing interests in formulating policies that adequately protect the rights of all involved. For example, in some societies, a change in religious beliefs may have far-reaching social ramifications, whereas in others, such a change will have only an internal impact. The problem, therefore, in laying down internationally constructed requirements is that different nations inevitably prioritize human rights differently and often hold differing views on the necessity of regulating, and the wisdom of influencing, religious choices of their people that conflict with international norms.¹³⁰

The 1999 Report claims that “[t]he United States seeks to promote religious freedom, not simply to criticize, or to make headlines.”¹³¹ Steve McFarland, Executive Director of the Commission on International Religious Freedom, stated that he feared that the United States would fail to effectively respond to the first Report’s objective findings, particularly in compliance with the IRFA’s requirement of naming those nations responsible for severe violations by September 1st of each year.¹³² According to McFarland, the test of U.S. commitment to ending religious persecution would be whether Cuba, Sudan, and especially China

129. *Id.* The Summary noted that U.S. overseas mission efforts constituted the Commission’s “front line” in pursuing religious freedom. *Id.* This training, according to the summary, “requires clear explanations both of the American approach to religious freedom in the United States, and of the U.S. practice of applying only international standards in its assessment of foreign governments.” *Id.* This highly subjective component—determining the appropriate remedy—is essential to the effective implementation of the remedies provided for in the statute. For example, a nation’s policy on religious freedom often can be “better understood in the context of its history, culture, and tradition—a particular religion may have dominated the life of a nation for centuries, making more difficult the acceptance of new faiths that offer challenges in both cultural and theological terms.” *Id.* Although citing to tradition and culture should not be encouraged or used as a superficial pretext for legislation or policies that restrict genuine religious belief or its legitimate manifestations, understanding this context greatly helps the Secretary to construct a proper diplomatic response if one is possible.

130. See Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251, 253.

131. *Executive Summary*, *supra* note 123.

132. Julia Lieblich, *Religious freedom law proves challenging*, THE HOLLAND SENTINEL, Oct. 2, 1999, http://www.thehollandsentinel.net/stories/100299/re_elfreedom.html. Steve McFarland formerly served as Director of the Christian Legal Society’s Center for Law and Religious Freedom before being appointed to his position as chairman of the Commission (known by author based on active work with the Christian Legal Society).

are named among the greatest offenders on that date or whether the United States would allow “good politics” to obstruct the reality of persecution.¹³³ McFarland’s concerns, as well as those of other skeptics who feared that subjective political allegiances would distort the Act’s objective results, were initially calmed to a substantial extent when China and Sudan both made that list.

C. China Ranks High on Religious Freedom “Offender” List

China is at the forefront of current events on the international religious freedom front. On October 6, 1999, the U.S. State Department, in a somewhat surprising apolitical move, designated China among the top five countries “of particular concern” for religious freedom violations.¹³⁴

As a Communist regime since 1949, the People’s Republic of China has one of the world’s most depressing human rights records which includes forced abortion,¹³⁵ violent political repression, and religious persecution. Although the Chinese Government recognizes the right to freedom of religion in principle, it is quick to clarify that it does so only to the extent compatible with the security and development of a purely socialist state.¹³⁶

China is not indifferent to its citizen’s religious choices; on the contrary, it wishes to completely control those choices.¹³⁷ The ultimate goal of China’s religious policy is to eliminate individual faith in something beyond the power of the state, as the ruling Communist Party believes that religion should wither away over time for the good of society.¹³⁸ Although the government now officially rejects the use of force to bring about this goal, it is to this end that religious policy is ultimately

133. *Id.*

134. China was again named as a “country of particular concern” in the 2000 Report, emphasizing that nation’s continued and unabated persecution of faith-based communities within its boundaries. The Department designated China, Burma, Iran, Iraq, and Sudan as the five worst violators, as mandated by the IRFA. *Id.*

135. The Family Research Council described the horror of forced abortion in one instance: “Before being deported from Australia to China, Zhu Qingping, eight months pregnant, was promised she would not be forced to abort her child. When she arrived, however, she was forced into a car and taken to the hospital, where her child was aborted against her will.” Saunders, *supra* note 24.

136. See Document 19: The Basic Viewpoint in the Religious Question During Our County’s Socialist Period § IV (March 1982), reprinted in R. Lanier Britsch, *The Current Legal Status of Christianity in China*, 1995 BYU L. REV. 347, app. 1, at 370.

137. *Id.*

138. *Id.*

directed.¹³⁹ The Party's expressed calling is to "aggressively propagate atheism:" all Party members must be avowed atheists¹⁴⁰ and the only proselytism politically condoned by the state is that which is aimed at convincing religious believers to abandon their beliefs.¹⁴¹

As a result, the sphere within which religious activities may be legally conducted under the Communist regime is extremely small, and is only getting smaller.¹⁴² In the 1950's, the Chinese

139. Document 6: Issued by the Central Committee of the Communist Party and the State Council on Some Problems Concerning Further Improving Work on Religion, *reprinted in* Britsch, *supra* note 136, app. 2, at 384.

140. Document 19, *supra* note 136, § IV at 369 ("We Communists are atheists and must unremittingly propagate atheism"). "A Communist Party member cannot be a religious believer; s/he cannot take part in religious activities." *Id.* § IX at 377.

141. Document 6, *supra* note 139, § II at 392 ("Party committees and governments at all levels must . . . instruct the propaganda departments to . . . educate the masses, youngsters in particular, in dialectical materialism and historical materialism (including atheism)").

142. Spiegel, *supra* note 17. Spiegel describes the current state of affairs in this Communist regime:

The Chinese Communist Party (CCP) has never made any secret of its view of the place of religion within Chinese society. It is to be tolerated—but only barely—until such time as "socialism with Chinese characteristics" is fully realized and religion, having become irrelevant, will wither and die Religious control begins with restricting to five—Buddhism, Catholicism, Protestantism, Daoism and Islam—the number of religions officially recognized by the Chinese government, and by separating religion from "superstition," which is illegal and includes such practices as divination, fortune telling, healing rituals and exorcising ghosts. Each of the five recognized religions is monitored by a "patriotic association," among them the Chinese Buddhist Association, the Catholic Patriotic Association, the Protestant Three-Self Patriotic Movement (TSPM), the Chinese Islamic Association and the Chinese Daoist Association All churches, temples, mosques, monasteries and other fixed locations for worship must register with the relevant patriotic association. Unregistered religious activity is illegal and is a punishable offense

Still another constitutional clause outlaws control of any Chinese congregation by a foreign religious organization. The requirements of self-administration, self-support and self-propagation (the three-self policy) is particularly difficult for Catholics, as it severs, as it is meant to, links between the Vatican and Chinese Catholics

January 31, 1994, Regulation No. 144, On the Management of Religious Activities of Foreigners Within Chinese Borders. Foreigners cannot "establish religious organizations, set up religious offices or run religious institutes." They can only bring in religious material for personal use—bringing in even one extra Bible is illegal. Foreign pastors must receive permission, rarely granted, from the RAB to preach in a Chinese church.

Almost immediately after Regulation No. 144 went into effect, a group of Protestant missionaries, who reportedly had come to celebrate the Chinese New Year with fellow-believers, was expelled from China after first

being detained and harassed. The authorities confiscated from the group a substantial amount of money and expensive equipment

Registration is the government's core control mechanism. Its legal basis is spelled out in Regulation No. 145, On the Management of Places for Religious Activities, issued by the Religious Affairs Bureau under the State Council, and signed by Premier Li Peng on January 31, 1994. A supplementary set of regulations, Registration Procedures for Religious Activities, promulgated the following May, details conditions and procedures for new applicants and formerly approved congregations, all of which are required to reapply. Registration is based on the "three-fix" policy, requiring an applicant congregation to have a professional religious leader approved by the relevant patriotic association, a fixed meeting point and activities confined to a specific geographic area. Such conditions effectively eliminate significant contributions by lay leaders, critically important in small congregations and in those, which insist on non-hierarchical organization, and severely proscribes recruitment through proselytization. In addition, these regulations specify the need for a regular membership and a legal source of income.

Despite clauses that appear to loosen the ties between religious personnel and sites and patriotic associations, the latter are charged with the task of insuring compliance with the rules. Furthermore, a government-approved religious affairs administrative commission must endorse all registration applications, the opinion of the local people's government or the neighborhood committee must be attached, as well as the views of unspecified "related parties."

To ensure further control, three of eighteen new articles added by the National People's Congress on May 12, 1994, to the January 1987 Regulations Governing Public Order Offenses specifically targeted religious practice. "Carrying out activities under the name of a social organization without registration," "organizing activities of superstitious sects and secret societies to disrupt public order" and "disturbing public order and damaging people's health through religious activities" are subject to criminal charges. When violations are deemed not serious, perpetrators can be held for up to 15 days and fined up to 200 yuan (\$24). "Disturbing social order" and "damaging people's health" are not defined in the Regulations.

"Official" churches too are under constant scrutiny. Controls are exercised over such issues as personnel selection, sermon themes, dissemination of religious publications and congregation size. Those that test the limits of government tolerance, even on matters seemingly outside the purview of religion are subject to arbitrary procedures including the forcible removal of leaders, but their members are rarely subjected to the kind of treatment meted out to "illegal" unofficial groups.

Local authorities use central government regulations to extort money from unofficial church members, to forcibly break up clandestine meetings, to hold worshippers without charge until they can raise exorbitant sums to buy their releases and to orchestrate beatings severe enough to cause death. In late March 1993, 22 year-old Lai Manping died as the result of a beating by security forces in Taoyuan Village, Lijia Township, Xunyang County Shaanxi Province. On January 6, 1994, one day after he was arrested, Zheng Muzheng, an active proselytizer, was beaten to death in a jail in Dongkow County, Hunan Province. Thirteen inmates allegedly administered the beating because Zheng was "disobedient" and "failed to keep up good cleaning work." When family members finally found out he had died—12 days later—they rejected that explanation on the grounds that the wounds were inconsistent with an inmate beating, insisting

instead that prison authorities had at the very least colluded with the prisoners. Zheng's widow's lawsuit against a district police station, the Dogkou Public Security Bureau and three named officers has stalled, and she herself has been repeatedly interrogated and threatened with arrest.

Other members of unofficial churches have had their personal and productive property confiscated or been threatened with the loss of their jobs or been bankrupted by excessive fines. Still others, under constant surveillance or de facto house arrest, are never formally detained or arrested. They are held for a few months, released, picked up again, released again and so on. Some church leaders are intermittently sent on mandatory journeys in order to disrupt their relationships with their followers, some are forced to attend long-lasting "study classes" aimed at conversion to official belief

In the run up to the fifth anniversary of the 1989 crackdown in Beijing, six or seven Christians were detained, among them Gao Feng, a 26-year-old worker The others were held only briefly, but Gao was detained for over a month. Without international intervention, he would have lost his job. Gao's "crimes" reportedly included links to pro-democracy activists the group had invited to prayer and Bible study meetings, contacting foreign journalists, issuing an appeal to believers world wide to help "win the release of our brothers who have been arrested," planning to pray publicly for the souls of those killed in the 1989 crackdown and complaining about the state of democracy and human rights in China.

After Gao's release, he was suspended from work and given the choice of resigning or being fired for absence without leave. Police refused to provide the company with proof that he had been in detention and, in fact, denied that he had been held for more than three days

On June 18, 1992, forty vehicles loaded with armed police and government officials broke up a monthly communion service held by the Jesus Family, an unregistered evangelical Protestant sect, in Duoyigou, Shandong Province. They arrested participants and destroyed a large part of the village, including completely or partially bulldozing six buildings. Sect members were arrested on the spot and again later in the month and in early July, leaving some children without a parent at home. In what appeared to be a deliberate attempt to reduce the group's ability to survive economically, the police also confiscated most of the sect's belongings: furniture, cotton quilts, cooking and eating utensils. They took away the long-haired rabbits the group raised, as well as grain and cobblers' tools. At least 31 of the 61 arrested were sentenced to between one and 12 years in prison on charges of holding illegal religious gatherings, leading a "collective life," disturbing the social order, resisting arrest and beating up police. The latter charge probably referred to the attempt by Jesus Family members to prevent the razing of their church. The majority of those detained were sent to Reeducation Through Labor and wound up working at mining camps. The sect's leader and his sons, arrested a month before the others, were also charged with "swindling" for collective contributions to cover the costs of an annual communal Christmas celebration attended by Jesus Family members, and received the heaviest sentences.

A year later, members who remained free were still being persecuted. Some had money, bicycles and watches confiscated. On one occasion, the village was sealed off and anyone wishing to enter or exit had to pay five yuan. As of August 1994, the church and the site where some members of the Jesus Family had lived and worked communally were still in ruins. Meetings of the sect were forbidden, and members were ordered not to participate in common meals even within a single household. The few who

Government orchestrated the infiltration, subversion and control of all organized faiths, particularly Christianity.¹⁴³ By 1958, its task was completed through the establishment of the Three Self Patriotic Movement (TSPM) among Protestants, and the Catholic Patriotic Association (CPA) among Catholics, both of which were directly controlled by the government's Religious Affairs Bureau, an agent of the Chinese Communist Party.¹⁴⁴ During the Cultural Revolution of the mid-1960's and 70's, however, even these "official religious associations" were banned, thus forcing all religious activity underground and giving rise to the modern, but very illegal house church movement.¹⁴⁵ In 1978, the Communist government reestablished the TSPM and CPA as a means of regaining control of the growing number of non-registered house churches, which by then was reaching the thousands.¹⁴⁶ Despite this government attempt to restrain it, the house church movement is now believed to be the largest evangelical church in the world, serving as many as fifty to eighty million Chinese Christians.¹⁴⁷ The Chinese Government, because it found it could not officially contain them, continues to persecute, imprison, torture and even kill these underground church members as well as other religious believers, including Catholics, Protestants, and Buddhist Tibetans.¹⁴⁸

High-ranking Chinese authorities fervently deny that the underground movement even exists, citing American animosity toward the Chinese as the reason behind the alleged fabrications.¹⁴⁹ The evidence, however, points to a different conclusion. A secret government document titled "Implementation of the Special Class Struggle for the Suppression of the Christian Churches," which lists illegal churches known to the government in the Zhejiang province, was smuggled out of China and is now in the hands of the U.S. Freedom House.¹⁵⁰ In it, the government revealed a plot of mass church destruction: "Eliminate, according to law, the illegal

dared to continue to proselytize—primarily teenagers—were briefly detained and interrogated.

Id.

143. Britsch, *supra* note 136, at 349.

144. *Id.*

145. *Id.* at 350.

146. *Id.*

147. Christian Freedom International, "My Mother, My Dear Mother," at <http://www.christianfreedom.org/frontline/news/Mymothermymother.asp> (last visited Feb. 26, 2000).

148. McCormick, *supra* note 1, at 295.

149. See CHINA DAILY, *supra* note 19.

150. *The Real Story About China's Christians*, The First Freedom (Center for Religious Freedom, Washington, D.C.), October 1997, at 1, 2.

religious meeting points. With great determination, suppress illegal activities [D]eterminedly suppress and eliminate the large-scale illegal meetings, both Catholic and Protestant.”¹⁵¹ The document also details government plans to “list the underground Catholic bishops, priests and Protestant self-ordained ministers . . . and implement measures of investigation and indictment.”¹⁵² Despite the Communist regime’s superficial claims that they support religious freedom, this policy paper demonstrates the true aims of the Chinese government toward the unofficial and as yet uncontrolled church by advocating harsh, destructive government action to uphold the primacy of the state-approved associations.

China does, however, know its enemies well. In regard to Catholicism, the same paper reads, “The Vatican will try to take advantage of the normalization of relations between China and the Vatican to deny the right of independence, sovereignty and autonomy in the [state-approved] church and work to regain the power of the Catholic Church in China.”¹⁵³ Recognizing the Catholic threat, the paper further revealed that those who refuse to cooperate within the official religious boundaries and thus fall short of full compliance with the state-approved church would be sentenced to serve time in re-education at labor camps.¹⁵⁴

According to U.S. sources, this document mirrors the current reality of Chinese religious persecution. In 1997, the same year Beijing announced it would sign the ICCPR, the *Washington Post* reported¹⁵⁵ that at least seven Catholic bishops were imprisoned, forty percent of inmates in Henan labor camps were being punished for their allegiance to the underground church, four house church Christians were beaten to death, a Catholic shrine at Dong-Lu was destroyed, hundreds of house churches had been reported desecrated, shut down or destroyed, and raids and arrests were taking place continuously.¹⁵⁶

D. Current U.S. Diplomatic Efforts in China

Many U.S. officials take these reports very seriously. In certain individual cases of international concern, U.S. ambassadors have become personally involved. For example,

151. *Id.*

152. *Id.*

153. ASSOCIATED PRESS, *Beijing plans breakup of Catholic Church*, SOUTH CHINA MORNING POST, Nov. 10, 1999, <http://www.scmp.com/News/China/Article/FullText.asp?ArticleID=1999110150343300>.asp. The article discussed a paper by the Chinese Communist Party’s policy-setting Central Committee. *Id.*

154. *Id.*

155. WASHINGTON POST, Apr. 9, 1997, at A22.

156. *The Real Story About China’s Christians*, *supra* note 150, at 2.

when Bishop Su disappeared in late 1997, the U.S. ambassador to China began what continues to be a long-term mission campaign to determine his whereabouts.¹⁵⁷ According to reports, these diplomatic efforts were soon met by an unresponsive, uncooperative Chinese authority structure:

When [the Bishop] disappeared, the [U.S.] Embassy immediately began efforts to ascertain his status and whereabouts, requesting information from Chinese officials in Beijing and Hebei province. Chinese officials claimed that the Bishop was free but rejected embassy requests to see him. Over the next year and one-half, there were conflicting reports about Bishop Su's status, and the Embassy continued to press his case. Embassy officers also regularly raised with Chinese officials the cases of other religious prisoners and reports of religious persecution . . . ¹⁵⁸

In addition, the Clinton Administration also pled Bishop Su's case on two very public occasions. The first occurred when President Clinton secured agreement from President Jiang Zheming of China at their October 1997 summit that a delegation of U.S. religious leaders could travel to China to initiate a dialogue on religious freedom.¹⁵⁹ In July 1998, Bishop Su's case was again raised during the President's state visit to China and by Secretary of State Albright in her meetings with senior Chinese officials.¹⁶⁰ Despite these honorable diplomatic efforts, however, the Bishop remains a missing person.¹⁶¹ While the U.S. Embassies in several countries have implemented actions in response to

157. *Executive Summary, supra* note 123.

158. *Id.* These "other cases" included Pastor Xu Yongze, the boy recognized by the Dalai Lama as the 11th Panchen Lama, Abbot Chadrel Rimpoche, Tibetan monks and nuns reported to have been beaten in prison, and Pastor Li Dexian. *Id.* Embassy efforts have been effective elsewhere, however. *See id.* In Egypt, for example, the U.S. Embassy's "expression of interest" led to the release and lifting of travel restrictions for two Muslim converts to Christianity. *Id.*

159. In response to the Chinese Government's invitation but wary that the Chinese may try to "exploit it for propaganda," President Clinton sent an appointed team of clergymen to China to continue dialogue. CNN Interactive, *U.S. clergymen seek religious dialogue with China* (February 11, 1998), <http://www.cnn.com/WORLD/9802/11/china.religion/>. The team included Roman Catholic Archbishop Theodore McCarrick, Rabbi Arthur Schneier of New York, and Reverend Don Argue, President of the National Association of Evangelicals. *Id.* Argue noted that "we are willing to take the risk (of being used for propaganda purposes) to open dialogue and have the opportunity to advance our mission." *Id.* The team was involved in meetings prearranged by the Chinese, and were allowed only to meet with members of state-approved "patriotic" religious organizations. *Id.*

160. *Executive Summary, supra* note 123.

161. Arguably, then, such efforts have done little in regard to promoting the U.S. goal of international accountability and rescuing the persecuted.

violations such as formal demarches¹⁶² and even sanctions,¹⁶³ a glaring lack of any similar action has been taken by the Clinton Administration with respect to more economically viable countries like China and its strategic counterpart, Russia.¹⁶⁴

The presence of the new Commission on International Religious Freedom has initiated a renewed and more focused diplomatic effort that promises to yield better results than those previously obtained. During the Commission's first year, Ambassador Seiple and his staff have visited China, Indonesia, Uzbekistan, Egypt, Saudi Arabia, Israel, Kazakhstan, Russia, Laos, Vietnam, Belgium, Austria, Germany, and France¹⁶⁵ for the sole purpose of explaining the IRFA's international implications and promoting religious freedom. To ease foreign fears of unilateral U.S. action in their meetings, the Commission members emphasize the importance of religious liberty in the American experience but also note that the IRFA relies on international norms of religious freedom as the standards to which all countries, including the United States, must be held accountable.¹⁶⁶ The Commission has also already made substantial progress in determining the whereabouts of prominent religious prisoners like Bishop Su and Catholic priest Li Qinghua.¹⁶⁷

162. *Id.* The report described embassy efforts in Minsk and Rangoon as those utilizing formal demarches to raise attention to the human rights concerns there. *Id.*

163. *Id.* "The U.S. Government has supported annual resolutions by U.N. bodies criticizing Burma's lack of respect for human rights and religious freedom and has imposed comprehensive sanctions." *Id.*

164. In fact, the Administration's glowing support of PNTR status for China demonstrates just the opposite: not only in the U.S. government not utilizing its sanctioning power against China for its continued human rights abuses, but in essence is rewarding Chinese persecution with open trade. President Clinton signed H.R. 4444, the bill granting China PNTR status, into law on Oct. 10, 2000. For the fact sheet on this signing and other related U.S.-China information, see *The United States and China* website from the Department of State International Information Program at <http://usinfo.state.gov/regional/ea/uschina>.

165. *Id.*

166. *Id.*

167. *Id.* During a January 1999 visit to China, Seiple reportedly requested that an embassy official or an independent third party be permitted to visit Bishop Su and Father Li. Human Rights Watch World Report 2000, China and Tibet, <http://www.hrw.org/wr2k/Asia-03> (last visited Sept. 6, 2000). Although to date the Chinese Government has not responded positively to these requests, it had expressed willingness to continue discussing and negotiating the matter with the Ambassador; this dialogue, unfortunately, was suspended in aftermath of the NATO bombing of the Belgrade-based Chinese embassy in May, 1999. *Id.*

V. WHAT THE U.S. SHOULD DO TO PROMOTE RELIGIOUS RIGHTS
WITHOUT DAMAGING ITS INTERNATIONAL REPUTATION

"The United States acknowledges and accepts its responsibility to meet [the IRFA's] standards in the safeguarding and protection of religious liberty."¹⁶⁸ In other words, Congress has decided to unilaterally champion the cause of the human spirit, and it can voluntarily assume such a burden without creating a state-endorsed hierarchy of human rights. Strict enforcement of legislation that ignores the complex corollary issues surrounding religious freedom would be largely ineffective and dangerous. Although unprecedented in this particular area of human rights, an individual state can, however, voluntarily and effectively use its power to promote international acknowledgment of these basic human dignities.

A. *Not Hierarchy, But Equality*

One of the most popular criticisms of the IRFA is that through it the United States is discriminating among human rights.¹⁶⁹ In other words, is the United States really setting apart religious freedom as more important than other human rights, thus creating the "hierarchy of rights" described by concerned critics? Absolutely not. While it is certainly true that states cannot act to protect human rights without recognizing that they act within the context of an international effort, this does not necessarily imply that current U.S. actions constitute a state-created hierarchy at all, let alone one with serious negative implications for the protection of human rights on an international level.

It is first significant to note that if anything, religious freedom until now has been at worst, ignored and at best, neglected as a legitimate international human rights issue. Despite the clear affirmation of the free exercise of religion in the Universal Declaration of Human Rights, the United Nations has since issued only a declaration on freedom of religion¹⁷⁰ but not a covenant on religious liberty, which is substantially less than the United Nations has done on other major human rights issues

168. Executive Summary, *supra* note 123.

169. See Wuerffel, *supra* note 41, at 392.

170. *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1982).

such as the covenants on race¹⁷¹ and the rights of women¹⁷² and children.¹⁷³ Yet despite this glaring irregularity, the present legislative campaign against religious persecution is being called "special pleading" in foreign policy circles and is criticized domestically for creating a hierarchy of rights that would downgrade political and racial persecution. Despite charges of favoritism coming at them from all sides, those in charge of the refinement and implementation of religious freedom foresee that there is little chance that a sufficient number of nations would ever ratify a treaty or covenant on religious freedom that would eventually become customary international law.¹⁷⁴

These criticisms are both strange and misplaced. First, the problem remains that the only real international consensus concerning human rights lies in the language of the Declaration. Perhaps, such legislation as the IRFA, *if* drafted and adopted by the United Nations itself as a means of addressing the problem of international religious persecution rather than by the United States, would properly be cited as discriminating among rights and thus undermining the spirit of the Declaration. Second, all human rights campaigns are "particular pleadings" for foreign policy purposes, as they tend to focus on specific causes. The United States has several task forces on various human rights issues. From gender to race, it seems that many human rights have already reserved a special place in U.S. foreign policy. For example, Human Rights Watch has special initiatives in place on drugs and human rights. Amnesty International focuses on prisoners of conscience and the death penalty on an international level. When Secretary of State Madeline Albright recently expanded international labor rights coverage, there was no similar outcry that the United States was overstepping its boundaries.¹⁷⁵

The United States need not be penalized for taking advantage of its position as a global leader to promote change in all areas of human rights abuses, including religious persecution. As awareness of atrocities increases, "religious human rights deserve more than to remain a *neglected* chapter in the universal

171. *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195.

172. *Convention on the Political Rights of Women*, opened for signature Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135.

173. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989).

174. Robert F. Drinan, S.J., *The Convergence of the First Amendment and Vatican II on Religious Freedom*, 97 MICH. L. REV. 1948, 1950 (1999).

175. Marshall, *supra* note 28.

endeavors to ensure observance of and respect for human rights."¹⁷⁶

Inserting freedom of religion into the mix does not set it higher than these other rights. On the contrary, its inclusion assures that the United States will take a more comprehensive approach to international human rights leadership and policy. As explained by Shattuck: "There will be no sponsorship or endorsement of any religion or of, indeed, religion as such. The United States... is [simply] looking at an issue of basic human rights, very similar to other human rights areas that we have looked at."¹⁷⁷ Because that is all the United States is seeking to do, it should be supported rather than reprimanded for its effort thus far.

B. Appropriate U.S. Enforcement of the IRFA

Assuming its involvement is legitimate, then, how should the United States enforce the provisions of the IRFA, if at all? In the recent past, the Clinton Administration appears only to have been paying lip service to the Act's most serious provisions. On Religious Freedom Day in 1997, President Clinton stated: "America's commitment to religious tolerance has empowered us to achieve an atmosphere of understanding, trust, and respect in a society of diverse cultures and religious traditions. Today, much of the world still looks to the United States as the champion of religious liberty."¹⁷⁸ Unfortunately, these superficial political claims accomplish little in the face of continuing persecution such as arrests, beatings and floggings, starvation, slavery, imprisonment, amputation, beheading, hanging and executions.¹⁷⁹

China is a perfect example, however, of why a very strict enforcement of the IRFA which matches "this" violation to "that" corresponding penalty would likely be a harsh and ill-advised move on the part of the United States. The U.S. government would have a hard enough time enforcing it domestically, let alone on a worldwide scale, even though mistakes could be more easily corrected and outliers brought to heel within the States. In

176. Nathan Lerner, *Religious Human Rights Under the United Nations*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES* 79, 134 (Johan D. van der Vyver & John Witte, Jr. eds., 1996) (emphasis added).

177. On-the-Record Briefing by John Shattuck, Assistant Secretary of State for Democracy, Human Rights, and Labor, On Report on "U.S. Policies in Support of Religious Freedom: Focus on Christians," Washington, D.C., July 22, 1997, http://www.state.gov/www/policy_remarks/970722.shattuck.html.

178. Shattuck, *supra* note 59.

179. McCormick, *supra* note 1, at 320.

contrast, foreign relations law by definition involves the presence of third parties¹⁸⁰ who are not within our direct control and are thus almost impossible to oversee.¹⁸¹ In addition to the aforementioned enforcement problems for individual nation offenders, there is also evolving in the present age a much greater obstacle to the IRFA: a secularism that so permeates Western culture that many will begin to deny that the free exercise of religion is a value that deserves any particular attention at all.¹⁸²

So how can the United States implement the spirit and purpose of the IRFA on an international scale without running headfirst into these problems? Since 1997, efforts of the United States to incorporate religious freedom into foreign policy have been focused almost exclusively at a formal diplomatic level.¹⁸³ According to State Department documents, public U.S. actions concerning religious freedom currently include the following:

- (1) The President and Secretary have publicly instructed all U.S. agencies and embassies to treat religious freedom as a priority issue;
- (2) U.S. Government officials at all levels have raised religious freedom issues with foreign leaders and representatives in meetings;
- (3) The Secretary has instructed all U.S. diplomatic posts to treat religious freedom as a priority;
- (4) The State Department annually reports on the worldwide status of religious freedom in a special section of its Human Rights Report;

180. "Third parties" in this context refers to other nation-states.

181. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999). Sensing this problem, Spiro takes a quite different approach: he explores whether individual U.S. states—"insofar as they are recognized as autonomous players in global politics within their independent spheres of authority . . . and are subject to the discipline of a globalized international economy"—should be allowed to develop their own foreign policy as it suits them so long as their subfederal action does not disrupt national foreign relations. *Id.* at 1225, 1247.

182. Dinan, *supra* note 173, at 1955.

183. Secretary of State Madeline K. Albright, Remarks before Public Meeting of the Secretary's Advisory Committee on Religious Freedom Abroad, Washington, D.C., Feb. 13, 1997, http://www.state.gov/www/global/human_rights/970213_acrfa_mtg_summ.html. As Albright has emphatically stated: "The issue of religious freedom belongs squarely in any comprehensive discussions that we should be having and are having about American foreign policy." *Id.* Since the official passage of H.R. 4444 on October 10, 2000, non-economic *diplomatic* efforts perhaps may be the *sole* option available to the U.S. government officials. In passing H.R. 4444, the Senate overwhelmingly rejected (83-15) an amendment that would have conditioned PNTR on Chinese improvement in human rights, thus effectively removing the use of trade privileges as leverage in the human rights debate. See U.S. Dept. of State website, *International Information Programs* at <http://usinfo.state.gov/regional/ea/uschina>.

- (5) The President, Vice-President and Secretary have met with international religious leaders such as the Pope and the Dalai Lama;¹⁸⁴
- (6) The President and Secretary have created what is now known as the Commission on International Religious Freedom;
- (7) The U.S. Government has utilized “multilateral fora to speak forcefully and shape international policy in support of religious freedom and in response to violations;”
- (8) The Administration has appropriated funds from the foreign assistance budget to support religious liberty and tolerance programs;
- (9) The Administration has supported “religious reconciliation and interfaith cooperation” in war-torn nations;
- (10) The Administration broadcasts internationally programs advocating religious freedom;
- (11) The Administration promotes “Model Business Principles among U.S. businesses to underscore that human rights and religious freedom, on the one hand, and economic development on the other, are complementary, not contradictory, and that a good human rights environment supports and promotes a good business environment.”¹⁸⁵
- (12) The Administration “applaud[s] the critical efforts of . . . religious groups in shining a spotlight on abuses wherever they occur;” and
- (13) President Clinton’s asylum initiatives grant special consideration to those seeking refuge from religious persecution.¹⁸⁶

Is this enough, or is it even the proper approach to effectuating the IRFA? Many critics of current U.S. policy argue that China’s horrifying record of religious and human rights should not have merited greater economic rewards in the form of more trade rights, especially admittance to the WTO. They claim that the more the human right situation deteriorates in China, the last

184. In response to an accusation that the United States was basically paying lip-service to religious rights while really doing nothing to effectively combat persecution, Shattuck gave the following response:

Q—“A number of your critics would say a report is all well and good, but this Administration’s actions have been sort of tepid notwithstanding your . . . points. For example, the President did meet with the Dalai Lama, but it was a drop-by; it wasn’t an official visit. He hasn’t really pressed those kinds of things” A—“Well, I think there has been no Administration that has focused more on this topic than the Clinton Administration. The new emphasis that it’s receiving in the second administration and the fact that the President, this President, the Secretary of State are meeting with religious leaders such as the Dalai Lama is one element of that focus.”

Shattuck, *supra* note 59.

185. Shattuck, *supra* note 59. In 1997, the State Department awarded John Kamm, the President of Asia Pacific Resources, with the Best Global Practices Award for his company’s “efforts to obtain the release of individuals detained and imprisoned by Chinese authorities for exercising their right to free expression and freedom of religion.” *Id.*

186. *Id.*

and worst thing the United States should have supported is a decision that gives China such vast economic rewards.¹⁸⁷

Noting the most recent U.S. State Department Human Rights Report, foreign policy analyst Darren Logan is one of those critics. He argued that the United States must wait until reform is visible in China before seriously considering supporting China's bid to join the WTO.¹⁸⁸ Bill Saunders, human rights counsel for a domestic politico-religious organization, observed:

The Chinese government is increasingly guilty of religious persecution, forced abortions, and victimization of political dissidents and ethnic minorities—so why would we reward the government with economic security and open trading? If we give China membership in to the WTO, we lose future leverage in fighting injustice in China and we effectively undermine the cause of democracy and freedom around the world.¹⁸⁹

These are legitimate concerns and have been echoed in the recent legislative debates on issues involving trade rights, nonproliferation treaties, and religious freedoms.¹⁹⁰ Although many feel that the best U.S. approach to effectuating the IRFA would be to keep open trade relations with China (called a "constructive engagement"¹⁹¹ approach), others emphatically disagree. Clinton's policy of toleration and engagement when it comes to China and the annual approval of "normal trade relations" status have indeed not remedied the incidents of persecution. On the contrary, arguably such a hands-off approach has only moved China closer to absolute despotism. Why is that? "Engaging" China has been ineffective because China is vast, isolated, and quite able to hide its abuses. To effectively address the Chinese human rights situation, critics claim the United States must adopt a more assertive strategy than simple engagement. Otherwise, the Chinese government will

187. Press Release, Family Research Council, *China's Record of Wrongs Should Not Merit More Trade Rights* (Nov. 18, 1999) (on file with the Vanderbilt Journal of Transnational Law). Unfortunately, despite heated Congressional debate over the role played by human rights issues in the PNTR decision, the Senate heard and rejected those amendments that would have joined the two issues. To view transcripts of these recent debates, see <http://usinfo.state.gov/regional/ea/uschina>.

188. *Id.*

189. *Id.*

190. Most of the recent debates have revolved around H.R. 4444, a bill that would grant China PNTR status. U.S. Dept. of State website, U.S. official Policy Materials on U.S.—China Relations, <http://lists.state.gov/archives/US-China.html>.

191. The general belief of constructive engagement is that the more the United States engages in trade, the more America is able to export First Amendment ideals along with the goods. McCormick, *supra* note 1, at 297.

simply continue to ignore U.S. and internationally-held human rights concerns.¹⁹²

The immediate response many of these critics support is to impose the sanctions that are provided for in the IRFA.¹⁹³ Recently, the United States has effectively used sanctions and executive orders in response to India and Pakistan's violations of the Nuclear Proliferation Prevention Act of 1994¹⁹⁴ and to retaliate against the Republics of Serbia and Montenegro for continuing to repress ethnic Albanians in Kosovo.¹⁹⁵ In response to Castro's persecution of the Cuban community, the United States has now maintained a trade embargo against Cuba for forty years to pressure Castro to improve his policies.¹⁹⁶

Despite the above successes, an underlying level of fear still pervades the Administration's feeble confrontation efforts thus far in the Far East. China is one of the greatest suppliers of dangerous weapons to America's sworn enemies and is currently

192. *Id.* In fact, China will now have no economic incentive to do so. The United States has now—through the passage of PNTR for China—made it nearly impossible to utilize trade leverage to encourage Chinese reform in the area of religious human rights.

193. *See, e.g.*, U.S. Dept. of State website, *supra* note 189. U.S. Representative Chris Smith is one of Congress' most outspoken advocates on this issue, arguing that Clinton's strategy of constructive engagement has "brought the people of China 6 more years of torture, forced labor, forced abortion, and sterilization, the crushing of the free trade unions, the denial of fundamental rights of freedom of religion, of expression, of assembly, and of the press When the U.S. turns up the economic pressure of Beijing, the beatings and the torture are less severe and are imposed on fewer people. When the pressure lets up, the repression gets worse." *Rep. Chris Smith Decries Persecution in China*, July 19, 2000, at Dept. of State website, *supra* note 189.

194. William M. McGlone & Timothy P. Trenkle, *Economic Sanctions and Export Controls*, 33 INT'L LAW. 257, 258 (1999). The authors stated:

In response to a series of nuclear weapons tests by India and then Pakistan in May, President Clinton imposed statutorily-mandated sanctions under the Nuclear Proliferation Prevention Act of 1994 (NPPA) . . . [which] mandates a menu of sanctions against any 'non-nuclear' state that 'detonate[s] a nuclear explosive device Almost immediately following India's surprise nuclear tests, President Clinton issued a determination that India had 'detonated a nuclear explosive device on May 11, 1998,' and he directed the relevant government agencies to impose sanctions under the NPPA. The President issued a similar determination with respect to Pakistan shortly after its detonation of a nuclear device on May 28, 1998.

Id.

195. *Id.* at 261. The executive order blocked Yugoslavian property and prohibited new investment in Serbia, paralleling European Union's investment ban on Yugoslavia. *Id.*

196. *Foreign Policy: Governor George Ryan of Illinois Visits Cuba*, Current Focus on American Government, http://www/currentlinks.org/featured_current/index.html (last visited Feb. 26, 2000).

conducting the world's largest build-up of arms. These destructive activities are indirectly supported by the growing U.S. trade deficit with China, which presently is in excess of fifty billion dollars and is expected to grow to more than sixty billion in 1999.¹⁹⁷ China's goal is to be just as powerful, if not more so, than the United States.¹⁹⁸ Perhaps it is well on its way, especially considering its recent military and political partnerships with Russia.¹⁹⁹ Meanwhile, as the United States weakly engages, Chinese abuses grow in frequency and strength.²⁰⁰ They want the United States to stay out of what they consider to be solely internal concerns.²⁰¹

Despite logical reservations about the effectiveness of any particular remedy for China's violations of religious freedom, some kind of action must occur in response to such open hostility to human life and dignity irregardless of any purely economic concerns the United States might have. As Ambassador Seiple noted, "you have a human right that's universal and that

197. *Morality in Foreign Policy*, Frequently Asked Questions section of the Family Research Council website, at <http://www.frc.org/faq/faq9.html> (last visited Sept. 8, 2000).

198. Jim Garamone, *DOD Report Examines China's Military Goals*, AMERICAN FORCES PRESS SERVICE, Dec. 3, 1998. China currently holds classified design information on American nuclear warheads and guidance technologies and has nurtured a budding relationship with Russia since the U.S. Serbian raids. *Id.* A 1999 Pentagon report states that China's ultimate goal is "parity in economic, political and military strength with the world's leading powers by the middle of the next century," so it is not surprising that the corroboration of the two powers would be of concern to the U.S. Administration. Saunders, *supra* note 24. William Saunders is foreign policy and human rights counsel to the Family Research Council. *Id.*

199. Colonel Robert Maginnis, *1999 Update on Chinese Security Threat*, Military Readiness Project, Family Research Council website, <http://www.frc.gov/mil/mp99g1df.html> (last visited Sept. 8, 2000) (on file with Vanderbilt Journal of Transnational Law). China and Russia are a dangerous combination: both countries perceive the U.S. as an enemy, and currently perform simulated missile firings against U.S. troops in South Korea, Okinawa and mainland Japan; China also regularly visits Russian Pacific Fleet exercises to train against U.S. attacks on the Russian coastline. In the words of Russia's Security Council and federal security service director Vladimir Putin: "In the light of the rapidly changing situation in the world, relations between Russia and China have assumed strategic nature." 990609 China/Russia, STATFOR NEWS ARCHIVE: China, June 9, 1999. See *id.* Maginnis is Family Research Council's senior director, national security and foreign affairs. *Id.*

200. *Rep. Chris Smith Decries Persecution in China*, *supra* note 193.

201. The Xinhua News Agency published a statement asserting that the United States "persists in playing power politics" even though "religious affairs should not be interfered with by other countries"; "[t]he United States has no right to criticize China's religious affairs, and the act of imposing sanctions against China according to U.S. domestic law is a violation of international laws." Xinhua General News Service, December 11, 1999 (on file with Vanderbilt Journal of Transnational Law).

transcends nation-state, that transcends borders. You have this concept of neutral accountability in the international covenants that China has signed.”²⁰² Many foreign skeptics will also be watching the U.S. response to Chinese atrocities, seeing if we take this opportunity to go easy on our economic allies while bullying militarily and economically weaker countries, for example, punishing Sudan while Saudi Arabia, Israel and China get nothing more than a slap on the wrist.²⁰³

C. *The IRFA Not as Mere Legislation, But as Mobilizing Declaration*

Considering the above, the IRFA’s strongest use may be as a mobilizing declaration of intent. Just as the United Nations declared its commitments over fifty years ago, so now does the United States individually declare its own allegiance to the cause of human dignity. Strong diplomatic foreign policy at all levels of government is perhaps the most important and influential means available to America to effectively pressure other regimes to comply with human rights standards.²⁰⁴ If utilized properly, the IRFA can add strength and support to various grassroots and non-governmental entities already acting to champion the cause of religious freedom, as it has done already.

Several alternatives to strict official enforcement, such as involvement of secular and religious organizations, letter-writing campaigns, etc., find support in the IRFA’s language of responsibility and cooperation. These foreign policy tools include public and private diplomacy, several forms of aid,²⁰⁵ or trade sanctions such as tariffs, quotas, “normal trade relations” status, direct-investment controls, limits on transfer of technology, boycotts and embargoes.²⁰⁶ Positive changes within the United States can promote change internationally as well. Examples include restrictions on benefits from international financial institutions, indoctrination via dissemination of information over the Internet, internal business practices, and the granting of asylum to persecuted individuals.²⁰⁷

202. Seiple, *supra* note 117.

203. Lieblich, *supra* note 132 (quoting Abdullahi Ahmed An-Na’im, Emory University law professor).

204. McCormick, *supra* note 1, at 315-16.

205. This includes humanitarian, economic, infrastructure and military aid.

206. Through international organizations such as the United Nations, the Organization for Security and Cooperation in Europe and the International Courts of Justice or through treaties such as GATT, NAFTA, Maastricht, or NATO, the U.S. can also influence the remedial decisions of offending nations. *Id.* at 316.

207. *Id.* at 316-17.

Some suggest that a more individualized grassroots approach would be the most effective approach. Several political and non-political groups have already taken this suggestion to heart. The Religious Prisoners Task Force, for example, is run by a small contingent of bipartisan Congressmen and organizes letter-writing campaigns on behalf of international religious prisoners.²⁰⁸ Christian Freedom International frequently advocates similar letter-writing to its website visitors.²⁰⁹ Many in the international legal community also endorse a voluntary fund sponsored by several U.N. member nations which would establish within the United Nations itself an enforcement body much like the current U.S. Commission, but with the neutrality that other U.N. member nations feel is lacking in a unilateral U.S. effort.²¹⁰

Above all else, the United States needs to act decisively according to the commands of the IRFA to combat the religious persecution that is increasingly prevalent in many areas of the world. In order to avoid overstepping their boundaries as a member as opposed to a preeminent self-proclaimed despotic leader of the international community, it should also seek international consensus on the definitions contained in the IRFA.

In regard to the appropriateness of sanctions, because "lesser" forms of persecution do not dangerously threaten the lives or livelihoods of religious minorities and are often incidental by-products of a foreign nation's establishment of religion,²¹¹ the United States should hesitate to utilize sanctions in those cases. Otherwise, it runs the risk of becoming a sort of "moral police" for

208. O'Keefe, *supra* note 31.

209. *Persecuted Christians in the People's Republic of China*, *supra* note 15. Efforts such as these demonstrate that this advocacy work should not simply be left to secular human rights organizations, arguing that although objectivity is required to take a rational and neutral approach to combating violations, secular organizations are often insensitive toward such persecution. Johan van der Vyver disagrees, however, saying that even those nations who establish a national religion necessarily violate religious human rights: "[T]he human rights paradigm is concerned with protecting the minority against the majority States upholding a particular religious commitment often claim to be tolerant toward other religions, but the notion of toleration in itself reflects a condescending attitude." An-Na'im, *supra* note 49, at 987.

210. An-Na'im, *supra* note 49, at 980. Although it would seem an "incredibly complicated task to get some 185 countries around the world, with their own religious and cultural traditions, to come together and collaborate in applying this universal concept [of religious freedom] in their respective situations," this idea is gathering followers. *Id.*

211. Johan van der Vyver disagrees, saying that even those nations who establish a national religion necessarily violate religious human rights: "[T]he human rights paradigm is concerned with protecting the minority against the majority States upholding a particular religious commitment often claim to be tolerant toward other religions, but the notion of toleration in itself reflects a condescending attitude." *Id.* at 987.

the world. If it did so, the United States would be attempting to recreate the world into its own image, proclaiming its beliefs to be the best, as well as the only, standard by which the rest of the world must abide. That it *must* not do. The United States is not the only member of the international community, but is merely a participant, albeit an influential and powerful one. It should act like one in order to gain acceptance and support from the rest of the international community.²¹²

The United States should confine its serious official actions such as sanctions to counter only the worst instances of persecution which fall into the "severe violations" category of the IRFA as it is amended to reflect international, rather than simply nationalistic, concerns. In response to such severe violations, however, the Administration should not hesitate to act swiftly and harshly. People of faith are dying every day, and the United States can and should use its power and influence to help preserve human dignity around the globe.

D. Conclusion

Ambassador Seiple asserted, "We should never apologize for human rights being part of our foreign policy, part of our national interest, and being on the table in any bilateral relationship."²¹³ The International Religious Freedom Act of 1998 should not be used as a purely punitive instrument. Instead, it should be envisioned and utilized as an international act with international implications, on an equal basis with economic and trade concerns. Instead of tabling such life and death issues to focus on economic questions and thus choosing money over morals, the United States should have incorporated its concerns about China's human rights abuses when it determined whether to support China's admission to the WTO. Now that such an opportunity has passed, the United States should investigate other means to fervently seek significant worldwide consensus on the need to promote religious human rights just as it has in the past taken the lead in advocating women's, children's and race-based rights. By doing so, it will bring religious freedom to the same level as these other important human rights and will take a stand for Bishop Su, his comrades, and for human dignity not only in China, but throughout the globe.

212. *Id.* at 1017-18. Comments of Rosalind Hackett: "The need for the widest possible consensus is not inherent in the nature of the human rights paradigm as a collaborative global effort, it is a prerequisite for the effective implementation of these standards." *Id.*

213. Seiple, *supra* note 117.

Harold Hongju Koh, the Assistant Secretary of State for Democracy, Human Rights, and Labor perhaps said it best. "When we promote religious freedom, we promote all human rights."²¹⁴

Nichol Jeannette Starr

214. From Assistant Secretary Koh's comments at a special State Department briefing in September, 1999. Radio Free Europe, *World: Religious Freedom Lacking Around Globe*, <http://www.rferl.org/nca/features/1999/09.F.RU.990910125436.html> (last visited Sept. 8, 2000).