Norms and National Security: The WTO as a Catalyst for Inquiry

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Norms and National Security:  
The WTO as a Catalyst for Inquiry  
Ryan Goodman*

I. INTRODUCTION

Multilateral treaties often include a national security exception as an opt-out mechanism for a state party to free itself of constraints otherwise imposed by the agreement. The standard view is that such "escape clauses" allow states to elevate their security interests above international commitments and, thereby, evade international obligations. A state's invocation of such a provision is, therefore, generally viewed as a retreat from compliance with international norms. The standard account goes like this:

National security is the Achilles' heel of international law. Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. The right of any nation-state to protect itself in times of serious crisis by employing otherwise unavailable means has been a bedrock feature of the international legal system. As long as the notion of sovereignty exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.¹

Recent US practice before the World Trade Organization ("WTO") appears to confirm this view. The General Agreement on Tariffs and Trade ("GATT") effectively restricts a state's ability to enact unilateral economic sanctions, unless the action fits within an enumerated exception. Article XXI provides one of those exceptions; it stipulates that a state can opt out of GATT requirements for actions taken to protect "essential security interests." ² The United States has invoked this

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2. Article XXI provides:

Security Exceptions
Nothing in this Agreement shall be construed
provision on two occasions—to defend the Helms-Burton secondary boycott against Cuba and the Massachusetts selective purchasing law against Burma. The United States argued, in part, that these measures served its security interests because they responded directly to human rights violations committed by the respective regimes. Many commentators view this position as another instance of US resistance to, and the breakdown of, international legal norms.

In this brief essay, I argue that, in principle, the United States' position involves a wholly legitimate definition of "security interests" and that the US stance, rather than representing a retreat from international legal norms, reflects and contributes to them. In making this claim, I rely on the legal and social history following World War II that has integrated into the concept of security interests a concern for human rights conditions in other countries. Based on this history, I submit that the US invocation of the particular defense—that another state's severe mistreatment of its citizens threatens US security interests—accords with emergent international norms. Of course, the US taking this position before the WTO may diminish compliance with international trading obligations. However, the dimension that I explore here—consistency with and furtherance of robust international norms of security—should be taken into account in rendering any broad assessment of the relationship between the US actions and international norms. Indeed, I use the opportunity of this essay to suggest a few implications this particular dimension has for understanding the construction and operation of international norms more generally.

3. As this description of my argument suggests, I adopt a constructivist approach in carrying out this analysis. By saying that, I mean to invoke sociological works such as Martha Finnemore’s and Alexander Wendt’s. Finnemore provides a useful description of the constructivist perspective:

State interests are defined in the context of internationally held norms and understandings about what is good and appropriate. That normative context influences the behavior of decisionmakers and of mass publics who may choose and constrain those decisionmakers. The normative context also changes over time, and as internationally
While the WTO controversy mainly provides the occasion for starting such a discussion, it is also important to analyze the discussion's particular importance for the WTO. Let me first address some of those issues before examining the broader theme of normative constructions of security and human rights.

II. SIGNIFICANCE FOR THE WTO

My analysis of the normative scope of security interests is relevant to a number of international agreements, but it has special significance for the WTO. First, many were concerned that the US government's recent invocations of the national security exception tore at the fabric of the WTO. A number of states, policymakers, and scholars criticized the United States on the ground that its proffered concerns exceeded the definition of security interests. Some commentators even suggested that the US argument was not exercised in good faith. Whether the stance taken by the United States is a fair invocation of the national security exception is, therefore, an especially timely and intense topic of concern to the WTO. This essay helps resolve one element of that debate.

Second, although a US appearance before a WTO panel was avoided on these two previous occasions, the issue can be expected to return. Over the last several decades, the United States has often resorted to unilateral human rights sanctions, and it can be expected to do so again. We should accordingly anticipate not only

held norms and values change, they create coordinated shifts in state interests and behavior across the system.

Martha Finnemore, National Interests in International Society 2 (Cornell 1996). See also id at 3 (attributing influence of sociology to development of this area of scholarship); Alexander Wendt, Social Theory of International Politics 1 (Cambridge 1999) ("The version of constructivism that I defend is a moderate one that draws especially on structurationist and symbolic interactionist sociology. As such it concedes important points to materialist and individualistic perspectives.").


6. In the Helms-Burton case, President Clinton brokeder a political deal with allies in return for their suspending the WTO complaint. In the Burma case, the WTO complaint was rendered moot by an intervening US Supreme Court decision, which invalidated the legislation.

7. Admittedly, the present Administration will likely scale back the use of sanctions, as indicated by Secretary of State Colin Powell's nomination hearings. George Gedda, Powell Wants Time Out on Sanctions, 2001 WL 11948187 (Jan 31, 2001). This, however, does not mean the elimination of sanctions as a foreign policy tool in all circumstances. Id ("As for Cuba, Powell said . . . It is President Bush's intention to keep the sanctions in place."). Nor does it control for the inclinations of Congress or future Administrations.
another dispute on this issue arising, but the possibility of one eventually coming before a WTO panel.

Third, the scope of the security exception is important to US lawmakers in determining the range of permissible actions under GATT. Consider the recent deliberations over Permanent Normal Trade Relations for China. During the congressional debates, many expressed concern that China's admission to the WTO would cripple the US government's ability to enact trade sanctions in response to human rights violations committed by the People's Republic of China. The general assumption was that GATT eliminated this option.

Fourth, recent decisions by dispute settlement bodies have narrowed the scope of exceptions under Article XX, thus forcing the United States to depend more heavily on Article XXI's security exception in future cases. In 1998, the Appellate Body of the WTO held that Article XX's nondiscrimination clause requires trade measures to include transparent and predictable procedures, least restrictive alternatives, and safeguards against overinclusive application. Earlier panel decisions, which invalidated US measures dealing with dolphin-safe tuna harvesting, also interpreted Article XX narrowly. In 1991, a panel held that Article XX's exemption for actions taken "to protect human, animal or plant life or health" concerned only animals within a state's own jurisdiction. And, in 1994, a panel held that a US tuna embargo did not satisfy Article XX because it was designed not to achieve environmental goals directly, but to coerce other governments into adopting specific environmental policies. Although neither panel decision was adopted, they both indicate restrictive interpretations of Article XX that WTO dispute settlement bodies may apply in the future.

Fifth, if a US sanction is challenged before a WTO panel, the panel may reach the merits of a proffered national security justification. One school of thought is that mere invocation of the Article XXI national security exception is a discretionary right of states not reviewable by a WTO panel. Another school, however, maintains that jurisdiction cannot be stripped so easily and that a WTO panel has the authority to review the merits of various aspects of a state's Article XXI justification. Still, even if the first school is correct and a WTO panel declines jurisdiction, other states' perceptions of the merits of the US position will have considerable effects on the viability of the institution. More broadly, the persuasiveness of the US position will

shape general perceptions of US willingness and reliability in conforming to international rules and standards of practice.

Before proceeding to Part III's discussion of the norms of security and human rights, I should register one caveat. There are a number of different components to the national security exception under Article XXI, and the argument I pursue here is agnostic on whether Helms-Burton or similar measures meet these other elements. Indeed, one of the valuable aspects of a recent article by Hannes Schloemann and Stefan Ohlhoff is the authors' care in distinguishing Article XXI's different components. They contend, for example, that a WTO panel has some, though limited, authority to review a state's claim that particular concerns constitute "essential security interests." They separately argue that a panel has broader authority to review whether the action taken was "necessary"—and, in turn, proportional—to address those interests (Article XXI(b)) and whether the action occurred "in time of... [an] international emergency in international relations" (Article XXI(b)(iii)). They also submit that a panel has authority to apply a good faith test in reviewing whether a state genuinely considered the particular matter (for example, Cuba's behavior) a threat to the concerns that the sanctioning state identifies as a security interest. By illustration, one might conclude that (A) particular human rights violations constitute a threat to security, but (B) the United States did not genuinely consider Cuba's actions threatening to that particular range of security interests or Helms-Burton was not a necessary, or proportional, response. This essay discusses issues under category A, and takes no position on issues under category B.

Such distinctions are relevant not only to how a panel might decide a case, but also to how observers—including scholars, policymakers, and other governments—consider the issues. Many opponents of Helms-Burton believe the legislation was grossly disproportionate or motivated by illegitimate ideological convictions. A number of these commentators, however, go too far by issuing a point-by-point criticism of the US position—including criticism of the US stance linking human rights and security. In doing so, many of these critics are not careful to differentiate the various components of the US claim. It is important, however, not to misjudge a legitimate aspect of the US position, even though the other reasons for opposing Helms-Burton may be well-founded.

III. THE CONSTRUCTION OF SECURITY

Over time the international community has arrived at the view that a certain severity and extent of human rights violations internal to a country constitute a threat to international security. Aspects of this development can be traced back to the treaties of Westphalia, which included provisions concerning respect for the rights of

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religious minorities as part of an effort to create regional stability and peace between nations.\textsuperscript{14} The universalization of that principle and its extension to individual rights and other minority groups is, however, mostly a 20th century phenomenon.\textsuperscript{15}

Foundations for the contemporary link between individual human rights and security were introduced during the framing of the United Nations Charter and the creation of the rest of the post-World War II architecture for peace. In a technical sense, one could point to clear textual linkages between human rights and security in postwar international documents as evidence enough that the US human rights-security argument is plausible. The depth of the commitment to those textual statements, however, did not arise until the international community squarely confronted the two competing goals of the United Nations: (1) the prohibition against intervention; and (2) the protection of universal human rights. While Nuremberg provided the initial groundwork for a principled compromise between these competing objectives—that state sovereignty cannot shield a government from international intervention when it commits atrocities against its own citizens—the practice implementing that solution did not follow until the end of the Cold War. Once the East-West rivalry receded, certain multilateral initiatives could be realized, and, in turn, the norm linking human rights and security more firmly established.

The various sources that demonstrate the human rights-security linkage are not so clear on the specific reasoning underlying that connection. The sources analyzed in the following discussion indicate three variants: (1) a regime committing widespread and severe human rights violations heralds a threat to harmony among nations; (2) the level and severity of the violations produce substantial destabilizing effects on proximate states such as refugee-related emergencies; and (3) such violations constitute an offence against humanity and thus a threat to international peace. In the following discussion, I analyze various sources that support each of these three variants. It should go without saying that a source can show strong evidence of one variant, but also support another, as these linkages are not mutually exclusive and, in various contexts, will surely overlap.

A. VARIANT 1: REGIME AS A THREAT

A state campaign to conduct widespread and severe human rights violations against sectors of its population has been viewed as a precursor to, as well as indicative of, aggression against other states and hostility among nations. Justice Jackson’s report to the President in the context of the Nuremberg trials reflects this perception:

\begin{itemize}
\item \textsuperscript{14} Stephen D. Krasner, \textit{Sovereignty: Organized Hypocrisy} 79–82 (Princeton 1999).
\end{itemize}
Our people... witnessed persecution of the greatest enormity on religious, political and racial grounds, the breakdown of trade unions, and the liquidation of all religious and moral influences. This was not the legitimate activity of a state within its own boundaries, but was preparatory to the launching of an international course of aggression and was with the evil intention, openly expressed by the Nazis, of capturing the form of the German state as an instrumentality for spreading their rule to other countries.\(^{16}\)

The modern connection between gross human rights violations and a threat to international peace is based in large part on the particularities of the confrontation with fascism and Hitler's crimes of aggression. A view emerged out of World War II that a government's concerted attack against racial and ethnic minorities was deeply connected to hostility towards national groups and other nations.

This sensibility is expressed, for example, in the Constitution of the United Nations Educational, Scientific, and Cultural Organization ("UNESCO"), one of the earliest postwar institutions. The Preamble of the UNESCO Constitution states: "[T]he great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races." Correspondingly, Article I of UNESCO's Constitution states: "[t]he purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms."

Subsequent international agreements evince a similar view of the connection between systematic attacks against internal populations and hostility among nations. Instruments with a focus on human rights reference the link to international security, while instruments with a focus on international security reference the link to human rights. As for the former, the 1978 Declaration and Program of Action for the first World Conference to Combat Racism and Racial Discrimination states: "All forms of discrimination... based on the theory of racial superiority, exclusiveness or hatred are a violation of fundamental human rights and jeopardize friendly relations among peoples, co-operation between nations, and international peace and security." As for the latter, the 1970 Declaration on the Strengthening of International Security states that the General Assembly "[s]olemnly reaffirms that universal respect for and full exercise of human rights and fundamental freedoms and the elimination of the violation of those rights are urgent and essential to the strengthening of international security, and hence resolutely condemns all forms of oppression, tyranny and discrimination, particularly racism and racial discrimination, wherever they occur."\(^{17}\)

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Neither of these documents has achieved significant salience long after its promulgation. They do, however, reflect a sense of the international community's conceptual connection between the categories at issue.

It is difficult to sort out all the connections between human rights and security that transpired during the Cold War, as many civil and political rights were sacrificed at the altar of so-called military necessity and political interest. Still, for the United States, a significant aspect of Cold War foreign policy involved the human rights-security variant described here. The geopolitical conflict was, in essence, a rivalry between competing models of governance. In the US perception, the Marxist-Leninist model was antithetical to the American way of life: it entailed religious persecution, elimination of political freedoms, and rejection of basic property rights. The United States regarded the spread of Communism as a threat to its security interests and employed overt and covert means to safeguard and expand the alignment of states in the Western camp.

The human rights-security link was also based on the fact that the Soviet Union and its client states associated their own national security with the elimination of internal political dissent. As with China today, these regimes considered human rights organizations and the publication of domestic human rights reports to be direct threats to the state's survival. With such an internal security mindset, it was impossible for the West to consider human rights conditions in these countries outside the prism of geopolitics and international security.

The transition from the Cold War to present-day geopolitics has maintained significant continuity in the concern for internal human rights conditions. First, in terms of the warming of American-Soviet relations, human rights featured as a key component of détente; and significant agreement on civil and political rights issues in the Helsinki process (especially at the Vienna Review Conference in 1989) was viewed as one of the first signs that the Cold War was coming to an end. Second, in terms of post-Cold War alignments, a dimension of US and Western European foreign policy has been grounded in the belief that liberal states do not go to war with each other and are generally more likely to foster peace and security. Leading proponents of this theory define a liberal state to include not only democratic elections but also respect

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18. The Declaration on International Security, however, has been reaffirmed in General Assembly Resolutions over the years. One principle that is repeated in these subsequent resolutions is that "respect for and promotion of human rights and fundamental freedoms in their civil, political, economic, social and cultural aspects, on the one hand, and the strengthening of international peace and security, on the other, mutually reinforce each other." See, for example, United Nations, Review of the Implementation of the Declaration on the Strengthening of International Security, A/RES/44/126 (Dec 15, 1989). In 1983, the Second World Conference to Combat Racism and Racial Discrimination reaffirmed the principle linking international security and racial discrimination. The 2001 draft text of the Third World Conference Against Racism does the same.
for basic human rights. Accordingly, democracy-building projects featured in the US national security agenda are now combined with attention to safeguarding human rights. The old security concerns associated with competing models of communism and capitalism have thus been replaced by a new opposition—liberal versus nonliberal forms of governance—with human rights beginning to figure more prominently as a dimension along which such lines are drawn.

Finally, in terms of political statements, the Office of the UN Secretary General has articulated the post–Cold War concern for human rights in reference to the UN Charter's original understanding of human rights as central to the maintenance of international peace. In the 1991 Report of the Secretary General on the Work of the Organization, Secretary General Javier Perez de Cuellar called the protection of human rights "one of the keystones in the arch of peace." In the 1992 Report, Secretary General Boutros Boutros-Ghali stated, "respect for human rights is clearly important in order to maintain international peace and security." In 1999, Secretary General Kofi Annan stated:

As we review what has been achieved since 1945, we can see how right the drafters of the Charter were to link human rights and the maintenance of peace and security. Today, with 50 years of experience behind us, we can reaffirm the crucial importance of that link. Our experience has also taught us that respect for human rights is crucial to peace-building, and to the broader task of ensuring development.

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B. VARIANT 2: INSTABILITY AS A THREAT

A government’s practice of gross human rights violations often produces external harms to neighboring states, such as massive refugee flows, and the normative development linking such conditions to a threat to peace and security has been expressed through institutional responses. Here, I discuss two strong indications of the norm’s solidification as reflected in (i) a succession of Security Council decisions and (ii) recent institutional initiatives of the European Union.

This variant of the link between security and human rights is perhaps most evident in a series of Security Council decisions involving human rights-related concerns. Under Chapter VII of the UN Charter, the Security Council may adopt enforcement measures if it decides a situation constitutes a threat to international peace and security. Primarily over the last decade, the Council expanded the scope of such threats to include human rights atrocities involving cross-border harms.

This was a break from the past. As Bruno Simma explains, the original understanding of the Charter was that only interstate conflicts could trigger Chapter VII powers. The UN confrontation with the white minority regime in Southern Rhodesia marked the first break towards a more expansive conception of threats to peace and security. From there, the Council has since decided a threat to peace and security includes the following internal human rights-related crises with a nexus to cross-border instability: civil war (for example, Somalia and Yugoslavia); military coup (for example, Haiti and Sierra Leone); repression of a civilian population (for example, Iraq’s abuses against the Kurds); and genocide (for example, Rwanda).

My classification of these decisions diverges from that of international law scholars who take some of the Security Council decisions to mean that massive human rights violations without any effect on external instability constitute a threat to international peace and security. I disagree with this view at least in terms of the text of the Security Council decisions. On each occasion that the Security Council has decided a situation constitutes a threat to international peace and security, the Council has noted a nexus with interstate instability such as mass refugee flows.

One objection might be that human rights violations are, then, irrelevant to the determination of a threat to international peace and security, because each of the Council’s decisions has depended on external instability. This objection does not go very far for two reasons. First, the relevant factor in each of these decisions is the presence of gross human rights violations. On each occasion, the Council has

appeared most concerned, if not preoccupied, with the human rights violations, and these violations form a key aspect of the decision to adopt Chapter VII enforcement measures. It is not as though the Council has decided situations involving merely refugee flows constitute a threat to international peace and security without a nexus to such human rights violations. Second, the principal motivating factor for the Council's decision is so clearly the existence of mass atrocities that some who deny the existence of a human rights-security link maintain that "it appears that the Security Council's use of massive refugee flows to establish the existence of a threat to international peace and security has been a pretense to intervene in internal situations that involve gross violations of human rights." Accordingly, in this situation, we may actually have a norm not fully expressed through rhetoric and text, but through institutional decisions that de facto consider mass human rights violations a threat to international peace and security.

Recent institutional developments within the European Union ("EU") offer independent evidence of discursive and institutionalized links between human rights and security. In the past decade, European states have dealt directly with massive refugee flows and other forms of regional instability resulting from human rights atrocities committed in neighboring states. The conceptual understanding of contemporary security interests has developed to encompass widespread human rights violations in other countries, and corresponding institutional reforms have followed. Two examples indicate the nature of these developments: the Stability Pact for South Eastern Europe and the European rapid-reaction force.

Both of these initiatives were spurred in significant part by the logic of the second variant's concern over instability caused by severe human rights violations and, consequently, each incorporates a sense of the variant within its institutional design. The EU launched the Stability Pact—sometimes popularly called the Security Pact—for South Eastern Europe during the Kosovo crisis. The originating idea was to stabilize frontline states in Milosevic's neighborhood. A prominent feature of the pact is the commitment to institution-building in the context of individual and minority group rights. This specifically includes intergovernmental training programs, sponsorship of media freedom, assistance with obtaining support from the international donor community, and progressive integration of South Eastern states into both the Organization for Security and Cooperation in Europe ("OSCE") and the Council of Europe's human rights institutions. These programs serve the overall objectives of the Pact, which are expressly defined in terms of building friendly relations and regional stability.  

The EU has also committed itself to developing a rapid-reaction force, motivated in large part by a concern that the United States may have a higher threshold of tolerance for human rights violations and other threats to security in the European theater. The rapid-reaction force will provide 60,000 military personnel, drawn from EU member states and sustainable for up to one year in an international mission. The initiative draws inspiration from lessons learned in the face of genocide in the former Yugoslavia. Accordingly, the rapid-reaction force's mandate includes performing humanitarian operations, intervening to prevent conflicts from erupting, and undertaking peacekeeping efforts. As a demonstration of the link between local rule of law issues and regional stability, the commitment to a rapid-reaction force has recently been followed by a supplemental commitment by EU member states to provide up to 5,000 police officers for international missions as well.

C. Variant 3: Offence Itself as a Threat

The third variant of the human rights-security link is based on the conception of grave human rights violations as an offence against the international community. Particular violations—for example, genocide and crimes against humanity—rise to the level of an international delict that other states have the prerogative, and sometimes obligation, to respond to with force. Such human rights violations are now considered a threat to international security due to (a) the development of a norm that these violations are an attack against the basic foundation of humanity and harmony among nations, and (b) the development of a norm accepting external intervention by other states to halt such offenses. Therefore, this variant of the link is based on the ontological construction of the scope of the violations' harms and the acceptance of armed intervention as a lawful response to their occurrence.

This variant can be traced back to earlier justifications for humanitarian intervention of a more limited scope. Martha Finnemore argues that the normative focus of Western humanitarian intervention expanded over the centuries from a concern for persecution of Christians in foreign countries to a concern for all human beings abroad.28 Indeed, the Peace of Westphalia's attention to particular religious minorities is part of the historical roots of that normative lineage. While the third variant has expanded to include severe human rights violations against individuals unrelated to their membership in a particular classificatory group, aspects of the narrower scope remain. Majority ethnic groups in certain states share ethno-national affiliations with minority groups in neighboring states (especially in South Eastern

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Europe and the Horn of Africa), and the severe mistreatment of those minorities is a tinderbox for conflict.29

At its broadest level, the modern development of the third variant is clearly reflected in the codification of international criminal law. Consider, for example, the International Law Commission’s (“ILC”) work on crimes against international peace and security. The ILC’s 1954 Draft Code of Offences Against the Peace and Security of Mankind listed twelve categories of substantive offenses. Eight of these clearly related to hostilities between states such as acts or threats of aggression, terrorist activities, and illegal annexation of another state’s territory. One concerned violations of arms control treaties. One involved violations of the laws of war. The final two “offences against the peace and security of mankind,” related exclusively to mass human rights violations: genocide and crimes against humanity. The ILC’s 1996 Draft Code maintains this general classificatory system. Although the ILC is composed of independent experts, its articulation of international law on this subject is supported by the Rome Treaty for an International Criminal Court (“ICC”). The ICC treaty includes jurisdiction over four offences—aggression, war crimes, genocide, and crimes against humanity—and the treaty’s preamble makes no distinction in its “recognition that such grave crimes threaten the peace, security, and well-being of the world.” Signed by 139 states and ratified by 29 states as of February 12, 2001, the ICC treaty reflects prevailing international sentiment in this regard.

Finally, the norm is also reflected in the Genocide Convention, and, through the obligations contained therein, it has influenced both the United States’ ability and failure to act in various situations. In terms of ability to act, the genocide in Northern Iraq has lent legitimacy to certain US military measures against the Iraqi government. The US has been sure to refer to the Kurdish genocide to legitimize these military efforts and thereby contain international criticism. Conversely, in terms of failure to act, during the first period of the Rwanda genocide, the US Department of State was jarringly reluctant to call the situation a “genocide” because such a statement would trigger international obligations. Additionally, in the aftermath of the genocide, the official apologies by President Clinton and UN Secretary General Kofi Annan reflected the importance the norm held and the shame felt in not measuring up to it. The historic failure of the international community to stop the genocide has also led to a remarkable number of formal commissions of inquiry at the national (for example, France and Belgium), regional (for example, the Organization of African Unity), and international (for example, the Office of the UN Secretary General) levels. In short, both the Iraq and Rwanda cases indicate the norm’s influence on

degrees of freedom in constraining or supporting particular state behaviors. While the obligations under the Genocide Convention also provide evidence of the norm, these cases demonstrate the norm’s embeddedness in international relations and state practice.

IV. IMPLICATIONS

At a narrow level, the above discussion demonstrates how the US invocation of the human rights-security link comports with international normative developments. At a broader level, it points to the ongoing reconstruction of aspects of the world community based on the deep perceptual connection between internal human rights conditions and security. Lessons can be drawn from this discussion to advance our understanding of the ways international norms operate. In this remaining part, I take up these concerns by offering a few suggestions on this study’s relevance to understanding: (1) the indirect influence norms exert on state identity and interests through changes made in institutions; (2) the direct influence norms exert on state identity and interests; and (3) the significance of instability in norm construction, maintenance, and decline.

A. INSTITUTIONAL DESIGN

The emergent human rights-security norm has already produced significant effects in the creation and design of international institutions. Consider a few examples. As indicated above, UNESCO was one of the first international institutions shaped by the post–World War II conception of the human rights-security link. Similarly, a recent study by Gregory Flynn and Henry Farrell concludes that institutional changes in the OSCE—such as the creation of the High Commissioner on National Minorities and “missions of long duration”—reflect deep normative links between security, a sense of a community of liberal nations, and internal human rights conditions.³⁰ As another example, the post–Cold War mechanisms established by the United Nations to conduct peacekeeping in crisis areas now regularly feature a human rights component within their mandate (for example, UNAMSIL [Sierra Leone], UNMIBH [Bosnia and Herzegovina], UNTAC [Cambodia], and ONUSAL [El Salvador]). Furthermore, institutional reforms in other settings have been prompted by the international community’s failure in the Rwanda crisis. The national and international commissions of inquiry that studied the Rwanda debacle have each suggested various institutional reforms including: formalized and more transparent early warning systems, the creation or strengthening

of regional military forces (for example, ECOMOG), and changes in rules of engagement to protect civilian lives.

As one final example, consider the effect of the human rights-security link in the establishment of the last international institution created during the 20th century: the ICC. One might posit that the strength of "international human rights issue networks" and norm entrepreneurs in helping bring about the ICC drew significant support from the cultural salience and persuasiveness of the conception that certain atrocities, wherever committed, are an affront to humanity at large. The ICC, indeed, marks a distinct trend in support of the third variant of the human rights-security link. Its historical antecedent—the Nuremberg Tribunal—required a link between human rights violations and the crime of aggression, at least for purposes of jurisdiction. In contrast, the ICC treats each of the crimes separately and allows the quasi-independent prosecutor to take up cases of genocide and crimes against humanity without any other threat across international borders. Indeed, the final text of the statute was adopted at Rome without the crime of aggression provision even being completed, and states have seen fit to ratify the statute without it.

Given the above, it is fair to conclude that if norms help shape the creation and design of such institutions, those norms may be said to affect state behavior at least indirectly. The human rights-security norm, for example, by helping create the position for and shaping the mandate of the OSCE High Commissioner on National Minorities has, in turn, influenced the management of interethnic relations within countries under the High Commissioner's mandate, the integration of those countries into the liberal European regional institutions, and foreign ministries' awareness of and responses to conflicts in the area. As another example of practical effects, consider the norm's influence in incorporating human rights mandates into United Nations peacekeeping operations such as UNAMSIL (Sierra Leone). This institutional design necessitates particular human rights-related processes and


32. Rome Statute of the International Criminal Court, Art 5(2), available online at <gopher://gopher.igc.org/00/orgs/icc/undocs/rome/rome statute.txt> (visited Mar 25, 2001). ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 ["Amendments"] and 123 ["Review of the Statute"] defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.").

33. See, for example, CSCE Helsinki Document 1992: Challenges of Change, available online at <http://www.osce.org/docs/english/1990-1999/summits/hels922.htm>, para 12 (confidence-building measures); para 13 (early warning procedures); see also Ratner, 32 NYU J Int'l L & Pol'Y (cited in note 29) (analyzing High Commissioner's importance as a norm mediator promoting minority rights protection and reducing ethnic tension in various countries).

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measurements of success in nation-building efforts under the UN’s mandate. In short, as the norm is accepted at the stage of institutional design, the consequences of those institutional arrangements will necessarily influence the direction of efforts, resources, and cognitive understandings of human rights and security concerns in numerous settings.

B. STATES’ INTERESTS AND IDENTITIES

The acceptance and reiteration of the human rights-security norm may also affect structural dimensions of the world community by more directly shaping states’ interests and identities. The US human rights-security stance, in particular, helps set the relationship not only with regard to direct targets (for example, Burma and Cuba), but with respect to third parties as well. If the world is indeed heading towards a “culture of collective security,” US leadership in delineating and supporting the idea of particular states as security threats due to their human rights record has important ramifications. It signals to partners such as the EU the scope of interests that will be managed in their joint efforts and relationships. It also signals to other states the dimensions of liberalism that are necessary to earn perceptual membership in the so-called “community of nations.”

This form of signaling to third parties can be effective in encouraging governments to regulate their own behavior for fear of either enforcement actions or reputational costs. For example, the government of Indonesia incorporates such information in determining the margin of discretion it has to quell secessionist movements without crossing a threshold of concern set by US security interests and, by extension, those of the Security Council. Consider, as another example, former Croatian President Tudjman’s eagerness to be accepted as a member the community of liberal nations. It was widely understood that Croatia’s cooperativeness with the International Criminal Tribunal for the former Yugoslavia and implementation of domestic political reforms reflected Tudjman’s efforts to evince common interests with the United States and Western Europe—to act like a liberal democratic state is supposed to act. Rather than a target of the OSCE’s human rights-security concerns, Croatia preferred to be a cooperative member identifying and addressing such concerns. As the leader of the free world, the US position on these matters, even if primarily in rhetoric, is information such governments and political leaders incorporate and their countries consequently internalize through domestic legislative reform and changes in public policy.

34. Id at 314.
C. Norm Instability and Reconstruction

From a constructivist perspective, the degree of support for the shift towards a human rights-security link is important as it indicates the sedimentation and durability of the norm. The WTO debate, in particular, potentially exposes a weakness in this constructivist account. Because norms are built on shared understandings, how can we explain the fact that the US invocation of the human rights-security link in the WTO context met with such disapproval? In even stronger terms, a critic might argue that the WTO controversy indicates the norm is hollow.

While there is some merit to this objection, I believe it can be effectively answered through refinement and clarification of the constructivist account of norm development. First, from a constructivist perspective, one should anticipate certain levels of instability in the formation and maintenance of norms. The negative reaction in the context of the WTO simply suggests the possibility of an underlying fragility of the norm and the need for its continual reinforcement. Norms only reach a point of solidification for a period of time. During their emergence and decline, they are necessarily unsettled. Second, the WTO controversy may reveal a measure of indeterminacy in the human rights-security norm. Indeed, the fact that this essay has had to detail the content and scope of the norm indicates current deficiencies in the norm's recognition and definition. The US reliance on the norm in the two WTO cases did not reach the point of formal briefing and argumentation before a WTO panel. At this early stage, a general reference to the norm, without a more detailed explanation of it or invocation of a specific variant, was possibly more likely to meet with dissension than acceptance. This would help explain the norm's general existence despite criticisms of the US stance.

Third, the WTO cases in particular suggest the relevance of obvious (or perceived) pretext in a state's rhetoric in relation to the acceptance of a norm's invocation by other actors. The US invocation of the WTO security exception in the Helms-Burton case was widely perceived as a pretext, while in the Burma case, the gravity of the US human rights concerns was viewed as genuine. The United States, by employing the security threat to defend Helms-Burton along with a panoply of other proffered arguments, compromised the integrity of its position and obscured the validity of the particular human rights-security component of its claim. This experience subsequently affected the nature of the response to the US invocation of the human rights-security claim in the Burma case, given that many actors and commentators had argued against the same invocation in the Helms-Burton context. Notably, in the Burma case, the response by transnational actors was split. Some

35. See id at 334 ("[E]ven when ideas that constitute identities and interests are not changing, they are being continually reinforced in interaction.").
organizations in Europe criticized the European Commission’s WTO petition against
the United States as “condoning ‘crimes against humanity,’” and European
Commission spokespersons were careful to remind naysayers of Western Europe’s
own ongoing efforts to sanction Burma’s government. At bottom the conflict was
really about the secondary effects of the US trade measure on European companies,
not the ultimate purpose of the US act. The principled motivations of the
Massachusetts polity in passing the law gave the US stance a different hue. It spoke
directly to the third variant of the human rights-security link. One might wonder
whether the international response to the US invocation would have been different if
the Burma case arose before Helms-Burton.

Finally, while a violation of a norm does not deny its general existence, if
constructivist accounts are to succeed, measurements of a norm’s depth and durability
must be developed. Paul Kowert and Jeffrey Legro explain:

To argue that certain norms are influential is to suggest that their effects vary with
their strength. . . . But by what criteria can one assess norm robustness . . . . [T]he
choire is complicated by the widely accepted notion that some behavioral violations
of norms do not necessarily invalidate the norms. At a certain point violations clearly
do begin to undermine norms. But how do we assess that point?

This essay suggests a few factors that could be useful in determining a norm’s
strength. First, observed continuities in the norm’s expression and invocation may
serve as an indicator of its strength. Express and implicit references to the norm in
agreements, texts, statements of intent, declarations of principles, or programs of
action are part of this test for continuity. Second, regularized patterns of behavior in
accord with the norm can serve as another measurement. In this regard, one should
examine not only actions the norm helps produce but also those it helps constrain. For
example, the United States’ eventual action in Rwanda, and now Sierra Leone, can be

36. Angus MacKinnon, EU Accused of Condoning “Pariah” Burma with WTO Action, Agence France
Presse (Sept 21, 1998).
37. Id. At the time, the European Parliament also adopted a Resolution criticizing the European
Commission’s position before the WTO, stating:

The European Parliament . . .
2. Calls again on the Burmese Government to guarantee the fundamental rights of the
Burmese people . . ;
3. Believes that, in the interest of a foreign policy founded upon the principles of human
rights and democracy, the scope of the WTO to take these principles into account
should be enlarged rather than restricted and calls upon the European Union to use its
weight as the biggest trading power of the world to this end;
4. Criticises in this context the Commission decision to insist on a conflict resolution
panel within WTO over the law of the US State of Massachusetts.
38. See Paul Kowert and Jeffrey Legro, Norms, Identity, and Their Limits: A Theoretical Reprise, in
taken as motivated in part by the third variant of the human rights-security norm rather than by any national self-interest. At the same time, the initial unwillingness of the United States to recognize the Rwanda massacres as a genocide and the limits on international criticism of the US actions in protection of Iraqi Kurds both—not so strangely—indicate constraints imposed by the norm. Finally, the degree of institutionalization may be a third indicator of a norm's strength. Instances of the human rights-security norm's institutionalization include the creation and capacities of the OSCE High Commissioner on National Minorities, the project designs included in the South Eastern Europe Stability Pact, and the human rights mandates of UN peacekeeping operations in post-humanitarian crises. In sum, all three of these indicators—continuities in expressions and invocations, regularized patterns of behavior, and institutionalization—may be used to gauge and falsify claims made about a norm's strength or embeddedness.

V. CONCLUSION

This essay started from the conventional view that national security exceptions simply allow states to opt out of international obligations and that an invocation of such an exception accordingly represents a retreat from international norms. The WTO experience serves as an important testing ground for this view given the recent controversies over US practices. I have argued that, along one dimension, the US position—the stance that severe human rights violations constitute a threat to security interests—accords with and furthers emergent international norms.

This analysis contains large and small lessons. In terms of the WTO dispute itself, the analysis argues against those who suggest measures taken in response to severe human rights violations cannot constitute a national security interest under Article XXI. In terms of broader theoretical implications, the analysis suggests a dimension along which invocation of such a national security exception may reflect and contribute to international norms. These broader theoretical implications are an important part of understanding the significance of cases such as the WTO controversy in terms of international normative developments. In that regard, this essay is intended to suggest avenues for resolving quandaries about how state practice and norms operate more generally.

39. In terms of the Rwanda case, constraints were to operate on the US government once it officially recognized the genocide and thus constraints also operated on the government's willingness and ability to issue that recognition.