

NOTE

Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life

I. INTRODUCTION

As the July 1990 census revealed, the People's Republic of China (PRC) is a nation of 1.13 billion people, spread over seven percent of the world's arable land.¹ Fearing for China's economic development in the next century, in 1979 the government instituted the so-called "one-child family" policy, implementation of which includes government-sponsored use of contraceptives, abortion, sterilization, and economic incentives to avoid over-quota births.² According to Chinese officialdom, this policy is absolutely necessary if future generations are to enjoy a decent living standard in an economically prosperous country.³

1. Peter Goodspeed, *'Fewer Children—Fewer Burdens': Severe Birth-Control Measures Aim to Curb Demands of Swelling Population, Still Another 64,000 Babies Born Daily*, TORONTO STAR, Jan. 11, 1991, at B1.

2. According to the New York Times, "[t]he one-child policy is a misnomer in many cases, because there are many exceptions and Chinese women have, on average, 2.25 children." Sheryl WuDunn, *With its Population Still on Rise, Beijing Pushes One-Child Family*, N.Y. TIMES, June 16, 1991, §1, at 1. The Chinese government admitted in 1991 that "[t]he policy [has not been] uniformly applied to all sectors of Chinese society[.] Couples in rural areas, for example, generally have had more than one child, and members of ethnic minority groups have not been expected to adhere to the one-child policy." *Analysis of the Second Periodic Report Submitted to the Committee on the Elimination of Discrimination Against Women: China*, U.N. Doc. CEDAW/C/13/Add.26/WP.1, at 5 (1991) [hereinafter *Analysis*].

3. *Population Minister Defends Abortion Policy*, British Broadcasting Corporation; Summary of World Broadcasts, Part 3: The Far East [hereinafter SWB/FE], June 12, 1991, available in LEXIS, Nexis Library, BBC/SWB File. China is not the only country adversely affected by its swelling population. The National Academy of Sciences in the United States and the Royal Society of London have issued a joint appeal for curbs in population growth to help avoid "irreversible damage to the earth's capacity to sustain life." Noting that the world's population is growing at a rate of nearly 100 million people per year and could reach 10 billion by the middle of the twenty-first century, the joint statement warned that "[i]f current

International declarations and conventions on human rights assign to State governments responsibility for ensuring the social and economic advancement of their peoples. The same international instruments assert the fundamental human right of every couple to decide freely the number and spacing of their children. The PRC's one-child family policy brings these two goals into direct conflict. Can the same United Nations instruments which proclaim the government's duty to promote economic advancement and improved living conditions be used to curtail reproductive freedom? This note seeks to examine the economic rewards and sanctions relating to China's population policy in order to determine whether these sanctions violate international human rights or fall within legal parameters.

This note argues that from a theoretical point of view, the economic inducements which constitute an essential component of the PRC's population policies do not in fact violate international human rights laws relating to a couple's procreative rights. Reproductive rights, like many other types of "human rights,"⁴ are not totally unrestricted. A couple's rights, while indisputable under international law, are constrained by their duty to act responsibly and in a manner which will benefit their family and the community as a whole. Thus, parents who insist upon having more children in the face of economic sanctions, may, in the Chinese context, reasonably be viewed as behaving irresponsibly — as exposing their families to significant financial hardships and the community to a Malthusian nightmare.⁵ The author wishes at the outset to clarify that this note reaches that conclusion only with respect to the *policies* of the PRC as they are set forth in legal instruments and articulated in official statements by government representatives. This note does not specifically address the issue of policy *implementation*.⁶ Incidents of coerced abortions, forced

predictions of population growth prove accurate . . . science and technology may not be able to prevent irreversible degradation of the environment." *Scientists Warn on Population*, N.Y. TIMES, Feb. 27, 1992, at A20.

4. For a discussion of "human rights" generally and reproductive rights specifically see text, *infra* sections III, VI and V.

5. For an alternative "staggered birth" model proposal, see John Bongaarts & Susan Greenlaugh, *An Alternative to the One Child Policy in China*, 11 POPULATION & DEV. REV. 585 (1985).

6. One author has advanced an argument which allows a state to move in graduated steps from voluntary to coercive family planning:

(1) governments have an obligation to enhance freedom of choice in family planning; (2) if family planning programs prove ineffective, governments have the right to go beyond non-coercive family planning programs if they can show that voluntary methods have

sterilizations and involuntary insertion of interuterine devices (IUDs), which have occurred as a result of the policy, are repugnant and indefensible.⁷

However, with regard to the theoretical interaction between legitimate State interest and personal procreative rights, the past five decades have seen the creation of a substantial body of international law which attempts to define the boundaries of encroachment. This note's modest goal is to examine the economic aspects of China's one-child policy in light of this international law to determine whether the policy is defensible when personal rights are placed within the broader context of social development. The author hopes that clarification of the theoretical situation will stimulate further discussion as to whether the underlying moral choices being made at the international level, and the harsh consequences they may have for specific populations, are those which humanity is willing to tolerate.

Part II of this note examines the current system of economic sanctions and incentives that constitutes official Chinese policy, and touches upon some of the cultural attitudes most deeply threatened by the one-child goal. Part III addresses certain threshold questions regarding human rights and their acceptance as international law. Part IV examines international human rights documents related to State duties and powers vis-a-vis the family, and forms an eight-principle model of international law concerning procreation and national development. Part V attempts to apply this model to the economic component of China's one-child family policy. Part VI offers brief concluding remarks.

repeatedly failed when administered in a systematic way; (3) in choosing stronger measures, governments should opt for the least coercive ones, favoring incentives over disincentives; (4) coercive measures may be justified if, and only if, the government can discharge its burden of proof that continued unrestrained liberty poses a direct threat to distributive justice or security-survival; and (5) the proposed measures promise in the long run to increase options on free choice and the means respect human dignity.

Daniel Callahan, *Ethics and Population Limitation*, in *ETHICS AND POPULATION* at 34-35 (M. Bayles ed., 1976), cited in Laura E. Farrell, Note, *Population Policies and Proposals: When Big Brother Becomes Big Daddy*, 10 *BROOKLYN J. INT'L L.* 83, 91 n.53 (1984).

7. For a detailed and vociferous attack on the coercive implementation of China's one-child family policy, see JOHN S. AIRD, *SLAUGHTER OF THE INNOCENTS* (1990). Aird accuses foreign demographers, research institutions and journalists who describe China's policy as voluntary — including the United Nations Population Fund — of "practic[ing] deception on their own people to ingratiate themselves with the Chinese authorities." *Id.* at 11. See also STEVEN W. MOSHER, *BROKEN EARTH: THE RURAL CHINESE* (1983), and JOHN F. COPPER ET AL., *HUMAN RIGHTS IN POST-MAO CHINA* (1985).

II. CHINA'S POPULATION POLICIES

A. *Changing Attitudes and the Current Policy*

Historically, mainland China has always been one of the world's most populous nations.⁸ Traditionally an agrarian society, 80 percent of the current population still lives in rural areas. For agricultural pursuits, the more hands tilling the land, the more benefit to the family, especially since recent economic reforms have allowed Chinese to return to private enterprise farming.⁹ With no national social security or pension plans for the elderly, parents have had to rely on their children, particularly their sons, for support.

Until recently, Chinese could indulge their desire for more children and especially more sons. During the 1950s and 1960s the People's Republic experienced a baby boom, spurred by Chairman Mao's philosophy that more children equaled greater strength.¹⁰ Mao even referred to birth control as a bourgeois plot to visit "bloodless genocide" upon the Chinese people.¹¹ However, as the population swelled, it became apparent to Chinese officials that the situation could not continue. Declining health and living standards, lack of housing, food, and jobs, and the perpetuation of economic backwardness have all been cited by Chinese officials in the past decade as reasons for curbing population expansion before it reaches an unsustainable level.¹² To that end, the government in 1979 adopted a highly

8. Mosher notes that "China's population was already 60 million at the time of the birth of Christ and reached . . . 80 million in the ninth-century Tang Dynasty, 110 million in the twelfth-century Sung, 200 million in the sixteenth-century Ming, and 425 million in the nineteenth-century Ching." *Id.* at 230. China conducted its first modern-era census in 1953, which revealed that 582,603,417 individuals then lived in mainland China. LEONARD L. CHU, *PLANNED BIRTH CAMPAIGNS IN CHINA 1949-1976*, at 126 (1977).

9. Goodspeed, *supra* note 1, at B1; *Population Growth Still Overshooting*, ECONOMIST PUBLICATIONS; Country Report [EP/CR], Mar. 20, 1990, available in LEXIS, Nexis Library, EP/CR File.

10. Mao reasoned that "[e]very mouth comes with two hands." Goodspeed, *supra* note 1, at B1.

11. *Id.*

12. Shen Gaoxing, director of the Education Department of China's State Family Planning Commission, claimed in 1984 that "[i]f we had adopted an appropriate policy during the 1950s and 1960s we would not have had to advocate a one-child-per-couple policy now." Julian Baum, *China Birth-Control Policy: Controversial But Very Effective*, CHRISTIAN SCIENCE MONITOR [CSM], Aug. 1, 1984, available in LEXIS, Nexis Library, CSM File. See *infra* sections II and V for other official statements defending the necessity of China's current population policies.

controversial one-child-per-family policy.¹³ In addition, during the 1980s the government has created a comprehensive population control regime, which includes free access to birth control information and devices, abortion,¹⁴ eugenics,¹⁵ sterilization,¹⁶ and economic rewards and sanctions.¹⁷

The 1990 census revealed that between 1991-95, 121 million women will be of "child bearing age", that is, between 20 and 29 years old. This figure represents an increase of 16.2 percent over the

13. See *supra* note 2. The policy is also referred to as the one-couple-one-child policy. *Id.* The slogan of the campaign is "fewer children — fewer burdens." Goodspeed, *supra* note 1, at B1. This policy is by no means novel. Since the People's Republic was founded, it has experienced four distinct birth planning campaigns: 1953-57 (derailed by the Great Leap Forward); 1962-65 (disrupted by the Cultural Revolution); 1969-76; and the present campaign commencing in 1979. For discussion of the earlier campaigns, see generally JOAN KAUFMAN, *A BILLION AND COUNTING: FAMILY PLANNING CAMPAIGNS AND THE POLICIES OF THE PEOPLE'S REPUBLIC OF CHINA* (1983), and CHU, *supra* note 8.

14. The United Nations Fund for Population Activities (UNFPA) is currently assisting China's efforts to manufacture condoms, IUDs, oral contraceptives and Norplant. *Analysis*, *supra* note 2, at 9-11; Ramon Isberto, *Population: China Faces Aging Problem on Top of Baby Boom*, Inter Press Service [IPS], May 13, 1991, available in LEXIS, Nexis Library, IPS File. Because of UNFPA's involvement in these and other contraceptive activities in the PRC, since 1985 the United States has withheld funding from that organization, although not without some disagreement among members of Congress. See, e.g., statements of Hon. John Edward Porter of Illinois addressed to the House of Representatives in 131 CONG. REC. 12,691 (1985).

The Reagan and Bush administrations have based their decision on a determination that "the UNFPA's extensive involvement in China's coercive population-control program violates the 1985 Kemp-Kasten Amendment . . . den[ying] U.S. 'population assistance' funds to any organization which supports, or participates in the management of, a program of coercive abortion or involuntary sterilization." *UN-Funding-Veto; U.S. Will Not Support U.N. Population Fund While It Participates in China's Compulsory Abortion Program*, Business Wire [BW], Nov. 20, 1989, available in LEXIS, Nexis Library, BW File. When the Kemp-Kasten Amendment was passed, Zhou Gucheng, Vice-Chairman of the Standing Committee of the National People's Congress (NPC) and Chairman of the Education, Science, Culture and Public Health Committee of the NPC, denied that coercion was part of official policy, and cited both national and international laws which supported China's program. *China Regrets U.S. Attack on Its Family Planning Program*, Xinhua General Overseas News Service [Xinhua], June 3, 1985, available in LEXIS, Nexis Library, Xinhua File. For background on the United States position, see Anne Joyce, *China: United States Withdrawal of Support from the United Nations Fund for Population Activities*, in 1 HARVARD HUMAN RIGHTS YEARBOOK 205 (1988).

15. According to an editorial, Gansu, Fujian, Guangdong, Henan, Liaoning and Sichuan provinces have all adopted eugenics laws which forbid mentally retarded individuals from marrying unless they are sterilized. *Three Generations of Idiots Are Enough*, WASHINGTON TIMES, Aug. 23, 1991, at F2. See *supra* note 3, for statements by Peng Peiyun supporting these laws.

16. According to Aird and others, after the couple's first child, the woman is required to be fitted for an IUD. If the couple has a second child, one or both parents are sterilized. Abortions are performed on "unscheduled" births. AIRD, *supra* note 7, at 61, 68-69.

17. See, e.g., Andrew Roche, *China Warns of New Punishments for Birth Offenders*, Reuters, Reuters Library Report [RLR], Feb. 23, 1989, available in LEXIS, Nexis Library, RLR File.

number of child-bearing women in the previous decade.¹⁸ Fearing another baby boom, officials have been pressing for renewed vigilance in promoting the one-child policy.¹⁹ The Chinese government's major concern is the nearly 1.3 billion people who will have to be fed, clothed, sheltered, and provided jobs in the coming decade.²⁰ Ensuring that the worst-case scenarios of over-population never occur has involved government at national, regional, and local levels in regulating familial activities (both marriage and procreation) via constitutional law and a system of economic sanctions and rewards.

B. National Legislation Concerning Family Planning

"Socialism should make it possible to regulate the reproduction of human beings so that population growth keeps in step with the growth of material production."

— Vice Premier Chen Muhua, 1979²¹

Article 25 of the Chinese Constitution provides that "[t]he state promotes family planning so that population growth may fit the plan for economic and social development."²² Article 49 establishes the constitutional duty of husband and wife to practice family planning,²³ while Article 51 provides that "[t]he exercise by citizens of the People's Republic of China in their freedoms and rights may not infringe upon the interests of the state, of society and of the collec-

18. These women were born during the cultural revolution, when the government's population program was severely disrupted. Isberto, *supra* note 14. These statistics are cited by Peng Peiyun, Minister of the State Family Planning Commission. *China's Population Could Reach Two Billion by 2025*, RLR, Aug. 21, 1991, available in LEXIS, Nexis Library, RLR File.

19. *Demographers Raise Proposals on Family Planning*, Xinhua, Nov. 12, 1990, available in LEXIS, Nexis Library, Xinhua File. Reuters reports that "Beijing municipal authorities recently published new, stricter rules to promote population control, mandating steep fines, pay freezes and the loss of certain housing and social services for parents who break the one child limit." *China's Population Could Reach Two Billion by 2025*, *supra* note 18.

20. "China is now expected to break the 1.2 billion barrier by 1995, and to approach 1.3 billion by the year 2000[.]" WuDunn, *supra* note 2, §1, at 1. See *infra* section V, for a fuller discussion of these concerns.

21. Quoted in MOSHER, *supra* note 7, at 246.

22. ZHONGHUA RENMIN GONGHEGUO XIANFA (1982) [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982)], art. 25 [hereinafter CONSTITUTION OF THE PRC], translated in LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS AND MATERIALS 945, 951 (Ralph H. Folsom & John H. Minan eds., 1989) [hereinafter LAW IN THE PRC].

23. CONSTITUTION OF THE PRC, *supra* note 22, art. 49.

tive.”²⁴ Similarly, Article 12 of the Marriage Law states that both spouses have a legal duty to practice family planning.²⁵ Currently, the legal marriage age in China is 20 for women and 22 for men.²⁶ These minimum age levels represent an increase of two years over the pre-existing marriage law and constitute the highest minimum marriage ages in the world.²⁷ Although it is not clear that any additional national legislation specifically addressing the one-child family policy has been promulgated,²⁸ official statements by Peng Peiyun, head of the State Family Planning Commission, and Family Planning Minister Qian Xinzong indicate that several drafts of a new law which would formalize the one-child policy throughout China have been considered.²⁹ Meanwhile, several regions have aggressively taken the lead in turning the policy into positive law, creating economic rewards and penalties designed to further the policy.³⁰

24. *Id.* art. 51.

25. Marriage Law of the People's Republic of China (1980), art. 12 (“Husband and wife are in duty bound to practice family planning”) [hereinafter Marriage Law] *translated in* LAW IN THE PRC, *supra* note 22, at 380.

26. *Id.* art. 5. At the time the Marriage Law was passed the People's Daily reported that the government had actually advocated minimum ages of 24 and 26, respectively, as part of the national birth control campaign. Reuters, Sept. 16, 1980, *available in* LEXIS, Nexis Library, Reuters File.

27. LAW IN THE PRC, *supra* note 22, at 387; Interview with Xue Hangin, Deputy Division Chief, Legal and Treaty Department, Ministry of Foreign Affairs of the PRC, in New York, N.Y. (Mar. 4, 1991). Realistically-minded Chinese officials such as party veteran Zhang Pinghua have pointed out that increases alone would “have no effect on population control, because late marriage does not necessarily mean fewer children.” Jay Mathews, *Chinese Congress Ends With Traces of Dissent*, WASHINGTON POST, Sept. 11, 1980, at A1.

28. Aird identifies two internal documents, Document No. 7 and Document No. 13, the texts of which have never been made public, which he claims outline China's official population policies in full. AIRD, *supra* note 7, at 36, 59-61.

29. For Peng Peiyun's statements see Roche, *supra* note 17; *China To Promulgate First Law on Family Planning*, Xinhua, Feb. 14, 1990, *available in* LEXIS, Nexis Library, Xinhua File. For Qian Xinzong's statements see *One Couple, One Baby, Urges Chinese Minister*, *supra* note 13. Yet another source reported in 1990 that, “[l]ater this year, family planning guidelines will for the first time become law.” *Population Growth Still Overshooting*, Xinhua, Jan. 2, 1983, *available in* LEXIS, Nexis Library, Xinhua File. As of February 1992, no national law had been passed.

30. See, e.g., Shanghai Regulations of Sept. 1981 and Guangdong Province Planned Birth Ordinance of Feb. 1980, *compiled in* MATERIALS ON CHINESE LAW (available in Columbia Law School Library). Both set out population policies, dispense rewards for compliance and prescribe sanctions for disobedience.

C. Regional Legislation and Economic Incentives

1. Sanctions Discouraging Additional Children: The "Stick"

The world over, children cost money. But in the People's Republic, just how much money depends upon where you live, whom you know, and whether the child is the first, second, or third. Certain features of regional birth control policies are common throughout China. Ordinarily, couples wishing to have a child are required to seek permission from their neighborhood committee and their employers a full year in advance. Each province and city is awarded a yearly quota for births. Neighborhood committees and production units then apportion the number among their members.³¹ According to Shen Guoxiang, director of publicity at the State Family Planning Commission, local officials have much autonomy in deciding punishments for couples who have too many children.³² The Guangming Daily reported in 1989 that "regulations, incentives and fines differ from region to region and often depend on the attitude of local officials."³³ Fines may be levied at the time of birth for significant but not crushing sums, or may extend over several years and amount to two or three years' wages.³⁴ Nationwide, "unauthorized" children lose their rights to free education and health care subsidies.³⁵ In accordance with the regulations on the Registration of Residency, births must be registered in the local residence registration office of the mother's domicile.³⁶ However, officials may refuse to register the birth of an over-quota baby for an extended period of time, during which the infant is not eligible for food or clothing rations.³⁷ In addition to the financial burden placed on the family by the depriva-

31. MARTIN K. WHYTE & WILLIAM L. PARISH, *URBAN LIFE IN CONTEMPORARY CHINA* 161 (1984) [hereinafter *URBAN LIFE*]; MOSHER, *supra* note 7, at 233; Goodspeed, *supra* note 1.

32. James Kynge, *China Steps Up Enforcement of 1-Child-Per-Family Law*, *L.A. TIMES*, May 6, 1990, at A4; Roche, *supra* note 17.

33. Richard Pascoe, *Reuters*, Sunday, BC Cycle, Aug. 30, 1981.

34. Uli Schmetzer, *Chinese Fathers Caned to Force One-Child Policy*, *CHICAGO TRIBUNE*, Mar. 21, 1991, at 29C.

35. Goodspeed, *supra* note 1, at B1; Schmetzer, *supra* note 34, at 29C.

36. Sheng Yu et al., *Chinese Law and the Status of Children*, in *LAW AND THE STATUS OF THE CHILD* 71, at 78 (Anna Mamalakis Pappas ed., 1983).

37. *URBAN LIFE*, *supra* note 31, at 161.

tion of subsidies, one or both parents may confront wage deductions and even dismissal.³⁸

Beijing municipal authorities recently imposed stricter fines, pay freezes and loss of certain housing and social services for disobedient parents,³⁹ while in Chongqing, a family that is already one child over the limit faces sanctions which include being deprived of farmland or fined up to three times the parents' annual income. This fine must be paid in monthly installments until the child reaches age 14.⁴⁰ Like their rural counterparts, urban workers employed in state-run factories also risk losing their jobs or being fined as much as fifteen percent of the couple's combined salaries until the child reaches age 14.⁴¹ Until 1989, the non-Han Chinese were exempted from the one-child policy. Although now under its auspices, the policy is still less severe for minorities.⁴² Unlike the Han, minorities in rural areas are permitted to have three or even four children, while those in the cities may have two. Penalties, on the other hand, seem comparable. Currently, in Xinjiang province's capital Urumqi, families exceeding the birth limits face a fifty percent wage cut for one year, and an additional RMB 2,000 *yuan* fine.⁴³ In the Le-Miao Autonomous Prefecture in Hainan, any family having a fifth child in 1983 had to pay 220 pounds of unhusked rice and RMB 50 *yuan* every year until the extra child reached age 14. When one considers that annual per capita income in some villages at the time was 180 *yuan* the significant burden of such sanctions becomes apparent.⁴⁴

For some, having additional children is simply a matter of bribing the right people. In Guangdong Province, for example, the birth

38. MOSHER, *supra* note 7, at 234. Mosher states that a provision from a 1980 national family-planning law stipulates a 10 percent cut in family salary upon the birth of a third child, although he does not name the law.

39. *China's Population Could Reach Two Billion By 2025*, *supra* note 18.

40. Goodspeed, *supra* note 1, at B1.

41. *Id.*

42. Christopher Wren, *China's Policy on Size of Families is Extended to Include Minorities*, N.Y. TIMES, Feb. 10, 1983, at A16. The article indicates that the policy was not previously extended to minorities because central authorities feared agitating ethnic frictions. Even now, minority area officials appear not to enforce the new laws with the same zeal as their Han area counterparts. *Where Communists and Cultures Collide*, FINANCIAL TIMES, June 15, 1991, available in LEXIS, Nexis Library, Financial Times File.

43. David Holley, *Population: China Applies Family Limits to Minorities*, L.A. TIMES, Nov. 17, 1990, at A3. The article reports that according to the July 1990 census, China's minority population increased 36% between 1982 and 1990, from 67 million to 91 million people. During the same period, the ethnic Chinese population grew by 11%, or 102 million. China's ethnic minorities currently form 8% of the mainland population.

44. Wren, *supra* note 42, at A16.

control fines are regarded as a form of tax which more affluent peasants can afford to pay in order to have larger families.⁴⁵ In some areas, over-quota babies are sufficiently common that villages offer installment plans for families who cannot pay the fines in one lump sum.⁴⁶

2. Financial Incentives Encouraging Birth Control: The "Carrot"

Like the economic sanctions described above, financial incentives vary among the different regions. Nevertheless, there appear to be certain carrots that exist nationwide. One of these is the refundable prenatal care fee. In the PRC, prenatal care serves the dual purpose of reducing infant mortality and discouraging unauthorized pregnancies. Every pregnant woman is required to pay an obligatory \$2.00 registration fee, which entitles her to receive three prenatal checkups. If the woman uses a government-trained midwife during the birth, the government pays the midwife forty cents and returns \$1.60 to the mother "as a bonus. But if she does not use the approved midwife, then her \$2 fee is forfeited."⁴⁷ For a woman whose income is \$300 a year, this forfeiture is significant.⁴⁸

Couples may sign a formal contract with the State agreeing to have only one child. In return, they are rewarded with yearly cash bonuses which may equal as much as one third the average worker's monthly pay, larger food subsidies, longer maternity leave to care for the one child, more farm land and improved housing opportunities.⁴⁹

45. As one woman put it, "[i]f you want a second child you go to the Communist Party secretary and pay RMB 10,000 yuan (\$2,700 U.S.) in advance. Then nobody bothers you." Roche, *supra* note 17. See also *Population and Labour News: Family Planning, Census, Unemployment Up*, ECONOMIST PUBLICATIONS; Country Report [EP/CR], June 15, 1990, available in LEXIS, Nexis Library, EP/CR File. The daughter of the village Communist Party leader in Sichuan's Bai Mao township paid a \$153 fine after the birth of her second daughter. WuDunn, *supra* note 2, §1 at 1.

46. WuDunn, *supra* note 2, §1, at 1.

47. Nicholas D. Kristof, *The "Barefoot Doctors": Shod, But Still Footsore*, N.Y. TIMES, March 30, 1991, §1, at 2.

48. *Id.*

49. Goodspeed, *supra* note 1, at B1. Mosher reports that in the early 1980's a national family planning law provided that rural families with only one child would receive an extra plot of private land and 300-400 extra work points a year, approximately a ten percent increase in income. MOSHER, *supra* note 7, at 241.

Voluntary sterilization after the first child is also compensated.⁵⁰ In Sichuan Province, benefits "vary but can include monthly subsidies of \$1, higher retirement pensions for the parents, greater allocation of land, lower grain taxes and easier access to good schools."⁵¹ In Guiyang, where "a pound of spinach costs 8 cents, a pound of pork costs 60 cents, and a pound of rice is 12 cents," parents with only one child are given a "reward" of 80 cent each month.⁵²

Just as individual cadres are compensated for their efforts on behalf of family planning schemes, the collective benefits from maintaining the appropriate birth quota. Village family planning committee members receive significant bonuses, while the village as a whole may be rewarded with additional land, fertilizer or new machinery. Naturally, communal pressure on couples to adhere to the quotas increases with the amount of benefit a collective stands to gain from compliance.⁵³

3. Financial Incentives Discouraging Female Infanticide

Female children have traditionally been devalued in Chinese society.⁵⁴ In a patrilocal marriage system under which the daughter marries out of her family and into her husband's household,⁵⁵ elderly parents expected to rely on their sons for financial support.⁵⁶ Addi-

50. The *Los Angeles Times* reports that rewards of money or land are given to couples vowing to have only one child, and extra cash is dispensed to those who undergo sterilization. *China Steps Up Enforcement of 1-Child-Per-Family Law*, *supra* note 32, at A4.

51. WuDunn, *supra* note 2, §1, at 1.

52. Nicholas D. Kristof, *Chinese Pay is Meager, But a Little Buys a Lot*, N.Y. TIMES, Dec. 17, 1991, at A10.

53. Schmetzer, *supra* note 34, at 29C.

54. "To give birth to a boy is considered a big happiness. To give birth to a girl is small happiness. Well, you can't say it's no happiness at all." Chinese peasant father, quoted in SMALL HAPPINESS: WOMEN OF A CHINESE VILLAGE (Carma Hinton and Richard Gordon, New Directors/New Film Series, Museum of Modern Art, New York, Apr. 12, 1985).

"In the village there is no way to survive when you are old if you don't have a son. Sons are like heavy cotton quilts in the winter; if you don't have one, you will freeze to death." Chinese peasant mother, quoted in MOSHER, *supra* note 7, at 260.

55. CHU, *supra* note 8, at 131.

56. *Populations Trends, Growth and Distribution*, EP/CP, Dec. 31, 1989, available in LEXIS, Nexis Library, EP/CP File; Whyte and Parish note that the one-child policy has been more successful in urban areas, partly because urban children cannot contribute meaningfully to the family income until age 16. URBAN LIFE, *supra* note 31, at 161-162. See also WHYTE & PARISH, VILLAGE AND FAMILY IN CONTEMPORARY CHINA 131 (1978) [hereinafter VILLAGE AND FAMILY]. In 1983, the State Family Planning Commission Minister Qian Xinzong urged that social welfare and insurance programs for elderly peasants be developed to combat the current belief that old people are only able to depend upon their children. *One Couple, One*

tionally, only males were qualified to perform the rituals involved in ancestor worship.⁵⁷ Thus, a family with no sons could not continue the blood line, and was considered "a disgrace to its forebears."⁵⁸ The convergence of these social and cultural realities led frequently to the neglect and outright killing of female babies.⁵⁹

The PRC government has attempted to provide financial incentives to families with a daughter to counter incidents of female infanticide and abortion, which are widely acknowledged within China to constitute a persistent and serious problem.⁶⁰ The 1982 Constitution of the PRC and the 1980 Marriage Law explicitly state that both male and female children have a duty to support elderly parents.⁶¹ The Marriage Law also allows the husband to become a member of the wife's family line.⁶² In 1983, Qian Xinzong, Minister in charge of the State Family Planning Commission, advocated improving social welfare programs and insurance for the elderly to "change the old belief that people can only depend on their own children when they are old."⁶³ In addition, he urged that when allocating farmland, private plots or housing, and assigning production work according to

Baby, Urges Chinese Minister, supra note 29.

57. VILLAGE AND FAMILY, *supra* note 56, at 132.

58. Kyngé, *supra* note 32, at A4.

59. HUGH D.R. BAKER, CHINESE FAMILY AND KINSHIP 5-7 (1979).

60. Officially, doctors are not permitted to reveal the sex of the foetus to the parents. However, recently, Chinese entrepreneurs have developed a "cottage industry" in private ultrasound scanning in both urban and rural areas. Catherine Sampson, *Profit in China's Babies*, THE TIMES, June 25, 1991, available in LEXIS, Nexis Library, Times File; *A New Fad for China's Prospective Parents: Ultrasound Scans*, RLR, June 20, 1991, available in LEXIS, Nexis Library, RLR File (citing the GONGREN RIBAO [WORKERS' DAILY]). This phenomenon is not new. In 1983, Canton's Yangcheng Evening News [Yangcheng Wan Bao], reporting on unnatural male/female birth ratios in the Ganxiao district of Hubei Province, stated that "[b]ecause we call for one child per family, those who prefer boys to girls are having the sex of the child tested in advance and, if it's a girl, having an abortion." Reuters North European Service, Mar. 14, 1983, available in LEXIS, Nexis Library, Reuters North European Service File. While infanticide of female babies has its roots in traditional China, what is new is the apparent ease with which Chinese parents may now gain access to ultrasound technology.

A recent Chinese and Swedish joint research effort has raised the possibility that informal adoptions, unregistered births, and sending the girls to relatives, rather than infanticide, largely account for China's unusually high male-to-female birth ratio (111.3:100 in 1991, as compared to the 104 or 106:100 of other countries). Nicholas D. Kristof, *A Mystery From China's Census: Where Have Young Girls Gone?* N.Y. TIMES, June 17, 1991, at A1; Lars Foyen, *Swedish Scientist Finds One Million Missing Chinese Girls*, RLR May 8, 1991, available in LEXIS, Nexis Library, RLR File.

61. CONSTITUTION OF THE PRC, *supra* note 22, art. 49; Marriage Law, *supra* note 25, art. 15.

62. Marriage Law, *supra* note 25, art. 8.

63. *One Couple, One Baby, Urges Chinese Minister, supra* note 29.

specialties and side-occupations among one-child families, priority should be given to those with a daughter.⁶⁴ Some areas are also experimenting with rudimentary social security schemes which will insure families against the death or disability of an only child, thus alleviating the need to have several male children to support both parents and female siblings.⁶⁵ Nevertheless, despite both financial incentives and prohibitive national legislation,⁶⁶ incidents of female infanticide reportedly continue to occur.⁶⁷

III. SOURCES AND VIEWS OF INTERNATIONAL HUMAN RIGHTS

"[T]here is no human rights problem in China."

— Common attitude of Chinese legal scholars⁶⁸

It is clear from the above discussion that sticks and carrots are stressed to different degrees among the various regions enforcing China's one-child family policy. Thus, the system suffers morally from lack of uniform application, both in terms of geography and family status.⁶⁹ But leaving aside the issue of discriminatory imple-

64. *Id.*

65. *Population Growth Still Overshooting*, *supra* note 9.

66. CONSTITUTION OF THE PRC, *supra* note 22, art. 49: "[m]altreatment of old people, women and children is prohibited." Marriage Law, *supra* note 25, art. 3: "within the family maltreatment and desertion are prohibited." Art. 15 states in part: "Infanticide by drowning and any other acts causing serious harm to infants are prohibited." *Id.* art. 15. Infanticide is also punishable under the Criminal Law of the People's Republic, arts. 134 and 183, as a crime of ill-treatment and a crime of intentional injury. Sheng et al., *supra* note 36, at 81. The official daily newspaper Jiangxi reported in 1983 that a south China actor and his sister-in-law were sentenced to three and four years, respectively, for the drowning of the man's fourth baby daughter. Reuters North European Service, Mar. 14, 1983, *available in* LEXIS, Nexis Library, Reuters North European Service File. The paper does not indicate under which law they were convicted.

67. Although running counter to "official policy," reports of female infanticide typically come from the countryside, where economic pressures to have sons for the work force and as old age security are greatest. According to Shen Gaoxing, director of the education department of China's State Family Planning Commission, female infanticide is a problem, but Shen claims that such cases are severely dealt with under the law. Baum, *supra* note 12. Responding to accusations by the United States, the Chinese Embassy in Washington, D.C. has called press reports of female infanticide "lopsided, distorted and exaggerated." States News Service, Apr. 12, 1985, *available in* LEXIS, Nexis Library, States News Service File.

68. Hungdah Chiu, *Chinese Attitudes Toward International Law in the Post-Mao Era, 1978-1987*, 21 INT. LAW. 1127, 1139 (1987).

69. The daughter of the village Communist Party leader in Bai Mao township, Sichuan, had to be dissuaded from having a third child by relatives, who convinced her that it was already difficult enough for her father to urge other villagers to have only one child when his own daughter had two. WuDunn, *supra* note 2, §1, at 1.

mentation, in order to determine whether these economic sanctions and incentives violate international human rights, it is necessary to consider three questions: first, what constitutes the *law* of international *law*; second, what international human rights are provided for families; and third, how competing national interests might curtail such rights.

The mainland Chinese may not spend much energy contemplating human rights,⁷⁰ but beyond China's borders lies a significant body of treaties, declarations and proclamations relating to population policies. Furthermore, the tension between a couple's procreative rights and State duties to pursue policies which raise living standards has been apparent in these international instruments ever since the United Nations first began delineating "human rights."⁷¹ Therefore, before examining specific instruments, a brief discussion of what constitutes international *law* and how the PRC and the majority of States view human rights within that rubric may be helpful.

A. Sources of International Law⁷²

There are four primary sources of international law: treaties, custom, "general principles of law recognized by civilized nations,"

70. Some interesting comparisons between the quality of life in democratic India and authoritarian China suggest that complacency may account for the relative lack of agitation over human rights among rural Chinese. A recent article noted:

Chinese enjoyed an economic growth rate over the last decade that was 83 percent higher than India's, China's life expectancy of 70 years of age is 11 years longer than India's, and illiteracy rates are only about half as high in China as in India. For an infant born in China today, the chance of dying in its first year of life is only one-third as high as it would be in India — and that may mean more to the parents than issues of voting or freedom of speech.

Nicholas D. Kristof, *Helping Hand, Heavy Foot: Both Are the Real China*, N.Y. TIMES, Jan. 26, 1992, §4 at 4.

71. Henkin explains that human rights of each individual are "legitimate, valid, justified claims — upon his or her society. . . . Human rights are not some abstract, inchoate 'good'; they are defined, particular claims listed in international instruments. . . . They are those benefits deemed essential for individual well-being, dignity, and fulfillment, and that reflect a common sense of justice, fairness, and decency. . . . They include liberties — freedom *from* (for example, detention, torture), and freedom *to* (speak, assemble); they include also the right to food, housing, and other basic human needs. Human rights are universal[.]" LOUIS HENKIN, *THE AGE OF RIGHTS* 2 (1990) (emphasis in original).

72. For a general discussion of current Chinese scholarly views regarding the sources of international law see Chiu, *supra* note 68, and Samuel S. Kim, *The Development of International Law in Post-Mao China: Change and Continuity*, 1 J. CHINESE L. 117 (1987).

and judicial precedents and scholarly writings.⁷³ General multilateral treaties⁷⁴ have a legislative character.⁷⁵ Customary international law, as defined by the Statute of the International Court of Justice, comprises two elements: (1) "general practice" and (2) its acceptance as law.⁷⁶ References to familial and developmental rights, which may or may not constitute evidence of customary international norms, are found in both treaties and declarations.⁷⁷ The extent to which United Nations declarations and resolutions⁷⁸ move beyond aspiration to provide evidence of "general practice" sufficient to constitute universal principles accepted as law by the majority of states has yet to be

73. The Statute of the International Court of Justice [hereinafter ICJ Statute], Article 38 reads (in part):

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, 59 Stat. 1031, 1060, T.S. 993, 3 Bevans 1153, 1187.

74. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child are all examples of multilateral treaties. See *infra* note 75. For discussion of these texts, see *infra* sections IV and V.

75. HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS (2nd ed., 1987) at 70-71 (hereinafter INTERNATIONAL LAW). There are three basic categories of treaties: multilateral treaties, which "lay down rules of behavior which . . . are of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law," regulatory treaties which establish mechanisms whereby States can manage a particular area of activity, and bilateral and regional agreements that are more contractual than legislative in nature. *Id.*

76. 59 Stat. 1055, art. 38(b). The Restatement of the Foreign Relations Law of the United States indicates that international law may be derived from customary law, international agreements, or "general principles common to the major legal systems of the world." REST. 3RD, RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (hereinafter RESTATEMENT (REVISED)). The debate over whether custom or treaty plays the more dominant role in the development of international law is not central to the present discussion. For a brief examination of this issue, see INTERNATIONAL LAW, *supra* note 75, at 71-72.

77. For discussion of specific texts, see *infra* section IV.

78. The Universal Declaration of Human Rights, the Proclamation of Teheran, the Declaration on Social Progress and Development and the Declaration on the Right to Development are examples of recommendatory resolutions. For discussion of these texts, see *infra* section IV.

definitively determined.⁷⁹ There is some debate as to whether resolutions and declarations should be regarded as legally binding,⁸⁰ as evidence of customary international law,⁸¹ or as simply hortatory.⁸² Nevertheless, there appears to be broad acceptance for the proposition that General Assembly resolutions and declarations, while perhaps not intrinsically carrying the force of law, do have a "formative influence" on the development of international law.⁸³

*B. Human Rights as International Law*⁸⁴

The question of the legally binding nature of custom, resolutions and declarations, hardly a clear-cut subject under the best of circum-

79. The General Assembly is not an international legislature, and resolutions and declarations are not included among the list of sources of international law found in Article 38(1) of the ICJ Statute (*see supra* note 73); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 85 (1991). One source notes that "[n]ot all 'declarations' by the General Assembly are intended to express legal rights and obligations. . . . All governments appear to agree that General Assembly resolutions are not, as such, legally binding except when addressed to subsidiary organs[.]" *INTERNATIONAL LAW, supra* note 75, at 115.

80. One school of thought believes that resolutions which build upon existing rules or principles, especially those adopted unanimously, may reasonably be viewed as interpreting the United Nations Charter, and therefore have the effect of making new law. SCHACHTER, *supra* note 79, at 87. *See also* Luke T. Lee, *Law, Human Rights and Population: A Strategy for Action*, 12 VA. J. INT'L. L. 309, 313 (1972). According to Lee, the question of the legally binding nature of a resolution "would hinge upon the intent of the resolution, the extent of the consensus supporting it, and the repeated endorsements it receives both in and out of the United Nations." *Id.*

81. Schachter argues that resolutions and declarations should be viewed as "evidentiary," and should be used to "assess the degree and character of support received in the United Nations and the relation if any of the asserted rule to an underlying Charter or customary law principle." SCHACHTER, *supra* note 79, at 89.

82. The Universal Declaration of Human Rights is one example of a declaration which, according to those voting for it, was not intended to be a statement of existing law, but rather to express "a common standard of achievement." *INTERNATIONAL LAW, supra* note 75, at 115, quoting the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). The purely aspirational nature of a declaration is most clearly indicated when there exists little or no State practice to support the text. *RESTATEMENT (REVISED) supra* note 76, § 103, comment c. However, the Universal Declaration is also an example of a recommendation which has gradually acquired the force of law. *See infra* note 90 and accompanying text.

83. SCHACHTER, *supra* note 79, at 85; SIR GERALD FITZMAURICE, *SPECIAL REPORT TO THE INSTITUT DE DROIT INTERNATIONAL IN LIVRE DU CENTENAIRE 1873-1973*, at 269 (1973), *quoted in* *INTERNATIONAL LAW, supra* note 75, at 120.

84. The term "human rights" has not been authoritatively defined. However, in common usage the term implies "those 'moral-political claims which, by contemporary consensus, every human being has or is deemed to have upon his society and government,' claims which are recognized 'as of right,' not by love, or grace, or charity." *INTERNATIONAL LAW, supra* note 75, at 983, citing Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979) and LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 1-3 (1978).

stances, becomes even more complex with regard to the highly controversial area of international human rights.⁸⁵ The Charter of the United Nations specifically mandates "respect for, and observance of, human rights and fundamental freedoms."⁸⁶ It further provides that "[a]ll members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [these] purposes[.]"⁸⁷ The Charter is indisputably a treaty, legally binding upon all members of the United Nations, including China. However, even if one accepts the argument that "the legal duty to promote respect for human rights includes the legal duty to respect them,"⁸⁸ the scope of human rights is not defined within the Charter.

The Universal Declaration of Human Rights⁸⁹ represents the United Nations' first attempt to articulate this scope. Numerous subsequent United Nations resolutions, Final Acts and Covenants have reaffirmed the provisions of the Declaration, thus re-enforcing the view that "the Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law."⁹⁰ Subsequent conventions and declarations have further elaborated

85. Henkin et al. note that those state practices which are accepted as building customary international laws of human rights include some forms of conduct which differ from those that build customary international law generally, because general customary international law governs relations between States, while "[i]nternational human rights law governs relations between a state and its own inhabitants. Other states are only occasionally involved in implementing such law through ordinary diplomatic practices." *INTERNATIONAL LAW*, *supra* note 75, at 999.

86. U.N. CHARTER, art. 55(c). It is interesting to observe that the tension between human rights and development is present even within this article, which states that the United Nations shall promote: "higher standards of living, full employment, and conditions of economic and social progress and development." *Id.* art. 55(a).

87. *Id.* art. 56.

88. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 152 (1973).

89. *Supra* note 82. The Universal Declaration was adopted in 1948 by a vote of 48 to 0 with eight abstentions. *INTERNATIONAL LAW*, *supra* note 75, at 986. *See* discussion, *infra*, section IV regarding specific sections of the text.

90. Montreal Statement of the Assembly for Human Rights 2 (New York, 1968) *reprinted in* 9 J. INT'L COMM. JURISTS 94, 95 (1968) *quoted in* *INTERNATIONAL LAW*, *supra* note 75, at 987. *See* *INTERNATIONAL LAW* at 987 for similar statements by the Secretary-General, and in the Proclamation of Teheran and the General Assembly resolution supporting the Proclamation. This view is not undisputed. *See* LAUTERPACHT, *supra* note 88, at 408-417 for the proposition that the Universal Declaration is no more than "morally binding." Discussing the "grey zone" of legality in which the Universal Declaration exists, Henkin observes that: "[w]ith time, the Universal Declaration has itself acquired significant legal status. . . . Few [States] claim that any state that violates any provision of the Declaration has violated international law. Almost all would agree that some violations of the Declaration are violations of international law." HENKIN, *supra* note 71, at 19.

specific types of "human rights" and how States should go about promoting and observing them. The conventions bind the States Parties by virtue of their treaty status. However, because China is not a signatory to most of these instruments, it becomes necessary when evaluating whether the one-child policy violates international human rights to determine the extent to which China may nonetheless be constrained by the customary international law created by these treaties and declarations.⁹¹

The Chinese recognize the existence of customary international law,⁹² and consider United Nations resolutions a subsidiary means of determining the rules of law.⁹³ In their view, those General Assembly resolutions adopted by unanimous or overwhelming majorities, while not possessing a formally legal character, do have a certain binding force on those members who voted for their adoption, as well as "general significance in international relations."⁹⁴ Furthermore, the People's Republic recognizes the Universal Declaration as "the first international human rights document that has laid the foundation for the practice of human rights in the world arena."⁹⁵

This praise notwithstanding, Chinese legal scholars and government representatives have consistently insisted that global human rights standards are aspirational, and must in practice be subject to national historical, social, economic and cultural conditions.⁹⁶ They deny that

91. Put another way, to what extent does repeated reference in treaties and declarations to, for example, a couple's right to decide the number and spacing of their children constitute evidence of an *opinio juris communis* which binds China despite that State's non-participation? See discussion, *infra*, section IV, for some possible answers. Lee takes the view that "those human rights based on international custom [which are codified in treaty form] continue to be binding upon states, notwithstanding the latter's failure to ratify or adhere to such treaties." Lee, *supra* note 80, at 312.

92. See Kim, *supra* note 72, at 129. According to Chinese scholars, evidence of custom which may constitute evidence of general practice "can be created or found in (1) diplomatic relations among states, as expressed in treaties, declarations and statements, and various diplomatic documents[:]; (2) practices of international institutions, as expressed in resolutions and decisions; and (3) internal behavior of states, as expressed in domestic laws and regulations, court decisions, and administrative orders." *Id.* at 133.

93. Chiu, *supra* note 68, at 1142.

94. *Id.* (quoting a discussion in GUOJI FA [INTERNATIONAL LAW] 35 (Wang Tieya & Wei Min eds., 1981), the standard textbook on international law used in most Chinese colleges and institutions.)

95. Information Office of the State Council, *Human Rights Whitepaper: Human Rights in China*, BEIJING REV., Nov. 4-10, 1991, at 8 [hereinafter *Human Rights Whitepaper*].

96. The Chinese maintain the position expressed by Chen Shiqiu, permanent representative of the PRC to the UN, that "in view of the diversity of social and political systems, degrees of economic development and historical, religious and cultural backgrounds, it was only natural

individuals are subjects of international law.⁹⁷ Indeed, they "harbor a skeptical view" of the validity of international human rights law, and generally accuse Western countries of "attempt[ing] to use the pretext of protecting human rights to interfere in China's and other socialist states' internal affairs."⁹⁸

However, by analyzing China's position from the "the practical attitude, the attitude of seeking truth from facts,"⁹⁹ it can be argued that China's behavior suggests de facto recognition of international human rights law. Although currently a State Party to very few of the major human rights conventions,¹⁰⁰ the PRC nevertheless has not hesitated to invoke the Charter and "generally accepted principles of international law concerning human rights" to denounce actions by other States.¹⁰¹ Edwards observes that "when a state repeatedly invokes international law principles, there comes a point when its actions are actually constrained," and that Chinese government leaders "would probably" concede that their conduct should be held to the same standards which they apply to other States.¹⁰²

that the concept of human rights should be interpreted in different ways." *Report of the Economic and Social Council*, U.N. GAOR 3rd Comm., 50th mtg. at 7, U.N. Doc. A/C.3/45/SR.50 (1990). The *Human Rights Whitepaper* claims that "[o]wing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights Despite its international aspect, the issue of human rights falls by and large within the sovereignty of each country." *Human Rights Whitepaper*, *supra* note 95, at 8-9. The standard Chinese textbook on international law, edited by Wang Tieya and Wei Min in 1981, devotes only eight pages to the subject of human rights, and criticizes Western views of the international character of human rights law and the international rights of individuals as an excuse for violating state sovereignty. *Discussed in* Chiu, *supra* note 68, at 1133-34.

97. Chiu, *supra* note 68, at 1133, 1134 n.13. According to Chiu, the Chinese view is that international law is exclusively an instrument of state foreign policy and a means to regulate inter-state conduct. *Id.* at 1130. Edwards reports that, according to the PRC government, state infringements of human rights are fitting subjects for redress only by recourse to the domestic legal system. Andrew J. Nathan et al., *Current Chinese Communist Views of Human Rights*, in *HUMAN RIGHTS: A SYMPOSIUM*, Part II, at 114, 121-122 (1978).

98. Chiu, *supra* note 68, at 1139.

99. *Human Rights Whitepaper*, *supra* note 95, at 9.

100. See Nathan et al., *supra* note 97, at 121. For China's status regarding the international texts considered in this note, see APPENDIX. The United States of America is also not a State party to the majority of international human rights conventions. For comparative information on the United States' record of participation in international human rights instruments, see *HUMAN RIGHTS — STATUS OF INTERNATIONAL INSTRUMENTS AS AT 31 MARCH 1991*, U.N. Doc ST/HR/5, U.N. Sales No. E.87.XIV.2 (1991), at 10-11; Henkin, *Rights: American and Human*, *supra* note 84, at 420-25.

101. Nathan et al., *supra* note 97, at 121.

102. *Id.*

With respect to the possible incorporation of certain human rights provisions in the Constitution of the People's Republic, Nathan points out that:

The Constitution in China is not a "guarantist" document which protects the rights of individuals against the encroachment of the state. It is instead based on the assumption of a harmony between the high interests of the individual (if he can perceive them) and those of the state (provided that the leaders of the state properly understand their duty).¹⁰³

If Nathan's assessment is correct, then the one-child family policy must be evaluated from the standpoint of international standards of human rights, not of China's own constitutionally guaranteed civil liberties.¹⁰⁴

Although scholars generally agree that certain human rights are *egra omnes* (obligations binding upon all States)¹⁰⁵ and therefore abuses of those rights violate customary international law,¹⁰⁶ there is no consensus regarding whether the right to decide number and spacing of children falls within this category.¹⁰⁷ The Restatement (Revised) § 702 provides that "a state violates international law if, as a matter of state policy, it practices, encourages or cordones . . . (g) consistent patterns of gross violations of internationally recognized

103. *Id.* at 115-16.

104. Edwards argues that the Chinese people themselves do not generally feel a sense of having human "rights" and "entitlements" vis-a-vis the State. He observes that the revolutionary character of Chinese society impresses upon the people a view that their individual interests are subordinate to the pursuit of Communist goals. *Id.* at 122. Edwards does not discuss the degree to which a growing de facto capitalist orientation in industry undermines belief in the subordination of individual needs to those of society. Nevertheless, it is interesting to note, as Edwards does, that traditionally "the individual in China was never the basic unit in social, political, and economic organization." Rather, this status belonged and continues to belong to the family. *Id.* at 125.

105. INTERNATIONAL LAW, *supra* note 75, at 1019; HENKIN, THE AGE OF RIGHTS, *supra* note 71, at 21.

106. Freedom from and protection against genocide, slavery, torture, racial discrimination and possibly gender discrimination are among these virtually undisputed universal human rights. See INTERNATIONAL LAW, *supra* note 75, at 996-98; HENKIN, THE AGE OF RIGHTS, *supra* note 71, at 21.

107. See discussion *infra* sections IV and V.

human rights.”¹⁰⁸ However, as the previous discussion indicates, there may well be considerable debate as to the extent to which the procreative rights effected by China’s one-child family policy constitute either *lex communalis* or *jus cogens* (norms from which no derogation is permitted).¹⁰⁹ Leaving that theoretical debate to more competent authorities, let us now take up the issue of what is and is not guaranteed as of right under specific human rights instruments.

IV. THE RIGHT TO FOUND A FAMILY IN INTERNATIONAL LAW: SCOPE AND LIMITATIONS

A. *Family and Human Rights in the Universal Declaration of Human Rights*

Article 16 of the Universal Declaration of Human Rights seems concerned primarily with guaranteeing the freedom of individuals to enter into, maintain, and dissolve a conjugal union.¹¹⁰ Paragraphs (1) and (3) of Article 16 taken together suggest that the international community in 1948 regarded the family unit (i.e., the traditional model of husband-wife-child), rather than simply the spousal relationship, as the natural and desirable state of existence. Couples are

108. RESTATEMENT (REVISED), *supra* note 76, § 702(g). The Restatement notes that § 702(g) does not extend to certain “infringements of recognized human rights” which are “committed singly or sporadically (although they may be forbidden to states parties to the International Covenants or other particular agreements).” *Id.* at § 702, comment m. Schachter concurs with this assessment. SCHACHTER, *supra* note 79, at 341. Henkin argues that human rights which are recognized as “general principles of law recognized by civilized nations” might also become international law. HENKIN, *THE AGE OF RIGHTS*, *supra* note 71, at 21*.

109. Significantly, development rights may well gain international recognition as customary law sooner than familial rights. Schachter notes that: “[p]resent tendencies also suggest that other human rights may be on their way to acceptance as general international law, especially in virtue of their widespread inclusion in national law plus general recognition of their international significance. Several economic and social rights may well meet that dual test — in particular, the right to basic sustenance, and to public assistance in matters of health, welfare and basic education.” SCHACHTER, *supra* note 79, at 340.

110. Article 16 of the Universal Declaration of Human Rights states:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

G.A. RES. 217 (III) (1948) [hereinafter UDHR], *reprinted in* HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS at 4, U.N.Doc. ST/HR/1/Rev.3, Sales No. E.88.XIV.1 (1988) [hereinafter COMPILATION].

guaranteed the right to attain the model status if they wish by bringing some number of children into their homes, either through procreation or adoption, and the State is exhorted to protect the resulting unit.

The Universal Declaration may view the family as a fundamental building block, but does not conceive of it as an end unto itself. The "right" to found a family is expressed in language which suggests neither a mandate to procreate nor a guarantee that couples may have as many children as they wish. The Universal Declaration clearly places the individual and his rights within the broader context of society.¹¹¹ Article 29 contemplates man living within a society, responsible to it for conducting his life in a communally non-detrimental manner. Individuals have "duties to the community" — namely that they must abide by the rule of law, respect the rights of others, and comply with the "just requirements" which promote the "general welfare."¹¹² Article 29(3) suggests that the "just requirements" in Article 29(2) include the principle that no one shall exercise his rights to a degree which unreasonably harms others. In the Chinese context, it is possible to interpret the Universal Declaration to mean that parents have the right to *some* children under Article 16, but, according to Article 29, the number may be subject to legal limitations necessary to ensure the general welfare of the community.

Using the Universal Declaration as a skeletal frame upon which to build, many subsequent international instruments have specifically explored the connection between families, human rights and national development. While the language of these instruments is not identical,

111. Universal Declaration of Human Rights, Article 29 states:

1. Everyone has duties to the community in which alone the freedom and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

UDHR, *supra* note 110.

112. The Universal Declaration of Human Rights offers a possible definition of the "general welfare" in Article 25(1):

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Id. art. 25(1).

there are certain common elements which give the impression that these documents are cross-referential, and that collectively they may articulate an internationally recognized matrix of "laws" relating to familial rights and State duties. The following section will attempt to set forth the uniform aspects of these international instruments and to explore the significant distinctions between them, so that China's policy of economic incentives and disincentives may be measured against a concrete standard.

B. Articulating the "Law" of Procreative Rights and the Duty to Develop

The legal matrix of individual, familial and societal rights and duties appears to embrace the following principles: (1) the family is the natural and fundamental unit of society; (2) as such, it is entitled to some degree of State protection; (3) all children have, without distinction or discrimination, an explicit right to protection by the family and the State; (4) parents have the right to decide freely and responsibly the number and spacing of their children; (5) States have an affirmative duty to provide parents access to and education about family planning so that they may exercise this right; (6) every human being has the right to an adequate standard of living; (7) States have the duty to formulate and pursue policies which will create favorable conditions for the realization of an adequate standard of living; and (8) by implication, in order to be successful, State policies may take precedence over certain individual and family rights.¹¹³

C. Variations Among the Instruments

1. Principles 1 and 2: The Family is the Fundamental Unit of Society and Therefore Entitled to Protection

The Universal Declaration's view that the family is the natural and fundamental unit of society and is therefore entitled to protection by society and the State¹¹⁴ has been embraced unconditionally and with

113. For discussion of the specific texts from which these principles are derived, see *infra* section IV(C).

114. It may also be entitled to protection by international organizations. The Proclamation of Teheran notes in Point 16 that "[t]he protection of the family and of the child remains the concern of the international community." U.N. Doc. A/CONF.32/41 (1968) [hereinafter Teheran Proclamation], reprinted in COMPILATION, *supra* note 110, at 45.

only slight linguistic variations by all subsequent instruments referring to the family. However, the instruments part company on the degree and character of protection a State must provide. Thus, the International Covenant on Economic, Social and Cultural Rights claims that the family should be afforded "[t]he widest possible protection and assistance."¹¹⁵ The International Covenant on Civil and Political Rights states merely that the family is entitled to "protection" but identifies the source of this protection as "society and the State."¹¹⁶ The drafters of the Declaration on Social Progress and Development appear to have consciously steered a middle course by urging that the family should be "assisted and protected[.]"¹¹⁷ Their approach was modified only slightly under the Convention on the Rights of the Child to provide that this assistance should be given as "necessary[.]"¹¹⁸

115. The International Covenant on Economic, Social and Cultural Rights, Article 10(1) provides:

[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children

G.A. Res. 2200 A, U.N. GAOR 21st Sess., Supp. No. 16 (1966) [hereinafter ICESCR], reprinted in COMPILATION, *supra* note 114, at 11.

116. The International Covenant on Civil and Political Rights, Article 23(1) states: "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State." G.A. Res. 2200 A, U.N. GAOR, 21st Sess., Supp. No. 16 (1966) [hereinafter ICCPR], reprinted in COMPILATION, *supra* note 110, at 27.

117. Declaration on Social Progress and Development, Article 4 states:

[t]he family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community.

G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, 50, U.N. Doc. A/7630 (1969) [hereinafter DSPD], reprinted in COMPILATION, *supra* note 110, at 381.

The original text of the Declaration's working draft called for the family environment to be "strengthened by all possible means, it being recognized that each family has the right, within the framework of national demographic policies, to the knowledge and means to decide the number and spacing of children[.]" Working Party on the Draft Declaration of Social Progress and Development, Draft Declaration on Social Progress and Development, E/4467/Rev. 1, Annex II (1968), art. 1, para. 10 (emphasis added) [hereinafter Draft Declaration]. The phrase relating to national demographic policies was moved to Article 22, (*see infra* note 131 and accompanying text) which is addressed primarily to States, suggesting that there was considerable disagreement among the drafters as to whether the need for family planning was fundamentally a matter of individual choice or of State policy.

118. The preamble to the Convention on the Rights of the Child asserts that its signers are "[C]onvinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community." G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1990) [hereinafter CRC], (emphasis added).

The issue of how much and what type of assistance and protection is afforded the family becomes important in the context of parental rights and State duties. If the locus of decision-making regarding number and spacing of children resides primarily with parents, their ability to make these decisions requires that the State assist with (or at least not hinder) access to contraceptive devices. Furthermore, because exercise of family rights is constrained by responsibilities to the community, protection may imply protection of all families collectively, rather than of each discrete family unit.

2. Principle 3: All Children Have the Right to Parental and State Protection without Distinction or Discrimination

International law appears to afford children heightened protection in certain areas, and to explicitly forbid differentiated treatment for children based upon birth order. The International Covenant on Economic, Social and Cultural Rights provides that "special measures" should be taken on behalf of all children without discrimination "for reasons of parentage or other conditions."¹¹⁹ The International Covenant on Civil and Political Rights identifies the child's "family, society and the State" as the entities required to give protection and assistance without discrimination as to "birth."¹²⁰ Both the Declaration on the Rights of the Child and the Convention on the Rights of the Child provide that States shall respect and ensure the rights of all children without discrimination on the basis of "birth or other status,"¹²¹ while the Convention on the Rights of the Child further

119. Article 10(3) provides, "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. . . ." ICESCR, *supra* note 115, art. 10(3). *See also Id.* art. 10(1).

120. Article 24(1) provides "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family and the State." ICCPR, *supra* note 116, art. 24(1).

121. Principle I of the Declaration on the Rights of the Child states:

[t]he child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1960) [hereinafter DRC], *reprinted in* COMPILATION, *supra* note 110, at 367. Furthermore, Article 2(1) of the Convention on the Rights of the Child provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the

insists that States shall protect the child from discrimination based upon the "status" or "activities" of the parents.¹²²

Economic policies which penalize a child solely on the basis of birth order appear to violate the international standard set forth above since they discriminate based upon a factor which is wholly outside the child's control. However, as will be discussed below, this standard is reactive, applying to the child once it is born, and should be distinguished from policies which are primarily aimed at discouraging prospective parents from conceiving and bearing the "additional" child.

3. Principle 4: Parents Have a Right to Decide the Number and Spacing of Their Children

The principle that parents have the right to decide the size of their family and therefore are entitled to access to information and means which will enable them to exercise this right also appears to have gained broad acceptance under international law. The General Assembly formally recognized the "sovereignty of nations in formulating and promoting their own population policies, with due regard to the principle that the size of the family should be the free choice of each individual family[.]"¹²³

Yet, the relevant texts do not consistently express the degree to which these family rights are inviolable. The Proclamation of Teheran asserts that parents have a "basic right" to determine freely and responsibly the number and spacing of their children,¹²⁴ while the Declaration on Social Progress and Development states that this right

child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth or other status.

CRC, *supra* note 118, art. 2(1).

122. Article 2(2) provides:

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

CRC, *supra* note 118, art. 2(2).

123. Population Growth and Economic Development, G.A. Res. 2211, U.N. GAOR, 21st Sess. (1966), *reprinted in* 11 UNITED NATIONS RESOLUTIONS: SERIES I, RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY 1966-1968, at 157, 158 (Dusan Djonovich, ed. 1975).

124. Point 16 states that, "[p]arents have a basic right to determine freely and responsibly the number and spacing of their children." Teheran Proclamation, *supra* note 114, point 16.

is "exclusive."¹²⁵ The Convention on the Elimination of All Forms of Discrimination against Women does not qualify the right, but simply affirms that men and women shall have equal rights regarding decisions as to number and spacing of children.¹²⁶

On its face, the "exclusive right" granted by the Declaration on Social Progress and Development appears to extend isolated family rights beyond the parameters established in the Universal Declaration and other instruments, in which family rights are clearly constrained by duties to the community. Indeed, an examination of the "legislative history" of the Declaration reveals that there was considerable disagreement among the drafters as to just how "exclusive" Article 4 was intended to be.¹²⁷ Despite the fact that the article was approved unanimously, after the vote several delegates expressed their reservations regarding the word "exclusive," on the grounds that "[a] country's population growth must go hand in hand with economic growth," and making the right "exclusive" would impede government

125. Article 4 provides, "[p]arents have the exclusive right to determine freely and responsibly the number and spacing of their children." DSPD, *supra* note 117, art. 4.

126. Article 16 provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . . (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights[.]

The Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) [hereinafter CEAFAW], reprinted in COMPILATION, *supra* note 110, at 120.

127. Use of the word "exclusive" was keenly debated. Some of the protecting States claimed that "in the case of the developing countries, the right of parents to decide the number of their children could not be separated from the requirements of national development[.]" Mrs. Ould Daddah (Mauritania), U.N. GAOR 3rd Comm., 23rd Sess., 1600th mtg., at 3, U.N. Doc. A/C.3/SR.1600 (1968). Defenders of the term responded that inserting the word "exclusive" would "strengthen the right of families to determine the number of their children without outside interference or pressure of any kind." Mr. Artaza (Chile), U.N. GAOR 3rd Comm., 23rd Sess., 1601st mtg., at 1, U.N. Doc. A/C.3/SR. 1601 (1968).

A separate vote was taken solely on the word "exclusive," which was approved by a narrow margin of 28 to 25 votes, with 25 abstentions. *Id.* at 1. After this vote, a second was taken on the entire phrase "[p]arents have the exclusive right to decide freely and responsibly the number and spacing of their children." Some states wished to delete the phrase "each family having the right to decide the number of its children" because, they argued, "it was not a universal right." Mr. Le Diraison (France), U.N. GAOR 3rd Comm., 23rd Sess., 1589th mtg., at 1, U.N. Doc. A/C.3/SR. 1589 (1969). The majority disagreed, believing that "[t]he right itself was beyond dispute," even if the methods to be employed in exercising that right were debatable. When the sentence received broad approval (passing by a vote of 70 to 4, with 20 abstentions), a third vote was taken on Article 4 as a whole. It was adopted by 87 votes to none, with 9 abstentions. U.N. GAOR, 3rd Comm., 23rd Sess., 1601st mtg., at 1, U.N. Doc. A/C.3/SR.1601 (1968).

programs.¹²⁸ However, only a small portion of the States representatives actually commented on the issue of exclusivity. Therefore, it is difficult to ascertain how high parental rights may have been elevated by the Declaration above the "basic" level. Furthermore, because the Declaration, which does not have treaty status, is the only international instrument which characterizes this right as "exclusive," the degree to which customary international law embraces this right's exclusivity remains unclear, particularly in light of competing and compelling State interests. Nevertheless, post-debate statements, while not constituting a definitive interpretation of the text, do underscore the fact that several delegations regarded an international instrument espousing an "exclusive" parental right as a potentially dangerous trump to State demographic policies.

4. Principle 5: Parents Have a Right to Practice Family Planning and States Have a Duty to Provide Information and Access

Over the years, family planning has gained the status of a "human right" and States have been assigned a certain degree of responsibility for ensuring this right. The Declaration on Population refers to family planning as a basic human right.¹²⁹ The Final Act of the International Conference on Human Rights claims that families have a right to adequate education and information to enable them to practice family planning.¹³⁰ The Declaration on Social Progress and Development requires States to formulate and establish, "as needed," population programs which shall include "education, training of personnel and the

128. Mrs. Galetshoge (Botswana), U.N. GAOR, 3rd Comm., 23rd Sess., 1601st mtg., at 2, U.N. Doc. A/C.3/SR.1601 (1968). Mr. Sanon (Upper Volta) said that "[w]hile his country respected the right of parents to determine the size of their families, it also recognized the right of the State to limit population growth for economic or security reasons." Mrs. Agboton (Dahomey) explained that she had voted against the word because, in her view, the smaller and weaker countries should be allowed the right to influence population trends, if necessary, with a view to maintaining a balance between the size of the population and the degree of economic and social development. *Id.* Similarly, Mr. Gherib (Tunisia) was of the opinion that "a Government might find itself forced to furnish guidance to parents, by means of persuasion, in regard to number and spacing of births. That being so, the insertion of the word "exclusive" could raise difficulties for some Governments." *Id.*

129. The Declaration was signed by 30 Heads of State on Human Rights Day, 10 December 1966. WORLD POPULATION CONFERENCE, BUCHAREST, U.N. Doc. E/Conf.60/CBP/6 at 6 n.7 (1974); Lee, *supra* note 80, at 316.

130. *Human Rights Aspects of Family Planning*, International Conference on Human Rights, Res. XVIII, U.N. Sales No. E.68.XIV.2, at 14; *discussed in* the WORLD POPULATION CONFERENCE, BUCHAREST, U.N. Doc. E/Conf.60/CBP/5, at 3-4 (1974).

provision to families of the knowledge and means necessary" to enable them to exercise their rights regarding birth decisions.¹³¹ The Convention on the Elimination of All Forms of Discrimination against Women provides that women shall have the same rights as men in the arena of family planning.¹³²

Among these instruments, the Declaration on Social Progress and Development is most noteworthy because it moves beyond simply articulating the family's "rights," to requiring that States actively provide family planning information and means to their citizens. Among the drafters, the idea that national demographic policies and programs should include dissemination of knowledge, training and means necessary to ensure effective implementation proved as controversial as had the term "exclusive." In fact, a separate vote was taken on the words "and means."¹³³ General Assembly records indicate that the drafters' intent was to ensure individuals access to

131. Article 22(b) states that in order to achieve the objectives of the Declaration, States are required to mobilize the necessary resources for:

[t]he formulation and establishment, as needed, of programmes in the field of population, within the framework of national demographic policies and as part of the welfare medical services, including education, training of personnel and the provision to families of the knowledge and means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children[.]

DSPD *supra* note 117, art. 22(b).

132. Article 12 provides, "[s]tates parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." CEAFAW, *supra* note 126, art. 12. Article 16(e) further ensures women "access to the information, education and means to enable them to exercise [family planning] rights." *Id.* art. 16(e).

133. It passed by 60 votes to 16, with 17 abstentions. U.N. GAOR 3rd Comm., 24th Sess., 1684th mtg. at 185, U.N. Doc. A/C.3/SR.1684 (1969). A minority of delegates argued that there was no over-population, only under-production. Therefore, the Declaration should mandate utilization of previously unexploited resources, and leave questions of demographics and family planning to individual States. Soviet, Mongolian and Brazilian representatives expressed this view on record. *See* U.N. GOAR 3rd Comm., 24th Sess., 1683rd mtg. para. 7, U.N. Doc. A/C.3/SR. 1683 (1969); U.N. GAOR 3rd Comm., 24th Sess., 1682nd mtg. para. 6, U.N. Doc. A/C.3/SR. 1682 (1969).

This position was effectively rebutted by several delegates, including the Pakistani, Norwegian and United Arab Republic representatives, who pointed out that unconstrained population growth would negate all social and economic efforts to reduce malnutrition, illiteracy and poverty. *See* U.N. GAOR 3rd Comm., 24th Sess., 1682nd mtg. para. 38, U.N. Doc. A/C.3/SR. 1682 (1969); U.N. GAOR 3rd Comm., 24th Sess., 1683rd mtg. paras. 11 & 23, U.N. Doc. G.A. A/C.3/Sr. 1683 (1969).

information about and means to exercise birth control. The issue of coercive birth control was not raised.¹³⁴

5. Principles 6, 7 and 8: Everyone Has the Right to an Adequate Standard of Living and the State Has a Duty to Formulate Policies Which Will Foster Realization of That Right, Even Though Such Policies May Intrude Upon Specific Family Rights

As was discussed above, the Universal Declaration conceives of the family as an *integrated* unit of society, and individual behavior as being subject to certain socially mandated limitations which will enhance "the general welfare."¹³⁵ The International Covenant on Economic, Social and Cultural Rights calls upon States to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."¹³⁶ Additionally, this Covenant requires that States placing limitations on specifically protected rights do so only in "so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."¹³⁷ However, without more, the Universal Declaration and the Covenants stop well short of addressing acceptable and unacceptable means of balancing procreative rights and community goals, let alone the specifics of the one-child-per-family policy.

The Proclamation of Teheran takes a step toward subordinating isolated parents' wishes to broader social authority by recognizing that "the widening gap between the economically developed and developing countries impedes the realization of human rights" and that it is "imperative for every nation, according to its capacities, to make the

134. Originally, Article 22(b) of the Declaration on Social Progress and Development provided that governments and international organizations were to pay attention to the "establishment as needed of programmes in the field of populations; consistent with and related to the economic, social, religious, spiritual and cultural circumstances of the respective countries[.]" Draft Declaration, *supra* note 117, art. 3, para. 5. Deletion of the phrase "consistent with and related to the economic, social, religious, spiritual and cultural circumstances" may signify that the drafters did not wish States' policies to be hindered by traditional attitudes that had become harmful to the "general welfare."

135. UDHR, *supra* note 110, art. 29(2). See *supra* notes 111 and 112 and accompanying text.

136. ICESCR, *supra* note 115, art. 11(1).

137. *Id.*, art. 4.

maximum possible effort to close this gap[.]”¹³⁸ An examination of the United Nations records reveals that participants of the International Conference on Human Rights at which the Proclamation was drafted¹³⁹ recognized that full realization of civil and political rights would be impossible without “sound and effective national and international policies of economic and social development.”¹⁴⁰ The Conference ominously observed that unlimited population growth posed a serious threat to world health.¹⁴¹

The Declaration on Social Progress and Development attempts to place “exclusive” parental rights within the broader context of communal and national concerns by affirming that each State has the “right and responsibility” to set its own goals and means for achieving social development, “without any external interference.”¹⁴² The family unit is to be protected “so that it may fully assume its responsibilities within the community.”¹⁴³ Furthermore, the government is assigned “the primary role and ultimate responsibility of ensuring the social progress and well-being of its people,” and of developing programs which bring these goals closer to realization.¹⁴⁴ Lastly, the Declara-

138. Point 12 states:

[t]he widening gap between the economically developed and developing countries impedes the realization of human rights in the international community. The failure of the Development Decade to reach its modest objectives makes it all the more imperative for every nation, according to its capacities, to make the maximum possible effort to close this gap[.]

Teheran Proclamation, *supra* note 114, point 12.

139. Participants included representatives from the Food and Agricultural Organization (FAO) and the World Health Organization (WHO) as well as member states. INT’L. CONF. ON HUM. RTS., 1968 U.N.Y.B. 538 U.N. Sales No. E.70.I.1.

140. *Id.* at 540.

141. Participants noted that “the present rate of growth in some areas of the world hampered the struggle against hunger and poverty, and in particular reduced the possibilities of rapidly achieving adequate standards of living, including food, clothing, housing, medical care, social security, education and social services, thereby impairing the full realization of human rights.” *Id.* at 545.

142. Article 3 states:

the right and responsibility of each State and, as far as they are concerned, each nation and people to determine freely its own objectives of social development, to set its own priorities and to decide in conformity with the principles of the Charter of the United Nations the means and methods of their achievement without any external interference .

...

DSPD, *supra* note 117, art. 3.

143. *Id.*, art. 4. *See supra* note 125.

144. Article 8 states:

[e]ach government has the primary role and ultimate responsibility of ensuring the social progress and well-being of its people, of planning social development measures as part of comprehensive development plans, of encouraging and co-ordinating or integrating all national efforts towards this end and of introducing necessary changes in the social

tion calls for the formulation of programs, "within the framework of national demographic policies," including education regarding and access to methods of birth control, which will enable families to exercise their rights.¹⁴⁵ It appears that international human rights law leaves individual nations broad discretion with regard to internal demographic policies. Several international documents have explicitly stated that formation of a national demographic policy is an exercise of state sovereignty.¹⁴⁶ However, State exercise of intrusive population control must be measured against other international standards, including human rights.¹⁴⁷

The Declaration on the Right to Development¹⁴⁸ reiterates some of the language found in prior instruments, first by affirming that States have both the right and the duty to formulate development policies. The text expressly states that "[a]ll human beings have a responsibility for development, individually and collectively" and that

structure. In planning social development measures, the diversity of the needs of developing and developed areas, and of urban and rural areas, within each country, shall be taken into due account.

Id., art. 8.

145. *Id.*, art. 22:

[The Declaration calls for mobilization of the necessary resources by national and international action for:]

- (a) The development and co-ordination of policies and measures designed to strengthen the essential functions of the family as a basic unit of society;
- (b) The formulation and establishment, as needed, of programmes in the field of population, within the framework of national demographic policies and as part of the welfare medical services, including education, training of personnel and the provision to families of the knowledge and means necessary to enable them to exercise their right to determine freely and responsibly the number and spacing of their children[.]

Id.

146. This was the sixth basic principle of the Draft World Plan of Action. *Objectives and Principles of World Population Plan of Action*, WORLD POPULATION CONFERENCE, BUCHAREST, at 7, U.N. Doc. E/Conf.60/CBP/10 (1974). This source cites four General Assembly resolutions, two ECOSOC resolutions, one World Health Assembly resolution, and the Declaration of the Stockholm Conference on the Human Environment to support its claim that "[t]his principle has been repeatedly recognized in United Nations instruments[.]" *Id.*

147. Principle 97 of the World Population Plan of Action as adopted reads: [t]his Plan of Action recognizes the responsibility of each Government to decide its own policies However, national policies should be formulated and implemented without violating, and with due promotion of, universally accepted standards of human rights. STEPHEN L. ISAACS, *POPULATION LAW AND POLICY: SOURCE MATERIALS AND ISSUES* 378 (1981).

148. G.A. Res. 41/128, U.N. GAOR., 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1987), reprinted in *COMPILATION*, *supra* note 114, at 403 [hereinafter DRD]. "Development" is defined in the Preamble as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom[.]" *Id.*

individuals must consider "their duties to the community" when exercising their human rights.¹⁴⁹ States are assigned "the primary responsibility" for creating conditions which favor national development,¹⁵⁰ and are required to undertake "all necessary measures" to provide individuals equal access to "basic resources, education, health services, food, housing, employment and the fair distribution of income."¹⁵¹

Even the Convention on the Rights of the Child gives the State a mandate to ensure that conditions exist under which a child can realize its right to an adequate standard of living, "particularly with regard to nutrition, clothing and housing."¹⁵² Nevertheless, the Convention provides that children's right shall be promoted by States parties "in accordance with national conditions and within their means," thus

149. *Id.*, art. 2:

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Id.

150. *Id.*, art. 3(1).

151. *Id.*, art. 8(1).

States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income

Id.

152. CRC, *supra* note 118, art. 27.

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. [Omitted.]

Id.

carefully bounding these high aspirations within actual resource constraints.¹⁵³

The potential for conflict between development and procreative rights is evident by the very language of these texts. The remainder of this note will be devoted to evaluating whether the economic facets of China's one-child family policy violate the international human rights standards which emerge from these instruments. Of necessity, all arguments made on behalf of the People's Republic are hypothetical since that government has never stated any position specifically concerning the issue.

V. EXAMINING CHINA'S ECONOMIC POLICY ACCORDING TO THE INTERNATIONAL STANDARD

"Human rights enjoy at least a *prima facie*, presumptive inviolability, bowing only to important societal interests, in limited circumstances, for limited times and purposes, and by limited means. . . . Human rights are claims by individuals upon their own societies, not on other societies or on the international community. . . . Inevitably, the condition of individual rights in any country will depend on its commitment to the idea of rights, and on national mores and institutions, on national attitudes, policies, and social forces."

— Louis Henkin¹⁵⁴

"If America had 1.1 billion people, then they would not be so concerned about this humanitarianism they talk about."

— Shen Guoxiang, director of publicity at the State Family Planning Commission¹⁵⁵

The international standard articulated in the previous section seems to call for a weighing of parental rights against social duties and State obligations. The reality of China's situation — over one billion people living on seven percent of the world's arable land — cries out for some comprehensive national demographic policy. The final section of this note is devoted to showing that economic development in China,

153. *Id.*

154. Louis Henkin, *The Human Rights Idea in Contemporary China: A Comparative Perspective*, in R. RANDLE EDWARDS ET AL., *HUMAN RIGHTS IN CONTEMPORARY CHINA* 9-13 (1986).

155. Kynge, *supra* note 32, at A4.

and therefore the collective well-being of its citizens, is directly and adversely affected by the burdens of its large population. China's response, to the extent that it includes economic incentives and sanctions directed at parents rather than children, does not appear on its face to violate international law. This conclusion is founded in part on the view that China's one-child policy is forward-looking, a long-term plan based upon a determination of what action is necessary now to protect the economic and social well-being of future generations.

A. *Principles 1 and 2: The Family Is the Fundamental Unit of Society and Is Therefore Entitled to Protection*

The ideal family in China has only one child.¹⁵⁶ The PRC could argue that births are apportioned by neighborhood committees and production units much the same way other scarce resources are allotted: according to a collective fairness standard. Every couple is entitled to have a child, and thus to achieve the "model status" described by international law. Furthermore, the resulting one-child family is protected with various financial incentives such as giving expectant mothers "bonuses" for using government-trained midwives, one-child contracts, better housing opportunities and longer maternity leave, all of which improve the quality of life for the family unit.¹⁵⁷ Some officials are also making special efforts to protect female children by giving their families preference in housing and land allocation.

The goal of assisting and protecting the family under international law is to enable its members to assume their responsibilities within society.¹⁵⁸ For reasons which will be elaborated below, each Chinese family has a specific responsibility not to endanger Chinese society's aggregate standard of living by having more children than the country's resources can maintain. According to this view, every additional birth represents that couple's endangerment of other human rights to which their fellow citizens are entitled. The Chinese government has a duty to ensure that everyone's rights are realized to the maximum degree possible. It can be argued that multi-child families frustrate that duty and threaten the realization of other

156. CONSTITUTION OF THE PRC, *supra* note 22, art. 49 states "Marriage, the family and mother and *child* are protected by the state." (Emphasis added.) It should be noted that the original Chinese does not specify singular or plural forms.

157. See *supra* notes 53-67 and accompanying text.

158. See DSPD, *supra* note 117, art. 4.

essential human rights, even among family members. Therefore, they are not entitled to the same degree of protection.

B. Principle 3: All Children Have, without Distinction or Discrimination, an Explicit Right to Be Protected by the Family and the State

When examining the economic component of China's one-child policy under international law, it becomes apparent that with regard to children, the international standard is not met. In most cultures, the birth of a healthy child (particularly a male child) is a joyous event. As the Convention on the Rights of the Child and other instruments indicate, once their lives are created,¹⁵⁹ children are entitled to a heightened degree of protection. Despite the fact that the Chinese government would prefer its citizens to regard additional children as "burdens," China is *required* to protect these "burdens." More specifically, the economic sanctions which discriminate against second and subsequent children merely because of their birth order or their parents' activities clearly appear to violate international law.

A useful distinction may be drawn between those sanctions directed at parents who, despite knowing the consequences, choose to disregard the policy, and those aimed at children who have no say in their own births. While it may arguably be within accepted norms of international law to dock wages for several years in response to an unauthorized birth,¹⁶⁰ denying over-quota babies education and health service subsidies is patently unacceptable. International law requires that all children must be guaranteed access to food, shelter, health care and education without distinction.¹⁶¹

159. In order to pursue the limited purposes of this argument, this *Note* assumes that human life begins at birth and not before. The author defers to more competent authorities for discussion of the issue of exactly when human life begins, either under international law or according to personal beliefs.

160. See *infra* section V(C).

161. ICESCR, *supra* note 115, art. 13(2). "The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all." *Id.* See also discussion, *supra* section IV(C)(2).

Even though China is not a State Party to either of the Covenants (see Appendix), the Compulsory Education Law of 1985 requires every child to attend primary school. COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 18 OF THE CONVENTION, SECOND PERIODIC REPORTS OF STATES PARTIES, ADDENDUM (CHINA), at 8, U.N. Doc. CEDAW/C/13/Add.26 (1989) [hereinafter SECOND PERIODIC REPORT].

The PRC would probably point out that international law also appears to recognize States' obligations to ensure children's rights in accordance with national conditions and abilities. Thus, the PRC might argue, the realization of an individual child's rights, like those of a single adult, are subject to the geographically imposed limitation of living in a country which cannot support everyone out of its own pocket. Imposing economic sanctions is one way to protect against irresponsible parents bearing children whom they cannot afford and who would place an unacceptable drain on State resources. In other words, those couples rich enough to afford the fine (or the bribe) should be strong enough financially to provide adequate food and education for their "extra" children without needing subsidies.

However, several problems arise when parents are viewed as rational economic actors rather than human beings. The first is that couples may disregard economic sanctions, not because they can genuinely afford to forego wages or subsidies or because they expect the child to work at a young age and therefore pay for itself, but because they have strongly held traditional beliefs that encourage the birth of as many sons as possible. Economic sanctions may in fact place significant hardships on poorer families determined to have more children for these cultural reasons. The PRC might respond that part of the one-child campaign involves changing cultural attitudes which devalue female children, a legal obligation China has assumed by becoming a State Party to the Convention on the Elimination of All Forms of Discrimination against Women.¹⁶² Since inferiority of females is one of these strongly held cultural beliefs, and it leads to infanticide, economic rewards specifically aimed at one-daughter families may be defended as protecting the rights of one half the child population. However, parents only receive these particular carrots when the first child born is female. Sanctions are still levied on the second child, regardless of its sex, and the PRC simply cannot deny that this discrimination violates the spirit, if not the letter, of international law.

A second objection to the argument that threat of sanctions reduces the number of families living beyond their means is that both

162. CEAFAW, *supra* note 126, art. 5.

States Parties shall take all appropriate measures: (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women[.]

Id.

the parents and the State are responsible for protecting children under international law. The Chinese government cannot abdicate its responsibilities to children simply because parents do. A possible reply that the State must balance its duties to present and future generations of children does not seem to answer persuasively the charge that discriminatory treatment derogates from international norms. This aspect of the policy becomes even less defensible if one attaches some legal significance to the fact that China is a signatory to the Convention on the Rights of the Child, a treaty which obliges States Parties to protect all children's rights to the fullest extent possible.¹⁶³

In short, the PRC's discriminatory and adverse treatment of second and subsequent children under the economic component of the one-child policy does not appear to pass international muster. It is difficult to imagine an effective economic policy which would impose sanctions on "irresponsible" parental behavior without any adverse impact upon the children who are the product of their parents' irresponsibility. For the purposes of the present discussion, a theoretical distinction may be drawn between those sanctions aimed at parents, such as docked wages, and those aimed at children, such as temporary denial of ration cards. Nevertheless, while the former may be a necessary evil in China and perhaps justifiable under international law,¹⁶⁴ the latter cannot be.

C. *Principles 4 and 5: Parents Have a Right to Decide Freely the Number and Spacing of Their Children and States Have an Affirmative Duty to Provide Information Regarding and Access to Means of Family Planning*

With the exception of the Declaration on Social Progress and Development, no international instrument considers parents' rights to decide number and spacing of children to be "exclusive." The Declaration is an aspirational document rather than a treaty, and its language is unique, suggesting that although the basic right is

163. See Appendix. As was indicated in Section III, *supra*, until China actually ratifies or accedes to the Convention, any such obligation would arise only under customary international law. Nevertheless, by signing the Convention, the Chinese government appears to have expressed its intent to be bound by the principles contained in the Convention. See INTERNATIONAL LAW, *supra* note 75, at 995.

164. See *infra* section V(C).

recognized by international law, it is not regarded as being absolute.¹⁶⁵

China's compliance with the international standard is decidedly mixed. On the one hand, family planning is constitutionally mandated¹⁶⁶ and contraceptives are readily available to both sexes free of charge.¹⁶⁷ On the other hand, parents do not have the right to decide freely the number and spacing of their children. The number is set at one and parents are told by their work units or neighborhood committees when they will be allowed to conceive. As has been mentioned previously, failure to comply with these restrictions may result in docked wages, extended fines, withheld farm land and lost rations. Economic incentives and sanctions such as these seem to go beyond merely articulating a policy, into the realm of significant pressure — if not coercion — to conform.

However, Chinese authorities might argue that parents are required under the international standard to exercise their rights "responsibly" so that the community may flourish. Economic incentives and sanctions are designed to put parents on notice as to what the community and the State considers responsible behavior. To this extent, the economic component of China's one-child policy, including free access to contraceptives, compensation for voluntary sterilization, and bonuses for couples who sign one-child contracts,¹⁶⁸ is proactive, directed not at punishing deviant parents but at deterring them. Parents who choose to have additional children despite the economic warnings are irresponsibly endangering the community.

165. See *supra* section III, for a discussion of the legal quality of declarations.

166. Henkin suggests that international human rights standards, as contrasted with the PRC Constitution, do not permit limitations which would wholly subordinate or suspend individual rights to benefit the perceived general welfare. Henkin, *supra* note 154, at 31.

167. The PRC, in its Second Periodic Report to the Committee on the Elimination of Discrimination against Women, presented the family planning program as one of the steps being taken to implement Article 12(1) of the treaty, which requires States Parties "to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." SECOND PERIODIC REPORT, *supra* note 161, at 10.

168. Arguably, these contracts represent tangible evidence of a couple's agreement to use the contraceptive methods provided by the State.

D. Principles 6, 7 and 8: Everyone Has the Right to an Adequate Standard of Living and the State Has a Duty to Formulate Policies which will Foster Realization of that Right, even though Such Policies May Intrude upon Specific Family Rights

In the Universal Declaration of Human Rights and other international instruments, "an adequate standard of living" appears to be synonymous with adequate access to food, clothing, housing, education and medical care.¹⁶⁹ The PRC government has both a right and an affirmative duty under international law to formulate policies which will enhance every individual's chances of achieving and maintaining an adequate standard of living as defined, not by China, but by the international community.

Food is a serious concern driving the one-child family policy.¹⁷⁰ Measured against the standards of consumption in developed nations, Chinese are already underfed, and even increased production would quickly be outstripped by population growth if no action were taken.¹⁷¹ Educational advancement is also linked to lower populations and higher living standards. Despite national legislation which mandates nine years of compulsory education, the New China News Agency reported that one third of the 220 million primary school children leave school prematurely. In some rural areas, lack of proper educational facilities,¹⁷² scarcity of trained teachers and the demand for teenagers to contribute to family income results in an even lower

169. Universal Declaration, *supra* note 110, art. 25(1); ICESCR, *supra* note 115, art. 11; DRD, *supra* note 148, art. 8(1); CRC, *supra* note 118, art. 27(3).

170. As legalist philosopher Han Fei-tsu noted in the third century, B.C., "[t]he wealth of a nation depends not on the number of its inhabitants but on the amount of food at its disposal." *Quoted in* CHU, *supra* note 8, at 1.

171. The National Family Planning Commission reported in 1983 that although residents in developed nations consume over 2,000 pounds of food per year, a Chinese individual in a population of 1.2 billion will be able to consume only 880 pounds of food per year, assuming farm land is not decreased. The Commission warned that if the population shoots up to 1.48 billion in the year 2000, then each person will only be able to consume 660 pounds of food per year. Ted Chan, United Press International [UPI], Jan. 30, 1983, *available in* LEXIS/Nexis Library, UPI File. It is not certain that China's population will grow quite that quickly. *See* WuDunn, *supra* note 2.

172. *Population and Labour: Census Results, Illiteracy, Employment*, ECONOMIST PUBLICATIONS LTD., COUNTRY REPORT [EP/CR], Dec. 10, 1990, *available in* LEXIS/Nexis Library, EP/CR File. Mosher notes that girls are more likely than boys to leave school early and begin working, or at best to stay in school but begin assuming burdens at home which significantly reduces the time and energy they can bring to studies. MOSHER, *supra* note 7, 119-200. *See also* INTERNATIONAL HANDBOOK OF HUMAN RIGHTS 92 (Jack Donnelly & Rhoda E. Howard eds., 1987).

percentage of children attending middle and high school,¹⁷³ which, in turn, increases illiteracy.¹⁷⁴

Each year, 15 million new jobs must be created for the swelling work force.¹⁷⁵ In 1990 Ruan Chongwu, Minister of Labor, estimated that approximately 11 million Chinese would be unemployed in 1991.¹⁷⁶ The China Daily predicted that a large surplus of labor would occur, especially in rural areas, by the end of the decade because there simply would not be enough jobs for the 233 million anticipated first-time employees.¹⁷⁷ Housing is also a serious problem. Extensive housing reform is underway in 19 cities and 30 counties across the country, with an additional 200 cities operating experimental programs, but difficulties remain.¹⁷⁸

As the discussion above indicates, every individual in China has a right to an adequate standard of living. Therefore, if every couple has as many children as they wish, the resulting population growth

173. R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in EDWARDS ET AL., *supra* note 154, at 72.

174. In its second periodic report to the Committee on the Elimination of Discrimination against Women in 1989, the PRC reported that there were 220 million illiterates in China, 70 percent of whom were women. SECOND PERIODIC REPORT, *supra* note 161, at 8. The China Daily defines literate as "those city residents who have learned 2,000 Chinese characters and can read newspaper stories and articles In the rural areas the criterion is 1,500 characters." Zhang Lin, *Beijing Has Success in Illiteracy Campaign*, CHINA DAILY, Jan. 2, 1991.

175. Goodspeed, *supra* note 1.

176. He said that "overt" urban unemployment was likely to increase by more than one percent over the previous year, to four percent. Such estimates ignore rural factory layoffs (because workers simply return to their farms) and "covert" unemployed, i.e., surplus personnel accumulated as a result of adhering to the socialist ideal of full employment. *Population and Labor News: Family Planning, Census, Unemployment Up*, *supra* note 45.

177. *China Sees Continued Population Woes*, UPI, Aug. 8, 1991, available in LEXIS/Nexis Library, UPI File. Chinese demographics researcher Yang Zihui of the Chinese Academy of Social Sciences has warned that underemployment will combine with a swelling elderly population to create serious welfare service problems. *Id.* The World Bank reports that life expectancy among Chinese is 70 years, compared with 76 in the United States and 58 in India. Kristof, *The 'Barefoot Doctors': Shod, But Still Footsore*, *supra* note 47. According to one journalist in China, "[s]ome estimates say each economically active person in China will have to support about six by the start of the century." Isberto, *supra* note 14.

178. *Housing Reforms Move On*, CHINA DAILY, Feb. 2, 1991. In Shandong Province, East China, one professional had to borrow over 45,000 yuan (\$9,000 U.S.) from six relatives in order to purchase an apartment that is 68 square meters. *Chinese Seek Homes of Their Own*, CHINA DAILY, Dec. 26, 1990. Although the vice-mayor of Guangzhou, the capital of Guangdong Province, reported that although in the past five years there have been gains in living space for the 11,642 urban households who had an average living space of less than 2 square meters per person, during the same five year period another 15,000 families in the city whose living space was less than 2 square meters per person emerged. Li Zhuoyan, *Ten-year Housing Plan Set*, CHINA DAILY, Feb. 12, 1991.

would endanger their own, their children's and their neighbors' living standards over the long term. On the other hand, a smaller population today may ensure this right for posterity. A smaller youth population will enable the State to concentrate educational resources on fewer and better facilities and instructors, while families spreading their income among fewer members will thus be able to afford the "luxury" of letting their child stay in school. They will also need less living space. A shrunken but better educated work force will enhance national productivity and increase living standards, which may in turn ultimately lead to conditions under which China could sustain a larger population.

Do these future-oriented goals justify current economic sanctions which require parents to pay one-time or protracted fines for over-quota babies and to forfeit certain housing and social service privileges?¹⁷⁹ Do they justify economic incentives which encourage one-child contracts? International standards appear to leave nations broad discretion to answer these questions, as the Chinese are quick to point out.¹⁸⁰ Given the serious nutritional, housing and social situation China could face without the one-child policy, it may be concluded that economic inducements and sanctions which shape individual behavior to advance the collective good do appear to fall within the parameters of international law.

IV. CONCLUSION

Chinese parents have an internationally recognized human right to determine freely and responsibly the size of their family. They are constrained in the exercise of this right by their obligations to Chinese society. The system of economic sanctions and rewards, the purpose of which is to shape behavior in the desired direction of the one-child family, appears fully consistent with the Constitution of the PRC and other national laws. Furthermore, to the extent that sanctions and rewards are aimed at influencing parental behavior, they seem to

179. See *supra* section II, and accompanying notes.

180. "China's family planning policy fully conforms to Item 9 of the United Nations' Declaration of Mexico City on Population and Growth in 1984, which demands that 'countries which consider that their population growth rate hinders their national development plans should adopt appropriate population plans and programs.' " *Human Rights Whitepaper*, *supra* note 95, at 38. But see ISAACS, *supra* note 147. For a general discussion of the World Population Conference in Bucharest and the World Population Plan of Action formulated there, see *Id.* at 348-400.

violate neither international customary law nor treaties. However, it is also clear that sanctions specifically designed to discriminate against second and subsequent children are in derogation of international law and should be ended.

In one sense, the debate over economic aspects of the one-child family policy is one of quality of life versus quantity of lives. In another, it is a conflict between traditional culture and future economic development. Chinese officials maintain that education is the key to a successful population program.¹⁸¹ Since this is undoubtedly so, the Chinese people should be informed not just of how to practice family planning, but also of what their rights and duties are under international law, so that they may engage with their government in a constructive dialogue regarding a voluntary, effective, and humane population policy which satisfies international requirements, national needs and family desires.

*Lisa B. Gregory**

181. *Human Rights Whitepaper*, *supra* note 95, at 38; SECOND PERIODIC REPORT, *supra* note 161, at 10-11.

* A.B. 1988, Harvard University, J.D. 1993, Columbia University.

The author wishes to thank Professors R. Randle Edwards and Lori F. Damrosch for their scholarly insights and to express her sincere appreciation to the *Journal* staff for their tireless editorial assistance.

APPENDIX¹⁸²

The following chart indicates the People's Republic of China's status as of 31 March 1991 regarding the international human rights instruments discussed in this note:

International Covenant on Economic, Social and Cultural Rights	No action
International Covenant on Civil and Political Rights	No action
Convention on the Rights of the Child	Signature not yet followed by ratification or accession
Convention on the Elimination of All Forms of Discrimination against Women	Ratification or accession obtained 4 Nov. 1980
Convention on the Political Rights of Women	No action
Convention on the Nationality of Married Women	No action
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	No action

182. HUMAN RIGHTS — STATUS OF INTERNATIONAL INSTRUMENTS AS AT 31 MARCH 1991, *supra* note 100.