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THE PROTECTION OF REPRODUCTIVE RIGHTS UNDER INTERNATIONAL LAW: THE BUSH ADMINISTRATION'S POLICY SHIFT AND CHINA'S FAMILY PLANNING PRACTICES

Hannah A. Saona*

Abstract: On his first day in office, U.S. President George W. Bush reinstated a policy that restricts United States Agency for International Development funding of foreign non-governmental organizations. A year and a half later, President Bush attracted media attention by rejecting funding commitments to the United Nations Population Fund ("UNFPA") based on its alleged involvement with the People's Republic of China ("PRC"). The PRC, in an effort to curb rampant population growth, has adopted a one child per couple policy. This policy has, in some cases, led to the use of coercive family planning practices such as forced abortion and sterilization. Though the UNFPA does not contribute to such coercive measures, the Bush Administration felt the only way to be sure that U.S. dollars were not funding such activities was to discontinue funding completely.

Despite national practices, international law binds both the PRC and the United States to protect an individual's reproductive rights. Such rights include the right to determine the size and spacing of one's family without government control, the right to reproductive health, and the right of access to family planning information and contraceptives. These rights are recognized and protected by both international treaty law and international reproductive rights policy. The coercive policies of the PRC and the funding policies of the United States, thus violate international treaty obligations and are poor international policy. To meet its international obligations and policies, the United States should ratify the International Covenant for Economic, Social and Cultural Rights so that funding is no longer discretionary and dependent on executive prerogative. Although these treaties and policies already bind the PRC, the PRC will only be able to move in the direction of protecting human rights and reproductive rights with international financial support, including support from the United States.

I. INTRODUCTION

On his first day of office, January 22, 2001, U.S. President George W. Bush announced the reinstatement of the restrictive "Mexico City Policy."¹ This policy prohibits the receipt of U.S. funds by foreign non-governmental organizations ("NGOs") that "perform" or "actively promote" abortion as a

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¹ Restoration of the Mexico City Policy, 66 Fed. Reg. 17303, 17303 (Mar. 28, 2001) [hereinafter Bush Memorandum]. A Presidential memorandum implemented the policy on March 28, 2001. *Id.*

method of family planning under the laws of their own countries and with the use of their own funds.²

On July 22, 2002, the Bush Administration dealt a second blow to family planning and reproductive rights by announcing a decision to end U.S. financial support of the United Nations Population Fund (“UNFPA”).³ Citing concerns with the UNFPA’s role in the People’s Republic of China (“PRC”), President Bush cut thirty-four million dollars in funding that had previously been set aside for the UNFPA.⁴ The Bush Administration claims that by implementing these restrictive funding policies, it is preventing the use of U.S. funds for abortions⁵ and other coercive birth control measures utilized by governments like the PRC.

The decision to eliminate U.S. financial support of the UNFPA drew much media attention, as officials throughout the world commented on the Bush Administration’s action. The day after it became public, a spokesperson for the State Family Planning Commission of China expressed his disappointment,⁶ noting that when the United States and Great Britain sent separate delegations to investigate UNFPA project sites in China, both were able to see that the UNFPA was operating in compliance with international agreements and conventions.⁷

UNFPA officials also criticized the Bush Administration’s move, commenting that women and children across the world who would have benefited from UNFPA services would feel the effects of the funding cuts.⁸ The UNFPA’s executive director, Thoraya Obaid, stated that the money “would have prevented two million unwanted pregnancies, nearly 800,000 induced abortions, 4,700 maternal deaths, nearly 60,000 cases of serious

² *Id.*

³ Barbara Crossette, *Implacable Force for Family Planning*, N.Y. TIMES, July 30, 2002, at F7, available at <http://www.nytimes.com>. The United Nations Population Fund (UNFPA), a United Nations NGO, supports developing countries, at their request, to improve access to and the quality of reproductive health care, particularly family planning, safe motherhood, and prevention of sexually transmitted infections (STIs) including HIV/AIDS. U.N. Population Fund, *About the United Nations Population Fund*, at <http://www.unfpa.org/about/index.htm> (last visited Nov. 15, 2003).

⁴ Nicholas D. Kristof, *Bush vs. Women*, N.Y. TIMES, Aug. 16, 2002, available at <http://www.nytimes.com>. The concerns stemmed from the one child per family policy of the PRC government. *Id.*

⁵ *Id.*

⁶ *Statement by the Spokesperson of the State Family Planning Commission of China on U.S. Decision Not to Grant Funding to UNFPA* (July 23, 2003), available at <http://www.cpic.org.cn/news20020723-1.htm> (last visited Jan. 29, 2003).

⁷ *Id.*

⁸ *China Regrets U.S. Fund Move*, XINHUA NEWS AGENCY (July 24, 2002), available at <http://www.cpic.org.cn/news20020725-1.htm> (last visited Jan. 29, 2003). The UNFPA provides development and population services worldwide, including education, medical programs, clinics, supplies, and midwife training. *Id.*

maternal illness, and more than 77,000 infant and child deaths.”⁹ Because reproductive rights are important to the lives and health of women and children, international law protects such rights.

A number of international treaties¹⁰ require states parties to recognize and protect reproductive rights.¹¹ These protections include the right to a high standard of health,¹² the right to found a family,¹³ and the right to access information regarding family planning and reproductive health.¹⁴ The United States and the PRC have signed and/or ratified a number of these treaties.¹⁵ In addition to these binding treaties, international reproductive rights policy recognizes the importance of these rights, as well as the importance of providing international assistance to better ensure their protection.¹⁶

As signatories of these treaties, both the United States and the PRC have violated their treaty obligations. In addition, U.S. and PRC policies on reproductive rights run contrary to widely accepted international policy. These violations are relatively obvious in the PRC because its law and policy both adopt coercive family planning practices. Though more subtly, the United States also violates its treaty obligations through its denial of funding to the UNFPA and various other foreign NGOs. Even if the U.S. actions are not considered direct violations of these treaty obligations, the current U.S. policies violate both the spirit of these treaties and international policy.

Part II of this Comment examines the history of U.S. funding policies for family planning and development organizations as well as present U.S. funding policies. Part III discusses the present and past reproductive rights and family planning policies of the PRC. Part IV explores international legal obligations regarding family planning and reproductive rights. Part V discusses international reproductive rights policies set forth at international conferences. Part VI argues that the United States violates its obligations under international law by restricting funding for family planning and reproductive rights programs and further proposes that the United States should ratify the International Covenant on Economic, Social and Cultural Rights so that funding will no longer be dependent upon executive politics.

⁹ *U.S. Pulls \$34 Million Family Fund*, (July 23, 2002), at <http://www.cnn.com> (last visited Jan. 5, 2003).

¹⁰ See *infra* Section IV.

¹¹ See *infra* notes 90-134 and accompanying text.

¹² See *infra* note 125 and accompanying text.

¹³ See *infra* notes 90-134 and accompanying text.

¹⁴ See *infra* notes 90-134 and accompanying text.

¹⁵ See *infra* Section IV.

¹⁶ See *infra* notes 156 and accompanying text.

Part VII argues that the PRC fails to comply with international law and policy and concludes that the present policies of the PRC can only change if the international community, including the United States, provides economic assistance for family planning and reproductive rights programs and education.

II. POLITICS: U.S. FUNDING OF INTERNATIONAL FAMILY PLANNING

A. *History of U.S. Funding for Family Planning and Reproductive Rights*

The international community has identified inadequate health conditions and uncontrolled population growth as major shortcomings in development policy efforts.¹⁷ As a result, the U.S. government supported international family planning and population assistance throughout the latter half of the twentieth century.¹⁸ Congress went so far as to amend the Foreign Assistance Act of 1961,¹⁹ authorizing the president to fund volunteer population planning around the world.²⁰ This liberal funding policy, however, began to shift in 1973.

In 1973, Congress passed the Helms Act Amendment to the Foreign Assistance Act to prohibit foreign NGOs from using federal money to perform abortions, coerce or motivate the use of abortion, or use abortion as a family planning method.²¹ A year later, the United States Agency for International Development (“USAID”) established an internal policy that prohibited the use of U.S. funds for “information, education, training, or communication programs that seek to promote abortion as a method of family planning.”²² In 1984, under the Reagan Administration, the “Mexico City Policy” put further restrictions on U.S. funding of international family planning.²³ This policy prohibited the receipt of U.S. funds by foreign NGOs if they “performed” or “actively promoted” abortion as a method of family planning, even if such actions were legal under the national law of

¹⁷ Center For Reproductive Law and Policy Pub., *The Bush Global Gag Rule*, July 2001, at http://www.reproductiverights.org/hill_int_ggr.html (last visited Nov. 15, 2003) [hereinafter *The Bush Global Gag Rule*].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 48 C.F.R. §752.7016(b) (1996).

²³ *Policy Statement of the United States of America at the United Nations International Conference on Population*, 2d Sess., Mexico City (Aug 6-13, 1984) cited in *The Bush Global Gag Rule*, *supra* note 17.

the NGO's home country and even if the NGOs used their own money.²⁴ These restrictive regulations denied funds for almost all types of abortions, except in cases of rape, incest, or when the life of the mother would be endangered if the fetus were carried to full term.²⁵

During the past ten years, U.S. family planning policy has been volatile. Although the Clinton Administration abandoned the Mexico City Policy in 1993, family planning opponents in Congress fought to reinstate many of the policy's same restrictions.²⁶ Though not in favor of its restrictive effects on family planning services and information, President Clinton finally signed restrictive legislation in 1999.²⁷ In a trade for these restrictions, Congress assured President Clinton that U.N. dues would be paid, securing the right of the U.S. to vote in the U.N. General Assembly.²⁸ Congress eliminated these restrictions on family planning services through appropriations legislation the following year,²⁹ but USAID funding for family planning was not released until February 15, 2001 – after President Clinton left office.³⁰ This delay allowed President Bush to reinstate the “global gag rule,”³¹ limiting reproductive rights, on his first day in office.³²

²⁴ *Id.* The phrase “actively promote abortion” was defined to mean a “substantial or continuing effort to increase the availability or use of abortion as a method of family planning,” including “providing advice and information regarding the benefits and availability of abortion as a method of family planning” and “[p]roviding advice that abortion is an available option” to a woman in a clinical context if she is not pregnant or has not already decided to have an abortion and stated her intention to do so. John Blane & Matthew Friedman, *Mexico City Policy Implementation Study*, app., at A-4, A-6 (Population Technical Assistance Project Occasional Paper No. 5, 1990) cited in *The Bush Global Gag Rule*, *supra* note 17, § I n.8.

²⁵ *Id.*

²⁶ *The Bush Global Gag Rule*, *supra* note 17.

²⁷ *Id.* The Fiscal Year (“FY”) 2000 restriction prohibited foreign NGOs from using their own funds “to perform abortions in any foreign county, except where the life of the mother would be endangered if the pregnancy were carried to term or in cases of forcible rape or incest.” Consolidated Appropriations Act, 2000, § 1001(a)(2) (P.L. 106-113), enacting Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000, § 559D cited in *The Bush Global Gag Rule*, *supra* note 17, § I n.11. It also disqualified foreign NGOs if they used their own money to “engage in activities or efforts to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited.” *Id.*

²⁸ *The Bush Global Gag Rule*, *supra* note 17. President Clinton did not want to sign but did so to ensure that U.N. dues would be paid. *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ “Global Gag Rule” is the name given to the Mexico City Policy reinstatement by reproductive rights organizations. *The Bush Global Gag Rule*, *supra* note 17.

³² Bush Memorandum, *supra* note 1.

B. Recent Retraction of Funding for International Family Planning and Reproductive Rights

Once in office, President George W. Bush reinstated Reagan's Mexico City Policy, or the "global gag rule." Under the gag rule, foreign NGOs that receive family planning and/or reproductive health services money from USAID may not use their own, non-U.S. money to "perform or actively promote abortion as a method of family planning in USAID-recipient countries or provide financial support to any other foreign nongovernmental organization that conducts such activities."³³ NGOs may not perform or actively promote abortions regardless of whether their funding comes directly from USAID or indirectly from other USAID-funded NGOs.³⁴ Almost all types of abortions are prohibited, including "abortions performed for the physical or mental health of the mother."³⁵

The Bush policy also explicitly bans the following family planning activities:

- (1) Operating a family planning counseling service that includes, as part of the regular program, providing advice and information regarding the benefits and availability of abortion as a method of family planning;
- (2) Providing advice that abortion is an available option in the event other methods of family planning are not used or are not successful or encouraging women to consider abortion;
- (3) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and
- (4) Conducting a public information campaign in USAID-recipient countries regarding the benefits and/or availability of abortion as a method of family planning.³⁶

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

The Bush Administration's global gag rule effectively prohibits foreign NGOs that need USAID funding from continuing their work, using their own funds to teach women about all legal methods of family planning, and lobbying for government change and reform in abortion and family planning law.³⁷

A little over a year and a half after the reinstatement of the Mexico City Policy, the Bush Administration made yet another decision that would restrict the availability of family planning and contraceptive information. In 2002, citing the PRC's coercive family planning practices and the UNFPA's alleged involvement in coercive family planning activities as the primary reasons, President Bush ended all funding to the UNFPA.³⁸

Before the Bush Administration formally denied the UNFPA funding, the State Department sent a team of experts to China to determine what amount of U.S. funds, if any, were being funneled through the UNFPA to the Chinese government for promotion of coercive family planning practices.³⁹ The State Department found no evidence that the UNFPA knowingly supports or participates in coercive practices or programs involving the practices of coercive abortions and sterilization.⁴⁰ On completion of its mission, the State Department recommended that the Bush Administration release the thirty-four million dollars originally earmarked for the UNFPA.⁴¹

Contrary to the State Department recommendations, the Bush Administration refused to release funds to the UNFPA, again citing family planning practices of the PRC and UNFPA. As a result of this decision, the UNFPA lost about 12.5% of its annual budget, which led to the cancellation of various family planning programs throughout the developing world.⁴² Ironically, as the United States moves away from liberal funding policies and towards more restrictions on family planning and reproductive rights, it puts the lives of women and children at risk, including those subject to the PRC's coercive family planning practices.

³⁷ *Id.*

³⁸ Kristof, *supra* note 4.

³⁹ *Population Control Politics*, N.Y. TIMES, July 23, 2002, available at <http://www.nytimes.com>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

III. REPRODUCTIVE RIGHTS AND FAMILY PLANNING POLICY IN THE PRC

A. *History of Reproductive Rights and Family Planning Policy in the PRC*

The PRC's family planning policies have shifted in accordance with trends in China's population growth. In 1949, China's population was almost 542 million.⁴³ Throughout the 1950s, 1960s and into the early 1970s, PRC policy promoted rapid population growth as ideologically supportive of enhanced production and the growth of the socialist state.⁴⁴ By the early 1970s, however, the PRC was very concerned about rapid population growth and its impact on the quality of life in China.⁴⁵ As part of a public awareness campaign to lower the national population, the PRC began to promote and encourage later marriage, longer intervals between births, and fewer children.⁴⁶

By 1979, rapid population growth was viewed as a major problem in the PRC.⁴⁷ The government abandoned its two-child per family policy, adopting a stricter "one couple, one child" approach.⁴⁸ Resistance to this policy in rural regions pushed the PRC to modify its policy, allowing certain categories of couples to have more than one child.⁴⁹ Exceptions included couples of ethnic minorities, rural couples that had a single daughter,⁵⁰ and couples that had given birth to children with certain illnesses.⁵¹ Even with these strict policies in place, by 1998, China's population reached 1.25 billion, roughly twenty-one percent of the world's total population.⁵² The goal of family planning in the 1990s was to "create the groundwork for social and economic development and improve the quality of life for Chinese people."⁵³ Although the PRC presently claims to pay more

⁴³ Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 560 (1996).

⁴⁴ *Id.* at 561.

⁴⁵ L.M. Cirando, Note, *Informed Choice and Population Policy: Do the Population Policies of China and the United States Respect and Ensure Women's Right to Informed Choice?*, 19 FORDHAM INT'L L.J. 611, 640 (1995).

⁴⁶ Zhang, *supra* note 43, at 561.

⁴⁷ Cirando, *supra* note 45.

⁴⁸ Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51, 53 (2000).

⁴⁹ *Id.*

⁵⁰ Zhang, *supra* note 43, at 561-62.

⁵¹ Peng, *supra* note 48.

⁵² *Id.* at 51.

⁵³ *Id.* at 54.

attention to individual rights in its efforts to keep population growth down,⁵⁴ its current coercive policies demonstrate otherwise.

B. Present Policy of the PRC

Despite assurances that it protects individual rights, the PRC's coercive family planning policies violate the reproductive rights of the Chinese people. To enforce the one-child per family policy, the PRC uses a system of permits and notices, forced abortions, involuntary sterilizations, involuntary birth control, and incentives and punishments.⁵⁵

The PRC distributes and uses permits and notices for a number of reasons. In general, permits and notices are used to control conception and childbirth, convey information about a woman's menstrual cycle to local officials, and regulate the use of contraceptives.⁵⁶ To have a child, a woman must be married and be issued a "birth-allowed" or a family planning certificate.⁵⁷ If a woman has already had a child or has not been approved for this type of permit, she will then be issued a "birth-not-allowed" notice.⁵⁸ If a woman becomes pregnant without one of the required permits and the authorities are notified, she will be forced or coerced into having an abortion.⁵⁹ Local family planning officials are vested with the authority to apprehend women who become pregnant without a permit or notice and to perform abortions on them without consent or approval of any other agency, or from the women themselves.⁶⁰ The stage of a woman's pregnancy has no bearing on whether she will be forced to have an abortion, as local officials have been reported to force abortions on women who are nine months pregnant.⁶¹

⁵⁴ Embassy of the People's Republic of China in the United States of America, *First National Family Planning Law Highlights Humanitarianism* (Sept. 2, 2002) (on file with author).

⁵⁵ See generally, Tara A. Gellman, Notes and Comments, *The Blurred Line Between Aiding Progress and Sanctioning Abuse: United States Appropriations, the UNFPA and Family Planning in the P.R.C.*, 17 N.Y.L. SCH. J. HUM. RTS. 1063, 1066 (2001).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1068.

⁶⁰ *Id.*

⁶¹ *Id.* A former administrator of a planned birth control office testified in Congress about a woman who was forced to undergo an abortion at nine months and the administrator "saw the child's lips were moving and how its arms and legs were also moving. The doctor injected poison into its skull and the child [died] and it was thrown into the trash-can." *Id.* quoted in *Forced Abortion and Sterilization in China: The View from Inside: Hearing Before the Subcommittee of International Operations and Human Rights of the Committee on International Relations, House of Representatives*, 105th Cong. 2d Sess. 22 (1998) (statement of Gao Xiao Duan, Planned Birth officer).

The PRC also uses sterilization and involuntary birth control to control population growth and ensure compliance with national family planning policy.⁶² If a couple has two children, one spouse may be forced to undergo sterilization.⁶³ Women who have given birth to a child without the requisite permit are also targeted for sterilization.⁶⁴ Many women who are forced to undergo an abortion are thereafter sterilized.⁶⁵ Some officials prefer sterilization to other methods of family planning because the women are left with no other option but compliance with the government's policies.⁶⁶ If a woman and her husband escape forced sterilization, they will likely be forced to use birth control, the most common form being the insertion of an intrauterine loop or implant known as an intrauterine device ("IUD").⁶⁷ In many cases, a woman will be implanted with an IUD immediately after having given birth without her knowledge or consent.⁶⁸

Incentives and punishments are also widely used to urge compliance with PRC family planning policies.⁶⁹ Government and family planning officials, as well as private citizens, may be rewarded for reporting out-of-plan births and other forms of noncompliance.⁷⁰ These reports can often be made to an "informer's box" placed in front of the local family planning office.⁷¹ Couples are also offered incentives such as money, preferential medical treatment, educational services, hiring preferences, or, for those living in rural regions, a better allocation of land for their voluntary compliance with government policies.⁷² Failure to comply with national policy results in disincentives such as fines for both officials and couples.⁷³ The harshest punishment comes to those women who are forced to undergo unwanted abortions and/or sterilization. Many are left with irreversible and irreparable damage to their reproductive systems, making a future pregnancy impossible even if they were to obtain a birth-allowed certificate.⁷⁴

⁶² *Id.* at 1069.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 1070.

⁶⁹ Paul Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 GEO. IMMIGR. L.J. 881, 894-95 (2000).

⁷⁰ See Gellman, *supra* note 55, at 1071.

⁷¹ *Id.* at 1070.

⁷² *Id.* at 1072.

⁷³ *Id.* at 1073.

⁷⁴ *Id.*

In 2002, the PRC officially adopted the one-child per family policy by enacting the Law on Population and Family Planning.⁷⁵ Under the new law, Chinese women are still punished for making their own family planning choices.⁷⁶ The law deems giving birth to more than one child a crime punishable by fine and provides for positive and negative incentives for compliance and noncompliance, respectively.⁷⁷

IV. INTERNATIONAL HUMAN RIGHTS TREATIES PROTECT AN INDIVIDUAL'S REPRODUCTIVE RIGHTS

Despite both countries' current family planning practices, both the United States and the PRC are signatories and/or ratifying parties to various multilateral human rights treaties that protect all aspects of an individual's reproductive rights. Such treaties include the United Nations Charter ("Charter"),⁷⁸ the Universal Declaration of Human Rights ("Universal Declaration"),⁷⁹ the International Covenant on Civil and Political Rights ("ICCPR"),⁸⁰ the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),⁸¹ and the Convention on the Elimination of all Forms of Discrimination Against Women ("CEDAW").⁸² Under these treaties and conventions, the right to reproductive choice includes the right to reproductive health,⁸³ the right to decide the spacing and size of one's family,⁸⁴ and the right to information about family planning and access to contraceptives.⁸⁵

⁷⁵ Zhonghua Renmin Gongheguo Renkou yu Jihua Shengyu Fa [Law of the People's Republic of China on Population and Family Planning] [hereinafter PRC Family Planning Law], Falu Di San Juan [Law (3)] Zhonghua Renmin Gongheguo Fadian [Code of the People's Republic of China] 171 (2001). See also CRLP Worldwide, *China Turns One-Child Policy Into Law* (2002), at http://www.crlp.org/www_asia_1child.html (last visited Oct. 10, 2003) [hereinafter *China Turns One-Child Policy Into Law*].

⁷⁶ *China Turns One-Child Policy Into Law*, *supra* note 75.

⁷⁷ *Id.*

⁷⁸ U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. NO. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945 [hereinafter UN Charter].

⁷⁹ G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 49, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

⁸⁰ G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

⁸¹ G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

⁸² G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979) [hereinafter CEDAW].

⁸³ See U.N. CHARTER, *supra* note 78, art. 55(b); Universal Declaration, *supra* note 79, art. 25; ICESCR, *supra* note 81, art. 12(1); CEDAW, *supra* note 82, art. 10.

⁸⁴ See Universal Declaration, *supra* note 79, art. 16(1); ICCPR, *supra* note 80, art. 23(1) & (2).

⁸⁵ See ICESCR, *supra* note 81, art. 12(1); CEDAW, *supra* note 82, art. 10, 12(1).

A. *The Nature of International Human Rights Treaties*

A treaty is a legally binding international agreement between two or more states that is governed by international law.⁸⁶ Once a state has signed a treaty, it is obligated to act in accordance with the treaty's object and purpose.⁸⁷ Once a state has ratified the treaty, the specific provisions of that treaty bind it.

The international community responded to World War II and the Nazi regime with the enactment of various human rights instruments.⁸⁸ It was thought that some of the human rights violations that occurred under the Nazi regime may have been prevented if there had been an effective international system in place to protect human rights.⁸⁹ With this in mind, the international community came together to sign the Charter. Though the Charter fell short of expressly protecting human rights, as some states parties advocated for, the international community increasingly accepts that the Charter legally obligates states parties to respect the rights granted in the Universal Declaration.⁹⁰ The ICCPR, the ICESCR, and CEDAW are formal treaties, and as such, bind states parties. The United States and the PRC have signed and/or ratified each of these treaties and are consequently bound by them. The following subsections explore the specific obligations of the United States and the PRC as states parties or signatories to each of these treaties.

B. *The United Nations Charter*

The Charter sets forth the basic obligations of member states, including the promotion and respect of human rights and freedoms for all.⁹¹

⁸⁶ HURST HANNUM & DANA FISCHER, UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 27 (1993).

⁸⁷ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

⁸⁸ THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 17 (1988).

⁸⁹ *Id.*

⁹⁰ See LOUIS HENKIN, ET AL., HUMAN RIGHTS 305 cmt. d (1999).

⁹¹ U.N. CHARTER, *supra* note 78, art. 55. The Charter states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a) higher standards of living, full employment, and conditions of economic and social progress and development;
- b) solutions of international economic, social, health, and related problems; and
- c) international cultural and educational cooperation and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Member states “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”⁹² Article 55 requires member states to act in concert with the U.N. to promote “solutions of international economic, social, health, and related problems.”⁹³ Although these provisions do not legally bind national governments to ensure that citizens of other states have access to family planning and reproductive health services, many national governments recognize their obligations to assist developing nations in these areas under the provisions of Article 55.⁹⁴

C. *The Universal Declaration of Human Rights*

Three years after the signing of the Charter, the U.N. General Assembly adopted the Universal Declaration of Human Rights.⁹⁵ The PRC, the United States, and forty-six other states voted in favor of the resolution.⁹⁶ The international community considers the Universal Declaration to be the primary human rights instrument of international law and the basis for all other human rights treaties.⁹⁷ The Universal Declaration did not require ratification when proclaimed.⁹⁸ The international community accepted that it did not bind states parties, but was simply an articulation and elaboration of those human rights set forth in the Charter.⁹⁹ Though not meant as a binding treaty, some of the provisions within the Universal Declaration were or have become obligations under customary international law.¹⁰⁰ Presently, few deny that the Universal Declaration creates legal obligations for U.N. member states.¹⁰¹ Its provisions have evolved and are now seen as binding on all member states.¹⁰²

The Universal Declaration lays the foundation for the overall protection of reproductive rights through the enumeration of specific

Id.

⁹² *Id.* art. 56.

⁹³ *Id.* art 55(b).

⁹⁴ *Id.* arts. 55 & 56. See also CRLP Worldwide, *International Family Planning and Reproductive Health: When Will the US Government Fulfill its Commitments?* (2001), available at http://www.crlp.org/pub_bp_intfamplan.html [hereinafter *International Family Planning*].

⁹⁵ Universal Declaration, *supra* note 79.

⁹⁶ Press Release, U.N. Dep't of Pub. Info., *The Universal Declaration of Human Rights: A Magna Carta for all Humanity* (Dec. 1997), available at <http://www.unhchr.ch/udhr/miscinfo/carta.htm> (last visited Nov. 15, 2003).

⁹⁷ *Id.*

⁹⁸ HENKIN, *supra* note 90, at 321.

⁹⁹ *Id.* at 322.

¹⁰⁰ *Id.*

¹⁰¹ BUERGENTHAL, *supra* note 88, at 29.

¹⁰² *Id.* at 29-30.

rights.¹⁰³ Several important provisions include: (1) the right to health for each individual, including the right to special protection for a woman in her role as a mother;¹⁰⁴ (2) the right to privacy for every individual;¹⁰⁵ (3) the right to marry and found a family on the basis of equality;¹⁰⁶ and (4) the right to freedom from discrimination on the basis of sex.¹⁰⁷ The Universal Declaration is a “common standard of achievement for all peoples and all nations to promote respect for these rights and freedoms” with progressive national and international measures.¹⁰⁸ Under the Universal Declaration’s anti-discrimination provision, both women and men are entitled to the same rights to health, to found a family, and to decision-making free from government control.¹⁰⁹ The Universal Declaration also protects the right to health for each individual and specifically to the woman in her role as a mother.¹¹⁰ The Universal Declaration states that every person “is entitled to a social and international order” under which those rights and freedoms set forth in the Universal Declaration can be realized.¹¹¹ This places an obligation on states to do their part to ensure that these rights and freedoms, including reproductive rights, are equally realized by all.¹¹² Therefore, governments are not to interfere, through coercion or otherwise, with matters surrounding the founding of one’s family.¹¹³

¹⁰³ *International Family Planning*, *supra* note 94.

¹⁰⁴ Universal Declaration, *supra* note 79, art. 25.

¹⁰⁵ *Id.* art. 12. Article 12 provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . .” *Id.* Many have linked the right to privacy to an individual’s right to control his or her reproductive capacity. See e.g., Reed Boland, *Civil and Political Rights and the Right to Non-Discrimination: Population Policies, Human Rights and Legal Change*, 44 A.M. UNIV. L. REV. 1257, 1260-61 (1995).

¹⁰⁶ Universal Declaration, *supra* note 79, art. 16.1.

¹⁰⁷ *Id.* art. 2.

¹⁰⁸ *Id.* pmb1.

¹⁰⁹ *Id.* art. 2. Article 2 provides: “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” *Id.*

¹¹⁰ *Id.* art. 25.2.

¹¹¹ *Id.* art. 28.

¹¹² *Id.* pmb1.

¹¹³ See *id.* art. 16.1.

D. *The International Covenant on Civil and Political Rights*

In contrast to the Universal Declaration, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are both treaties creating obligations binding on states parties.¹¹⁴ The ICCPR expressly obligates states parties to take measures designed to ensure respect for the rights set forth in the treaty.¹¹⁵ The ICCPR states that the “family is the natural and fundamental group unit of society and is entitled to protection . . .” and that the “right of men and women of marriageable age to marry and to found a family shall be recognized.”¹¹⁶ The ICCPR also protects the right of privacy,¹¹⁷ liberty,¹¹⁸ and the right to life.¹¹⁹ The right to reproductive self-determination has been linked directly with these rights.¹²⁰ By providing for the protection of an individual’s right to found a family,¹²¹ the ICCPR reiterates the protections guaranteed under the Universal Declaration and the Charter. The ICCPR also protects the right to seek and receive information of any kind, which implicitly includes information regarding all forms of family planning and reproductive rights.¹²²

E. *The International Covenant on Economic, Social and Cultural Rights*

The International Covenant on Economic, Social and Cultural Rights also creates binding obligations on states parties to take positive actions for progressive implementation of those rights protected within the treaty.¹²³ The ICESCR recognizes that every person has the right to the “enjoyment of the highest attainable standard of physical and mental health.”¹²⁴ To achieve this right, the treaty mandates steps to reduce the “stillbirth-rate and . . . infant mortality [rate] and [to promote] the healthy development of the child.”¹²⁵ These provisions implicitly include the right of a woman to health services and information to prevent unwanted pregnancies that may

¹¹⁴ BUERGENTHAL, *supra* note 88, at 33.

¹¹⁵ HENKIN, *supra* note 90, at 328.

¹¹⁶ ICCPR, *supra* note 80, art. 23(1)-(2).

¹¹⁷ *Id.* art. 17(1).

¹¹⁸ *Id.* art. 9(1).

¹¹⁹ *Id.* art. 6(1).

¹²⁰ Rebecca J. Cook, *International Protection of Women’s Reproductive Rights*, 24 N.Y.U.J. INT’L L. & POL. 645, 696 (1992).

¹²¹ ICCPR, *supra* note 80, art. 23(2).

¹²² *Id.* art. 19(2). See also *The Bush Global Gag Rule*, *supra* note 17.

¹²³ HANNUM, *supra* note 86, at 164.

¹²⁴ ICESCR, *supra* note 81, art. 12(1).

¹²⁵ *Id.* art. 12(2)(a).

endanger the woman's physical and mental health.¹²⁶ The ICESCR further requires that all states parties take steps, "especially economic and technical . . . to achiev[e] progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."¹²⁷ Although this provision does not place an obligation upon states to provide a specific amount of assistance,¹²⁸ a state's discretion regarding how much to contribute is limited, as states are required to give assistance to developing nations in need.¹²⁹ An open-ended discretion would in effect nullify the existence of any real obligation to contribute. Therefore, the treaty must be read as requiring states to give assistance.¹³⁰

F. *The Convention on the Elimination of All Forms of Discrimination Against Women*

The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") is one of the strongest articulations of the international guarantee of reproductive rights. CEDAW provides that states "shall take . . . all appropriate measures . . . to ensure the full development and advancement of women."¹³¹ Parties to CEDAW are obliged to ensure access to education, information, and advice on family planning,¹³² and to ensure access to health care services related to family planning.¹³³ Under the provisions of CEDAW, states must also "ensure, on the basis of equality of men and women . . . [t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights."¹³⁴ Thus, as signatories to this treaty, the United States and the PRC are required to take action to ensure that women have access to information and health services related to family planning.¹³⁵

¹²⁶ *International Family Planning*, *supra* note 94.

¹²⁷ ICESCR, *supra* note 81, art. 2(1).

¹²⁸ HENKIN, *supra* note 90, at 165.

¹²⁹ FRANK NEWMAN, ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY & PROCESS* 55 (2d ed. 1996).

¹³⁰ *Id.*

¹³¹ CEDAW, *supra* note 82, art. 3.

¹³² *Id.* art. 10.

¹³³ *Id.* art. 12(1).

¹³⁴ *Id.* art. 16(1).

¹³⁵ *Id.*

V. INTERNATIONAL REPRODUCTIVE RIGHTS POLICY AS PRONOUNCED AT INTERNATIONAL HUMAN RIGHTS CONFERENCES

In the 1990s, a series of U.N. conferences relating to human rights, population, and women's equality reaffirmed the importance of reproductive rights, including family planning, as critical for the advancement of women's human rights and development.¹³⁶ Both the United States and the PRC participated in these conferences and committed to improving reproductive rights for women throughout the world.

Although not binding as treaties are, international conferences articulate reproductive rights policies and goals for the international community. Though many U.N. conferences end with the adoption of a document adopted by General Assembly resolutions, these documents are not treaties. These documents represent the goals and policies agreed upon by the international community and do not create specific obligations under which states must act. When looking to these conferences and their delineations of reproductive rights, many claim the resulting texts produce binding legal obligations upon member states.¹³⁷ Even without this elevated standard, these texts reflect the international community's common goals and policies regarding reproductive rights.¹³⁸

A. *The International Conference on Population and Development and Cairo+5*

The International Conference on Population and Development was held in Cairo, Egypt in 1994 with the participation of 179 states, most of which endorsed the protection of reproductive rights as an integral part of protecting human rights.¹³⁹ Paragraph 7.2 of the Cairo Programme, the

¹³⁶ The conferences include the United Nations Conference on Environment and Development, held in Rio de Janeiro in 1992; the World Conference on Human Rights, held in Vienna in 1993; the International Conference on Population and Development, held in Cairo in 1994; the World Summit for Social Development, held in Copenhagen in 1995; and the Fourth World Conference on Women, held in Beijing in 1995.

¹³⁷ CORINNE A.A. PACKER, *THE RIGHT TO REPRODUCTIVE CHOICE: A STUDY IN INTERNATIONAL LAW* 20-21 (1996).

¹³⁸ *Id.* at 22.

¹³⁹ REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, Annex, U.N. Doc. A/CONF.171/13 Rev. 1, U.N. Sales No. 95.XIII.18 (1995) [hereinafter Cairo Programme]. Twenty-three participants, including the Holy See and various Latin American and Muslim countries, entered oral or written reservations to the Cairo Programme, many of which objected to provisions related to family planning. Reproductive rights were at the center of many discussions at the ICPD, an entire chapter of the ICPD Programme of Action (the Cairo Programme) was devoted to reproductive rights. *Id.* ¶ 7.

document resulting from the conference, states that an individual's reproductive rights include the right of access to:

[s]afe, affordable and effective methods of family planning of their choice, . . . and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.¹⁴⁰

The Cairo Programme added that reproductive health includes family planning counseling, information, and education.¹⁴¹ The Cairo Programme went on to provide that the principles of paragraph 7.2 "should be the fundamental basis for government and community-supported policies and programmes in the area of reproductive health, including family planning."¹⁴²

The Cairo Programme also emphasized the need for international cooperation to improve the quality of life for people worldwide.¹⁴³ It urged governments to "use the full means at their disposal to support the principle of voluntary choice in family planning."¹⁴⁴ One of the Cairo Programme's objectives was the substantial increase in the "availability of international financial assistance . . . to enable developing countries . . . to achieve the goals of the present Programme of Action."¹⁴⁵ The Cairo Programme suggested that 0.7% of the gross national product of each developed nation should go towards development assistance.¹⁴⁶

In 1999, the General Assembly adopted a plan of action known as the Cairo+5 Key Actions Document¹⁴⁷ and renewed its commitment to the advancement of health and reproductive rights of women and girls.¹⁴⁸ The Cairo+5 Key Actions Document directed states to enhance their efforts in protecting the human rights of women and girls as expressed in the Cairo Programme, and to incorporate a human rights approach in addressing

¹⁴⁰ *Id.* ¶ 7.2.

¹⁴¹ *Id.* ¶ 7.6.

¹⁴² *Id.* ¶ 7.3.

¹⁴³ *Id.* (Chapter II, Principles).

¹⁴⁴ *Id.* ¶ 7.15.

¹⁴⁵ *Id.* ¶ 14.10.

¹⁴⁶ *Id.* ¶ 14.11.

¹⁴⁷ *Key Actions for the Further Implementation of the Programme of Action of the International Conference on Population and Development*, U.N. GAOR Ad Hoc Comm., 21st Special Sess., U.N. Doc. A/S-21/5/Add.1 (1999) [hereinafter Cairo+5].

¹⁴⁸ *Id.* ¶ 39-42.

reproductive health issues.¹⁴⁹ As part of these obligations, states must take steps to increase access to obstetric care and, where abortion is legal, to ensure that healthcare providers are adequately trained and equipped to provide safe abortions.¹⁵⁰ Like the Cairo Programme, the Cairo+5 Key Actions Document also focused on voluntary and non-coercive means of implementing family planning services.¹⁵¹

B. *United Nations Fourth World Conference on Women and Beijing+5*

At the United Nations Fourth World Conference on Women (“Beijing Conference”), 189 participating states reaffirmed, in a document known as the Beijing Platform, what had been recognized one year earlier in Cairo.¹⁵² The Beijing Platform provided that “[t]he explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.”¹⁵³ The Beijing Platform recognized that women’s reproductive health and family planning formed an integral part of human rights and linked these rights to the overall status of women: “In most countries, the neglect of women’s reproductive rights severely limits their opportunities . . . The ability of women to control their own fertility forms an important basis for the enjoyment of their other rights.”¹⁵⁴

Along with reaffirming the importance of human rights, the Beijing Platform also recognized the need for international financial assistance.¹⁵⁵ The Beijing Platform echoed the Cairo Programme in suggesting a contribution equal to 0.7% of a country’s gross national product and an overall increase in international assistance.¹⁵⁶

In June 2000, representatives from over 180 countries met in New York at a Special Session of the U.N. General Assembly to review implementation and progress under the Beijing Platform, a meeting known as Beijing+5. At Beijing+5, states again reaffirmed their commitments to women’s rights, including reproductive rights, and pledged to take further

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶¶ 52, 53 & 63.

¹⁵¹ *Id.* ¶¶ 52, 56.

¹⁵² *Beijing Declaration and Platform for Action*, U.N. World Conference on Women, Annexes I & II, ¶¶ 94-97, 106-10, 223, U.N. Doc. A/CONF.177/20 (1995), reprinted in 35 I.L.M. 401, 407-470 (1996) [hereinafter *Beijing Platform*].

¹⁵³ *Id.* ¶ 17.

¹⁵⁴ *Id.* ¶ 97.

¹⁵⁵ *Id.* ¶ 353.

¹⁵⁶ *Id.*

action to implement the Beijing Platform in an official Review Document.¹⁵⁷ The Beijing+5 Review Document focused on various reproductive rights issues including maternal mortality rates,¹⁵⁸ provisions for safe and effective contraception,¹⁵⁹ and access to reproductive health services for women and adolescents.¹⁶⁰ To achieve these goals, states were directed to “review and revise national policies, programmes and legislation to implement” the provisions of the Beijing+5 Review Document.¹⁶¹

Taken together, these documents espouse an ideal of women’s rights as human rights. The idea that individuals’ reproductive rights should be protected and that each country should commit to contributing a portion of their gross national product to international assistance are of utmost importance. These are goals set forth in treaties as well as international conventions and should therefore be part of the national policy of both the United States and the PRC.

VI. THE UNITED STATES SHOULD RATIFY THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS TO CREATE AN OBLIGATION TO FUND INTERNATIONAL FAMILY PLANNING AND REPRODUCTIVE RIGHTS PROGRAMS

By signing and/or ratifying human rights treaties, the United States has pledged to advance and promote the protection of reproductive rights worldwide. As a member nation of the U.N., the provisions of both the Charter and the Universal Declaration bind the United States.¹⁶² The United States is a party to the ICCPR and is a signatory to CEDAW and the ICESCR.¹⁶³ The United States should continue this pattern of ratifying important human rights treaties and ratify the ICESCR to ensure that reproductive rights and family planning programs are adequately funded. Non-action by the United States in the funding of international programs and organizations is harmful to individuals in need of reproductive and family

¹⁵⁷ *Further Actions and Initiatives to Implement the Beijing Declaration and the Platform for Action*, U.N. GAOR Ad Hoc Comm., 23rd Special Sess., Supp. No. 3, Annex, Draft Res. II, ¶ 1, U.N. Doc. A/S-23/10/Rev. 1 (2000) [hereinafter Beijing+5].

¹⁵⁸ *Id.* ¶ 72(b).

¹⁵⁹ *Id.* ¶ 79(c).

¹⁶⁰ *Id.* ¶ 79(f).

¹⁶¹ *Id.* ¶ 79(c).

¹⁶² U.N. CHARTER, *supra* note 78; Universal Declaration, *supra* note 79.

¹⁶³ Office of the UNHCHR, *Status of Ratifications of the Principal International Human Rights Treaties*, Dec. 9, 2002, available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Nov. 7, 2003) [hereinafter *Status of Ratifications*].

planning services, violates U.S. treaty obligations, and makes it difficult for the PRC to live up to its own human rights treaty obligations.

A. *Through International Law and Policy, the United States Already Advances and Promotes the Protection of International Reproductive Rights*

Under the Charter, the United States is obligated to uphold its promises, including promises made regarding reproductive rights and family planning. Because reproductive rights relate to health concerns all over the world, the United States is bound to work towards improving them.¹⁶⁴ Contrary to this obligation, the United States has acted in ways that jeopardize a woman's health in her role as a mother by restricting and/or denying family planning funds¹⁶⁵ and inhibiting international organizations from providing much-needed health and family planning services.¹⁶⁶

While the Universal Declaration does not explicitly require states parties to contribute funds to these organizations, it does protect the right to reproductive health and calls for the implementation of international measures to ensure the protection of this right.¹⁶⁷ By refusing to fund these organizations, the United States acts contrary to its obligation to protect a woman's reproductive health.¹⁶⁸ Because the United States is not providing funds to foreign NGOs, many of these organizations cannot continue to provide effective reproductive health services in order to ensure reproductive health.¹⁶⁹

The United States ratified the ICCPR in June of 1992¹⁷⁰ and is therefore bound by its provisions.¹⁷¹ The U.S. global gag rule and the decision to deny funding to the UNFPA violate the ICCPR-protected right to seek and receive information of any kind.¹⁷² These funding restrictions preclude individuals in developing nations from seeking and receiving much-needed information about family planning and reproductive health

¹⁶⁴ U.N. CHARTER, *supra* note 78, art. 55(b).

¹⁶⁵ *U.S. Pulls \$34 Million Family Fund*, *supra* note 9.

¹⁶⁶ *Id.*

¹⁶⁷ Universal Declaration, *supra* note 79, pmb1.

¹⁶⁸ *See id.* art. 25.

¹⁶⁹ *See* Cairo Programme, *supra* note 139, ¶ 7.15; Beijing Platform, *supra* note 152, at 353 (stating that international assistance is necessary to ensure protection of reproductive rights).

¹⁷⁰ *Status of Ratifications*, *supra* note 163.

¹⁷¹ Vienna Convention, *supra* note 87, art. 26.

¹⁷² *See* ICCPR, *supra* note 80, art. 19. (Although the ICCPR specifically obligates States parties to ensure and respect the rights of all those within its jurisdiction and territory, because a state's power reaches beyond its territory, its obligations are not so limited). *See also*, *The Bush Global Gag Rule*, *supra* note 17.

options.¹⁷³ The restrictions also prohibit foreign NGOs from imparting valuable information to these same individuals, a right also protected by the ICCPR.¹⁷⁴ By infringing on a person's right to have access to family planning and reproductive health information by specifically prohibiting access to this type of information, even if not placing such restrictions on its own citizens, the United States is, at the minimum, acting contrary to the spirit of the ICCPR.

Although a signatory to CEDAW since 1980,¹⁷⁵ the United States is working to restrict valuable, protected family planning information in violation of both the object and purpose of the treaty.¹⁷⁶ By denying funds to the UNFPA and restricting activities of foreign NGOs receiving U.S. aid, the United States has, in effect, limited the amount of, and access to, information on family planning services and reproductive health.¹⁷⁷ Various programs have been limited or halted altogether because of the loss of U.S. funds, which translates to a lack of access to family planning information for women of developing nations.¹⁷⁸ By cutting international assistance, thereby limiting services and information regarding family planning and reproductive health, the United States violates its obligations to provide access to this type of information under CEDAW. Although the United States has not yet ratified CEDAW, it is still obligated to act in accordance with the object and purpose of the treaty. By taking measures to restrict access to information regarding reproductive rights and reproductive health, U.S. actions run contrary to the object of CEDAW.¹⁷⁹

The current U.S. policy to deny funds to international organizations contradicts international law and policy by compromising rights related to reproductive health and access to information about family planning and contraceptives.¹⁸⁰ In supporting the Cairo Programme, the Beijing Platform, and the five year reviews of each, the United States and other states parties recognized the integral role that international assistance, particularly financial and technical support, plays in achieving the population and

¹⁷³ See *U.S. Pulls \$34 Million Family Fund*, *supra* note 9.

¹⁷⁴ See ICCPR, *supra* note 80, art. 19(2).

¹⁷⁵ *Status of Ratifications*, *supra* note 163.

¹⁷⁶ UNFPA, *UNFPA Thanks Our 34 Million Friends*, at <http://www.unfpa.org.htm> (last visited Oct. 17, 2002). By denying funding, various programs are discontinued and information does not get to the people who need it most. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See BUERGENTHAL, *supra* note 88, at 57.

¹⁸⁰ See generally, Cairo Programme, *supra* note 139; Cairo+5, *supra* note 147; Beijing Platform, *supra* note 152; Beijing +5, *supra* note 157.

development goals set forth at these conferences.¹⁸¹ By reinstating the Mexico City Policy and denying funds to the UNFPA, the United States is violating pledges made at the Cairo and Beijing Conferences to increase funding for family planning and development programs and organizations.¹⁸²

B. As a Signatory to the ICESCR, the United States is Already Bound to Act in Accordance with the Object and Purpose of the Treaty

As a signatory to the ICESCR since 1977,¹⁸³ the United States is bound to act in accordance with the treaty's object and purpose.¹⁸⁴ By refusing to fund international family planning and reproductive rights programs, the United States has fallen short of protecting various human rights goals of the ICESCR, including the right to enjoy physical and mental health.¹⁸⁵

The United States puts the mental and physical health of many at risk by taking away funding for various family planning and reproductive health organizations. The adverse effects of this decision include health problems and loss of life for people in developing nations.¹⁸⁶ Some of the direct effects include: the closing of eight family planning programs in Kenya, the limiting of training for doctors in Bangladesh, and the cancellation of training programs for midwives and health workers in Algeria.¹⁸⁷

The United States remains one of the top contributors of monetary aid to family planning and population programs; however, the funding has become more restricted and is minimal when compared to what the international community expects the United States—the world's wealthiest country—to contribute.¹⁸⁸ By reinstating restrictive policies regarding the funding of foreign NGOs, as well as denying all funding to the UNFPA, the United States has acted in direct opposition to its responsibility to act in accordance with the object and purpose of the ICESCR: to contribute international economic assistance to the maximum of its available resources

¹⁸¹ See, Cairo Programme, *supra* note 139, ¶ 14.1. See also Beijing Platform, *supra* note 152; Beijing+5, *supra* note 157.

¹⁸² See generally, Cairo Programme, *supra* note 139; Beijing Platform, *supra* note 152.

¹⁸³ *Status of Ratifications*, *supra* note 163.

¹⁸⁴ Vienna Convention, *supra* note 87, art. 18. (Even though the United States has not ratified, it is still obligated to act in accordance with the treaty's object and purpose.) *Id.*

¹⁸⁵ See ICESCR, *supra* note 81, art. 12(1).

¹⁸⁶ See *UNFPA Thanks Our 34 Million Friends*, *supra* note 176.

¹⁸⁷ *Id.*

¹⁸⁸ See *International Family Planning*, *supra* note 94. The United States ranks last of twenty-two major donors. *Id.*

and to promote high standards of reproductive health.¹⁸⁹ If the United States were to ratify the ICESCR, these funds would not be dependent on executive politics and the United States would be legally bound to provide international assistance to these international family planning and reproductive rights programs.

1. *Even Though the ICESCR Does Not Create an Obligation to Contribute Funds in a Specific Amount, Discretion is not Open-Ended*

The U.S. denial of funding for reproductive rights programs is a violation of the spirit and policy of the ICESCR because it places women's health at risk.¹⁹⁰ The ICESCR protects an individual's right to the highest attainable standard of physical and mental health.¹⁹¹ The ICESCR requires states to take economic steps, including financial assistance, to ensure that this high standard is reached.¹⁹² Arguably, the United States has not violated these policies because the United States has only signed the ICESCR and not ratified the treaty, and the treaty does not require each party to provide an exact amount of assistance.¹⁹³ Although the treaty does not require an exact amount of assistance, the denial of funding to the UNFPA and other organizations violates the purpose and object of the ICESCR by taking assistance away rather than providing it.¹⁹⁴ By claiming that funding is not a necessary component of compliance with the ICESCR, the United States threatens to make the treaty inoperable and other rights provided for in the treaty virtually unattainable.¹⁹⁵

2. *Even Though President Bush Has Veto Power, Ratification Could Take Place with the Next Administration*

The U.S. Constitution provides that the president has the power to make treaties with the advice and consent of the Senate.¹⁹⁶ In light of the Bush Administration's actions thus far, it is unlikely that the ICESCR will be ratified while President Bush is in office. Because reproductive rights and family planning programs often involve education on the subject of

¹⁸⁹ See ICESCR, *supra* note 81, art. 2(1). See also *International Family Planning*, *supra* note 94.

¹⁹⁰ See ICESCR, *supra* note 81.

¹⁹¹ *Id.* art. 12(1).

¹⁹² *Id.* art. 2(1).

¹⁹³ See HANNUM, *supra* note 86, at 165. (The extent to which a state is required to contribute depends on what the state's economy can afford.)

¹⁹⁴ *Id.*

¹⁹⁵ NEWMAN, *supra* note 129, at 55.

¹⁹⁶ U.S. CONST., art. II, § 2, cl. 2.

abortion, the Bush Administration has not supported the ratification of this treaty. Though it is not likely that the Bush Administration will ratify the ICESCR, it may have a better chance, should a more liberal president be elected.

VII. PRC COMPLIANCE WITH INTERNATIONAL REPRODUCTIVE RIGHTS LAW AND POLICY IS DEPENDENT ON INTERNATIONAL ASSISTANCE FROM THE UNITED STATES AND OTHER MEMBERS OF THE INTERNATIONAL COMMUNITY

A. *China Fails to Comply with International Law and Policy*

Under the Charter, the PRC has an obligation to uphold its promises, including promises made regarding reproductive rights and family planning. As reproductive rights relate to health concerns all over the world, the PRC is obligated to work towards a solution to such health issues.¹⁹⁷ Through its present population and family planning policy, the PRC has violated many of its obligations under the Universal Declaration. Through coercive actions, the PRC has violated those provisions in the Universal Declaration that protect a person's health and protect one's right to found a family free of coercion.¹⁹⁸ Forced abortions and sterilizations are used as tools to promote the one-child per family policy, putting the health and life of each individual in danger, in violation of the provisions of the Universal Declaration.¹⁹⁹

As a signatory to the ICCPR since 1998,²⁰⁰ the PRC is bound to refrain from acts that would violate the object and purpose of the treaty.²⁰¹ One of the main objectives of the ICCPR is to recognize human rights and the obligations that states have to respect those rights, including reproductive rights.²⁰² At first glance it may appear that the PRC complies with the ICCPR by ensuring that individuals have access to family planning information, but the PRC uses coercive practices to enforce the national one-child per family policy. Through its coercive practices, the PRC violates the provisions of the ICCPR protecting individual liberty and the right to found a family, thereby acting in opposition to the treaty's purpose.²⁰³ The right to

¹⁹⁷ U.N. CHARTER, *supra* note 78, art. 55(b).

¹⁹⁸ Universal Declaration, *supra* note 79, art. 16.1.

¹⁹⁹ *Id.*

²⁰⁰ *Status of Ratifications*, *supra* note 163.

²⁰¹ Vienna Convention, *supra* note 87, art. 18.

²⁰² ICCPR, *supra* note 80, pmble & art. 23(2).

²⁰³ *See id.* arts. 9.1 & 23.2.

choose when and how many children an individual is going to have is taken away by the PRC's one-child per family policy.²⁰⁴ The decision is instead placed in the hands of government officials.²⁰⁵ Those living in the PRC do not have the right to found a family because they are allowed to have only one child and they are told when they may do so.²⁰⁶

Although it recently ratified the ICESCR, the PRC's one-child per family policy deprives its citizens of the right to a high standard of physical and mental health.²⁰⁷ The PRC may argue that, through the one-child per family policy, it complies with the ICESCR because a lower rate of population growth means more resources are available for those in need. Though more resources may be available, the PRC continues to use forced abortions, forced sterilizations and the forced use of birth control as tools to control population growth of the nation in violation of the ICESCR.²⁰⁸ Not only does this put the physical health of women at risk, but women's mental health is also affected when the right to found a family is taken from them involuntarily.

As required by its 1980 ratification of CEDAW,²⁰⁹ the PRC makes access to information regarding family planning readily available at government family planning clinics,²¹⁰ but its policies fail to ensure the advancement of women that is explicitly required by CEDAW.²¹¹ Instead of allowing a woman to freely decide the number and spacing of her children as required under CEDAW, the coercive family planning policy of the PRC decides for the woman that she will have one child, unless she fits into one of the exceptions under which she may be allowed to have two children.²¹² The PRC policy also removes the choice of whether sterilization or abortion is a necessary or desirable option – both may be forced onto a woman by the government.²¹³ By taking these decisions away from the woman, the PRC policy oppresses women instead of working towards their advancement.

The PRC's family planning policies also violate international pledges and policies on reproductive rights made at various U.N. conferences. These principles include the protection of a person's right to reproductive freedom

²⁰⁴ Zhang, *supra* note 43.

²⁰⁵ *Id.*

²⁰⁶ *See id.*

²⁰⁷ ICESCR, *supra* note 81, art. 12(1).

²⁰⁸ Gellman, *supra* note 55.

²⁰⁹ *Status of Ratifications*, *supra* note 163.

²¹⁰ *See* Gellman, *supra* note 55.

²¹¹ CEDAW, *supra* note 82, art. 3.

²¹² *Id.* art. 16.1.

²¹³ *See* Gellman, *supra* note 55.

regarding the size of his/her family, the spacing between each child,²¹⁴ and the prohibition of the use of coercion in implementing family planning services and programs.²¹⁵ In contrast, the PRC uses coercion to enforce its family planning policy. In most cases, families are still bound to have just one child – the birth of a second child is deemed a crime punishable by fine.²¹⁶ Although expressly discouraged at the U.N. conferences, the PRC still imposes positive and negative incentives to encourage compliance and punish non-compliance.²¹⁷ The PRC continues to violate international treaty law and international reproductive rights policy through the application of these coercive family planning policies.

B. By Cutting and Limiting International Family Planning Assistance, the United States is Hindering PRC Compliance with International Law and Policy

The PRC can only move in the direction of protecting human rights with help from other nations. The PRC is an overpopulated country without the resources to make changes alone; it needs financial assistance from the international community in order to devise plans and create programs that will ensure the human rights of all of its citizens. Although the UNFPA continues its work in the PRC, the amount of resources available has decreased as a result of the shift in U.S. policy. The denial of funding makes it harder to provide the necessary education and programs to the PRC and other countries in similar situations. The PRC can only move away from coercion and towards education and compliance with human rights if the UNFPA and other such organizations have the means to provide education regarding these changes. While the Bush Administration claims to deny funding for fear that those funds will be used for coercive methods of birth control in the PRC, the retraction of funds may actually remove the education necessary to decrease the use of abortion and coercive family planning methods.

²¹⁴ Beijing Platform, *supra* note 152.

²¹⁵ Cairo+5, *supra* note 147, ¶ 52.

²¹⁶ PRC Family Planning Law, *supra* note 75. See also *China Turns One-Child Policy Into Law*, *supra* note 75.

²¹⁷ Cairo+5, *supra* note 147, ¶ 52.

VIII. CONCLUSION

Neither the PRC nor the United States is currently complying with international law under their respective treaty obligations. Furthermore, their actions run contrary to international policy protecting reproductive rights and calling for international cooperation and financial assistance to the organizations working in the fields of family planning and reproductive health. While the PRC continues to use coercive measures to address its population problem in violation of international law and policy, the Bush Administration has justified its policy to limit or deny funding to foreign NGOs and the UNFPA in particular based on human rights violations committed by the PRC. In its attempt to justify its decisions to limit or deny funding altogether because of clear human rights violations on the part of the PRC, the United States itself violates international human rights law and policy. The United States should ratify the ICESCR, which would obligate it to provide economic assistance for family planning and reproductive rights programs worldwide. By providing such assistance, the United States will not promote the use of abortion as a method of family planning, but will increase the number of much needed educational programs offered. As a result, a high standard of health will be more attainable and countries like the PRC will be able to work towards full protection of human rights and reproductive rights.