CONFORMITY OR PERSECUTION: CHINA'S ONE CHILD POLICY AND REFUGEE STATUS

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I. INTRODUCTION

In recent years, refugee-receiving countries like the United States, Canada and Australia have been faced with refugee claims by Chinese seeking shelter from enforcement of the one child policy – the edict that couples in China ("PRC") may only have one child.[1] In most cases, these applicants for refugee status have failed. Courts and tribunals responsible for determining refugee status have generally found that the applicants have not been singled out from the Chinese population for violation of their rights as required by the 1951 Convention Relating to the Status of Refugees ("Refugees Convention").[2]

The Refugees Convention defines a refugee as someone who:

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[3]

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1 As noted *infra*, there are now fairly extensive exceptions to the policy.

2 189 UNTS 150. All references to the Refugees Convention refer to the Convention as amended by the 1967 Protocol Relating to the Status of Refugees: 606 UNTS 267. The relevant case-law in the United States, Canada and Australia is discussed at nn 76-93 *infra*.

3 Article 1A(2) Refugees Convention.

Persecution – which may be defined as a serious violation of human rights indicative of a failure in state protection[4] – must be linked to one of the five grounds for persecution. These are known as the 'Convention grounds' or 'Convention reasons'.

Many courts and tribunals have taken the view that the one child policy violates the human rights of all Chinese citizens equally, since the limitation on family size applies to all Chinese and the policy will be enforced against any who seek to circumvent it. Consequently, although courts and tribunals have usually accepted that the policy is persecutory in the sense that it violates human rights, they have found that there is no connection between the persecution and the Convention grounds.

This article presents an alternative view. It maintains that a policy which criminalises a human right – in this case the right to found a family or the right to reproductive freedom – may generate refugees within the definition contained in the Refugees Convention. It is argued that where a government goes so far as to ban the exercise of a human right, the law or policy concerned is inherently a case of political persecution. As Hathaway argues, it is:

> unreasonable to accept at face value the state of origin's characterization of the exercise of a core human right not only as illegitimate, but as just cause for punishment.[5]

Choosing to outlaw a human right, even in pursuance of a rational goal like limitation of population growth, suggests that the law or policy concerned is driven, at least in part, by an insistence on compliance with governmental views. Persons who assert their rights despite the law may be perceived to express an opinion at odds with government; an opinion that challenges the power of society or government to compel individuals to forgo their rights – that is, a political opinion. They may also be perceived as a group in society that is dangerous to the community or the political regime. In other words, they are a particular social group. It is arguable that this explains the government's choice of means to achieve its goals, a ban on the right concerned, over more reasonable methods. Persons who refuse to accept limitations placed upon family size by the state, who are prepared to disobey state policy to this effect, and seek asylum elsewhere, may therefore qualify as refugees pursuant to the Convention grounds of political opinion and/or membership of a particular social group.

The article also raises questions about the underlying assumptions and motivations for refusal of refugee status to Chinese fleeing enforcement of the one child policy. While those who attack the one child policy often do so on ideological or religious grounds,[6] its supporters have their own political agenda. Many governments of refugee-receiving countries, and possibly the courts and tribunals that determine refugee status, are unwilling to interpret the definition of a refugee liberally by reference to general human rights law. They fear their

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4 See JC Hathaway, *The Law of Refugee Status*, Butterworths (1991) p 106.

5 Note 4 *supra*, pp 172-3. Hathaway argues that contravention of laws prohibiting the exercise of human rights should be viewed as an "absolute political offence".

6 Members of the anti-abortion lobby generally are in favour of granting refugee status to people who flee enforcement of the one child policy.

countries' immigration programs may be undermined.[7] It also seems there is broad acceptance of the Chinese government's decision that the one child policy is the only way forward for China.

These fears and assumptions are unfounded. Fear of an influx of Chinese is unwarranted. A number of hurdles facing potential refugees, including the difficulty of leaving their country, make a flood of refugees unlikely. Complacent acceptance of the PRC's decision regarding the best method of stemming population growth ignores the possibility that the important goal of limiting population growth may be achieved by means that respect the right to determine the number and spacing of children. It also overlooks the possibility that the coercion involved in the one child policy may fail to achieve lasting change in China's fertility patterns and continue to cause some Chinese citizens to flee and seek refugee status.[8]

Our concern should be for the human beings who may be subjected to intolerable treatment (women, in particular, are at risk[9]) on the basis that they wish to exercise a legitimate human right. When they are our focus, it is apparent that we should embrace the synergy between the Refugees Convention and general human rights law. True, the thesis that anyone fleeing enforcement of a generally applicable law that bans a human right could have far-reaching implications as human rights law evolves. This is demonstrated by the recent recognition that 'sodomy' is protected by the right to privacy. Gay men and lesbians threatened with jail for their sexual preference or orientation may now claim refugee status. But this simply indicates that ideas regarding the categories of people requiring protection as refugees are subject to change. Current standards concerning acceptable behaviour may one day be recognised as unacceptable infringements of individual liberty which serve no higher social purpose. The definition of a refugee should be flexible enough to serve future needs.

Of course, some soul-searching on the part of countries traditionally thought of as havens for refugees is required as the realisation dawns that refugee status is not applicable only to the oppressed from elsewhere. All countries can afford to reflect on the blots on their human rights records. We also need to confront the real reason for alarmist fears concerning numbers of refugees – the basic desire of the 'haves' to exclude the 'have-nots', regardless of the need for protection.

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7 In Australia, a Federal Court decision that granted refugee status to Applicant A prior to being appealed to the Full Federal Court and subsequently the High Court (see *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 331 at 335), was met with a bill that aimed to ensure that the terms "particular social group" would not be construed by reference to a country's fertility control policy: Migration Legislation Amendment Bill (No. 4) 1995. Passage of the bill was unnecessary as a result of the High Court's finding, and, in any event, it had lapsed because of an intervening parliamentary election. However, the statements by parliamentarians at the time of the second reading speech reveal the level of paranoia over an influx of Chinese immigrants. One parliamentarian asked whether the courts would allow asylum to "every second woman from Tonga who lands in Australia and [says] that she comes from a male dominated society". Australia, House of Representatives 1995, Debates, vol HR 200, p 1809 (8 March 1995, L Ferguson).

8 See the concerns enunciated by Amartya Sen in the text accompanying note 62 *infra*.

9 Women may be subjected to forced abortion or sterilisation. Girl children are also indirectly at risk because of the policy and may be left in orphanages because their parents want a male child.

The article develops as follows. In Part II of the article a brief history of the one child policy is presented. This is followed in Part III by an analysis of the human rights violated by the policy, particularly the right of a couple to determine the number and spacing of their children. Part IV demonstrates that asylum seekers fleeing the one child policy may be regarded as falling within the Convention grounds of political opinion and/or membership of a particular social group. Part V concludes the article by exploring the implications and merits of an approach permitting an expansive interpretation of the definition of a refugee by reference to human rights law, compared with a more narrow approach driven by concern over immigration control.

II. THE ONE CHILD POLICY

Mao Ze Dong's initial view regarding population policy was that China's future prosperity depended on a large population. To achieve such a population, he encouraged high birth rates. By 1971, however, Mao's views had changed, and the State Council issued a directive on birth control, aiming to secure later marriages and childbirths, larger intervals between births and fewer children.[10] In 1973, population targets were introduced. Families were to have two children and, at first, this target was to be achieved through education and persuasion.[11] During the 70s, the policy was tightened. Eventually, the majority of the population was subjected to a target of one child per family,[12] although, according to the United States State Department, exceptions permitting second children are now commonplace in rural and remote areas.[13]

The policy has met with resistance in rural areas and there have been reports of coercive enforcement measures when persuasion is unsuccessful.[14] In fact, the 'policy' is a legally binding requirement entailing a number of coercive elements. First, there is a limit on family size imposed by the state. Second, intrusive monitoring of women's contraceptive practices is undertaken and permission for a pregnancy must be gained beforehand.[15] Third, the policy is enforced through a number of incentives and disincentives. The incentives may constitute coercion if perceived by citizens as necessary to their survival.[16] Incentives include extended maternity leave,[17] extra work permits and pensions and preferential

10 Deng Xizhe, *Demographic Transition in China: Fertility Trends since the 1950s*, Clarendon: OUP (1991) p 18.

11 *Ibid*, p 23.

12 *Ibid*, p 24.

13 US Department of State, *China Country Report on Human Rights Practices for 1998* at 30ff available at <http://www.state.gov/www/global/humanrights/hrp_reports_mainhp.html>.

14 Note 10 *supra*, p 25.

15 Statement of Gao Xiao Duan, Planned-Birth Officer, before the Subcommittee on International Operations and Human Rights of the International Relations Committee of the United States House of Representatives, June 10, 1998, at 1.

16 But compare with LB Gregory, "Examining the economic component of China's one-child family policy under international law: your money or your life" (1992) 6 *Journal of Chinese Law* 45.

17 P Kane, *The Second Billion: Population and Family Planning in China*, Penguin (1987) p 136.

allocation of jobs and housing.[18] The disincentives are clearly coercive. They include a multi-child tax, refusal to guarantee employment to any child other than the first, and reduction of the pension.[19] Other 'disincentives' such as destruction of crops and family assets, heavy fines, monthly fines, denial of housing permits, disconnection of utilities, reduction in salaries, demotion and job loss, and closure of businesses have also been reported.[20] Finally, forcible sterilisation and forcible abortion of unauthorised pregnancies, even at late-term, have been used. This was particularly true in 1983,[21] but there is evidence that these measures continue to be utilised.[22] In 1997, a Chinese asylum seeker was sent home to an abortion at eight months by the Australian authorities.[23] In 1999, the Committee on the Elimination of Discrimination Against Women ("CEDAW Committee") noted the persistent reports of coercive measures.[24]

The driving force behind the intensification of the one child policy was the PRC leadership's desire to increase the Gross National Product.[25] The leadership decided that the individual could not stand in the way of the needs of the Chinese population as a whole. As stated in a document issued by central authorities on 13 April 1984:

> [F]amily planning should serve the overall development plan, birth-control regulations should be enforced in accordance with the local conditions, and the program should be implemented upon the public co-operation, or mass line.[26]

Supposedly, the mass line consists of the ideas of the masses (the general public) transformed into a coherent theory by Communist party leaders. As Christenson observes:

> The leaders interact with the masses and absorb perceptions from them, then discuss and reflect on what they have learned, resulting in a theory. The theory is returned to the masses to be taught, practiced, and revised. The process is repeated and refined to higher levels of truth. In this role, the leaders act as the masses' brain, performing the conceptualization function. When the theory is returned to the masses, the education produces changes in the people's social nature.[27]

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18 *Ibid*, pp 90-1.

19 *Ibid*, p 135.

20 JS Aird, *Slaughter of the Innocents: Coercive Birth Control in China*, American Enterprise Institute for Public Policy Research (1990) p 74. US State Department, note 13 *supra*.

21 JS Aird *ibid*, p 32.

22 See the statement of Gao Xiao Duan, note 15 *supra*, at 2-3. Ms Gao was a Planned-Birth Officer between 1984 and 1998. Her testimony was noted by the US State Department in its Country Report on Human Rights in China, note 13 *supra*.

23 This incident attracted criticism from the Senate Legal and Constitutional Affairs Committee, together with recommendations to prevent any future such incidents, in its report on Australia's refugee and humanitarian system: Senate Legal and Constitutional Committee, *A Sanctuary Under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, chapter 9 available at <http://www.aph.gov.au/Senate/commiteee/legcon_ctte/refugees/index.htm>.

24 Concluding Observations of the Committee on the Elimination of Discrimination Against Women: China, A/54/38, para 299(a). Available at the United Nations High Commissioner for Human Rights website, <http://www.unhchr.ch>.

25 Deng Xizhe, note 10 *supra*, p 24.

26 *Ibid*, p 25.

27 D Christenson, "Breaking the Deadlock: Toward a Socialist-Confucianist Concept of Human Rights for China" (1992) 13 *Michigan Journal of International Law* 469 at 494 [footnotes omitted].

However, the mass line has also been described as "the government and the community pitted against the individual".[28] Similarly, Aird writes that the coercive nature of the one child policy is based on the 'dictatorship principle'.[29] He derives this principle from Article 1 of the Constitution of the People's Republic of China which depicts China as a 'democratic dictatorship':[30]

> Under the "dictatorship" principle, the Party leaders affirm their right to use dictatorial methods in imposing unpopular policies on the grounds that whatever the party does represents the will of the people, hence those who dissent are "counter-revolutionaries" who must be forcibly suppressed. In the mid 1970s, the principle was invoked to justify compulsory family planning measures, and all opposition was attributed to "class enemies", who were to be subjected to "class struggle" and defeated.[31]

Aird also makes clear that, despite the apparent cession of much authority to local officials, the central bureaucracy is ultimately responsible for the use of coercive methods of enforcing the policy. He demonstrates that the central bureaucracy has created conditions ripe for such methods, overtly and covertly encouraging coercion through official pronouncements.[32]

III. COMPULSORY FAMILY PLANNING: A VIOLATION OF HUMAN RIGHTS

China's one child policy is an attempt to be responsible about population growth. However, the policy falls foul of human rights laws, including treaties ratified by China. Enforcement measures such as forced sterilisations and abortions violate the rights to privacy and security of the person, and, possibly the prohibition on torture and cruel or inhuman or degrading treatment or punishment, and the right to life.[33] Prior to enforcement, the rights to privacy and liberty,[34] and the right to found a family, particularly the right to determine the

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28 See Deng Xizhe, note 10 *supra*, p 37.

29 JS Aird, note 20 *supra*, p 2.

30 "The People's Republic of China is a socialist State under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The Socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited." : AP Blaustein & GH Flanz, *Constitutions of the Countries of the World*, Oceana (1997) vol IV, entry for the People's Republic of China.

31 JS Aird, note 20 *supra*, p 2.

32 See Aird's analysis of the wording of official documents, note 20 *supra*, chapter 3 and pp 74-9.

33 Late-term abortions may pose a risk to the mother's life and many people accept that at some point the foetus requires protection as a human life. For a survey of feminist critiques of the debate concerning "when life begins" see R Graycar & J Morgan, *The Hidden Gender of Law*, Federation Press (1990) pp 211-14.

34 The right to privacy is protected by Article 12 of the Universal Declaration and Article 17 of the ICCPR, while the right to liberty and security of the person is protected by Article 3 of the Universal Declaration and Article 9 of the ICCPR. For the thesis that a right to reproductive freedom may be drawn from the rights to privacy, liberty and security of the person, see R Cook, "Human Rights and Reproductive Self-Determination" (1995) 44 *American University Law Review* 975; R Cook, "International Protection of Women's Reproductive Rights" (1992) 24 *New York University Journal of International Law and Policy* 647; B Hernandez, "To Bear or not to Bear: Reproductive Freedom as an International Human Right" (1991) XVII *Brooklyn Journal of International Law* 309.

number and spacing of children,[35] are infringed as a result of the compulsory nature of the policy. The right to determine the number and spacing of one's children is particularly controversial in the context of China as well as particularly relevant to the question of the Convention grounds which is dealt with in Part IV *infra*.

A. Status of the Right to Determine the Number and Spacing of Children

The right to found a family is a core civil right contained in numerous universal and regional instruments. Article 16 of the Universal Declaration of Human Rights ("Universal Declaration"), Article 23 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights")[36] and Article 17(2) of the American Convention on Human Rights ("American Convention")[37] all protect the right to found a family. The right freely and responsibly to decide on the number and spacing of children – expressly included on the international community's agenda since 1956[38] – is a component of the right to found a family. The major objection to such a right, its potential impact on the environment, seems unlikely to have been in the minds of the framers of the Universal Declaration. In recent times, the international community has indicated that the right to determine the number and spacing of children and the protection of the environment are compatible.[39] Provisions including the right are Article 16 of the Proclamation of Teheran (adopted at the International Conference on Human Rights in 1968),[40] Article 4 of the 1960 Declaration on Social Progress and Development,[41] Article 16(e) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),[42] the Platform of Action for the 1994 Cairo Conference on Population and Development,[43] and the Platform for Action for the 1995 Beijing Fourth World Conference on Women.[44]

China has not yet ratified the ICCPR,[45] however, it is bound by Article 16(e) of CEDAW, an article in respect of which it has entered no reservations. Article

35 Note that in some cases, the wording of the right includes a reference to the timing of children as well.

36 ETS 5 (1950).

37 OAS Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev 1. Corr. 1, January 7, 1970, 9 ILM 101 (1970).

38 See MK Eriksson, *The Right to Marry and to Found a Family: a World-Wide Human Right*, Iustus Forlag (1990) pp 132-5.

39 See particularly, the Platform of Action for the 1994 Cairo Conference on Population and Development referred to in note 43 *infra*.

40 See *Human Rights: a Compilation of International Instruments*, UN ST/HR/1/Rev.4, 1993, at 51.

41 Res 2542(XXIV) of 11 December 1969, cited in MK Eriksson, note 8 *supra* at note 15, p 134.

42 Adopted by GA Res 180 (XXXIV 1979) on December 18, 1979. Article 16 provides that States must "ensure on a basis of equality with men" the "same" rights to determine the number and spacing of children.

43 *Report of the International Conference on Population & Development*, Chapter VII Program of Action, UN Doc A/CONF.171/13 (18 October 1994), Annex Chapter VIIA at 7.3.

44 *Report of the Fourth World Conference on Women*, Chapter 1, VC Platform for Action, 15 September 1995, A/CONF177/20 (1995) at para 95.

45 China signed the ICCPR on 5 October 1998. See UN Treaty Collection: Multilateral Treaties Deposited with the Secretary-General (internet version), <http://www.un.org/Depts/Treaty/bible.htm>.

16(e) obliges China to "ensure, on a basis of equality of men and women ... the same rights to decide freely and responsibly on the number and spacing of their children".[46] It is clear that Article 16(e) refers to the rights guaranteed by international law, rather than rights provided for in national legislation. The CEDAW Committee has stated that CEDAW recalls the rights guaranteed by other human rights instruments[47] and it has noted the particular importance to women of the right to determine the number and spacing of children.[48]

It is surely a violation of Article 16(e) of CEDAW for a government to limit the number of children that any member of the population may have. Although state practice condones a number of dubious and discriminatory qualifications on the rights of some groups to determine the number and spacing of children,[49] it is fairly clear that governments cannot establish quotas for the entire population. Contrary state practice notwithstanding,[50] a 'free and responsible' exercise of the right to determine the number and spacing of children suggests that while governments may encourage small families – by explaining the benefits of small families, for example – they cannot set a compulsory limit and pursue it with coercive measures. While international forums tend to focus on the avoidance of unwanted children, rather than denial of the right to have more children,[51] there are authoritative statements that quotas are not to be imposed in the Cairo Conference Program of Action,[52] and by the Human Rights Committee[53] and the

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46 China has entered only one reservation to CEDAW - the ICJ clause in Article 29(1). See UN Treaty Collection: Multilateral Treaties Deposited with the Secretary-General (internet version), <http://www.un.org/Depts/Treaty/bible.htm>.

47 Committee on the Elimination of Discrimination Against Women, General Recommendation 21 on equality in marriage and family relations, 4 February 1994; available at the United Nations High Commissioner for Human Rights home page, <http://www.unhchr.ch/>, documents file.

48 *Ibid.*

49 For example, heterosexual and married couples may be given access to adoption and *in vitro* fertilization, while gay or lesbian couples or single women are not. The basis for these restrictions seems to be the possible linkage of the right to marry with the right to found a family and the use of gender-specific language in relation to the right to marry. The right to marry is coupled with the right to found a family in both the Universal Declaration and the ICCPR, and both instruments protect the rights of 'men and women' to marry, whereas other provisions in these instruments refer to the rights of individuals. However, this conservative reading of these instruments and their regional counterparts is not the only possible construction. Moreover, neither the ICCPR nor CEDAW contain limitation clauses in relation to the rights to marry and to found a family. In any event, such limitations that are permissible must be imposed only to protect the rights of others and the "*just* requirements of morality, public order and general welfare" (see Article 29, Universal Declaration). For discussion of these issues see MK Eriksson, note 38 *supra,* pp 131, 162-3; M Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary*, NP Engel (1993) pp 413, 613-14; P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer (1998) p 335.

50 China's policy has some counterparts elsewhere. See for example, the discussion of Vietnam's 'one or two child policy' in DM Goodkind, "Vietnam's One-or-Two Child Policy in Action" (1995) 21 *Population Development Review* 60. This policy is probably next in line to China's as the most stringent fertility control policy in the world, but it is generally less draconian both in its overall goal and the means of its implementation.

51 It has been said of the Cairo Conference on Population and Development that it almost became the 'Conference on Abortion'.

52 Cairo Conference Program of Action, note 43 *supra* at 7.12.

CEDAW Committee.[54] China's own statements indicate that its *opinio juris* is in conformity with these pronouncements. Despite some comments by PRC officialdom pointing to the impracticability of the right in the Chinese context,[55] the PRC consistently maintains in international forums that there is, and should be, no coercion involved in the one child policy.[56]

B. Derogation From the Right

Although the right to found a family may be derogable,[57] the one child policy is probably not a legitimate derogation from the right. Conditions for derogation from human rights obligations are an immediate threat to the life of the nation,[58] such as a war.[59] Where permissible, derogation is only for the purpose of "defending or restoring a democratic society where individual rights and freedoms can be fully enjoyed and guaranteed".[60]

The PRC's primary rationale for the one child policy, economic development, is never an appropriate reason for derogation from rights.[61] Nor can the Chinese Government show that the policy is proportionate ("strictly required by the exigencies of the situation" as Article 4 of the ICCPR puts it). Limitation of population growth can be achieved by other, more reasonable measures.

C. Alternatives to the One Child Policy

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53 See the Human Rights Committee's General Comment on Article 23, UN Doc CCPR/C/21/Rev.1/Add.2 (1990); reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1 (4 September 1992). See also the conclusions of MK Eriksson, note 38 *supra*, p 163.

54 General Recommendation 21, note 47 *supra*.

55 See R Boland, "Population Policies, Human Rights, and Legal Change" (1995) 44 *American University Law Review* 1257 at note 7.

56 See, for example, the statement by the Chinese delegate to the Cairo conference, available in the file containing the full text of government statements on the Cairo Conference home page: <http://www.ccme.ca/linkages/cairo.html>. See also the concluding comments of the CEDAW committee, note 24 *supra* at para 274.

57 The right to found a family is not one of the non-derogable rights listed in Article 4 of the ICCPR. CEDAW does not contain a derogation clause, however, this does not necessarily mean that derogations are simply impermissible: See A-L Svensson-McCarthy, *The International Law of Human Rights and States of Exception with Special Reference to the Travaux Preparatoires and the Case-Law of the International Monitoring Organs*, Kluwer (1998) p 198.

58 See Article 4 of the ICCPR, Article 27 of the American Convention and Article 15 of the European Convention. There are some differences in wording between Article 4 of the ICCPR and the regional instruments, and, in practice, public emergencies have been misused, particularly in the Americas. Nevertheless, it may be concluded that the basic condition of an immediate threat to the life of the nation is a customary norm. Note that the African Charter on Human and People's Rights (OAU Doc CAB/LEG/67/3/Rev. 5; reprinted in (1982) 21 ILM 58) does not contain a derogation clause or the right to found a family, though it does provide that the family is to be protected by the State.

59 War is one of the few examples discussed in the *travaux preparatoires* of the ICCPR. See the examination of the *travaux* in A-L Svensson-McCarthy, note 57 *supra*, pp 200-15. Svensson-McCarthy concludes that "the concept of public emergencies was at all times linked to warlike situations or situations brought about by violence, or grave natural disasters, which make it impossible or well-nigh impossible to control the functioning of a country's institutions": pp 215-16.

60 *Ibid*, p 721.

61 *Ibid*, p 215.

Amartya Sen has argued convincingly that respect for the rights and autonomy of individuals is essential to the containment of population growth.[62] Developing this argument, Sen first posits that the state of population growth is not as critical as biologists such as Paul Ehrlich, who coined the phrase 'the population bomb',[63] might think.[64] Sen then argues that forced change in reproductive behaviour may be unstable. He also queries how much of a reduction in births has been achieved through coercion in China as opposed to China's policies for the improvement of educational and job opportunities for women, increased availability of health care and economic expansion.[65] Reports indicating that some Western populations may soon experience a decline in population because of low birth rates support Sen's scepticism.[66] Sen also highlights the undesirable aspects of coercion, including undesirable social phenomena like the increase in female infanticide.[67] Finally, Sen compares the coercive Chinese system with the system in the Indian state of Kerala. In Kerala, the emphasis is on public education, particularly of women, and support for family planning through health care programs, in order to promote the realisation that a lower birth rate is a necessity for modern families.[68] Sen concludes that:

> the "solution" to the population problem that seems to deserve the most attention involves a close connection between public policies that enhance social development and gender equity (particularly education, health care, and job opportunities for women), and individual responsibility of the family (through the decisional power of potential parents, particularly mothers). The effectiveness of this route lies in the close link between the well-being and agency of young women. As a result, the solution to the population problem calls for *more* responsibility and freedom, not *less*.[69]

A philosophy similar to Sen's is reflected in the concluding comments by the 1999 CEDAW Committee on China's periodical report. The Committee urged the PRC to adopt a number of measures to ensure freedom of reproductive choice. These measures included the prohibition of coercive enforcement measures in relation to the one child policy and gender-sensitivity training for family planning officials; provision of adequate social security to supplant the support that male children give their aged parents; provision of more educational and job opportunities for rural women; enforcement of prohibitions against sex-selective abortion, female infanticide and abandonment of girls; and the removal of all legal discrimination against 'out of plan' and unregistered children.[70]

Importantly, Sen's arguments against coercion make sense beyond the confines of Western philosophical traditions which privilege the individual as

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62 A Sen, "Fertility and Coercion" (1996) 63 *The University of Chicago Law Review* 1035 at 1039.

63 P Ehrlich, *The Population Bomb*, Sierra Club (1969).

64 Note 62 *supra* at 1050.

65 *Ibid* at 1055.

66 T Colebatch, "Childless Future for More Women" *The Age*, 22 March 2000, p 1.

67 Note 62 *supra* at 1053, 1056.

68 *Ibid* at 1056. See also A Sen, "Population and Reasoned Agency: Food, Fertility, and Economic Development" in Lindahl-Kiessling & H Landberg (eds), *Population, Economic Development and the Environment: the Making of Our Common Future*, Oxford University Press (1994) 51 at 72.

69 Note 62 *supra* at 1061.

70 Concluding Comments on China's periodical report, note 24 *supra* at paras 300-1.

having an intrinsic worth. The right to determine the number and spacing of one's children, if conceived as harnessing individuals' autonomy and rational thought processes to pursue broader societal goals such as limiting population growth, is consistent with the communal[71] philosophical traditions of the Chinese.[72]

IV. THE ONE CHILD POLICY AND REFUGEE STATUS: WHAT IS THE 'CONVENTION GROUND' OF PERSECUTION?

Having established that the one child policy breaches human rights norms, it is necessary to consider whether persons fleeing enforcement of the policy may claim that they have a well-founded fear of persecution. Hathaway has proposed a convincing thesis that the term 'persecution' as used in the Refugees Convention refers to a failure in state protection and that the international bill of rights[73] and well-accepted treaties like CEDAW[74] provide the standards by which to measure a state's protective duties.

Not every violation of human rights constitutes persecution. If an isolated incident occurred but the state moved to remedy the violation and to prevent future violations, it is doubtful that the applicant for refugee status could demonstrate a well-founded fear of persecution. Minor infractions of human rights would probably not constitute persecution either, although upon accumulation they could amount to persecution. The extreme, physical measures used to enforce the one child policy – forced sterilisation and forced abortion – clearly constitute persecution. Some of the more severe economic disincentives could also constitute persecution. The issue for decision-makers dealing with asylum claims stemming from the one child policy is whether there is a well-founded fear that the policy will be enforced with measures amounting to persecution. The asylum seeker's preparedness to disobey the one child policy or the likelihood of the asylum seeker's opposition to the policy coming to the

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71 See RP Peerenboom, "What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics" (1993) 6 *Harvard Human Rights Journal* 29. The Marxist conception of the family emphasises "the social functions of marriage, more than the protection of the private sphere of life": MK Eriksson, note 38 *supra*, pp 28-9. This emphasis on the community is reflected in various provisions of the Chinese Constitution. Article 49 establishes family planning as a constitutional duty, while Article 51 states that "[t]he exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective": Blaustein & Flanz, note 30 *supra*, entry for the People's Republic of China. Confucian thought, which is still influential in China, is similarly focussed on the individual as a member of society, rather than as a separate, inviolable person. For a description and analysis of Confucianism and Marxism as they relate to the idea of human rights, see RP Peerenboom at 39-47 (Confucianism) and 47-50 (Socialism).

72 Cf Peerenboom, note 71 *supra*, especially at 54-7.

73 Hathaway, note 4 *supra*, p 106. The Bill of Rights comprises the Universal Declaration on Human Rights (Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948); the International Covenant on Civil and Political Rights (999 UNTS 171) and its two protocols, and the International Covenant on Economic, Social and Cultural Rights (993 UNTS 3).

74 JC Hathaway, "The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute" in Association Internationale Des Juges Aux Affaires Des Refugies, Conference (1998) 80 at 87.

attention of the authorities[75] or being assumed by the authorities (perhaps as a result of the close scrutiny of reproductive practices) is relevant to this assessment. So are factors like the region that the asylum seeker has come from, the nature of the area (rural or urban, for example), and the sex of the asylum seeker.

The next and most problematic issue is whether there is a link between the persecution feared and the five Convention grounds. Some courts and tribunals have refused to recognise persons fleeing enforcement of the one child policy as refugees because they have been unable to find such a link.

A. Jurisprudence in the United States, Canada and Australia

In the United States, the proposition that persons fleeing enforcement of the one child policy are persecuted for reasons of political opinion, while supported initially,[76] has been rejected by the United States Circuit Court of Appeals. A similar argument based on membership of a particular social group has also been rejected.[77] The Courts have accepted that the decision of the United States Board of Immigration Appeals ("BIA") in *Matter of Chang* is the controlling precedent.[78] In *Chang*, the BIA took the view that there was no link between the persecution feared and the Convention grounds. Congress eventually legislated to deem persons fleeing enforcement of the one child policy to be persecuted on the basis of political opinion.[79]

The Canadian jurisprudence is a mixed bag. In *Cheung v Canada*,[80] the Federal Court decided that "women in China who have more than one child and are faced with forcible sterilization" were a particular social group and were entitled to protection as refugees. However, in *Chan v Minister of Employment and Immigration* ("*Chan*"), the Federal Court did not accept that a man claiming he faced forcible sterilisation qualified as a refugee under the Convention.[81] According to the Court, the policy applied to the entire population, and Chan was persecuted for what he had done, rather than for what he was. Chan had violated

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75 Simple opposition to government policy is generally insufficient to ground a claim to refugee status: *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status,* UN Doc HCR/IP/4/Eng/REV 1 (1979, re-edited, 1992), ("*UNHCR handbook*") at para 80.

76 In particular, see *Guo Chun Di v Carroll*, 842 F Supp 870 (reversed, *Guo Chun Di v Moscato*, F3d 315 (4th Cir 1995)). For analysis, see T Moriarty, "Guo v Carroll: Political Opinion, Persecution, and Coercive Population Control in the People's Republic of China" (1994) 8 *Georgetown Immigration Law Journal* 469; J Wines, "*Guo Chun Di v Carroll*: the Refugee Status of Chinese Nationals Fleeing Persecution from China's Coercive Population Control Measures" (1994) 20 *North Carolina Journal of International Law & Commercial Regulation* 683.

77 *Chen v INS* 95 F3d 801 (9th Cir, 1996); *Dong v Slattery*, 84 F 3d 82 (2nd Cir, 1996); *Chen v Carroll*, 48 F3d 1351 (4th Cir, 1995); *Guo Chun Di v Moscato*, note 76 *supra*; *Zhang v Slattery*, 55 F3d 732 (2nd Cir, 1995).

78 Int Dec 3107 (1989).

79 The *Illegal Immigration Reform and Immigrant Responsibility Act* 1996 (PubL 104-208, 110 Stat 3009 (1996)) amended the definition of refugee in section (a)42 of the US *Immigration and Nationality Act.* Individuals who resist coercive population control are deemed to be persecuted or to possess a well-founded fear of persecution on account of political opinion. A limit of 1 000 refugees per year applies to this provision. The limit has been interpreted as not applying to grants of withholding of removal. It applies only to the discretionary grant of asylum.

80 (1993) 102 DLR (4th) 214.

81 [1993] 3 FC 675, 20 Imm L R (2d) 181, 156 NR 279, 42 ACWS (3d) 259, per Heald and Desjardins JJA; Mahoney JA dissenting.

a generally applicable policy, instead of being persecuted for a pre-existing characteristic held in common with other members of a particular social group.[82] A particular social group could not be defined by reference to the persecution feared. On appeal, a majority of the Supreme Court also rejected Chan's claim. However, the majority's decision was based on their view that the evidence did not support Chan's claim as it was primarily women who were subjected to forcible population control measures.[83] The dissentients, on the other hand, found that Chan was a member of a particular social group 'voluntarily associated' with the right to determine freely and responsibly the number, timing and spacing of one's children.[84]

Australian courts have rejected claims that persons fleeing enforcement of the one child policy are persecuted for reasons of membership of a particular social group. The High Court found in the case of *Applicant A v Minister for Immigration and Ethnic Affairs* ("*Applicant A*"),[85] that it is impossible to view such persons as members of a persecuted social group without engaging in circular reasoning, since the policy applies to the entire population rather than a select group within the population. In similar fashion to the Canadian Federal Court in *Chan*'s case,[86] the majority found that a particular social group may not be defined by reference to the persecution feared. Even if a particular social group had been created by the one child policy, the persecution feared was not 'for reasons of' membership of that group. Whether or not such persons may rely on the Convention ground of political opinion has not been dealt with definitively. In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong*, the High Court dismissed a claim concerning the one child policy that raised both imputed political opinion and membership of a particular social group, in the context of other claims concerning persecution for various activities such as illegal departure from the PRC.[87] The majority in *Guo Wei Rong* confirmed the approach to the issue of membership of a particular social group taken in

82 According to the Canadian Supreme Court, a social group may be defined by an innate characteristic such as race or a characteristic like religious belief that could be changed but which a person should not be required to change: *Attorney-General of Canada v Ward* [1993] 2 SCR 689.

83 *Chan v Minister of Employment and Immigration* [1995] SCR 593 at 658, per Major J (delivering the opinion for the majority).

84 *Ibid*, per La Forest J at 646. As mentioned in note 35 *supra*, some international instruments include a reference to the timing of children. See for example, the platform of action of the Cairo Conference, note 43 *supra*.

85 *Applicant A*, note 7 *supra*. For commentaries on *Applicant A*, see M Crock, "Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law" (1998) 10 *International Journal of Refugee Law* 49; C Dauvergne, "Chinese Fleeing Sterilisation: Australia's Response against a Canadian Backdrop" (1998) 10 *IJRL* 77; S Kneebone, "Case Note: Refugee Test and the "one child policy": Applicant A v Minister for Immigration and Ethnic Affairs" (1997) 4 *Australian Journal of Administrative Law* 173; P Mathew, "Case Note: The High Court and 'Particular Social Groups': Lessons for the Future" (1997) 21 *MULR* 277.

86 *Chan*, note 81 *supra*.

87 (1997) 144 ALR 567.

Applicant A.[88] However, the Court did not address the merits of the claim that enforcement of the one child policy may amount to persecution on the basis of political opinion. The Court's decision on this aspect of the claim for refugee status turned on the issue of the limitations on powers of judicial review.[89]

The exception to this negative jurisprudence in Australia is the High Court's ruling in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*.[90] Chen was a child born in contravention of the one child policy – a *hei haizi* or 'black child' – who, it was accepted, was likely to be subjected to discriminatory denial of education, food and healthcare.[91] The Court found that the persecution suffered by black children was not simply a component of a generally applicable policy and that black children are persecuted for something that they cannot change – namely having been born in contravention of the policy – rather than some action of their own in violation of that policy.[92] The children are defined by something other than the discriminatory treatment or persecution they fear. Their fear results from membership of a particular social group defined by the fact of birth in contravention of the one child policy.[93]

B. Critique

In this part, the basis of the numerous findings that persons fleeing enforcement of the one child policy are not refugees is critiqued. To begin this critique, the rationale for the inclusion of the Convention grounds in the Refugees Convention's definition of a refugee, and the context in which the definition was drafted are explored. Hathaway's thesis that the framers were concerned with selective denials of citizenship through persecution is accepted as correct.[94] It is shown that seemingly general laws against conduct may fit within the model of selective denials of citizenship with which the Convention's framers were concerned. The criminalisation of 'sodomy', laws restricting travel abroad, and laws providing for military conscription are used to demonstrate this. The one child policy is compared with these three laws and it is argued that the policy

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88 *Ibid* at 576, per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ. Justice Kirby noted that it was open to the Australian Refugee Review Tribunal (RRT) to question the credibility of Ms Pan's case regarding forcible sterilisation under the one child policy and stated that "[n]othing said by this court in the decision (given since the hearing of these appeals) about cases concerning the Chinese 'one child policy' affords any ground for reopening the previous determinations concerning Ms Pan.": at 584, per Kirby J.

89 As Kirby J stated, *ibid* at 583, one of the two essential questions presented to the Court was whether, "[w]ithin the limitations inherent in proceedings for judicial review, ... the Federal Court [had erred] in holding that the tribunal had fallen into error in the manner in which it performed its functions". For a discussion of the case in the broader context of judicial deference to the RRT, see M Crock, note 85 *supra* at 74-6.

90 (2000) 170 ALR 553.

91 This finding by the RRT was not challenged: See *Chen*, *ibid*, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at para [31].

92 *Ibid* at paras [18] and [19]. The analysis in the separate opinion of Kirby J, the dissentient in *Applicant A*, was substantially similar, although it does not follow that he would change his opinion concerning a person in Applicant A's situation: paras [71] and [73-4].

93 *Ibid* at para [22].

94 See generally, JC Hathaway, note 4 *supra*, chapter 5.

should similarly be viewed as a law capable of generating refugees within the meaning of the Refugees Convention.

(i) Drafting Context and Concerns of the Framers

The definition of a refugee contained in the Refugees Convention builds on previous definitions used by international organisations responsible for refugees.[95] The Convention was also designed to apply to the refugees created by the Cold War division of Europe.[96] It seems that the framers did not contemplate that a refugee was someone suffering from 'benign' neglect as in the case of those whose economic, social and cultural rights are not provided for in Western countries.[97] Refugee status is for people actively rejected by a body politic intolerant of diversity. The framers of the Convention were concerned with a particular denial of human rights that amounted to an arbitrary and discriminatory denial of citizenship. As Hathaway explains, a refugee is targeted because of a characteristic that a person cannot change (race and nationality/ethnicity), or one that a person should not be required to change (political opinion and religion).[98]

The situation of the Jews in Nazi Germany provides a perfect illustration of the selective denial of citizenship covered by the Refugees Convention. No meaningful difference between Jews and other Germans existed prior to the Nazi regime. The Nazis chose a pre-existing characteristic that could not be changed – Jewish heritage – in order to divide German society into two categories – one privileged, one persecuted.

(ii) Generally Applicable Policies and the Convention Grounds

As a result of the focus on an arbitrary and targeted violation of rights, policies or laws that apply to the entire population seem incapable of generating refugees as defined by the Refugees Convention. These laws or policies do not appear to persecute any group within society on a selective basis.

This is certainly true of reasonable criminal laws. Even if it is accepted that a criminal is expressing a political opinion – namely that his or her activities should be legal – reasonable criminal laws do not ban the exercise of human rights and therefore do not constitute persecution.[99] More fundamentally, reasonable criminal laws rightly label certain activities as criminal. They have

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95 *Ibid*, p 102-3.

96 Indeed, because of the requirement that persecution be linked to one of the five Convention grounds, all of which relate to the refugee's "civil and political status", Hathaway argues that the Convention is primarily a Cold War document which reflects a pro-Western bias: *ibid*, p 6-9.

97 This is not to say that claims to refugee status based on denial of economic, social and cultural rights are unfounded, nor that state policies which fail to deliver these rights could never be seen as "active omissions" symptomatic of a failure in state protection. Such cases are simply beyond the scope of this paper.

98 JC Hathaway, note 4 *supra*, p 160-1, drawing on the analysis of the United States Board of Immigration Appeals, in *Matter of Acosta* 19 I&N 211 (1995).

99 Similarly, extreme punishments for ordinary crimes do not necessarily generate refugees, because these are cases where the punishment breaches, but does not outlaw, a human right. In the case of serious non-political crimes committed outside the country of refuge, the criminal is excluded from refugee status: see Article 1F(b) of the Refugees Convention.

the legitimate aim of protecting the community and, being proportionate to their aims, they do not outlaw activities protected by international human rights law. They do not impose an arbitrary or politicised vision of citizenship. The criminal is responsible for setting him or herself against the community.[100] So these laws should not be viewed as selecting persons for punishment for reasons of political opinion or membership in a particular social group.

A law that bans the exercise of a human right is different. It is experienced as persecutory by those persons who do not, or cannot, conform with the law because of something they should not be expected to change, namely their desire to exercise a human right. This desire sets them apart from other members of society who may be happy to forgo the right in question, who are in agreement with government and wish to exercise their rights in the manner decreed by government, or who are not prepared to defy government. Thus, the law will be enforced against some members of the community but not others for reasons that are discriminatory and unjust. It is demonstrable that enforcement of such a law against the group of non-conformists amounts to persecution for reasons of political opinion or membership of a particular social group.

(a) Generally Applicable Policies May Target Activities Viewed as the Expression of a Political Opinion

Some laws of general application are clearly aimed at persons who hold a particular political opinion or at activities that are perceived as the expression of a particular political opinion. The clearest illustrations of the first kind of law are the many laws against 'subversion' which are in fact aimed at keeping a particular regime in power by suppressing any dissent. An example of the second category – laws that are aimed at an activity viewed as the expression of a political opinion – is the laws restricting overseas travel adopted by former Soviet bloc countries.

On one view, as Goodwin-Gill notes, laws punishing unauthorised travel and stay abroad do not distinguish between particular sectors of society:[101] totalitarian governments violate the rights of all citizens through the enactment of these laws and, more generally, through their anti-democratic system of governance. An alternative view is that since totalitarian states require a high degree of loyalty to the state and its political agenda, these laws are better regarded as a method of repressing an activity that is viewed as a form of political dissent. Empirically it may be shown that the latter view is to be preferred: persons who contravened these laws were known as 'defectors' (*perebezhchiki*) in both the Soviet Union

100 Cf the statement by Brennan CJ in *Applicant A*, that the characteristic defining a particular social group may be any characteristic including attributes of "non-criminal" conduct: note 7 *supra* at 335.

101 GS Goodwin-Gill, *The Refugee in International Law*, Clarendon (2nd ed, 1996) p 53.

and the West.[102] Here the example is used to demonstrate a broader, theoretical proposition: laws that ban the exercise of an activity protected by human rights are inherently cases of political persecution.

The right to move posed a threat to the undemocratic regimes of Eastern Europe because of the crisis of legitimacy facing these governments. As Foldesi writes:

> [I]n a legitimate society leaving the country generally does not have political repercussions. ... But it was not like that in the Eastern European societies where – *as a result of attaching political importance to everything* – travelling abroad, emigrating, and especially staying abroad illegally (defecting as it was commonly described) qualified as an unfriendly or hostile step against the political system...[T]he socialist countries were part of a world wide struggle in which two camps were fighting with one another and thus leaving one camp automatically strengthened the other. This was in fact tantamount to treason.[103]

Defectors were persecuted because an accompanying political opinion was imputed to persons who left the country. It did not matter that the victims may not have viewed their departure as politically motivated.[104]

Some state practice supports recognition of defectors as refugees. In Germany, defectors have been recognised as refugees on the basis that they fear persecution for the crime of *republikflucht* (literally, flight from the republic).[105] In other states, *republikflucht* alone has been insufficient for the purposes of refugee status but it has been considered as a factor relevant to refugee status.[106]

It is apparent, then, that people who do not conform to a law of general application can be recognised as refugees provided that one understands the role of law in defining particular activities as political. The opposing view attempts

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102 V Krasnov, *Soviet Defectors: the KGB Wanted List*, Hoover Institution Press (1986). Krasnov, in addition to providing the Russian term, gives a historical sketch of the application of the term defector to persons who left the Soviet Union in violation of Soviet law: "[t]he word 'defector' came into common use only after World War II. It was used to distinguish Soviet soldiers who went over to the West from the millions of refugees who just happened to be in the West. Those who coined the word apparently sought to suggest that if these soldiers were not quite traitors, there was still something defective about them."

103 T Foldesi, "The Right to Move and its Achilles' Heel, The Right to Asylum" (1993) 8 *Connecticut Journal of International Law* 289 at 293 [emphasis added].

104 GS Goodwin-Gill, note 101 *supra*, p 53. As Bevis writes, "the imputation of a political opinion from conduct is a common cause of persecution for [o]nly the holder of an opinion knows what the opinion is until it is somehow expressed to others; moreover, the perception of the expression may inaccurately reflect the real opinion. Opinions can be expressed through acts, failures to act, spoken or written views, or through association with family, friends, acquaintances, strangers or organisations.": LD Bevis, "'Political Opinions' of Refugees: Interpreting International Sources" (1988) 63 *Washington Law Review* 371 at 411. However, see the *UNHCR Handbook* which requires that the person be motivated to stay abroad by political opinion: *UNHCR Handbook*, note 75 *supra* at para 61.

105 For example, see the decision of the Bavarian Higher Administrative Court regarding a Czechoslovak, (title not given) 7 June 1979, BayVGH 72 XII 77; and the decision of the Administrative Court of Appeal Baden-Wurttemburg regarding a Vietnamese (title not given), 14 January 1994, A 16 S 1748/93, InfAusIR 4/94, p 161. Both available at <http://www.unhcr.ch/refworld/legal/refcas.htm>.

106 For example, see the decision of the Dutch Council of State concerning a Czechoslovak in *H Jiskrova v. De Staatssecretaris van Justitie*, 20 September 1984, Council of State No A-2.0140 (1981). Available at <http://www.unhcr.ch/refworld/legal/refcas.htm>. The UNHCR representative put the view that the decision that *republikflucht* alone is insufficient for the purposes of refugee status was consistent with paragraph 61 of the *UNHCR Handbook* (note 75 *supra*).

to differentiate between the situation of persons who become dissidents because of the adoption of a generally applicable rights-violative law or policy (not refugees), and persons who are persecuted because they are dissidents (refugees). The assumption is that those breaking laws of general application are punished merely for engaging in activities prohibited by law, rather than for defying government or societal norms. However, this assumption is valid only if one ignores the overall political context in which society or government deems punishment for the exercise of a human right appropriate.

(b) Use of Disproportionate Means May Constitute Political Persecution

The one child policy is somewhat different from the laws discussed above. The stated goal of the policy – limiting population growth – is legitimate. By contrast, many laws against subversion aim simply to protect the power of a particular political regime, while the aim of laws restricting travel can be viewed as a rather paranoid attempt to maintain citizens' loyalty to a particular regime or kind of governance. However, the method for achieving the legitimate aim of limiting population growth, a ban on the exercise of a human right, is disproportionate and possibly counter-productive.[107] It is arguable that where a law seeks to achieve a legitimate goal by means that outlaw activities protected by human rights law, the activities concerned are politicised in similar fashion to the politicisation of overseas travel by governments of the Soviet bloc.[108] The activities become the subject of governmental and societal control when they should fall within the protected sphere of private life.[109] Where the activity falls within one of the Convention grounds, the victim may claim refugee status. Assertion of a human right will generally amount to expression of a political opinion.

The choice of means may also demonstrate that government views any deviation from the path it has determined as a threat to government or social order, not just its legitimate social aims. Otherwise, more reasonable means would be chosen to achieve these legitimate goals. So the choice of means betrays a motivation to persecute for reasons of political opinion. Through their conduct, persons who disobey the law express, or are perceived to express, the opinion that they have a right to do what the law has prohibited. They present an alternative model of citizenship to that which is presently promoted in society. Just like the traditional political dissident, they are persecuted for ideas deemed to be 'subversive'. This is so even if the victim does not perceive him or herself to be acting politically, as a subversive political opinion is imputed to the victim.

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107 See Sen's argument that coerced changes in behaviour may be unstable, note 62 *supra*.

108 As Spijkerboer demonstrates, no activity is inherently political. What is political depends on context. So speech may not always be political, while a usually innocuous activity such as cooking could be political in a particular context: T Spijkerboer, *Women and Refugee Status: Beyond the Public/Private Distinction*, The Hague, Emancipation Council, September 1994 at 57.

109 The line between public and private, as feminists have pointed out, is problematic because it is often drawn in an arbitrary fashion. For example, domestic violence is often viewed as falling with the private sphere – or rather, men's private sphere – and is not policed properly. However, this is not an argument in favour of getting rid of the idea of privacy altogether.

Laws for military conscription that do not make exception for conscientious objectors illustrate these points and are comparable with the one child policy since there is a similar disjunction between the legality of goals and means. The goal of military conscription – filling the army and protecting the state – is permissible. However, it is arguable that the failure to permit conscientious objection is not legitimate, or will not be in the near future, since a right of conscientious objection is emerging from the broader right to freedom of conscience.[110] Increasingly, it is recognised that society should not arrogate to itself the right to change an individual's mind concerning military service, against that person's conscience. A government's failure to provide a reasonable alternative to military service politicises the exercise of freedom of conscience, creating undue conflict between the state and those who feel that they cannot perform military service.[111]

As with the example of unauthorised travel abroad, there are competing approaches to the question of refugee status for conscientious objectors. The United Nations High Commissioner for Refugees ("UNHCR") has accepted that states may legitimately extend refugee status to conscientious objectors.[112] However, national courts have not always been prepared to do so, because they fail to see the way in which the law concerned politicises freedom of conscience. An illustration of this failure is the US Supreme Court's decision in *INS v Elias-*

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110 Goodwin-Gill, note 101 *supra*, pp 55-6. See particularly, the Human Rights Committee's General Comment on Article 18 of the ICCPR, where it is stated that a right to conscientious objection may be drawn from the right to freedom of conscience: General Comment No 22 (48), *Report of the Human Rights Committee to the UN General Assembly*, GAOR, A/48/40 (1), p 210, para 11; cited in A-L Svensson-McCarthy, note 57 *supra*.

111 Generally speaking, conscientious objectors pose no actual threat to society: it is unlikely that permitting a few persons to follow their convictions would jeopardise a country's war effort. Even when conscription and an element of compulsion is involved, the (predominantly) young men called up for service often comply willingly with their country's demand. It is submitted that only in circumstances where the broader society does not support a particular conflict, or conscription or warfare generally, is it likely that conscientious objection could undermine the war effort. In such a case the conscription order may be questionable anyway and it may be even easier to view objectors as victims of political persecution. The case of the United States' involvement in the Vietnam conflict, where public opinion – mobilised by television reportage of the conflict – supported 'draft evasion' may be an example of this. (There is in fact a distinction between draft evasion *per se* and 'draft evasion' motivated by valid reasons of conscience). From the perspective of international law, selective conscientious objection is permitted where the war violates norms of international law, and refusal to serve in such cases may be viewed as persecution for reasons of political opinion. It could be argued that the US had some legitimate basis for thinking that the Vietnam war was justified at international law. Alternatively, it may be argued that involvement in the war was based primarily on the determination that communism was a threat to the United States' national interest. It is therefore arguable that failure to permit selective conscientious objection in relation to the Vietnam war was driven by the idea that those protesting against the war and refusing to fight were subversive of the social/political order because they would not toe the anti-Communist line. Punishing people for objecting to this particular war may therefore be seen as an example of persecution for reasons of imputed political opinion. One principled response to this argument might be that the US failure to permit conscientious objection is not because of the threat that such people pose to a *particular* social order. Rather, the driving force might have been the general threat posed to society by questioning the government's power to assess the national interest. After all, someone has to make the decision as to when to go to war. On the other hand, when public opinion does not support the war effort, the government's powers to decide when to wage war may have been misused.

112 *UNHCR Handbook*, note 75 *supra* at paras 167-74.

Zacarias in which it was held that denial of refugee status to a Guatemalan who had resisted conscription by guerillas and feared retaliation was a legitimate interpretation of the Refugees Convention.[113]

In *Elias-Zacarias*, Justice Scalia, who authored the majority opinion, reasoned that the guerillas would take or kill Elias-Zacarias regardless of his political opinion.[114] His Honour required the persecutor to be overtly motivated by the victim's political opinion and not simply that persecution result from that opinion, which is not necessarily what the language of the Refugees Convention requires.[115] Moreover, Justice Scalia expressly excluded the political objectives of the persecutors as irrelevant,[116] ignoring the likelihood accepted by the minority[117] that the threat to kill was the result of the guerillas' belief that Elias-Zacarias held a political opinion unsympathetic to their cause. The majority took the view that Elias-Zacarias could not demonstrate that the guerillas would persecute him because of his political opinion, "rather than because of his refusal to fight with them".[118] This is an excessively formalistic approach which blinds the Court to the fact that these two things were probably one and the same in the guerillas' eyes, and that the guerillas might not have threatened to kill Elias-Zacarias if this were not the case.

Pursuing this monolithic approach which focuses on the persecutor's motivations and characterises them in one way, and one way only, the Court attempted to buttress its position by an appeal to the 'ordinary' meaning of the terms of the Refugees Convention:

> If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion.[119]

In using these examples, the Court failed to recognise, first, that it is possible for more than one Convention ground to be relevant in a claim for refugee status, and, second, that victims of persecution are not passive victims who have things done to them for particular reasons. They may attract persecution through active resistance. In such cases, political opinion will often be the most appropriate Convention ground.[120]

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113 *INS v Elias-Zacarias* 112 SCt 812 (1992), reversing *Zacarias v United States* 908 F2d 1452 (9th Cir, 1990). For discussion, see KE Knobelsdorff, "*INS v Canas-Segovia*: Keeping Politics in and Refugees out" (1993) 8 *Connecticut Journal of International Law* 657 at 674. There are conflicting Australian authorities regarding conscientious objectors. Contrast *Murill-Nunez v MIEA* (1995) 63 FCR 150 at 159, with *Istvan Magyari v Minister for Immigration & Multicultural Affairs* [1997] 417 FCA (22 May 1997). Available at the AustLII website in the Federal Court decisions file: <http://www.austlii.edu.au/>.

114 *Elias Zacarias*, *ibid* at 816.

115 Goodwin-Gill, note 101 *supra*, p 51; A Helton, "Resistance to Military Conscription or Forced Recruitment by Insurgents as a Basis for Refugee Protection: a Comparative Perspective" (1992) 29 *San Diego Law Review* 581 at 587.

116 *Elias-Zacarias*, note 113 *supra* at 816.

117 *Ibid* at 818, per Stevens J, joined by Blackmun and O'Connor JJ.

118 *Ibid* at 816, per Scalia J.

119 *Ibid*.

120 For analysis along these lines, see Spijkerboer, note 108 *supra*; A Macklin, "Refugee Women and the Imperative of Categories" (1995) 17 *Human Rights Quarterly* 213.

An example that demonstrates the overlap between Convention grounds is that of women who refuse to wear the veil in Islamic societies that require women to do so by law. (Whether or not Islam itself actually requires the wearing of the veil is highly controversial, as will be seen). The laws requiring that women wear the veil are driven by a particular social and political ideal, namely that women should behave in a certain way. Because the laws, by definition, are *compulsory*, they violate women's freedom of expression by limiting their conduct, as well as rights to liberty and privacy, and ultimately (because of the methods of enforcement), the right to security of the person. They are therefore persecutory. Since the laws are directed at women because they are women, they can be seen as examples of persecution for membership of the particular social group 'women'.[121] This is so even if the practices required by the laws are not experienced as persecutory by all women because many would voluntarily adopt them regardless of the dictates of the law.

Enforcement of the laws also amounts to persecution for reasons of political opinion. Indeed, Susan Musarrat Akram cogently argues that an analysis based on political opinion may often capture the experience of the refugee better than an analysis based on membership of the broad particular social group 'women', and may avoid the twin pitfalls of 'essentialism'[122] and stereotyping of Islam.[123] By failing or refusing to comply with the laws, which women may do even if they are devout Muslims, the women present a different interpretation of the requirements of the Koran from the dominant social group represented by politico-religious leaders. (This dominant social group may be defined as 'men' if one views the standards imposed on women as consistent with patriarchal attitudes, or simply the group within society – which may be the majority – who adopt a particular view of religious teachings.) Alternatively, women who do not wear the veil may be perceived as rejecting the Koran altogether. Women who fail or refuse to wear the veil are therefore expressing, or are perceived to express, a political opinion – an opinion concerning the organization of their society and what should be required of the women within it. This opinion is contrary to the views of the countries' leaders and, perhaps, the majority of the population, and it challenges the power of these leaders and/or society to impose their views upon women. This is why wearing the veil is compulsory rather than optional. The law is invoked to suppress dissidence. At the same time it clearly identifies persons who are dissidents.

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121 Regarding the possible meaning of the terms "particular social group" see further, Part IV.B(ii)(c) *infra*. It is increasingly recognised that women or sub groups of women may constitute a particular social group. For example, see the House of Lords decision in *Islam v Secretary of State for the Home Department* and *Regina v Immigration Appeal Tribunal and Another Ex Parte Shah*: [1999] 2 WLR 1015.

122 Essentialism is the pejorative word for the idea that all women's experiences can be characterised in one way. The problem with some critiques of essentialism is that they may go to the other extreme of denying any common experiences among women, playing into the hands of those who deny that gender-based discrimination exists at all.

123 SM Akram, "Orientalism Revisited in Asylum and Refugee Claims" (2000) 12 *International Journal of Refugee Law* 7.

It is apparent, then, that the Court's reasoning in *Elias-Zacarias*[124] was flawed. Since the argument against refugee status for conscientious objectors in general employs similar reasoning – that conscription is designed to protect the nation and is non-selective and non-political – it is arguable that it too is faulty. The penalties in many states for failure to perform military service, while less extreme than the guerillas' threat to kill Elias-Zacarias, are also designed to change people's minds against their consciences. It is also arguable that society would not attempt to change someone's mind despite the protection due to freedom of conscience, unless society deemed the exercise of individual conscience a threat to a particular model of society and good citizenship. For example, conscientious objectors might be seen as undermining a model of citizenship in which military service is viewed as a 'patriotic' duty as much as a military necessity. Consequently, those who wish to exercise their freedom of conscience are perceived to embody an alternative vision of good citizenship (a political opinion) that is thought to undermine the concept presently prevailing in society, and thus to threaten the body politic.

There is, of course, the practical difficulty of evaluating a person's true motives which may, at least in part, explain the failure to accommodate conscientious objectors. In particular, a person should not be motivated by cowardice. Anyone faced with the prospect of armed conflict has the right to feel afraid, but the right to act on this fear is conditioned by society's need for protection since cowardice or fear are not reasons of conscience.[125] However, the need to scrutinise claims to conscientious objection should not lead to their absolute denial. There is no justification for using concepts such as limitations on rights in the interests of public order to destroy rights.[126] Governments should be aware of their obligations not to destroy rights and the individual should be given the benefit of the doubt. Failure to permit conscientious objection on the basis of practical grounds such as the need to scrutinise claims boils down to a presumed failure on the part of the objector to comply with standards of good citizenship: conscientious objectors are presumed to be mere draft evaders.

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124 Note 113 *supra*.

125 Nor can punishment of draft evaders be viewed as a form of punishment for failing to meet an arbitrary model of good citizenship. In the absence of a reason of conscience, failure to serve valid societal interests which, if it has been validly determined simply cannot be met in any other manner, is, on an objective standard, a negation of citizenship. The situation is similar to that of the criminal who has a political opinion concerning the limitations society may impose on her behaviour but who is reasonably defined as criminal by society because she violates the rights of others. It could be argued that the radical libertarian occupies much the same space. To argue that government does not have the right to make you do *anything* because of a prior right to liberty does reflect a political opinion. However, failure to permit conscientious objection on this ground may not amount to persecution since the radical libertarian viewpoint can be also be seen as a negation of citizenship or belonging in organised society. On the other hand, there is a clear distinction between the radical libertarian and the person who simply dislikes or is afraid of military service – which could constitute the majority of the population – and it is doubtful whether the libertarian should be compelled to act against his conscience when the religious conscientious objector is not.

126 See Article 30 of the Universal Declaration.

(c) *Generally Applicable Laws May Create and Persecute a Particular Social Group*

It is also arguable that enforcement of generally applicable laws that prohibit the exercise of a human right constitutes persecution for membership in a particular social group. This is primarily because there is a link between imputed political opinion and membership in a particular social group. This link may operate in relation to a pre-existing group in society that is perceived as disloyal to the government. Alternatively, individuals engaging in a particular activity may unreasonably be perceived as dangerous to the state or social order and this sets them apart as a particular group in society. Persecution is arguably as much for their membership in this group as for their conduct as individuals.

The term 'particular social group', which are not defined in the Refugees Convention, may refer simply to an identifiable group within society.[127] Hathaway advocates a persuasive approach for ascertaining the characteristics that may identify a group in society. Adopting the US Board of Immigration Appeal's reasoning in *Matter of Acosta*,[128] Hathaway argues that the terms 'particular social group' should be defined in light of the characteristics that define the other Convention grounds. The four other grounds require that a refugee is persecuted for an immutable characteristic (race/nationality) or something that could be changed but which is so fundamental to personality that change should not be required (religion/political opinion). Consequently, a particular social group is a group of persons in society that share either an immutable characteristic or something fundamental to personality that they should not be required to change. The desire to act in a manner protected by international human rights law is an example of the second type of characteristic. By outlawing a human right – which is, by definition, something fundamental to personality – a law may both identify a particular social group and persecute it.

In cases of authoritarian governments like that of the PRC, which monitors nearly all aspects of peoples' lives, there are clear, overt signs that people who assert rights that are banned by the government are viewed as a group dangerous to the state and society. Such people may be labelled 'class enemies' or other like terms intended to depict them as a group separate and apart from the rest of the population. But there are examples of laws in liberal democracies in which the same phenomenon occurs. 'Sodomy' statutes are one such example.

Many countries have laws that ban homosexual sexual intercourse (often referred to as 'sodomy'). The justification for these laws is usually public morality. Sometimes public health is also relied upon. Neither reason provides a valid basis for the regulation of sexual intercourse occurring in private between consenting adults. In *Toonen v Australia*,[129] the Human Rights Committee rejected arguments put forward on the basis of public health and morality in support of a law prohibiting sodomy in the Australian State of Tasmania. The

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127 See the analysis by Chief Justice Brennan in *Applicant A*, note 7 *supra* at 335.

128 *Acosta*, note 98 *supra*. See JC Hathaway, note 4 *supra*, p 160-1. This reasoning has also been accepted by the Canadian Supreme Court in *Ward's* case, note 82 *supra*.

129 United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992 (8 April 1994).

Committee found that the law violated Mr Toonen's right to privacy, protected by Article 17 of the ICCPR.

The decision by the Human Rights Committee in the *Toonen* case has significant consequences for gay men and lesbians seeking protection as refugees on the basis of persecution stemming from their sexuality.[130] It is easy to link violations of the right to privacy pursuant to sodomy statutes with a person's membership of the particular social group 'homosexuals' (or 'gay men and/or lesbians') and to find that a person fleeing enforcement of a sodomy statute is a refugee. We are well used to the categories of homosexuality and heterosexuality and we think of these categories as particular groups within (or excluded from) society. It is therefore a short step to the conclusion that the enforcement of sodomy laws is a mechanism for society – or, rather, the dominant social group that constitutes society – to persecute a minority social group.

In Australia, for example, the Federal Court has recognised that sodomy laws amount to 'selective harassment'.[131] Referring to the High Court's decision in *Applicant A*,[132] and the idea that a generally applicable law will not ordinarily ground a claim for refugee status, Justice Madgwick stated:

> [I]n some cases, the existence of the law, provided it seems likely to be enforced, even though actual enforcement may not be selective, may indicate that the legislature as well as the executive of the country in question, was intending serious harm to a particular social group.[133]

Similarly, at the lower level of the RRT, it has been recognised that laws prohibiting homosexual sexual activity may help to ground a claim to refugee status because this activity is inextricably linked to the identity of members of a particular social group.[134] Distinguishing the case from that in *Applicant A*,[135] the

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130 The New Zealand Refugee Status Appeals Authority has determined that an Iranian man was entitled to rely on the *Toonen* decision in order to support his (successful) argument that he suffered persecution for reasons of his sexual orientation. See *Re GJ*, New Zealand Refugee Status Appeals Authority, Refugee Appeal No 1312/93, 24 August 1994, at 18. Available at <http://www.refugee.org.nz>. The decision contains a useful summary of decisions from other countries on the question.

131 See *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324, [1998] 1664 FCA 5 (22 December 1998): available at the AustLII website in the Federal Court decisions file, <http://www.austlii.edu.au/>. For analysis of this and other Federal Court and RRT decisions regarding sexuality and refugee status in Australia and elsewhere, see K Walker, "Sexuality and Refugee Status in Australia" *International Journal of Refugee Law* (forthcoming).

132 Note 7 *supra*.

133 *MMM*, note 131 *supra* at 5.

134 "The idea that homosexual acts (when an expression of a person's sexual orientation) can be considered as a separate issue which therefore permits unreasonable control or interference by the state is erroneous: that would be equivalent to demanding that a person who has political or religious beliefs should not act upon them in order to therefore save themselves from coming under the notice of the law or to the attention of their persecutors.": RRT Reference: N95/09584 (31 October 1996) at 15-16 (name withheld), available in the Refugee Review Tribunal decisions database at <http://www.Austlii.edu.au>. For a critique of the idea that gay men or lesbians should simply hide their activities and identity from public authorities, see K Walker, "The Importance of Being Out: Sexuality and Refugee Status" (1996) 18 *Syd L Rev* 568.

135 Note 7 *supra*.

decision-maker took the view that the law in such cases is "evidence as to the cognisability of the particular social group and not determinative of it".[136]

This reasoning is a welcome change in Australian jurisprudence,[137] which acknowledges that laws against sodomy construct particular sexual identities as wrong and therefore worthy of punishment. However, it may be possible, and helpful when considering the one child policy (because the policy is more difficult to characterise as a reaction to some pre-existing characteristic or identity than sodomy laws) to take the analysis of sodomy statutes a step further.

There is significant debate as to whether categories based on sexual conduct are innate and fixed or, alternatively, fluid because sexual identity is either chosen or socially constructed. For example, in his *History of Sexuality*, Foucault argued that the Greeks:

> did not see love for one's own sex and love for the other sex as opposites, as two exclusive choices, two radically different types of behaviour. ...
>
> To their way of thinking, what made it possible to desire a man or a woman was simply the appetite that nature had implanted in men's hearts for 'beautiful' human beings, whatever their sex might be.[138]

In a sense, sodomy laws themselves are premised on the view that sexuality is fluid since they generally target conduct, rather than identity.[139] The regulation of 'sodomy' represents an untenable moral judgment concerning people who practise it, or who may be likely to do so,[140] which is driven by the fear that condoning 'homosexual' activity will lead to the breakdown of the hegemony of 'heterosexual' behaviour, destroying the institution of the family as a vehicle for procreation. Being gay, or engaging in 'unheterosexual' activities, is perceived as a threat to the model of citizenship to which the rest of society demands conformity. As Emma Henderson argues, laws against sodomy are enacted to suppress what is perceived to be a homosexual identity totally defined by sexual activity, which is thought to be dangerous to the apparent heterosexual fabric of society:[141] the law seeks to (re)produce the supposedly natural and dominant sexuality.[142]

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136 *Ibid* at 16.

137 See the discussion in J Millbank, "Fear of Persecution or Just a Queer Feeling?" (1995) 20 *Alternative Law Journal* 261.

138 M Foucault, *The Use of Pleasure: The History of Sexuality*, vol 2, Penguin (1987), pp 187-8. Note that those who adopt this kind of approach would accept that sexual preference is not necessarily easily changed, however: see J Walker, note 131 *supra*, n 51.

139 For example, in some jurisdictions, sodomy is defined as anal sex and thought of as a synonym for buggery, while other jurisdictions outlaw oral sex as well, and others still refer to open-ended concepts like "unnatural acts" or "crimes against nature": S Minter, "Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity" (1993) 26 *Cornell International Law Journal* 771 at 801.

140 In secular societies, sex between consenting adults in private should not offend public morality. The other reason given for sodomy laws – public health – does not stand up to scrutiny either, since the AIDS virus and other sexually transmitted diseases are not confined to the gay community and prohibition of homosexual intercourse is likely to undermine promotion of safe sex.

141 E Henderson, "Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalization Debates" (1996) 20 *MULR* 1023.

142 *Ibid* at 1041.

However, it is clear that consensual sex between adult men or women does no actual harm to society. Indeed, it does not even threaten the dominance of heterosexual behaviour. After all, heterosexual parents have gay and lesbian children, so the argument that permitting 'homosexual' behaviour results in 'bad role models' is fallacious. Rather than pursuing the legitimate social goal of preventing harm to society, the law politicises an activity that falls within the private sphere for most members of society – namely, sexual intercourse. This is done in order to protect an arbitrary vision of normality, society and citizenship which is supposedly endangered by the presentation of – indeed, the embodiment of – an alternative vision.

Perhaps, then, laws that ban sodomy are not merely reactions to the activities of a pre-existing social group – a tool for punishing the group – but one part of the process by which the excluded group 'homosexuals' and the barriers between them and the rest of society are brought into existence.[143] In other words, not only may a society deem certain characteristics undesirable in the way that the Nazis demonised Jewish heritage, but a society may, through law and other social mechanisms, construct a group and the characteristic that (supposedly) holds the group together. Of course, a social group may develop in the absence of condemnation by the rest of society. Members of the group may also have a positive sense of self. But additionally, or in the alternative, the law may operate as one social mechanism by which an 'outsider' or 'deviant' identity centred on particular sexual activities is created,[144] when the activities are not, in fact, the exclusive domain of the minority group so established.

C. The One Child Policy Reappraised

The examples discussed above are instructive on a number of issues. First, some laws of general application ban particular activities because they are seen as a threat to the political regime in power or to social order. Consequently, these laws constitute persecution for reasons of political opinion. Second, some of these laws may have a legitimate goal, but they pursue their goal through illegitimate means and may amount to political persecution. The activity concerned may fall within one of the five Convention grounds. Assertion of a banned human right – for example – will generally be perceived as the expression of a political opinion. To assert one's rights is to challenge the power of government or society to require conformity. In addition, choosing to criminalise a human right in order to achieve legitimate goals may flow from a misguided perception that the assertion of rights is threatening to social order.

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143 Cf the argument by Goodwin-Gill, that "wherever persecution under the law is the issue, legislative provisions will be but one facet of broader policies and perspectives, *all* of which contribute to the identification of the group, adding to its pre-existing characteristics". Goodwin-Gill, note 101 *supra* , p 362. Note that as Goodwin-Gill is of the view that the activity of asserting a human right may define a particular social group, his reference to "pre-existing characteristics" here should not be taken as contradictory to the present author's thesis.

144 For an analysis of the arguments concerning the law's role in persecution of gay men advanced in Mr Toonen's communication to the Human Rights Committee, see W Morgan, "Identifying Evil for what it is: Tasmania, Sexual Perversity and the United Nations" (1994) 19 *MULR* 740.

So the persecutor may be motivated by Convention reasons. Third, some seemingly generally applicable laws create, or help to define, a particular social group at the same time as persecuting that group. The banned activities are deemed threatening to social order, as are the people who engage in them. Participants in these activities are therefore a group set apart from the rest of society. These three points lead us to the conclusion that enforcement of laws that ban human rights may constitute persecution for political opinion – actual or imputed – and/or membership of a particular social group.

The one child policy effectively outlaws the right to determine the number and spacing of children. Only if a couple decides to remain childless, or they in fact only wanted one child in the first place, is there any choice as to the number of children a couple may have. The policy may be a law of general application that generates refugees fleeing persecution for Convention reasons.

In the first place, giving birth to two or more children in violation of the one child policy may be viewed as an assertion of the right to determine the number and spacing of children and therefore as the expression of a political opinion which leads to persecution. Courts that have recognised people fleeing enforcement of the one child policy as refugees have sometimes proceeded on this basis.[145]

Of course, it may be questionable whether people evade the one child policy because of their publicly declared belief in their right to determine the number and spacing of their children. Perhaps they simply 'want' more children and hope to evade the authorities. Indeed, it is possible that many are driven by son preference. However, while the latter is discriminatory and therefore an irresponsible and irrational exercise of the right to determine the number and spacing of children, it is not the case that all persons will exercise their rights irresponsibly. Yet, this is precisely what the Chinese Government has assumed by making it compulsory to have only one child. This is similar to failing to permit conscientious objection on the basis that some draft evaders might benefit. Moreover, since procreative choices are monitored so closely and the chances of being caught are so high, any attempt to disobey the one child policy is a public assertion of one's rights. People might hope they will not be caught or that they can bribe officials, but they know that the chances of being caught and punished are extremely high. They are prepared to go ahead anyway. To assume that the person concerned is acting on personal preference, rather than engaging in civil disobedience[146] is to draw an unrealistic distinction in the context of China. The PRC Government makes the personal political. It is the Government's business to track down those who base their decisions on personal desires and rights rather than the communal good as defined by the Government. If a refugee applicant

145 See note 76 *supra*.

146 Civil disobedience in relation to any law constitutes expression of a political opinion. However, not all cases of civil disobedience would qualify participants for refugee status. If the law in question violates human rights and amounts to persecution, or the punishment is so disproportionately severe by comparison with other cases of law-breaking that it evidences an element of political persecution, a person may successfully claim refugee status. A person who refuses to pay tax on political grounds is not necessarily entitled to refugee status.

demonstrates that he or she wants to have more children on the basis that it is not the state's business to determine the number of children a person may have, it is arguable that this is sufficient to ground a claim for refugee status.

Alternatively, the PRC's choice of means to achieve its aim of lower population growth may demonstrate a persecutory motivation. It is possible that population growth could be lowered using means that respect, and even promote, a couple's right to determine the number of their children.[147] It is therefore arguable that the PRC is not motivated solely by its desire to limit population growth. The adoption of the one child policy as a *means* for achieving its legitimate goals may be driven by the PRC Government's insistence that its views are complied with at all costs. As such, the policy constructs the act of having more than one child as the expression of a contrary opinion and a threat to social order. It does so regardless of whether the individuals concerned wish to exercise their rights responsibly or otherwise and regardless of whether they view themselves as taking a political stand.

Of course, some might argue that the Government has simply mistakenly assessed the exercise of the right to determine the number and spacing of children as a real danger to Chinese society. However, this argument discounts China's ratification of CEDAW and its acceptance of the right to determine the number and spacing of children set out in Article 16(e) of that Convention. It also does not acknowledge the fact that China has stated in international forums, that there is and should be no coercion involved in the one child policy.[148] It is impossible to accept that governments that ban activities protected by human rights mistakenly believe the activities are a real danger to society. If international human rights law protects a particular activity, a government must make its efforts to curtail the activity or to limit its effects, conform with the right or at least bring these efforts within the realm of permissible limitations on, or derogations from, the right. It is therefore not possible to excuse the government concerned on the basis that it may have mis-estimated the weight of competing interests. Governments should know that it is not their decision to weigh interests in these cases.

Persons who disobey the one child policy may also be viewed as members of a particular social group defined by the activity of determining the number and spacing of their children in defiance of the one child policy. The relevant group may be 'dissidents' or 'class enemies' or 'capitalist roaders', 'persons wishing to exercise the right to determine the number and spacing of their children', or perhaps 'persons who disagree with the one child policy'.[149] There is some empirical evidence that persons disobeying the one child policy are perceived as members of a group dangerous to society. Failure to abide by the one child policy may be treated as a crime against the state – an ideological offence[150] –

147 See Part III.C *supra*.

148 See note 56 *supra*.

149 See the reasoning of LaForest CJ, in Chan's case, note 83 *supra*. See also Sackville J in the first judicial decision concerning the case of Applicant A: *Minister for Immigration and Ethnic Affairs v Respondent A and Others* (1994) 127 ALR 383.

150 See J Bannister, *China's Changing Population*, Stanford University Press (1987) p 200.

and some persons disobeying the policy have been labelled 'class enemies'. This is not surprising. The adoption of the one child policy as a means for pursuing the legitimate goal of stemming population growth indicates that the PRC is not concerned merely with the impact on this goal of individual decisions regarding family planning. Rather, it may be concerned that individual decision-making threatens the social order as determined by the Government. Those deemed dangerous to social order – dissidents – will naturally be viewed as an excluded or excludable particular social group. It is as much for membership in this group as for individual activities in contravention of the one child policy that persecution occurs. This is because the Government would not think it appropriate to impose the one child policy and the extreme sanctions it entails if not for the view that all dissenters should simply be made to comply with Government wishes.

V. CONCLUSION: IMMIGRATION CONTROL VERSUS HUMAN RIGHTS

The thesis of this article will be problematic for some. It appears to open refugee status to a large group of people. In relation to the one child policy, in particular, some people may fear that the entire Chinese population might claim refugee status. Furthermore, the one child policy and laws restricting travel passed by Soviet bloc governments demonstrate that authoritarian governments often enact oppressive laws, so there may be a fear of refugees fleeing enforcement of numerous laws and policies of general application.[151] In addition, the example of sodomy statutes and the progressive development of human rights law suggests that the number of generally applicable laws recognised as contravening human rights and capable of grounding claims to refugee status will expand with time.

However, the ability of the Refugees Convention to reflect changing standards is welcome and the alternative, a focus on limiting refugee numbers, is highly problematic. Undoubtedly, there is a limit on the numbers of refugees that may be absorbed by states of refuge. However in most cases, the numbers of refugees sheltered by such states does not even approach this limit, and, even in the aftermath of a crisis as large as that presented by the Kosovo conflict, it is evident that permitting refugee policy to be driven primarily by concern over immigration control creates uncomfortable moral dilemmas. The Albanian Kosovars had an immediate and dire need for protection, but this does not take away from the claims of persons faced with imprisonment for their sexuality, or forcible sterilisation because they wish to determine the number of children they will have.

151 In the PRC, for example, the strong-arm approach of the one child policy is adopted in many contexts. One example is the move to outlaw extra-marital affairs, something which Western liberal legal systems have ceased to view as a matter for the law.

Referring to the views of the framers of the Refugees Convention and their concern with immigration control[152] does not assist today's decision-makers when faced with new fact situations like the one child policy, either. To begin with, the ordinary words of the Convention may extend further than the framers anticipated, and the Convention has, to some degree, been liberated from the framers' concerns by the elimination of temporal and geographic limitations on the definition.[153] In the second place, despite the concerns of the framers, classic refugee-generating situations have the potential to generate large numbers of refugees. Apartheid, for example, privileged a minority white population over a huge majority black population. In the case of generally applicable laws that outlaw human rights, like the one child policy, it is simply a different kind of privilege at work: government views are unduly privileged over conflicting views existing in the broader community in order to justify human rights violations.

In any event, the fears concerning numbers of refugees are often exaggerated. Because of the continuing rise in the world-wide refugee population, there is a tendency to pose the hyperbolic question: if X million refugees arrived, what would we do then? Yet, even with the end of Cold War restrictions on travel abroad and the increased visibility of people smuggling, it is difficult for persons fearing human rights violations to leave their countries, or at least their region. Africa shelters more refugees than the West, for example.[154] Many refugees are women and children and they often find it very difficult to move far. Some traditional barriers to potential refugees, such as the difficulties experienced by dissidents in obtaining a passport, still exist. In addition, the requirement of proof as to a well-founded fear of human rights violation significantly limits the number of successful claims for refugee status. In relation to the one child policy, for example, the brutal measures of enforcement most likely to cause refugee flight and to constitute persecution are limited to specific regions of China.[155] Those countries which have sheltered refugees fleeing its enforcement have not experienced a breakdown in immigration control.[156]

The refugee population is large, and refugee status determination procedures have been heavily burdened in some instances. (Germany in the early nineties provides an example). But not *all* persons in need of protection are able to leave in order to obtain it, placing impossible demands on *all* Western systems for refugee status determination at *all* times. Nor are hypothetical questions about the arrival of X million refugees a particularly useful basis for policy. If this unlucky event was to occur, then reconsideration of the prevailing definitional approach – whether it is the expansive interpretation of the definition of a refugee argued for in this article, or a more narrow approach – would be one option available. But

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152 The framer's concern with immigration control is evidenced, among other things, by the fact that the Refugees Convention does not guarantee a right to asylum, only protection from *non-refoulement*.

153 Prior to the adoption of the Protocol, the Convention limited the definition of a refugee to persons fleeing events that occurred prior to 1951, and it gave States the option of limiting their obligations to refugees fleeing events that occurred in Europe.

154 According to Papademetriou, the West takes about 18 per cent of the total refugee population: DG Papademetriou, "Migration" (1997-8) 109 *Foreign Policy* 15 at 23.

155 See Justice Kirby's analysis in *Applicant A*, note 7 *supra* at 386.

156 *Ibid.*

all definitions may have to be applied to ever-increasing numbers of people needing protection.

The real issue to be confronted in refugee policy-making is not the perceived impossibility of sheltering those who require protection. It is far from clear that all countries have made a reasonable assessment of their capacity to shelter refugees. Australia, in particular, has a large capacity to shelter refugees and a comparatively small refugee intake.[157] Therefore, the problem for refugees is not their great number. Rather, it is the determination of the 'haves' to exclude the 'have-nots', regardless of whether the 'have-nots' should be regarded as refugees, and without any attempt to lessen the gap between 'haves' and 'have-nots', thereby addressing the root causes of refugee flows and migration in general.[158]

The case of the one child policy illustrates this point. It appears that many countries perceive that the one child policy diminishes the threat posed by a growing Chinese population to Western countries' own programs for controlling population growth – namely their immigration programs. This leaves the burden of controlling fertility to the developing world, while the smaller populations of Western countries continue to utilise the majority of the earth's resources, ignoring the threat that unsustainable development poses to our survival. Rather than sharing the earth's resources equitably and sensibly, the West seeks to protect its developed status.[159]

Yet, it may be impossible to rely on immigration control to maintain status as a developed country. Deterrence mechanisms are not always successful in the long-term. As Goodwin-Gill writes:

> [R]estrictive measures, particularly visa and transit visa requirements do curb asylum-seeker movements in the short-term, and tend to be most effective when applied to countries which do not produce refugees, either at all or in large numbers. Other measures, such as detention, designated accommodation, employment restrictions, summary process, removals, carrier sanctions, and restrictive interpretations of asylum criteria, may also have a dampening effect, but appear to be of more limited duration.[160]

A more successful approach to combating the refugee problem, and the broader problem of migration forced by dire economic circumstances that contributes to the demand on Western refugee determination systems, might concentrate on sharing economic resources and social resources such as

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157 For example, compare the refugee intakes of the Netherlands and Australia between 1987 and 1996 as estimated by the UNHCR: See table 13 of the "Statistical Overview" for 1997 in the UNHCR's *refworld* database: <http:/www.unhcr.ch>.

158 It is too ambitious in a world of nation states to argue against the legal right to limit immigration. However, there are significant questions about the moral right to control immigration in a context where developed nations have largely built their wealth by taking land from some peoples, and exploiting yet other peoples so that they are left in an underdeveloped state.

159 Regarding the West's efforts to protect its developed status generally, see M Connelly & P Kennedy, "Must it be the West against the Rest?" (1994) 274 *The Atlantic Monthly* 61. Contrast with V Abernethy, "Optimism and Overpopulation" (1994) 274 *The Atlantic Monthly* 84, arguing that controlling population growth is a local problem and that untied development aid and open immigration contributes to population growth.

160 G Goodwin-Gill, note 101 *supra*, p 194.

democracy and human rights. This might reduce push factors on refugees and migrants, stemming the refugee tide at its source.