1996

Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees

April Adell

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hlr/vol24/iss3/4

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.
NOTE

FEAR OF PERSECUTION FOR OPPOSITION TO VIOLATIONS OF THE INTERNATIONAL HUMAN RIGHT TO FOUND A FAMILY AS A LEGAL ENTITLEMENT TO ASYLUM FOR CHINESE REFUGEES

I. INTRODUCTION

On June 6, 1993, the Golden Venture, a ship laden with hundreds of Chinese citizens fleeing the coercive family planning policies of the People’s Republic of China, ran aground off the coast of New York.1 The survivors of the ill-fated ship applied for asylum in the United States, claiming that if they were returned to their country of origin, they would be subjected to coerced sterilization by the Chinese Government because of their desire to have more than one child.2 The Board of Immigration Appeals (“BIA”), the Court of Appeals for the Second Circuit, and a majority of United States district courts hearing asylum cases denied asylum to these refugees and held that opposition to the Chinese Government’s family planning policies does not constitute fear of persecution on account of political opinion3—the test for asylum as required by both the 1967 United Nations Protocol Relating to the Status of Refugees (“Protocol”)4 and the Refugee Act of 1980 (“Refugee Act”).

The issue of human rights abuses in China and the United States’

---

2. China’s One Child, supra note 1.
3. See infra parts IV-V.
relations with China are each controversial, mixed, and uncertain. The United States has frequently expressed deep concerns with China's history of human rights abuses and has previously asserted human rights law in its political dealings with China. One issue brought to the forefront recently is the small pool of Chinese parents who have already borne one child and who want to have a second child, consistent with their international human right to found a family. These Chinese parents face forced abortion, forced contraception, or forced sterilization by the Chinese Government for violating its "one child" policy. The United States continues to struggle with the law and politics created by those Chinese parents seeking asylum in the United States.

The era of absolute domestic sovereignty by a state over its citizens has passed. The BIA and the United States' courts should interpret U.S. asylum standards consistently with the current global era of sophisticated and emergent international human rights law. Both the United States Executive Branch and the United Nations Commission on Human Rights have interpreted asylum standards to admit into the United States Chinese refugees who fear persecution for violations of the international human right to found a family. The BIA and the federal courts, however, do not apply that human rights law.

The purpose of this Note is to analyze the international law standards that should be applied by the United States to the pool of Chinese parents seeking asylum as political refugees. This Note asserts that the BIA and the majority of United States courts, which deny asylum to Chinese refugees fleeing China's coercive family planning policy, interpret the asylum standards too narrowly. Missing from the BIA's and the courts' recent decisions on this issue is an analysis of human rights

7. See infra part III.
8. See infra part II.
10. See infra part IV.
11. See infra parts IV-V.
Specifically, this Note sets forth China's family planning policy; establishes that China's policy violates the internationally recognized human right to found a family, both as a matter of treaty law and as a matter of customary international law; and asserts that violation of that right should be considered as an independent analytical factor in determining the merit of asylum applications in the United States. This Note also argues that the failure of the United States judiciary and immigration administrative agencies to meaningfully apply international human rights law is not justified by any overriding policy consideration. Part VI concludes that the United States agencies and courts should reform their standards for granting asylum in the United States to conform with the international human right to found a family.

II. CHINA'S "ONE CHILD" POLICY

Article 25 of the Constitution of the People's Republic of China ("PRC") declares that "[t]he state promotes family planning so that population growth may fit the [government's] plans for economic and social development." Similarly articles 2 and 12 of the Marriage Law of the PRC require that family planning be practiced and that both husband and wife shall have the legal duty to practice family planning.

Although the methods of practicing family planning have not been codified, the government of the PRC has articulated and applied a "one child" policy. This policy was set forth in the PRC's Marriage Law, which was promulgated in 1980 and revised in 1982. The law requires that married couples only have one child. Couples who violate this law can face severe consequences, including fines, loss of employment, and even imprisonment.

12. See Stanford M. Lin, Recent Development, 36 HARV. INT'L L.J. 231 (1995). Mr. Lin's comment discusses the trial court's decision in Xin-Chang Zhang v. Slattery, 859 F. Supp. 708 (S.D.N.Y. 1994), and its potential implications on future immigration proceedings. However, neither the trial court's decision nor Mr. Lin's analysis factors into the analytical equation the human rights elements proposed in this Note. The trial court was subsequently overruled by the United States Court of Appeals for the Second Circuit, which also failed to include a human rights analysis in its determination. Xin-Chang v. Slattery, 55 F.3d 732 (2d Cir. 1995).

13. It should be emphasized that this Note does not purport to conclude that all family planning policies constitute grounds for asylum in the United States. The focus of this Note is only on those family planning policies which coerce married couples to forego their right to choose the size of their families through forced abortions and sterilizations.

14. The reform contemplated by this Note would only extend asylum to those couples who face sterilization, abortion, or physical danger upon return to China. This Note does not argue that the asylum standards should be reformed to include all Chinese nationals who merely say that they are opposed to the "one child" policy.

15. XIANFA [Constitution] (1982), art. 25 (P.R.C.).

couple, one child” policy to promote family planning. By 1993, the Chinese government had prevented approximately 100 million Chinese couples from bearing a second child under its “one couple, one child” policy. The preventive methods taken by the Chinese government to carry out its policy have included forcing the use of intrauterine devices (“IUDs”), mandating that the women be x-rayed up to four times a year to ensure that the IUDs are still in place, and forcing women (or their mates) to undergo sterilization operations after the birth of their first child.

Those couples who manage to conceive “illegally” (a second time) are punished in several ways: the Chinese government may fine them, destroy their homes, or force the wives to have abortions. Perhaps the most gruesome practice documented by researchers on China’s policy includes the inducement of labor by drugs during late-term pregnancies and the subsequent injection of “formaldehyde into [the] baby’s brain as it crowns in the birth canal ... .”

III. THE INTERNATIONAL HUMAN RIGHT TO FOUNDED A FAMILY

China’s “one child” policy, combined with the severe coercive methods used to effectuate it, violates the international human right to found a family. This right was first formally recognized by the international community in 1948 with the promulgation of the Universal Declaration of Human Rights (“Declaration”). Article 16 of the Declaration states that “[m]en and women of full age ... have the right

---

18. Id.
20. Jacoby, supra note 19, at 19; Simon, supra note 17, at A19. A New York-based human rights group, Human Rights Watch, has also found “compelling evidence” that many children who are born in violation of the “one child” policy, especially those who are physically or mentally handicapped, are abandoned as a result of the policy and are brought up in orphanages where the alarmingly high death rates are the product of deliberate starvation and abuse undertaken to minimize the population. Patrick E. Tyler, Chinese Deny Maltreatment at Orphanage, N.Y. TIMES, Jan. 9, 1996, at L3.
21. Nancie L. Katz, Caught Between Cultures, Mothers Fight for Rights, ATLANTA J. & CONST., May 21, 1995, at D1; see Jacoby, supra note 19, at 19. Other practices which shock the conscience include inserting a rubber “bulb” into a woman’s uterus during late-term pregnancy and filling it with water until the pressure induces contractions and premature stillbirth and injecting “poison shots” into the amniotic fluid, which poisons the baby when swallowed and also causes premature stillbirth. Id.
to...found a family” and that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

While the Declaration itself is not a binding treaty, it was adopted without objection by the United Nations membership, including the United States. The right to found a family has subsequently been codified in later human rights treaties. For example, article 23 of the International Covenant on Civil and Political Rights, to which the United States is a party, recognizes that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State” and that “[t]he right of men and women of marriageable age...to found a family shall be recognized.” Similarly, article 10

23. Id. art. 16.
24. The Declaration was adopted by the U.N. General Assembly on December 10, 1948. JOSEPH M. SWEENEY ET AL., CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 627 (3d ed. 1988). Forty-eight states voted in favor, none voted against it, and eight abstained. Id. at 627-28. Before the final vote on the Declaration Eleanor Roosevelt, who was the Chairman of the Commission on Human Rights and a representative of the United States in the General Assembly, explained the “basic character” of the Declaration:

It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stumped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.

Id. at 629 (emphasis added). Similarly, a commentator has noted that “[w]hile strictu sensu the Universal Declaration of Human Rights is not a legally binding instrument, it has been declared to set forth ‘the inalienable and inviolable rights of all members of the human family and to constitute an obligation for the members of the international community.’” ROMAN BOED, THE STATE OF THE RIGHT OF ASYLUM IN INTERNATIONAL LAW, 5 DUKE J. COMP. & INT’L L. 1, 6 (1994) (emphasis added) (quoting Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, ¶ 2, 23 U.N. GAOR, U.N. Doc. A/Conf. 32/41 (1968)).

25. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 23, 999 U.N.T.S. 171, 179, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1976). As of 1993, there were 114 state parties to the Covenant: Afghanistan, Albania, Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Barbados, Belarus, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Chile, Colombia, Congo, Costa Rica, Croatia, Cyprus, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Gambia, Germany, Grenada, Guatemala, Guinea, Equatorial Guinea, Guyana, Haiti, Hungary, Iceland, India, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Republic of Korea, Democratic People’s Republic of Korea, Latvia, Lebanon, Lesotho, Libyan Arab Jam., Lithuania, Luxembourg, Madagascar, Mali, Malta, Mauritius, Mexico, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, Rwanda, Saint Vincent and Grenadines, San Marino, Senegal, Seychelles, Slovenia, Somalia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Togo, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom, United States, Uruguay, Venezuela, Vietnam, Yemen, Yugoslavia, Zaire, Zambia, and Zimbabwe. LOUIS HENKIN ET AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW CASES AND MATERIALS 151-52 n.* (3d

Published by Scholarship @ Hofstra Law, 1996
of the International Covenant on Economic, Social and Cultural Rights echoes the Declaration and the International Covenant on Civil and Political Rights by providing that "[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 . . . ."26 Finally, article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women declares that "States Parties . . . shall ensure . . . [the right] to decide freely and responsibly on the number and spacing of their children . . . ."27 This recognition of a couple's human right to found a family creates on all states a correlative duty not to interfere with that right.

At a bedrock minimum, the international human right to found a family necessarily implies the right of parents to decide the size of the familial unit.28 Otherwise, the right to found a family is rendered largely meaningless. When a state attempts to implement a population control policy that deprives the individual the right to choose the number of

---


28. "The world population conference[ of . . . 1994 . . . espoused reproductive freedom [and declared that] [a]ll couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children . . . ." U.S. Reactions, supra note 6, ¶ 4.
children which will make up the family, as China’s policy clearly does, it is not affording “[t]he widest possible protection and assistance” to the familial unit.\textsuperscript{29} Rather, China is substantially encroaching upon what the international community believes is one of the most important group units of society, the family. Of course, a state is always free to implement a population control policy which encourages individuals to practice birth control or which provides economic incentives to those couples who bear only one child. This leaves intact the right to found a family while pursuing the legitimate state goal of curbing population growth. However, consistency with international human rights treaties requires that the state’s policy must leave to the parents the ultimate choice regarding the size of the family.

China’s coerced abortion and sterilization policy does not leave parents with any choice to decide the size of their family. Therefore, China’s policy violates the international human right to found a family codified in these treaties. Although China is not a party to either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights, it is a party to the Convention on the Elimination of All Forms of Discrimination Against Women.\textsuperscript{30} Under this convention, China has an international treaty obligation to protect the right to found a family.

Furthermore, China is bound to protect the right to found a family as a matter of emergent customary international law. Customary international law is the “general practice [of states] accepted as law.”\textsuperscript{31} Treaty provisions become customary international law, and thus binding upon all states, when a widespread consistency or uniformity of state practice develops over a considerable period of time by a sufficiently large number of states, including non-parties to the treaty.\textsuperscript{32} States must also accept that international law mandates the particular state practice before it can become custom.\textsuperscript{33} Many of the provisions of the Declaration and of the international human rights treaties are so fundamental and

\textsuperscript{29} International Covenant, \textit{supra} note 26, at 166.
\textsuperscript{31} Charter of the United Nations, art. 38, 59 Stat. 1031 (1945); \textit{see generally} H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972).
\textsuperscript{33} \textit{See} Gammie, \textit{supra} note 32, at 578.
widely accepted and practiced that they have attained the status of customary international law.\textsuperscript{34}

The right to found a family is one such widely accepted provision. As of 1993, there were 114 parties to the International Covenant on Civil and Political Rights, 120 parties to the Convention on the Elimination of all Forms of Discrimination against Women, and 117 parties to the International Covenant on Economic, Social and Cultural Rights.\textsuperscript{35} The fact that there are so many parties to the human rights treaties, which all include the identical right to found a family, indicates that the general practice of states is to protect the family as a matter of international law and that the failure of a state to protect the right to found a family violates international customary law obligations. That the right to found a family was long ago articulated and recognized in the Declaration in 1948, and that it has consistently and uniformly been codified in subsequent treaties and international instruments, indicates that there has been a sufficient lapse of time in which a state that did not acquiesce in the protection of the right to found a family as a matter of international law could have protested or registered an objection to such a right. Neither the United States nor China registered any objection to the establishment or recognition of the human right to found a family in international human rights law. Thus, China’s policy not only violates its treaty obligations to protect the right to found a family, it also violates China’s international obligations as a matter of customary international law.

At a minimum, United States agencies and courts should not ignore this growing body of international human rights law on the right to found a family when they consider political asylum for refugees. At most, the United States itself might even be said to violate the right to found a family by denying asylum and assuring both the denial of Chinese couples’ right to found a family and exposure to forced abortion and sterilization when returned to China.

\textsuperscript{34} See Boed, supra note 24, at 6 (stating that “the Declaration has been said to be ‘an authoritative expression of the customary international law of today in regard to human rights’” (quoting Paul Weis, The Draft United Nations Convention on Territorial Asylum, 1979 CAN. Y.B. INT’L L. 92, 136)).

\textsuperscript{35} See supra text accompanying notes 25-27.
IV. ASYLUM BASED ON POLITICAL OPINION

Chinese refugees who fear persecution because of their opposition to forced abortion and sterilization should be entitled to asylum in the United States. The Refugee Act states that an applicant for asylum must establish that he or she "is unable or unwilling to return to [his or her country of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . ."36 Congress passed the Refugee Act with the intent to formulate a refugee law in the United States that is consistent with the international law obligations it undertook when it ratified the Protocol and to both safeguard international human rights and effectuate the humanitarian interests of the United States.37 In light of those human rights purposes, it would seem that, without more, the United States judiciary should not ignore the fundamental human right to found a family when applying the Refugee Act.

The 1951 Convention Relating to the Status of Refugees38 ("Convention") establishes the integral link between asylum for refugees and human rights law.39 The preamble to the Convention states unequivocally that "the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination . . ."40 The legislative history of the Refugee Act demonstrates that Congress was concerned with "the homeless, the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes"41 and that it was intended to give "statutory meaning to [the

United States’] commitment to human rights and humanitarian concerns.\textsuperscript{42} Thus, at the center of the treaties’ and the implementing Act’s purpose lies a common and clear “spirit of humanitarianism.”\textsuperscript{43}

Ordinarily, the reception of aliens by a state is a matter of state discretion, as is normally true for the United States.\textsuperscript{44} By ratifying the Protocol and enacting implementing legislation, however, the United States has accepted certain limitations on the exercise of its discretion with respect to aliens seeking asylum.\textsuperscript{45} The United States is required, pursuant to international law obligations, to admit aliens who seek asylum because they fear that if they are denied admission to the United States and returned to their country of origin, they will be persecuted by their government for their political beliefs.\textsuperscript{46} Among the standards used to determine asylum is whether the government activity feared by the alien is a violation of fundamental human rights, such as the denial of the right to found a family of one’s choice.

In \textit{In re Chang},\textsuperscript{47} however, the BIA failed to apply this standard, in direct contravention of the regulatory history underlying it in the United States. In \textit{Chang}, the BIA denied an application for asylum by a Chinese refugee fleeing China because he opposed the “one child” policy.\textsuperscript{48} The BIA held that even if the policy constituted a violation of an international human right, that, in itself, would be insufficient to establish that the individual was persecuted “on account of [his] race, religion, nationality, membership in a particular social group, or political opinion,” as required by the Refugee Act.\textsuperscript{49} The BIA determined that if “the immigration laws [were to] be amended [so as] to provide . . . relief” from U.S. deportation to refugees fleeing countries which violate their fundamental human rights, it was solely up to Congress to

\begin{footnotes}
\footnotetext[42]{126 CONG. REC. 3756 (1980) (statement of Sen. Kennedy).}
\footnotetext[45]{\textit{Id.} at 805.}
\footnotetext[46]{This is not to say that the United States is obligated to accept all aliens. The United States retains expansive discretionary power despite these limitations on its domestic sovereignty and is free to exclude those aliens who pose a threat to its “public safety, security, general welfare, or essential institutions.” \textit{Id.} at 805. However, this Note argues that Chinese parents fleeing China’s “one child” policy pose none of these dangers to the United States.}
\footnotetext[47]{\textit{In re Chang}, Int. Dec. 3107 (Bd. of Immigration Appeals May 12, 1989).}
\footnotetext[48]{\textit{Id.}}
\footnotetext[49]{\textit{Id.} at 14.}
\end{footnotes}
so amend the laws. It held that as the Refugee Act stands, an asylum claim must be based upon "a well-founded fear of persecution on account of" one of its five enumerated categories, and that implementation of the "one child" policy to control population growth does not constitute persecution on account of any of the categories.

According to the BIA, an applicant must produce evidence that the "one child" policy was merely a guise for persecution, rather than a legitimate attempt to control population growth. The BIA states that the policy, on its face, is not persecutive and does not appear to be a mere "subterfuge for persecuting any portion of the Chinese citizenry [for any] of the reasons enumerated in . . . the Act." Under the BIA's analysis, the applicant must prove that the government selectively applied the policy only against certain individuals because of their race, religion, membership in a particular social group, or political opinion—e.g., that the policy was applied to the applicant in order to punish him for expressing a political opinion. Mere disagreement with the "one child" policy does not constitute a "political opinion" unless the government singled out the applicant for more severe treatment because the applicant publicly expressed opposition to the policy. Similarly, those persons who oppose the policy do not constitute a "particular social group" unless the policy is applied disparately against them for reasons other than general population control. In other words, the asylum applicant must prove that he was treated differently than other members of the population with respect to the application of the policy. A claim fails if it is based solely upon the fact that the applicant was subject to the same policy as every Chinese national. The BIA held that "[i]f a law or policy is not inherently persecutive[,] . . . one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it." In 1988, before the BIA decided Chang, the Department of Justice ("DOJ") issued policy guidelines ("Guidelines") to the Immigration and Naturalization Service ("INS") that would mandate a different result in

50. Id. at 15.
51. Id.
52. Id.
53. Id. at 10.
54. Id. at 11.
55. Id.
56. Id. at 11-12.
57. Id. at 11, 15.
58. Id. at 12.
Chang. The Guidelines specifically noted that opposition to the “one child” policy is regarded by the Chinese government as “political dissent,” and that it is therefore reasonable to find a “well-founded fear of persecution” on account of political opinion. By issuing the Guidelines, the DOJ intended to ensure that Chinese refugees fleeing their government’s coercive sterilization and abortion policies would be granted asylum. In Chang, the BIA refused to follow these Guidelines, claiming that technically, they were directed only to the INS and that therefore, neither the immigration judge nor the BIA were bound by them. Consequently, the BIA decided Chang in direct contrast to the Guidelines and denied asylum to a Chinese refugee fleeing the “one child” policy.

After Chang, Congress proposed the Armstrong-DeConcini Amendment to the Emergency Chinese Adjustment of Status Facilitation Act of 1989 for the direct purpose of overruling Chang. The Amendment was passed unanimously in the Senate and by a wide margin in the House. Although President Bush supported the Amendment, he vetoed the Act. Alternatively, President Bush instructed the Attorney General to provide “enhanced consideration” to immigrants under the same circumstances that existed in Chang. In response, Attorney General Richard Thornburg promulgated a 1990 Interim Rule (“Interim Rule”) which implicitly overruled Chang. The Interim Rule permitted asylum to be granted to those refugees who would be required to abort a pregnancy or submit to sterilization upon return to their country or who may otherwise be persecuted for prior refusal to submit to those

60. Id.
62. In re Chang, Int. Dec. 3107 (Bd. of Immigration Appeals May 12, 1989); see In re G—, Int. Dec. 3215 (Bd. of Immigration Appeals Dec. 8, 1993); Guo Chun Di, 842 F. Supp. at 870.
64. See Guo Chun Di, 842 F. Supp. at 863.
65. Id.
66. Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, 2 PUB. PAPERS 1611 (Nov. 30, 1989). President Bush claimed that the Act was unnecessary because he could “accomplish the laudable objectives of the Congress” by executive action. Id. at 1612.
67. Id.
procedures. The Interim Rule was never published, and in July of 1990, without explanation, the Attorney General published a final rule ("1990 Final Rule") which was silent on the Chinese "one child" policy.\(^7\)

The 1990 Final Rule left open and unaddressed the question of whether opposition to a coercive family planning policy constituted grounds for asylum in the United States.\(^8\) Since the 1990 Final Rule significantly altered many other sections of the asylum regulations, the courts consider the administrative silence in the 1990 Final Rule, regarding whether opposition to the "one child" policy constitutes grounds for asylum, as a rejection of the Interim Rule.\(^9\) Thus, the courts have been reluctant to give the Interim Rule any effect.\(^7\)

President Bush subsequently issued Executive Order 12,711 ("Order"), which instructed the Attorney General to "provide for enhanced consideration" for applicants who fear persecution based upon their opposition to coerced abortion or sterilization upon return to their country.\(^7\) The Order reasonably and practically could be viewed by any court inclined to do so as an Executive Branch implementation of the Interim Rule.

Again, the BIA and the courts failed to adhere to the Order. They made two claims: first, that it did not expressly overrule Chang; and second, that since the Attorney General failed to include the Interim Rule

---

70. Aliens and Nationality: Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674 (1990) (to be codified in scattered parts of 8 C.F.R.). The Freedom of Information Act requires that all agency rules be published in the Federal Register to become effective, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a) (1994).
73. See, e.g., Shan Ming Wang, 877 F. Supp. at 137; Si Peng-Fei, 864 F. Supp. at 401; Chen Chau Fei, 866 F. Supp. at 286.
in the final regulations, the Order did not have the force of law.⁷⁵ According to the BIA and the courts, the Order was merely a direction to the Attorney General to “consider” the provision of asylum to refugees fleeing their country because they opposed being subjected to forced abortions and sterilization.⁷⁶ Since the Attorney General failed to publish the Interim Rule, the Order had no effect upon the status of these refugees.⁷⁷ Furthermore, because it does not create a private cause of action, an applicant cannot enforce the Order.⁷⁸ Therefore, it cannot be enforced by a private party and is not binding upon either the BIA or the courts.⁷⁹ In other words, the BIA and the courts hold that private individuals cannot enforce obligations imposed on the Executive Branch—to provide for “enhanced consideration” by executive officials—when those obligations go unheeded.⁸⁰

In 1993, Attorney General William Barr promulgated a final rule (“1993 Final Rule”) explicitly intending to overrule Chang.⁸¹ However, the 1993 Final Rule provided that it would become effective upon publication.⁸² Before publication, President Clinton was inaugurated, and he halted all publication of the former administration’s regulations.⁸³ Since it was never re-submitted for publication, the 1993 Final Rule was never published in the Federal Register.⁸⁴

The courts are split, however, as to whether the 1993 Final Rule is effective despite the fact that it was not published. Some courts hold that “[b]ecause the [final] rule was never published, [and the agency has never before followed a similar rule,] the rule never became effective.”⁸⁵ Moreover, the fact that the rule was withdrawn from publication

---

⁷⁷. See Si Peng-Fei, 864 F. Supp. at 402.
indicates that the agency affirmatively decided not to adopt it. Yet, at least one court has held that the 1993 Final Rule, although unpublished, was effective and binding upon the BIA.

This ambiguous regulatory history surrounding the issue of whether opponents of China’s coercive family planning policy qualify for asylum in the United States suggests that the U.S. courts should not be bound by the BIA’s decision in Chang. On appeal of the district court’s reversal of the BIA, the Second Circuit Court of Appeals upheld the BIA’s decision, but admitted that its “result [was] ironic in light of seemingly purposeful efforts by the Executive Branch and the houses of Congress to achieve the opposite outcome.” The court of appeals, however, refused “to exercise [its] judicial power to repair or improve upon the incomplete initiatives of other government branches.” Additionally, regardless of whether the court of appeals had the power to repair the initiatives of the Executive Branch, it was not precluded from independently considering the internationally recognized human right to found a family in making its ultimate determination. Unfortunately, the court of appeals followed the BIA’s lead and failed to address human rights law in its decision.

The phrase “persecution on account of political opinion” has been correctly interpreted by at least one district court and the United Nations High Commissioner for Refugees in a way to include persecution of those individuals who oppose China’s “one child” policy. As a result of the uncertainty surrounding Chang, the federal district court in Guo Chun Di v. Carroll found room to follow the humanitarian spirit of the Act and held, on the merits, that opposition to the “one child” policy constitutes a “political opinion.” The court held that “political opinion” encompasses an individual’s views regarding procreation (or the right to found a family) because that right is a fundamental human

86. See Shan Ming Wang, 877 F. Supp. at 139-40.
89. Id. at 752.
91. Id. at 874. The court held that Chang warrants no judicial deference because of the “administrative cacophony” within the Executive Branch surrounding the issue as to whether Chinese refugees fleeing the “one child” policy should qualify for asylum. Id. at 867. Accordingly, it decided the issue on the merits. Id. at 866-70.
right. The court specifically and correctly found that coerced sterilization, especially, is "an egregious infringement on [this] fundamental human right." Since the right to found a family is a fundamental human right, it is essentially no different from any other fundamental rights which U.S. courts recognize "as [proper] grounds for asylum, such as the freedom of religion [or] the freedom of speech" (expression of one's political opinions). Moreover, "the expression of one's views . . . [concerning this] right . . . is 'political.'"

The court denounced as "fallacious" the BIA's decision in Chang, in so far as it held that an applicant cannot prove persecution solely on the ground that he opposed a governmental policy which was applied uniformly to all citizens. To support its view, the court compared the plight of Chinese citizens leaving China because they oppose the "one child" policy to the refugees fleeing the former Soviet Union. The court noted that "the uniformly applied policy of [the Russian government] is to persecute all who disagree with the government's legitimacy." "Yet, [these Russian] citizens . . . have always been beneficiaries of asylum" in the United States. The court noted that "[n]othing in the [Immigration and Nationality] Act precludes asylum for aliens persecuted by a government because of political opposition to uniformly applied governmental policies." The court correctly noted that asylum cannot be limited to non-uniformly applied oppression. The opposite conclu-

92. Id. at 872.
93. Id.
94. Id.
95. Id. There can be no more emphatic "expression" of opposition to governmentally forced sterilization than to flee one's country and seek asylum abroad. Id. at 873.
96. Id. at 871 n.29.
97. Id. The court also compared Cuban refugees persecuted for "seeking to replace the government by democratic means" in the same analysis. Id.
98. Id.
99. Id.; see also Katz, supra note 21, at D3 (quoting an attorney who has filed suit against the Clinton administration for its Chinese immigration policy as stating that "[w]hen the Nazis were sterilizing Polish women during World War II, we executed them for war crimes. Now, under the Clinton administration, we're not recognizing a crime under international law").
100. Guo Chun Di, 842 F. Supp. at 871 n.29.
101. Id. The Guo Chun Di decision comes from the only court that has applied a human rights analysis to this issue, holding that opposition to a coercive family planning policy is grounds for "political" asylum. Id. at 872. Unfortunately, on appeal, the Fourth Circuit Court of Appeals expressly disagreed with the district court and reversed its ruling. Guo Chun Di v. Moscato, 66 F.3d 315 (4th Cir. 1995) (table case, full text available at 1995 WL 543525). The court of appeals specifically held that Chang still controls and that
[e]ven if Guo could substantiate his claim that his opposition to the [one-child] policy constituted a 'political opinion,' for which he . . . has a well-founded fear of future
sion would confine or bar most legitimate reasons for granting asylum—e.g., as a matter of U.S. law, human rights law, the Refugee Convention, or the general practice of states.

The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees ("Handbook"), issued by the Office of the United Nations High Commissioner for Refugees ("UNHCR"), provides clear guidance—reflecting the general practice of states—for the interpretation of "persecution on account of political opinion."102 The Handbook defines political opinion logically and accurately to embrace "a mere act or refusal to act . . . [as an] expression of a political opinion."103 One commentator has suggested that "adjudicators [should] examine four factors derived from the . . . Handbook to begin an appropriate interpretation": (1) the relevant conditions of the applicant’s country of origin; (2) whether the persecutor noticed the applicant’s expression of a political opinion, or whether the persecutor may attribute a political opinion to the applicant; (3) whether the applicant’s opinion can be deemed "political" within the context of his country of origin; and (4) whether the persecutor was intolerant of the applicant’s political opinion and seeks to persecute the applicant because of it.105

Under these guidelines, Chinese refugees fleeing the "one child" policy because they fear forced abortion or sterilization qualify for asylum. First, the government officials unquestionably notice that the applicant, or the applicant's spouse, is pregnant with a subsequent child, in direct contravention of the "one child" policy. Second, the decision of the applicant to conceive a subsequent child is, under any standard of expression, an emphatic actual expression of the political opposition to China’s "one child” governmental policy. This opinion is "political" because it expresses opposition to an integral governmental policy that

---

103. Fielden, supra note 37, at 977; see HANDBOOK, supra note 102, at 20, ¶ 83.
104. Bevis, supra note 37, at 409.
105. Id.
violates international human rights law. Finally, the government persecutes those people who oppose its “one child” policy by having more than one child by forcing them to have abortions or to be sterilized. Nowhere in the Handbook is there a prerequisite that the government policy, in order to trigger asylum, must be selectively aimed at one identifiable segment of the society or that a uniformly applied governmental policy precludes asylum rights.106

The Handbook also acknowledges that “serious violations of human rights [could] constitute persecution.”107 While the United States is not bound by the provisions of the Handbook, it does provide persuasive authority for the interpretation of the Convention and the Protocol, to which the United States sought to conform when it enacted the Act.108 The Supreme Court recognizes that the Handbook “has been widely considered useful in giving content to the obligations that the Protocol establishes.”109 Because the Chinese Government’s forced abortion and sterilization practices violate the fundamental right to found a family, opposition to the “one child” policy by parents facing these practices constitutes fear of persecution on account of political belief.

V. OPPOSITION TO CHINA’S “ONE CHILD” POLICY AS A POLITICAL OPINION

The BIA and the majority of U.S. courts erroneously rely on Chang and fail to include a human rights analysis in their interpretation of U.S. asylum standards. These courts have violated international law regarding both the right to asylum and the right to found a family by ignoring both the “spirit of humanitarianism”110 inherent in the Refugee Act and the guidelines issued by the UNHCR in the Handbook.111 Instead, they have consistently applied the BIA’s decision in Chang to deny asylum to Chinese parents who flee China because they fear application of the

106. But see supra text accompanying notes 53-54, which indicates that the BIA requires a selective aiming of government policy to an identifiable segment of the population.
107. HANDBOOK, supra note 102, at 14, ¶ 51.
110. Fox, supra note 43, at 121.
111. HANDBOOK, supra note 102.
"one child" policy.\textsuperscript{112} They continue to hold that opposition to the policy does not constitute persecution on account of political opinion unless the applicant can prove that the policy was selectively imposed upon him or her for reasons other than the enforcement of an uniformly applied population control policy.\textsuperscript{113} For example, in \textit{Dong Jia-Ging v. Slattery},\textsuperscript{114} the District Court for the Southern District of New York denied asylum to a Chinese refugee who legitimately feared physical harm if returned to China because, while in China, he and his wife had fled from Chinese family planning authorities who wanted to abort his wife’s pregnancy.\textsuperscript{115} The immigration judge found credible the following evidence which the refugee, Dong, provided: the authorities ordered Dong’s wife to have an IUD inserted after their second child,\textsuperscript{116} but she nevertheless became pregnant with a third child; the authorities threatened to abort the pregnancy; Dong and his wife fled to avoid the abortion; the authorities beat Dong’s father because he failed to inform them of Dong’s whereabouts; some of the contents of Dong’s home had been destroyed; and the authorities had threatened Dong with physical harm if they found him.\textsuperscript{117} Dong fled China on the Golden Venture and was later informed that the authorities found his wife when she was four and one-half months pregnant and aborted the pregnancy.\textsuperscript{118} Despite the evidence of human rights abuses offered by Dong, the court held that “conception and [the desire to bear] children is not the inherently political activity whose general prohibition can reasonably be construed as veiled persecution of political opinion.”\textsuperscript{119}

Again, in direct contrast to the humanitarian spirit of the Refugee Act, the same court in \textit{Si Peng-Fei v. Slattery}\textsuperscript{120} denied asylum to a Chinese refugee despite evidence, which the immigration judge presumed to be true, that the refugee would be subjected to forced sterilization if returned to China, because he already had one child, and his wife had a


\textsuperscript{114} 870 F. Supp. 53 (S.D.N.Y. 1994).

\textsuperscript{115} \textit{Id.}

\textsuperscript{116} Dong’s first child suffered from polio. \textit{Id.} Under one of the few exceptions to the “one child” policy, Dong was permitted to have a second child. \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} at 58.

\textsuperscript{120} 864 F. Supp. 397 (S.D.N.Y. 1994).
medical condition which prevented her from being sterilized.\textsuperscript{121} The court held that although China’s “one child” policy “may seem cruel, the asylum laws do not provide relief on such grounds.”\textsuperscript{122} Similarly, in \textit{Lan Shon Qi v. Waters},\textsuperscript{123} the District Court for the Northern District of California denied asylum to a Chinese refugee, who faced sterilization if returned to China, because his wife was unable to undergo the procedure.\textsuperscript{124} The court held that notwithstanding the fact that “[t]he PRC’s family planning policy runs counter to fundamental notions of individual freedom[,] . . . \textit{Chang} [still] controls the admission of applicants for asylum on grounds of the PRC’s family planning practices.”\textsuperscript{125}

Subsequent decisions of the BIA have also failed to consider the humanitarian spirit underlying the Refugee Act. In fact, in \textit{In Re G—},\textsuperscript{126} the BIA denied that the United States had any international obligation to consider violations of the human right to found a family when determining asylum applications under the Refugee Act.\textsuperscript{127} The BIA acknowledged that the United States was a party to various international human rights instruments.\textsuperscript{128} However, it held that “these instruments do not provide potential avenues of relief to [refugees] . . . beyond those provided for in the [Refugee Act].”\textsuperscript{129} What the BIA failed to recognize, however, is that the Refugee Act was enacted precisely to bring the United States’ refugee law into conformity with its existing international law obligations.\textsuperscript{130}

The BIA and the majority of U.S. courts erroneously interpret the phrase “persecution on account of political opinion” too narrowly. The legislative history of the Refugee Act, and the Act itself, reveal that the phrase was drafted in broad terms in order to be construed to include, and not exclude, unforeseen victims of international human rights abuses.\textsuperscript{131} The preamble to the Protocol, to which the United States is

\begin{itemize}
  \item \textsuperscript{121} \textit{Id.} at 400.
  \item \textsuperscript{122} \textit{Id.} at 405.
  \item \textsuperscript{123} 869 F. Supp. 1483 (N.D. Cal. 1994).
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Id.} at 1491.
  \item \textsuperscript{126} \textit{In re G—}, Int. Dec. 3215 (Bd. of Immigration Appeals Dec. 8, 1993).
  \item \textsuperscript{127} \textit{Id.} at 18 n.15.
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} See Adarkar, \textit{supra} note 37, at 208; Bevis, \textit{supra} note 37, at 396-97; Fielden, \textit{supra} note 37, at 961.
\end{itemize}
a party, states that the purpose for its enactment was "that new refugee situations have arisen since the [Refugee] Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention." The preamble to the Protocol confirms that the United States and other parties to the Protocol were not concerned with drafting inflexible terms to restrict asylum rights, but rather wanted to assure asylum rights to those refugees encountering future circumstances unforeseen by the parties. Similarly, the humanitarian spirit underlying the Refugee Act requires that as new violations of human rights emerge, the definition of refugees who qualify for asylum should expand to include them. The commitment to humanitarian values requires that the term be left indefinite and flexible, rather than establishing a technically confining definition. When interpreting the term, the focus should be on the larger values embedded in the Refugee Act.

Under this interpretation of "persecution on account of political opinion," Chinese refugees fleeing China because they refuse to submit to coerced abortion or sterilization and those who fear retribution upon return to China clearly qualify for asylum in the United States. Such violations of the fundamental right to found a family undeniably constitute "persecution on account of political opinion." The U.S. courts and the BIA err in not factoring into their asylum analyses violations of the fundamental human right to found a family.

VI. POLICY CONSIDERATIONS

The failure of the U.S. judiciary to meaningfully apply international human rights law is not justified by any overriding policy considerations. Administrative officials of the Clinton administration cite several policy reasons for their narrow interpretation of the current immigration law. This narrow interpretation excludes from asylum Chinese parents who oppose China's "one child" policy and fear forced abortion or sterilization if returned to China. These policy reasons include: fear of opening a "floodgate" to innumerable refugees who are fleeing a country which

133. See Fox, supra note 43, at 121.
134. See Adarkar, supra note 37, at 208-09; Parish, supra note 108, at 928.
135. See Adarkar, supra note 37, at 209.
consists of approximately twenty percent of the world’s population, a desire to prevent fraudulent asylum claims, the need to protect the “American workforce so that [the United States] can better compete in the emerging global economy,” and the “duty” to curtail the illegal smuggling of human beings. However, denying the legitimate asylum claims of a small segment of Chinese nationals affects none of those policy concerns.

The Clinton administration has faced increasing political pressure to change its immigration policies to reduce the number of immigrants entering the United States because of the strain immigrants place on services provided by the federal and state budgets—e.g., schools, jobs, welfare, health care, social security, etc. Immigrants have been cited as the cause of many of the domestic problems prevalent in the United States today, including unemployment, urban fiscal distress, and low wages for unskilled workers. The Clinton administration cites the American hostility to immigrants entering the United States to support its position that there is a “very real set of fears . . . related to an enormous out-of-control border situation.” The Clinton administration’s fear that if it granted asylum to opponents of coercive family planning policies, there would be a mass influx of 1.2 billion Chinese immigrants, is unfounded. In 1993, only a total of 6,500 Chinese nationals applied for asylum in the United States. Rather than being the “floodgate” that the administration fears, this number represents only “a tiny fraction of the many thousands of asylum applications received [in the United States annually].” China has not “generate[d] [the] substantial percentage” of refugees seeking asylum in the United States.

136. See Katz, supra note 21, at D3.
138. Statement on the Commission of Immigration Reform, 31 WEEKLY COMP. PRES. DOC. 993 (June 7, 1995).
139. See Katz, supra note 21, at D3; see also Ashley Dunn, Golden Venture Passengers Are Opting for China Over U.S. Jails, N.Y. TIMES, Apr. 28, 1995, at B1; Thomas Muller, Missing the Boat on Immigration, NEWSDAY, June 18, 1995, at A37.
140. See Muller, supra note 139, at A37; 141 CONG. REC. S569 (article of Harold Hongju Koh).
141. Muller, supra note 139, at A37.
144. Id.
that might be expected from a country that consists of almost twenty percent of the world's population and has one of the most repressive governments.\textsuperscript{145}

Furthermore, only a few hundred actual grants of asylum, on any grounds, typically result from the several thousand asylum applications.\textsuperscript{146} In 1992, there were only 5,375 applications for asylum from Chinese refugees.\textsuperscript{147} Of these applications, only 1,911 came from illegal refugees.\textsuperscript{148} However, only a total number of 654 of the applications, from both illegal and legal aliens, were granted, "even though [the] INS . . . was treating [as] credible claims of persecution based on resistance to the population control program as giving rise to eligibility for asylum."\textsuperscript{149} These figures on the number of Chinese refugees applying for asylum in the United States include all Chinese refugees, not just Chinese parents who flee China because they face forced abortion or sterilization if they remain.\textsuperscript{150} Therefore, the number of refugees who would be granted asylum if the Clinton administration recognized opposition to China's "one child" policy as a legal entitlement to asylum in the United States would be considerably smaller than 654. In the last year of the Bush administration, which had a more lenient immigration policy and recognized opposition to coercive family planning policies as grounds for asylum, only 200 applications for asylum were granted.\textsuperscript{151} This certainly does not constitute the "enormous out-of-control border situation" that the Clinton administration fears, nor would it put a substantial strain on the United States' economy.\textsuperscript{152}

Those advocates of the new anti-immigration policy of the Clinton administration, who continue to view the issue as economic, link the high rate of minority unemployment in the United States to the presence of alien workers in the United States' workforce.\textsuperscript{153} However, this conclusion is unsupported by any empirical data.\textsuperscript{154} One commentator has

\begin{footnotes}
\item 145. Id.
\item 146. Id.
\item 147. Id.
\item 148. Id.
\item 149. Id.
\item 150. Id.
\item 151. Bedard, supra note 137, at A10.
\item 152. Id. at A10.
\item 153. Muller, supra note 139, at A37.
\item 154. Common Sense on Immigration, N.Y. TIMES, June 11, 1995, at 14; Muller, supra note 139, at A37.
\end{footnotes}
noted that "[h]istorically, the United States has been enriched by a steady influx of energetic and ambitious immigrants. But no one knows whether current levels . . . are too low or too high."\textsuperscript{155} This commentator readily admits that experts disagree over whether immigrants are the cause of the decreasing wages of native-born workers with whom the immigrants compete for low-wage jobs.\textsuperscript{156} Another researcher claims both that native-born Americans actually experience an increase in their income in those areas where the workforce has been expanded by a large number of immigrants and that minority unemployment is no higher in areas with large numbers of immigrants than elsewhere in the nation.\textsuperscript{157}

One researcher also noted that there have recently been disturbing trends in the increasing number of immigrants who drop out of high school and who must then depend upon welfare.\textsuperscript{158} However, this researcher cites no authority upon which he rests the premise that immigrants now "depend on welfare more than the native born do."\textsuperscript{159} In fact, this conclusion is contravened by another researcher's findings, supported by at least one authority, that "legal immigrants [actually] pay more in taxes than they receive back in social services."\textsuperscript{160} In fact, this researcher claims that native-born Americans actually benefit from the presence of immigrants because they are able to pay less for such things as child care and clothing, and because immigrants provide a larger pool of workers from which to fund increasing Medicare payments.\textsuperscript{161} Thus, no evidence supports the contention of the advocates of the Clinton administration's anti-immigration policy that immigrants are a substantial cause of urban fiscal distress.

Related to the purpose behind the Clinton administration's anti-immigration policy of preventing the mass influx of immigrants into the United States is its desire to prevent fraudulent asylum claims.\textsuperscript{162} The Clinton administration seeks to prevent the admittance of immigrants into the United States who merely claim that they might be subjected to some future governmental action with which they disagree.\textsuperscript{163} Tim Wirth, the
Undersecretary for Global Affairs, stated: "Are we going to be in a situation . . . in which anybody who claims that they have a fear of something that might happen therefore gets political asylum?"164

The prevention of fraudulent asylum claims is a legitimate concern. However, the United States' refusal to accept opposition to the Chinese "one child" policy by Chinese parents as grounds for asylum adds little, if at all, to the cause. In any event, very few refugees who oppose the family planning policies of their governments would be entitled to asylum if the Clinton administration refined its immigration policy to recognize opposition to coerced sterilizations and abortions as grounds for asylum. Only those family planning policies that encroach upon internationally recognized human rights would qualify as grounds for asylum applications. The applicants would have to be Chinese nationals who are already parents of one child. Furthermore, the asylum applicant would still have to produce real evidence that he or she was in danger of being forced to submit to sterilization or an abortion before asylum would be granted. If the applicant merely claimed that he or she was thinking about having a second child, but would not because he or she feared application of the policy, it would not be enough to establish grounds for asylum. Mere general disapproval by Chinese citizens of the "one child" policy would be insufficient grounds for asylum. To qualify for asylum, Chinese parents would have to present evidence that they have a real fear of the application of the policy to them in the form of forced abortion, forced sterilization, or forced contraception. Those specific evidentiary requirements would provide ample protection against fraudulent claims and mass immigration.

Another purpose of the administration's policy is to prevent the illegal smuggling of human beings.165 Administration officials claim that they want to "send a message" to Chinese nationals, such as the passengers of the Golden Venture, that they will not tolerate the criminal smuggling of Chinese refugees.166 According to Grover Joseph Rees III, the INS general counsel during the Bush administration, "[t]hese people are being smuggled. Therefore, they are not refugees. Let's send them back."167 This sentiment seems to be pervasive throughout the Clinton administration. Indeed, Carl Stern, a Justice Department

165. See, e.g., Dunn, supra note 139, at B2; Katz, supra note 21, at D3; Muller, supra note 139, at A37.
166. See Katz, supra note 21, at D3.
167. Id.
spokesperson, expressed his opinion that the administration was stuck between a rock and a hard place: "[T]he administration would 'surely have been criticized if we had sat back and done nothing to discourage' illegal smuggling of refugees." William S. Slattery, the Executive Associate Commissioner of Field Operations for the immigration service, reiterated this sentiment stating that "you can[not] put a price on stopping people who traffic in human lives." 

The Clinton administration believes that its immigration policy is working to deter the criminal trafficking of Chinese refugees. It cites that in 1993, fifteen ships, with more than 2,500 smuggled refugees, were documented trying to enter the United States, whereas in 1994, the numbers had declined to six ships, with less than 350 smuggled persons. This decline may be a result of the message sent back to China that the administration will not grant asylum to illegal refugees. However, within the first five months of 1995, two large ships, with almost 240 smuggled refugees, had been intercepted attempting to enter the United States. This indicates that despite the hard-line position of the Clinton administration, criminal smuggling of refugees will continue.

The United States has a legitimate concern about the illegal smuggling of human beings and should take measures to discourage its occurrence. Chinese parents fleeing China’s “one child” policy because they face forced abortion, forced contraception, or forced sterilization are willing to risk being “sold into slavery, forced to deal drugs or commit other crimes, [or] murdered by the criminal organizations who control these smuggling operations” in order to escape from a government that denies them their basic human rights. However, the Clinton administration could protect these refugees both from the dangers associated with illegal smuggling and from the human rights abuses of the Chinese Government by “sending a message” to China that

168. Id.
169. Dunn, supra note 139, at B2.
170. Id. at B2.
171. Id.
172. But see Muller, supra note 139, at A37 (stating that “[e]fforts to beef up the border patrol . . . have done pitifully little to stanch the steady stream of illegal aliens”).
173. Dunn, supra note 139, at B2.
174. One measure proposed to counteract criminal smuggling is the imposition of harsher penalties for illegal smugglers and manufacturers of fraudulent documents. Muller, supra note 139, at A37. Mr. Muller contends, however, that this measure would have little impact on the smuggling problem. Id.
175. Dunn, supra note 139, at B1.
as long as the refugees’ claims are legitimate, they will be permitted to legally enter into the United States. By denying lawful entry of these meritorious asylum claimants, the administration merely encourages these refugees to seek alternative means of escaping China’s “one child” policy. Instead, the Clinton administration should send the message that Chinese parents fleeing forced abortion, forced contraception, or forced sterilization would be admitted into the United States through legal channels. This would enable these refugees to bypass the illegal smugglers and come directly to the United States through legitimate means. This would further, not hinder, administration policy by reducing the smuggling of aliens.\textsuperscript{176} Turning a blind eye to the legitimate plight of Chinese parents whose fundamental human rights are being abused merely because they have been “smuggled” is not the answer to the human smuggling problem.\textsuperscript{177} This “message” does nothing to deter the smugglers, nor does it appear to be deterring the refugees either.

\textbf{VII. CONCLUSION}

The present U.S. position on immigration has been accurately and bluntly described as being “caught in a time warp.”\textsuperscript{178} The anti-immigration policy of the United States “embrace[s] the racism, hatred and nativism” that permeated the United States decades ago in the era of absolute internal sovereignty of states over humans.\textsuperscript{179} That era has passed and has no place in the current global era of sophisticated international human rights law. The United States today has a dual obligation not only to protect its citizens’ domestic legal rights from being burdened by the overcrowding caused by mass immigration, but also to abide fully by the international law obligations it has affirmatively and overtly accepted to vindicate the fundamental human rights of the citizens of other nations legitimately seeking asylum from the abuses of their respective governments. The current immigration policy of the United States, reflected in the BIA’s decisions and by most federal

\textsuperscript{176} See, e.g., Muller, supra note 139, at A37.
\textsuperscript{177} The message sent by the Clinton administration—that Chinese couples fleeing application of the “one child” policy are not welcome in the United States—merely punishes these refugees who might otherwise “obey our laws . . . and pay Social Security, sales and property taxes once they arrive.” \textit{Id.}
\textsuperscript{178} 141 CONG. REC. S569, S571 (Jan. 6, 1995) (article of Harold Hongju Koh).
\textsuperscript{179} \textit{Id.}
courts, carries out only its domestic obligation. Unfortunately, this "half-a-loaf" approach makes it appear that the government is "obsess[ed] with sovereignty and governmental power [and indicates] contempt for international law . . . ."\(^{180}\)

In order to fulfill its international obligation, the United States should amend its interpretation of the asylum standards to include those Chinese parents of one child who fear forced abortion, forced contraception, or forced sterilization because of their desire to have more children in vindication of their human right to found a family. The present interpretation of the asylum standards by the BIA and the majority of federal courts is inconsistent with both the international obligations, undertaken by the United States when it became a party to the Protocol, and with the humanitarian spirit at the heart of both the Protocol and the Refugee Act. The Executive Branch should promulgate a clear-cut final administrative rule that explicitly overrules Chang and requires the BIA to grant asylum to all refugees who legitimately fear persecution because they oppose a governmental policy which violates a fundamental human right. This will send a clear signal to federal courts about how to handle these cases. Even if the Executive Branch fails to make such a refinement, the courts should depart from Chang and interpret the statutory Refugee Act phrase "persecution on account of political opinion" consistently with the legislative purpose, international treaty law, and international human rights law. This consistent interpretation requires that fear of persecution for opposition to violations of the international human right to found a family be regarded as a legal entitlement to asylum in the United States for Chinese refugees.

April Adell

---

180. *Id.* at 569.