

I. INTRODUCTION

It is no secret to the world that the Chinese government engages in persecuting religious devotees. What is disingenuous, however, is the Chinese government's insistence that it complies with human rights laws and in fact, constitutionally guarantees the freedom of religious practice.¹ This article will demonstrate how the Chinese government cannot recognize that its concept of religious freedom is a legal fiction and that it indeed violates international customary law standards. In reaction to China's religious rights violations, the effectiveness of the United States' laws and policies as well as international laws and policies will be examined. Finally, this paper will question whether existing standards can be utilized and provide recommendations on alternative means to eradicate religious persecution in China.

II. THE UNITED STATES' EFFORTS IN SANCTIONING INTERNATIONAL RELIGIOUS PERSECUTION

One may ask why the United States participates in promulgating legislation concerning international human rights issues. Can a country be autonomous in its domestic policies without

* B.A. 1994, Purdue University; M.S. in Public Policy 2000, Eagleton Institute of Politics, Rutgers University; J.D. 2000, Rutgers University School of Law – Camden. Member of the New Jersey and Pennsylvania Bars. Currently serving as Law Clerk for the Honorable Arthur J. Lesemann, New Jersey Superior Court, Appellate Division. This Article was written as part of an independent research project in Fall 1999. I would like to thank Roger S. Clark, Board of Governors Professor, for his input and support on this project.

¹ For example, Article 36 states:

Citizens of the People's Republic of China enjoy freedom of religious belief. No state organ, public organization or individual may compel citizens to believe in, or not believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion. The state protects normal religious activities. No one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination.

P.R.C. CONST. art. 36 (1982), available at <http://www.insidechina.com/constit/chcons03.php3>.

being “policed” by a nosy foreign country, which more than likely has economic interests at the root of its motivation for scrutinizing that country? This argument had been accepted when international relations considered internal affairs of a country off-limits. However, this no longer applies in light of the newly accepted belief that “the entire international community [is] to be the watchdog for everyone’s rights.”² This responsibility derives from the recognition that international law gives rights not just to states, but also to individuals.³ Therefore, it could be said that the United States, through its leaders, is acting upon its moral duty to safeguard individuals’ rights all around the world.

A. The International Religious Freedom Act

President William Jefferson Clinton signed the International Religious Freedom Act of 1998⁴ (hereinafter “IRFA”) into law on October 27, 1998. In an attempt to safeguard individual’s rights, IRFA calls for executive action and economic sanctions against foreign states engaging in or tolerating religious persecution. The Act states that freedom of religion is a “universal human right and fundamental freedom,” citing several international agreements recognizing this right.⁵ To effectuate the law, the Act establishes the “Office on International

² James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 116 (1999).

³ *Id.* See also Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982). Professor Sohn states:

The modern rules of international laws concerning human rights are the result of a silent revolution of the 1940's, a revolution that was almost unnoticed at the time. Its effects have now spread around the world, destroying idols to which humanity paid obeisance for centuries. . . . States have had to concede that individuals are no longer mere objects, mere pawns in the hands of states.

Id. at 1.

⁴ International Religious Freedom Act of 1998, 22 U.S.C.A. § 6401 - 6481 (1998).

⁵ 22 U.S.C.A. § 6401(a)(2) (2000). The following international agreements were mentioned in the IRFA: the United Nations Charter, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on

Religious Freedom” within the Department of State.⁶ The chief officer of the Office will be an “Ambassador at Large” whose task is to identify and report international violations of religious freedom and to make recommendations for the United States’ response to these violations.⁷ In addition, IRFA creates the “United States Commission on International Religious Freedom”⁸ and a Special Advisor to the President, as part of the National Security Council, who will be a liaison to the Ambassador, the Commission, Congress, and non-governmental organizations.⁹ IRFA gives the President the authority to take certain actions in response to violations of religious freedom.¹⁰ Additionally, IRFA provides the President the discretion to certify to Congress that

Religion or Belief, the Helenski Accords, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.*

⁶ *Id.* § 6411(a).

⁷ *Id.* § 6411(c). “The primary responsibility of the ambassador at large shall be to advance the right to freedom of religion abroad, to denounce the violation of that right, and to recommend appropriate responses by the United States government when the right is violated.” *Id.* § 6411(c)(1).

⁸ *Id.* § 6431(a).

⁹ 50 U.S.C. § 402(i) (2000).

¹⁰ Under the IRFA, the President may order any of the following actions:

- (1) A private demarche.
- (2) An official public demarche.
- (3) A public condemnation.
- (4) A public condemnation within one or more multilateral fora.
- (5) The delay or cancellation of one or more scientific exchanges.
- (6) The delay or cancellation of one or more cultural exchanges.
- (7) The denial of one or more working, official, or state visits.
- (8) The delay or cancellation of one or more working, official, or state visits.
- (9) The withdrawal, limitation, or suspension of United States development assistance. . . .
- (10) Directing the Export-Import Bank of the United States, the Overseas Private Investment Corporation, or the Trade and Development Agency not to approve the issuance of any (or a specified number of) guarantees, insurance, extensions of credit, or participations in the extension of credit with respect to the specific government, . . . determined by the President to be responsible for violations
- (11) The withdrawal, limitation, or suspension of United States security assistance in accordance with section 2304 of this title.
- (12) . . . [D]irecting the United States executive directors of international financial institutions to oppose and vote against loans primarily benefiting the specific foreign government, . . . determined by the President to be responsible for violations

he is delaying action to further IRFA's goals or to further other important United States' interests.¹¹ IRFA precludes judicial review of the President's actions or an agency's actions in response to IRFA-related presidential directives.¹²

The inclusion of Presidential discretion represented a compromise to an earlier version of the Act opposed by the Clinton administration. John Shattuck, Assistant Secretary for Democracy, Human Rights and Labor outlined the administration's concerns before the Senate Committee on Foreign Relations, stating that "[w]e are concerned that the bill's sanctions-oriented approach fails to recognize the value of incentives and dialogue in promoting religious freedom and encouraging further improvements in some countries."¹³ The bill was modified to

(13) Ordering the heads of the appropriate United States agencies not to issue any (or a specified number of) specific licenses, and not to grant any other specific authority (or a specified number of authorities), to export any goods or technology to the specific foreign government, . . . determined by the President to be responsible for violations

(14) Prohibiting any United States financial institution from making loans or providing credits totaling more than \$10,000,000 in any 12-month period to the specific foreign government

(15) Prohibiting the United States Government from procuring, or entering into any contract for the procurement of, any goods or services from the foreign government, entities, or officials found or determined by the President to be responsible for violations under section 6441 or 6442 of this title.

22 U.S.C.A. § 6445(a).

¹¹ 22 U.S.C.A. § 6441(b)(3) (2000).

¹² *Id.* § 6450 ("No court shall have jurisdiction to review any Presidential determination or agency action under this [Act] . . .").

¹³ *The International Religious Freedom Act of 1998: Hearings before the Comm. on Foreign Relations*, 105th Cong. 92 (1998) (statement of John Shattuck, Assistant Secretary of State for Democracy, Human Rights and Labor), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:48618.wais (on file with the Rutgers Journal of Law and Religion). In speaking for the Secretary of State's office, Shattuck noted:

[w]e fear that the sanctions could result in greater pressures - - and even reprisals--against minority religious communities. . . . We do understand that the legislation contains waiver provisions. However, those provisions would not eliminate the annual, automatic condemnations required by the legislation, which are our principal source of concern. . . . [I]f the United States does not have the flexibility to determine when and how to condemn violators, we could endanger the well-being of those we are trying to help.

address the administration's concerns about flexibility in granting waivers and dealing with some infractions on a more private, diplomatic level.¹⁴ President Clinton commended Congress for "incorporating flexibility in the several provisions concerning the imposition of economic measures."¹⁵ Congress achieved flexibility by allowing the President to waive sanctions if required by "important national interests."¹⁶

In spite of IRFA's monumental movement towards legislating sanctions against violators of religious freedom, criticism has been directed towards the Clinton Administration's record of preferring trade agreements rather than human rights enforcement as its foreign policy focus.¹⁷ Critics have stated that the act provides little accountability for the President.¹⁸ They argue allowing exceptions for countries considered to be valuable trading partners, such as Saudi Arabia and China, for fear of offending those countries' governments dilutes the force of the act

Id., available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:48618.wais.

¹⁴ Shattuck detailed the Clinton administrations concerns in two reports entitled United States Policies in Support of Religious Freedom: Focus on Christians and Advocacy Committee on Religious Freedom Abroad, Interim Report to Secretary of State. *Id.*, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:48618.wais. Both reports are available online at http://www.state.gov/www/global/human_rights/970722_relig_rpt_christian.html and http://www.state.gov/www/global/human_rights/980123_acrfa_interim.html.

¹⁵ Statement by the President on the Religious Freedom Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2149 (October 27, 1998). President Clinton justifies his commendation by arguing that

[t]he imposition of economic measures or commensurate actions is required only when a country has engaged in systematic, ongoing, egregious violations of religious freedom accompanied by flagrant denials of the right to life, liberty, or the security of persons The Act provides additional flexibility by allowing the President to waive the imposition of economic measures if violations cease, if a waiver would further the purpose of the Act or if required by important national interests.

Id.

¹⁶ 22 U.S.C.A. § 6447 (2000).

¹⁷ See Jacob Heilbrun, *Christian Rights: The Next Big Conservative Issue*, THE NEW REPUBLIC, Jul. 7, 1997, at 19, 24.

¹⁸ See *Reject Religion Persecution Bill*, ST. PETERSBURG TIMES, May 8, 1998, at 20, available at http://www.sptimes.com/Commentary/50898/Reject_religious_pers2.html (last visited Jan. 21, 2001) (on file with the Rutgers Journal of Law and Religion).

and renders it futile.¹⁹ The lack of accountability stems from the provision allowing the President to waive sanctions if it is determined that an “important national interest of the United States” necessitates a waiver.²⁰ The Act’s purpose is not to punish, but to “make improvements in religious freedom,” according to Senator Don Nickles, the Senate sponsor of the Act.²¹

B. Economic Approaches

With the criticism surrounding IRFA and the exception carved out for “important national interests”, some human and religious rights advocates argued for using the World Trade Organization (WTO) entrance process to pressure China into complying with international human rights obligations. However on November 15, 1999, China and the United States entered into a historic trade agreement signifying China’s near-entry into the WTO. While President Clinton was a strong supporter of China’s entry into the WTO,²² congressional approval was still needed to grant China permanent Normal Trade Relations (NTR) status.²³

¹⁹ *Id.*, available at http://www.sptimes.com/Commentary/50898/Reject_religious_pers2.html (last visited Jan. 21, 2001). As of July 1999, China was the United States’ fourth largest trading partner. Dan Griswald, et al., *Trade and the Transformation of China: The Case for Normal Trade Relations*, Trade Briefing Paper No. 5, July 19, 1999 at http://www.freetrade.org/pubs/briefs/tpb_005_es.html (last visited Jan. 21, 2001) (on file with the Rutgers Journal of Law and Religion). In 1998 alone, the United States imported \$71 billion in goods and exported \$14 billion in goods. *Id.*, at http://www.freetrade.org/pubs/briefs/tpb_005_es.html (last visited Jan. 21, 2001). China was the United States’ thirteenth largest foreign market. *Id.*, at http://www.freetrade.org/pubs/briefs/tpb_005_es.html (last visited Jan. 21, 2001).

²⁰ 22 U.S.C.A. § 6447(a)(3) (2000).

²¹ Chris Casteel, *Nickles Bill Poses Sanctions for Religious Persecution Abroad*, THE SATURDAY OKLAHOMAN, October 3, 1998 at 3.

²² Jim Abrams, *China Trade Bill Approved* (September 19, 1999) at www.abcnews.go.com/sections/world/DailyNews/china000919.html (on file with the Rutgers Journal of Law and Religion). The Senate approved the bill by an 83-15 vote and the House passed the bill earlier that May by a 237 to 197 vote. *Id.*, at www.abcnews.go.com/sections/world/DailyNews/china000919.html.

²³ NTR, previously known as Most Favored Nation (“MFN”) status, affords countries low tariffs and treats them as normal trade partners. *Clinton to Renew Normal Trade Relations with China*, at <http://cgi.cnn.com/ALLPOLITICS/stories/1999/06/02/china.mfn> (last visited Jan. 21, 2001) (on file with the Rutgers Journal of Law and Religion). See also Griswald et al., *supra* note 19, at http://www.freetrade.org/pubs/briefs/tpb_005_es.html (July 19, 1999).

Even with congressional approval, China still needed to negotiate separate agreements with other key markets, such as the European Union, to be considered for membership. In total, there are 135 member countries in the WTO. Talks resumed on November 30, 1999 when WTO members met in Seattle, Washington to begin new global trade liberalization talks. At that time, China was not a member but was nonetheless invited to take part in the talks as an observer.²⁴

One international organization, Human Rights Watch (HRW), called on Congress to “set concrete, meaningful human rights conditions that Beijing must meet” before receiving NTR status.²⁵ It believed that both political and economic pressure could have been used to sway China’s government into complying with internationally recognized freedoms and human rights.²⁶ HRW believed that applying pressure in the WTO process, in conjunction with other pressures, could have led to greater transparency in economic matters.²⁷ Additionally, demands to modernize China’s legal system to handle international commercial disputes should have been used to create new laws in the political and social spheres. The HRW cautioned, however, that China could maintain its current status quo of building the rule of law in the economic sphere, but perverting it elsewhere. This can be seen in the government’s crackdown on religious devotees and pro-democracy activists, following “the rule of law” where disciplining these activists is viewed as an interest of the state.²⁸

²⁴ Rick Parnell, *More than China Awaits the WTO in Seattle*, http://www.dismal.com/todays_econ/te_112399.stm (last visited Jan. 21, 2001) (on file with the Rutgers Journal of Law and Religion).

²⁵ Human Rights Watch, *Use WTO Process to Push China on Rights*, at <http://www.hrw.org/press/1999/nov/china1025.htm> (Nov. 24, 1999) (on file with the Rutgers Journal of Law and Religion).

²⁶ *Id.*, at <http://www.hrw.org/press/1999/nov/china1025.htm> (Nov. 24, 1999).

²⁷ “Human Rights Watch believes that WTO membership won’t itself reform the Chinese system or lead to political changes, but it could be an important catalyst over the long run if combined with consistent pressure from outside China.” *Id.*, at <http://www.hrw.org/press/1999/nov/china1025.htm> (Nov. 24, 1999).

²⁸ *Id.*, at <http://www.hrw.org/press/1999/nov/china1025.htm> (Nov. 24, 1999).

III. A HISTORICAL PERSPECTIVE AND MODERN DAY EXAMINATION OF CHINA'S "LEGAL" SYSTEM

Before discussing other means of enforcing sanctions against China for its religious freedom violations, it would be helpful to examine the historical roots of China's current human rights policies. This section will review the policies existent during China's Imperial Period, when Chairman Mao governed under policies still in effect today.

A. Imperial China

China's suppression of religious freedom derives from Confucian traditions developed during the Imperial period of China's history.²⁹ The "law" in Imperial China has been described as "amorphous concepts or mere aspirations."³⁰ Imperial China viewed the Anglo-Saxon concept of black letter laws as "too rigid, externalized and artificial to regulate properly the realities and complexities of social relationships."³¹ A fear pervaded Imperial China that defined laws could be manipulated to fulfill either a leader's or powerful group's agenda, so laws were purposely kept vague.³²

²⁹ For additional historical information, see Daniel K. Gardner, *Modes of Thinking and Modes of Discourse in the Sung: Some Thoughts on the Yu-Lu. (Recorded Conversations) Texts*, 50 J. ASIAN STUD. 574, 596 (1991) and David F. Forte, *Western Law and Communist Dictatorship*, 32 EMORY L.J. 135, 147 (1983). Confucius asserted that China would not find peace if it was not a society dominated by social relationships according to the principles of filial piety and natural harmony. Forte, *supra*, at 147.

³⁰ Melanne Andromecca Civic, *A Comparative Analysis of International and Chinese Human Rights Law – Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 296 (1995).

³¹ *Id.* at 297. See also R.P. Peerenboom, *What's Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, 40 (1993) (discussing whether Confucianism is compatible with basic human rights).

³² Civic, *supra* note 30, at 296.

Culturally, Confucianism also played a part in diminishing individual rights. Society, or group identity, was seen as the source of essential unity and harmony.³³ Collective responsibility, where an individual is considered secondary to a family-based community system, was the norm; “[i]f any member of a family was guilty of a crime, the entire family was held responsible and liable for punishment equal to the actual culprit.”³⁴

B. Mao Tse Tung and the Communist Party

A period of political instability existed between the end of China’s last dynasty in 1912 and the Communist Party’s takeover by Mao Tse Tung in 1949. During this time, the ideologies of Nationalism and Communism competed for power and control, with the Communists ultimately driving Chiang K’ai-Shek and the Nationalists out of mainland China and coming into power. Chairman Mao’s Communist Party was based on a mix of Marxism, Leninism, and Confucianism with a Mao twist.³⁵ Once the Party took control of China, a conflict arose as to whether a Soviet method of socialism should control or whether the tradition of incorporating Confucianism in socialism should continue.³⁶ China eventually split from the Soviet Union and created “its own ideological model of Communism, law and society.”³⁷

In 1954, Communist China’s first Constitution indicated a step in the direction of organized law. Mao’s “One Hundred Flowers” campaign supported this move towards

³³ ANNE KENT, *BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS* 31 (1993).

³⁴ GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW* 119-125 (1990).

³⁵ Civic, *supra* note 30, at 300. See also Robb M. LaKritz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 *EMORY INT’L L. REV.* 237, 249 (1997).

³⁶ Mao Tse Tung, *On the Correct Handling of Contradictions Among the People*, in *SELECTED READINGS FROM THE WORKS OF MAO TSE TUNG* 449-50 (1971).

³⁷ Civic, *supra* note 30, at 300.

formalization through its encouragement of developing “regular procedures and freedom of thought.”³⁸ Mao, however, cut short this campaign in 1957 when he again opposed the idea of varying thought.³⁹ What followed was the “Great Leap Forward” campaign that re-abolished “the law.”⁴⁰

The “Great Leap Forward” campaign promoted the policy of “rapid mass collectivization” in agriculture and industry.⁴¹ “All citizens were to serve the communal goals of their collective and of the society at large and to find personal motivation exclusively from the Communist ideology.”⁴² This too ended in failure and temporarily discredited Mao, allowing a pro-law group to gain power. President Liu Shao Chi and General Secretary Deng Xiaoping headed the pro-law group.⁴³ This group was short-lived. Subsequently, Mao responded by launching the “New Proletarian Cultural Revolution” campaign.⁴⁴

Chairman Mao’s newest campaign depended on the youth of Communist China and the People’s Liberation Army to overthrow the pro-law group.⁴⁵ Mao created the Red Guard to

³⁸ RODERICK MACFARQUHAR, *THE ORIGINS OF THE CULTURAL REVOLUTION* 15 (1974). *See also* P.R.C. CONST. art. 78 (1954), *reprinted in* 1 *SELECTED LEGAL DOCUMENTS OF THE PEOPLE’S REPUBLIC OF CHINA* 1, 45 (J. Wang ed., 1976). The Preamble of the 1954 Constitution states that it “reflects the basic needs of the state in a period of transition, as well as the general desire of the people as a whole to build a socialist society.” P.R.C. CONST. pmbl. (1954), *supra*.

³⁹ MACFARQUHAR, *supra* note 38, at 86.

⁴⁰ SHAO-CHUAN LENG & HUNGDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA: ANALYSIS AND DOCUMENTS* 16-17 (1985).

⁴¹ Civic, *supra* note 30, at 301.

⁴² *Id.*

⁴³ LENG & CHIU, *supra* note 40, at 17.

⁴⁴ *Id.* at 17-20.

⁴⁵ *Id.*

promote the campaign and to weed out all counter-revolutionary and “revisionist” believers.⁴⁶ All schools, churches and courts were closed.⁴⁷ Scholars, Christians, and government officials were removed from their homes and “re-educated” in the ways of the peasant masses residing in the countryside.⁴⁸ In addition, youth in the Red Guard were trained to report and turn in anyone believed to oppose Mao’s campaign, including his or her own parents. Religion, specifically Christianity, was considered subversive propaganda.

Mao’s death in September of 1976 marked the end of the “Cultural Revolution.” It also marked a shift in ideologies from radical and ambiguous to systematic and rational.⁴⁹ Ironically, four years later in 1980, Deng Xiaoping became the new leader of Communist China.⁵⁰

C. The Modern Day Communist Party

Under Deng’s leadership, a newer, more modern Western-style legal system was introduced.⁵¹ Deng’s impetus for this new system was to introduce China into the international market and to make a second cultural revolution impossible.⁵² While this new system was designed to ease people’s distrust of law based on Mao’s ideologies,⁵³ it still attempted to maintain “Chinese traditions and needs”.⁵⁴

⁴⁶ Civic, *supra* note 30, at 302.

⁴⁷ *Id.*

⁴⁸ FOX BUTTERFIELD, CHINA, ALIVE IN THE BITTER SEA 17 (1982).

⁴⁹ Civic, *supra* note 30, at 303.

⁵⁰ *Id.* The irony lies in the fact that Deng Xiaoping served as General Secretary for President Liu Shao Chi during the period the pro-law group held power. *See supra*, note 40 and accompanying text.

⁵¹ Joseph W. Dellapenna, *Symposium: East Asian Approaches to Human Rights. Selected Panelists from the 1995 Annual Meeting of the American Society of International Law*, 2 BUFF. J. INT’L L. 231, 248 (1996).

⁵² Deng Xiaoping, *Reform of System of Party, State Leadership*, CHINA DAILY, July 1, 1987, at 4.

⁵³ Civic, *supra* note 30, at 306. Ms. Civic cites the traditional Chinese distrust of the Rule of Law and notes that “the skepticism and distrust of rule of law has been integrated into the modern Communist class struggle. *Id.*

Today, under this “new” system, the Communist government controls everything. Civil rights are regulated “by law”⁵⁵ and seen as an aid to the State, as opposed to being rights protecting the citizenry from the State.⁵⁶ Registration is the government’s most important means of supervising religious activities to ensure that teachings conform to state ideologies.⁵⁷ The “regulation by law” requires Christians to register with the official church in China.

Regulation Number Six titled “Concerning Certain Problems in Further Improving Religious Work” states “all sites of religious activities must be registered by law.”⁵⁸ Three other regulations further place government regulation on religious practice. In January 1994, “Regulations Regarding the Management of Places of Religious Activity” was passed setting out specific rules for religious sites and individual practitioners.⁵⁹ “Registration Procedures for Venues for Religious Activities,” passed in May 1994, detailed the exact process required for registration.⁶⁰ Finally, in 1996, the “Method for the Annual Inspection of Places of Religious Activities” added the requirement that all religious sites had to be approved annually.⁶¹

Recently, Justice Minister Cai Cheng declared that, “China must jettison the concept of ‘the supremacy of the law’ because the judicial code and system must be at the service of the proletariat.” *Id.*

⁵⁴ Dellapenna, *supra* note 51, at 249. Mr. Dellapenna notes evidence of Chinese traditions rooted in the current system where it “is best shown by the makeup of the Politburo of the Chinese Communist Party in 1949” where only one member had “any legal training.” *Id.*

⁵⁵ *Id.* at 250.

⁵⁶ Louis Henkin, *The Human Rights Idea in Contemporary China: A Comparative Perspective*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 27 (R. Randle Edwards et. al. eds., 1986).

⁵⁷ *China: State Control of Religion*, HUM. RTS. WATCH/ASIA (Human Rights Watch, New York, N.Y.), Oct. 1997, at 7.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

These regulations evidence the government's belief that religion serves the State and, therefore, must adapt to China's socialist society.⁶² However, this conflicts with the common principle that nothing, including loyalties to the State, can come before one's faithfulness to God. Requiring religious groups to register and receive the imprimatur of the government reduces the "freedom" of religious practice to an illusion.

D. Religion's Threat to the Communist Party

Most religions teach that there is no higher power than God.⁶³ As such, the State considers this a threat to the stability of the Communist government. In an effort to control religion by creating a state-religion, the government regulates what is acceptable. As a result, underground religions defined as, those failing or refusing to be regulated, are illegal and considered a threat to the State's power. One government chairman has stated, "[t]he biggest danger threatening stability comes from separatism and illegal religious activities."⁶⁴ The government believes that the only acceptable form of religion is one that conducts "its activities so as to safeguard the unity of nationalities and national unification" describing, of course, a State-controlled religion.⁶⁵

The State views religion as a competitor for the people's loyalty.⁶⁶ In light of the fact that many former card-carrying Community Party members, Red Guard members, and People's

⁶² *Id.* at 8.

⁶³ For example, the first two Commandments of *The Bible* mandate this principle. The First Commandment states "[Y]ou shall have no other gods before me." *Exodus* 20:3-4. The Second Commandment states "[Y]ou shall not make for yourself an idol in the form of anything in heaven above or on the earth beneath or in the waters below. You shall not bow down to them or worship them." *Id.*

⁶⁴ *China: State Control of Religion*, *supra* note 57, at 12.

⁶⁵ *Id.* at 10.

⁶⁶ W. Gary Vause, *Tibet to Tiananmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1598 (1989).

Liberation Army members became Christians, the State's view seems natural. These Christians no longer believe in the Party, rejecting Communism in favor of religion.⁶⁷ Addressing concern about the increasing number of converts, a Minister of Justice, Xiao Yang said, “[p]eople are using the power of religion to deceive and control the masses and to interfere with party and government work; they are struggling with us to seize grass-roots political power.”⁶⁸

One observer notes, “[t]he party does not have many sources of legitimacy left. Nationalism and economic growth are two of the only ones...so the government does not want to be on the wrong side of nationalism.”⁶⁹ If this is the case, is it any wonder why the Chinese government resists tooth and nail the national and international attempts to enforce international religious rights standards? In the eyes of State officials, a weak government unable to control all aspects of its citizens' lives signals the end to its stability and powerful position in the international community.

IV. THE U.S. AND CHINESE CONSTITUTIONS – FRUIT SALAD ANYONE?

Given the United States' heavy involvement in monitoring religious freedom throughout the world, one must question whether it is entirely fair to hold other countries to an “American” standard. The American commitment to religious freedom evolved, from the early settlers' struggle for religious freedom in America. Thomas Jefferson, the author of the Declaration of Independence, believed that protecting the freedom of religion and conscience were prerequisites

⁶⁷ THE INDIVIDUAL AND THE STATE IN CHINA 189 (Brian Hook ed., 1996).

⁶⁸ *Id.* at 216.

⁶⁹ Brian Duffy, *The China Conundrum*, U.S. NEWS & WORLD REP., June 7, 1999, at 31-32, available at <http://www.usnews.com/usnews/issue/990607/china.html> (last visited January 15, 2001).

to protecting morality.⁷⁰ The United States Constitution evidences these values by guaranteeing and protecting the freedom of religion in the First Amendment.⁷¹

The Chinese Constitution differs greatly from the United States Constitution and does not afford Chinese citizens the same religious protection that the United States Constitution affords its citizens.⁷² While the Chinese Constitution may grant the right to religious belief, it is by no means comparable to the First Amendment's freedom of religion. In China, religious rights are given within the Constitution, yet these rights are limited by the text.⁷³ A review of the purpose and history of the Chinese Constitution reveals stark differences from the United States Constitution.

China has had four different constitutions. The current constitution was drafted by the Chinese Community Party and adopted on December 4, 1982.⁷⁴ The changes to its constitution enable China to modernize its laws in order to address the ever-changing circumstances in China.⁷⁵ Although the structure and some of the text has changed with each constitutional revision, the purpose of each constitution has remained the same: to advance the Communist regime.⁷⁶

⁷⁰ Senator Gordon Smith, *Protecting the Weak: Religious Liberty in the Twenty-First Century*, 1999 B.Y.U. L. REV. 479, 489-490 (1999).

⁷¹ U.S. CONST. amend. I.

⁷² P.R.C. CONST. art. 1, sec. 1, et seq. (1993), available at <http://www.usconstitution.net/china.html> (last visited Jan. 21, 2001).

⁷³ *Id.*, available at <http://www.usconstitution.net/china.html> (last visited Jan. 21, 2001).

⁷⁴ *Id.*, available at <http://www.usconstitution.net/china.html> (last visited Jan. 21, 2001).

⁷⁵ Constance A. Johnson, *People's Republic of China*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 29 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

⁷⁶ *Id.* at 29-30.

Traditionally, the Chinese Communist Party has used its constitution to further the Party's platform and to outline its goal of perpetuating the rule of the Party and its hierarchy among the citizens of China. One could wonder why fundamental human rights, including religious rights, the right to demonstrate, and the right to a free press, have been placed before the chapter concerning state structure in the current constitution.⁷⁷ One observer explains that this was an overt attempt by the Communist Party to create the appearance of government emphasis on those fundamental human rights.⁷⁸ Although an outward appearance of freedom was created, the remainder of the constitutional text limits those rights. The continued acts of religious persecution and human rights violations, based on international standards, further illustrate the illusion of freedom in China.

A. The Conditioned Religious Freedom Provision

The provision in the Chinese Constitution granting religious freedom suggests that “citizens of the People’s Republic of China enjoy freedom of religious belief.”⁷⁹ Immediately after bestowing that right, however, the Constitution conditions that freedom by stating “[n]o one may make use of religion to engage in activities that disrupt public order, impair the health of citizens or interfere with the educational system of the state. Religious bodies and religious affairs are not subject to any foreign domination.”⁸⁰ Not only is the right to freedom of religion granted with conditions, but also the types of religion citizens are free to practice are limited to

⁷⁷ See P.R.C. CONST. art. 1, sec. 1, et seq. (1993), available at <http://www.usconstitution.net/china.html> (last visited Jan. 21, 2001).

⁷⁸ Johnson, *supra* note 75 at 29.

⁷⁹ P.R.C. CONST. art. 36, sec. 2 (1993), available at <http://www.usconstitution.net/china/html#Article36> (last visited Jan. 21, 2001).

⁸⁰ P.R.C. CONST. art. 36, sec. 3-4 (1993), available at <http://www.usconstitution.net/china/html#Article36> (last visited Jan. 21, 2001).

five: Buddhism, Catholicism, Protestantism, Daoism, and Islam.⁸¹ These are the only officially recognized “legal” religions in China.⁸² A right given with conditions does not seem to be much of a right at all.

B. Other Conditioned Rights

The right to freedom of religious belief is not the only right that is bestowed, conditioned, and limited by the text of the Constitution. Under the same chapter as the religious freedom provision, citizens are given the right to demonstrate and the right to a free press, but only on a limited basis.⁸³ “Citizens of the People’s Republic of China, in exercising their freedoms and rights may not infringe upon the interests of the state.⁸⁴ Nor may citizens “commit acts detrimental to the security, honor, and interests of the motherland.”⁸⁵ The “interests of the state” are the means justifying governmental interference with the “rights and freedoms” of Chinese citizens.⁸⁶

C. Implementation of the Chinese Constitution

A textual examination gives the impression that Chinese citizens have the freedom of religious belief, however limited. The reality of implementation, however, suggests that the freedom is in word, but not in fact. In practice, the citizens of China have no freedom of religious belief. Persecution by the Chinese government occurs, indicating that the freedom does

⁸¹ Darin W. Carlson, *Understanding Chinese-U.S. Conflict Over Freedom of Religion: The Wolf-Specter Freedom from Religious Persecution Acts of 1997*, 1998 B.Y.U. L. REV. 563, 567 (1998).

⁸² *Id.*

⁸³ P.R.C. CONST. art. 35 (1993) at <http://www.usconstitution.net/china/html#Article35> (last visited Jan. 21, 2001).

⁸⁴ P.R.C. CONST. art. 51 (1993) at <http://www.usconstitution.net/china/html#Article51> (last visited Jan. 21, 2001).

⁸⁵ P.R.C. CONST. art. 54 (1993) at <http://www.usconstitution.net/china/html#Article54> (last visited Jan. 21, 2001).

⁸⁶ Stephen J. Yates, *Advancing Freedom in China*, at <http://www.heritage.org/library/categories/forpol/asc147.html> (last modified May 7, 1997).

not exist. One explanation could be the lack of a judicial body, as provided for in Article III of the United States Constitution,⁸⁷ to review the legality of the laws. In China, “[n]o independent judiciary or other body exists to insist on an interpretation of the constitution different from that desired by the political organs, or to enforce it against high political authority.”⁸⁸

Although China recognizes five “legal” religions, nevertheless, the Chinese Communist Party closely monitors and controls these religions through “patriotic associations”.⁸⁹ Through these associations, the Party controls almost every aspect of a religion’s operations. Any religious practice outside of these associations is illegal and carries stiff penalties for any violations.⁹⁰ Religious meetings not registered with a patriotic association may be subject to a police raid.⁹¹ Those having the misfortune to attend an unregistered meeting have been assaulted, arrested, and interrogated.⁹² Religious leaders may not preach without government approval.⁹³ Indicative of the Party’s control over religion and the absence of religious freedom, the only individuals allowed to perform religious duties are those who are “politically reliable, patriotic and law-abiding,” who have been approved by a patriotic association, and who are registered with the Religious Affairs Bureau.⁹⁴

⁸⁷ Article III vests judicial power in “one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. Section 2 outlines the scope of the federal courts’ power. U.S. CONST. art. III, § 2.

⁸⁸ Henkin, *supra* note 56, at 27.

⁸⁹ Carlson, *supra* note 81, at 567.

⁹⁰ *Id.* at 567 – 570.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 571 (citing ASIA WATCH, HUMAN RIGHTS WATCH, FREEDOM OF RELIGION IN CHINA, 14 (1992)).

D. Examples of Carrying Out the “Interests of the State”

According to Bishop Ding Guangxun, leader of China’s official Protestant church and representative in the National People’s Congress, the suppression of religious activity by the Chinese Communist Party is severe. In a speech to the National People’s Congress in July 1992, Guangxun explained that “[t]hey mobilize cadres, PSB [the Public Security Bureau, or police,] and People’s Militia, to use electric batons, tear up religious pictures, confiscate Bibles and religious publications, imprison the believers, fine them, cut off their electricity, water . . . and grain supplies, demolish houses, and other such activities.”⁹⁵ After this speech, Duangxun was conspicuously not reelected to the Congress, even though he had been a delegate for almost thirty years.⁹⁶

In the fall of 1997, Rizvangul Uighur, a Chinese citizen, testified before the United States House of Representatives and described the Community Party’s reaction to Muslim activities during Ramadan in her hometown of Wu Jia.⁹⁷ Thirty religious leaders were arrested.⁹⁸ When 600 protesters gathered in the streets the next day demanding the release of their religious leaders, Chinese police and paramilitary forces “violently dispersed [the] crowd using electric clubs, [a] water canon, and tear gas.”⁹⁹ A larger demonstration was held the following day. This time, the police and paramilitary troops opened fire on the crowd killing one hundred sixty-seven

⁹⁵ *Id.* at 573 (quoting Ding Guangxun, A Speech to the National People’s Congress, On Correctly Dealing with the Religious Issue (1992) reprinted in ASIA WATCH, HUMAN RIGHTS WATCH, CONTINUING RELIGIOUS REPRESSION IN CHINA, 36 (1993)).

⁹⁶ *Id.*

⁹⁷ Carlson, *supra* note 81, at 574.

⁹⁸ *Id.* at 575.

⁹⁹ *Id.* (quoting Human Rights in China: Hearing Before the House Int’l Relations Subcommittee on Int’l Operations and Human Rights, 105th Cong. (1997) available at 1997 WL 676600, at *9).

people and arresting more than five thousand.¹⁰⁰ The elderly, young women, and children were among those arrested, tortured, and ridiculed for their religious beliefs.¹⁰¹

Another example of the fiction of freedom of religious belief occurred in December 1996 when Chinese police detained, beat, and fined approximately eighty members of an underground Catholic church, trying to prevent the members from holding a large, outdoor Christmas mass.¹⁰² The Chinese Community Party issued an internal directive in an effort to have these members write letters denying their faith and pledging to join the official church.¹⁰³

These examples illustrate that religious freedom is a fiction in China. Unlike the citizens in the United States, the Chinese people are clearly not able to freely practice and worship in any way they choose. These differences stem not only from a constitutional analysis, but also from differences in the two countries' governmental ideologies. Therefore, it is fair to ask whether an American standard is proper to monitor and sanction Chinese practices when the two standards differ completely. Even if an American standard is an improper measuring rod, in light of the fact that China is a part of the international community, the logical and compelling standard under which China's practices should be examined are international norms and laws. Yet under these norms and laws, China would still be considered in violation of international standards for religious freedom.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* Executions for several of those arrested people were delayed due to the pending NTR status of China. *Id.* After NTR was approved, seven of those arrested were "openly executed" by the Chinese government and twenty-three others were sentenced to imprisonment. *Id.* As these prisoners were driven through the town of Wu Jia to a state prison, their family and friends that gathered to bid farewell became the victims of soldiers shooting into the crowd. *Id.* Nine people were killed and more than twenty-five were injured. *Id.*

¹⁰² *Human Rights Watch World Report 1998: China*, available at <http://www.hrw.org/hrw/campaigns/china-98/chn-wr98.htm> (last visited Jan. 21, 2001) (on file with Rutgers Journal of Law and Religion).

¹⁰³ *Id.*, available at <http://www.hrw.org/hrw/campaigns/china-98/chn-wr98.htm> (last visited Jan. 21, 2001).

V. INTERNATIONAL HUMAN RIGHTS DOCUMENTS

When China took its United Nations seat in 1971, it became subject to the general principles accepted by all United Nations members,¹⁰⁴ namely the United Nations Charter. Article 1(3) states that one of the purposes of the United Nations is to promote and encourage human rights.¹⁰⁵ Other relevant provisions include Article 55, indicating that all states must respect and observe all human rights and fundamental freedoms,¹⁰⁶ and Article 56, requiring members to take action toward achieving these objectives.¹⁰⁷ One author described a United Nations member country's human rights duties as arising from "cases characterized by gross and persistent violations of human rights lifted from the area of domestic jurisdiction to the international arena."¹⁰⁸

China signed the basic United Nations Charter but refused to sign or ratify any documents specifically protecting human rights in the context of freedom of religion.¹⁰⁹

¹⁰⁴ Kent, *supra* note 33, at 101.

¹⁰⁵ The U.N. Charter states "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, para. 3, available at <http://un.org/aboutun/charter/index.html> (last visited Jan. 21, 2001).

¹⁰⁶ Article 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER art. 55, available at <http://un.org/aboutun/charter/index.html> (last visited Jan. 21, 2001).

¹⁰⁷ "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER art. 56, available at <http://un.org/aboutun/charter/index.html> (last visited Jan. 21, 2001).

¹⁰⁸ Kent, *supra* note 33, at 101.

¹⁰⁹ *Id.*

However, China made no “statements suggesting in any way that it should be made an exception to U.N. guidelines or documents on human rights.”¹¹⁰

While adherence based on lack of objection would be an easy rule, adherence to international agreements typically requires affirmative action. Documents such as the *International Covenant on Civil and Political Rights* (“ICCPR”) only bind signatory parties, of which China is not.¹¹¹ The relevant section of the ICCPR, article 2, states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice. Freedom to manifest one’s religion or beliefs may be subject only to limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.¹¹²

Since it is only a resolution, the *Universal Declaration of Human Rights* is not binding on China, and thus does not have the force of law.¹¹³ The Declaration states that, “[e]veryone has the right to freedom of thought, conscience and religion. This right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”¹¹⁴

¹¹⁰ John F. Cooper, *Defining Human Rights in the People’s Republic of China*, in *HUMAN RIGHTS IN THE PEOPLE’S REPUBLIC OF CHINA* 9, 15 (Yuan-Li Wu et al. eds. 1988).

¹¹¹ By 1998, 132 states were signatories to the Covenant. Jeri Nazary Sute, *Reviving RFRA: Congressional Use of Treaty-Implementing Powers to Protect Religious Exercise Rights*, 12 *EMORY INT’L L. REV.* 1535, 1558 (1998).

¹¹² *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966). The ICCPR took effect on Mar. 23, 1976.

¹¹³ See THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 29 (1988).

¹¹⁴ *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. GOAR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

Similarly, the aspirational *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* does not have the force of law.

Ideally, this declaration is intended to protect the right:

[t]o worship or assemble in connection with a religion or belief, and to establish and maintain appropriate places for these purposes; to establish and maintain appropriate charitable or humanitarian institutions; to make, acquire and use to an adequate extent the necessary articles and materials, related to the rites or customs of a religion or belief; to write, issue or disseminate relevant publications in these areas; to teach a religion or belief in places suitable for these purposes; to solicit and receive voluntary financial and other contributions from individuals and institutions; to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; and to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.¹¹⁵

While a United Nations declaration may not have an obvious or “strict” legal obligation behind it, one international law scholar argues that this sort of declaration “crystallizes customary law or amounts to an authoritative interpretation of the United Nations Charter.”¹¹⁶ This brings us to the last legal avenue that may be used to find China in violation of international norms of religious freedom: customary international law.

VI. CUSTOMARY INTERNATIONAL LAW

If legal technicalities render international declarations incapable of dealing with China's religious rights violations, customary international law provides another available avenue. The International Court of Justice defines “customary international law” as the general practice of

¹¹⁵ U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GOAR, 36th Sess., Supp. No. 51 at 171, U.N. Doc. A/36/51 (1981).

¹¹⁶ Roger S. Clark, *The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 31 CHITTY'S L.J. 23, 28 (1983). See also INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 65-67 (Richard B. Lillich & Franck C. Newman eds. 1979).

states that is accepted and observed as law.¹¹⁷ Legal norms in the international community become a part of customary international law “from a general and consistent practice of states followed by them from a sense of legal obligation.”¹¹⁸ Customary law, in essence, ranks higher than human rights treaties in terms of importance¹¹⁹ because it binds all nations, regardless of whether or not a state is a party to a particular human rights agreement.¹²⁰ The only states not bound by a rule of customary law are states “indicating dissent during development of the rule.”¹²¹

Scholars argue that using international norms as the means to hold countries and practices in violation of customary international law is the only way to ensure human rights protection on a global level. The argument is that treaties can only bind those states accepting them,¹²² and even with those treaties, enforcement is difficult because States can make reservations, thereby limiting a treaty’s effectiveness.¹²³ Therefore, since the Restatement notes that prohibiting religious discrimination has emerged as a part of customary international law, arguably China is violating international and global norms.¹²⁴

¹¹⁷ Statute of the International Court of Justice, art. 38 (1) (b).

¹¹⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.2 (1987) [hereinafter RESTATEMENT].

¹¹⁹ Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 8 (1986).

¹²⁰ THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3 (1989).

¹²¹ RESTATEMENT, *supra* note 118, § 102, cmt. d.

¹²² Richard J. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 WIS. L. REV. 171, 206 (1969).

¹²³ *Id.*

¹²⁴ RESTATEMENT, *supra* note 118, § 702 cmt. (j), (k), (l).

China would most likely argue otherwise, claiming that international norms are subjective and dictated primarily by Western philosophies and values. This is primarily a cultural relativism argument:

What are human rights? First, how many people's human rights? Is it the human rights of the minority, or the human rights of the majority, the human rights of the entire nation? What the West calls 'human rights' and the human rights we are talking about are two separate things. We have different conceptions.¹²⁵

China's leaders would also probably point to the five-day Asian Regional Conference on Human Rights held in Bangkok from March 29 to April 2, 1993 to show that China and forty-eight other countries dissent from largely accepted international norms of religious freedom.¹²⁶ The forty-nine states that adopted the Bangkok Declaration on Human Rights expressly or implicitly stated that the commitment to human rights was a subjective matter.¹²⁷ Significant sections contained in the Declaration discouraged using human rights as a condition for developmental assistance; emphasized respecting national sovereignty, territorial integrity, and non-interference in the internal affairs of States; and acknowledged human rights as a universal concept delicately balanced against a State's unique historical, cultural, and religious background.¹²⁸

However, the Bangkok Declaration was unpersuasive at the United Nations' World Conference on Human Rights that convened shortly after the Bangkok conference. On June 25, 1993, the World Conference adopted the Vienna Declaration and Program of Action, which

¹²⁵ Gun Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM RTS. J. 1,4 (1996) (quoting Deng Xiaoping).

¹²⁶ Daniel C. Turack, *The Clinton Administration's Response to China's Human Rights Record: At the Half-Way Point*, 3 TULSA J. COMP. & INT'L L. 1,3 (1995).

¹²⁷ *Id.*

¹²⁸ *Id.*

repeatedly affirmed the universality of human rights, as originally declared by the United Nations in its 1948 Universal Declaration.¹²⁹

In fact, one scholar states that “[f]reedom of religion is indeed the oldest of the internationally recognized human freedoms and, therefore, the one with which the international community has had the longest experience.”¹³⁰ Still, the questions facing the global community are difficult ones. What are the best means to punish violations? How can violators be reformed and future violations prevented?

VII. PUSHING OR PULLING CHINA: WHICH IS THE BEST METHOD?

A major argument against imposing American or even international legal standards on another country is the subjective nature of determining which standards should be used. Selecting a standard infers a value-hierarchy created by a sampling of members, which may be “fraught with personal, cultural and political bias” and carrying with it the danger that the chosen standard “has not been addressed by the international community as a whole, perhaps because of the improbability of reaching a meaningful consensus.”¹³¹ *The Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* took nearly two decades of “tortuous drafting” and it is only a non-binding resolution.¹³²

Considering a statute such as IRFA, enacted by only one country, as an enforcement mechanism for an international agreement seems laughable. The United States is far from being

¹²⁹ *Id.* at 4-5.

¹³⁰ John J. Humphrey, *Political and Related Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 171, 176 (Theodor Meron ed., 1984).

¹³¹ Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 4 (1986).

¹³² Clark, *supra* note 116, at 23.

ordained as “the religious police of the world.”¹³³ Nevertheless, it is understandable why the United States has involved itself in seeking to protect and promote human rights both domestically and internationally. International customary law has yet to be actively utilized in enforcing international norms of religious freedom. Therefore, the United States’ commitment is not arbitrary. Rather, this affirmative obligation is required of all countries under the *Universal Declaration of Human Rights*.¹³⁴

However, as discussed in Section III, China’s history explains the difference in religious views between China and the United States. Not only does the Communist Party view Christianity as a threat to the Party but also the Party’s anti-imperialism concerns are “rooted deeply in the bitter history of China’s earlier contacts with the West. During that time, the influence of foreign missionaries was viewed as an integral element in the Western domination and resulting national humiliation of China.”¹³⁵

Chinese Premier Zemin captured the problem of defining human rights and ordering their importance on a subjective rather than standardized basis when he stated: “the most important, the most fundamental human right is how to ensure that the 1.2 billion Chinese people have adequate food and clothing.”¹³⁶ Chinese law has always sought to serve the interests of the State over the rights of an individual. “The individual has consistently been seen as merely a disciplined member of some larger group. . . .At the core of Chinese ethics and morality, there has always been the ideal of depressing self-interest and glorifying self-sacrifice for the

¹³³ *Religious Freedom Act Gets Wide Acclaim*, THE CHRISTIAN CENTURY, Nov. 4, 1998, at 1015.

¹³⁴ M. G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813, 816 n.16 (1978).

¹³⁵ W. Gary Vause, *Tibet to Tienanmen: Chinese Human Rights and the United States Foreign Policy*, 42 VAND. L. REV. 1575, 1601 (1989).

¹³⁶ Jiang Zemin, *U.S. and China: Ups & Downs*, TIME, Oct 27, 1997, at 17.

collectivity.”¹³⁷ This, of course, is in direct contrast to the United States’ belief that a just government cannot exist without individual rights.

The question then is how best to persuade China of the global correctness of customary international law regarding religious persecution. Because China is still influenced by Confucian teachings, United States’ foreign policy advocates need to understand certain Confucian concepts. “Jen” is a moral feeling towards others, “i” is integrity exhibited through faithfulness, loyalty, and justice, and “fa” is the written or enacted law.¹³⁸ The Chinese have “continually leaned towards ‘i’ over ‘fa’ because it includes the normative rules of morality and proper behavior.”¹³⁹ Confucius taught that:

If you govern the people by laws [fa], and keep them in order by penalties, they will avoid the penalties, yet lose their sense of shame. But if you govern them by your moral excellence, and keep them in order by your dutiful conduct [i], they will retain their sense of shame, and also live up to this standard.¹⁴⁰

In light of the reliance upon Confucian principles, China’s view that Western involvement will bring economic imperialism and the Communist Party’s belief that religion tears away at social harmony, governmental power, and economic productivity, China will most likely ignore legislation such as the IRFA.¹⁴¹ Consequently, it would not be surprising for China to choose sanctions over compliance. Therefore, the question arises whether persuasive and enticing methods should be used to help China undergo its own paradigm shift or whether the

¹³⁷ Lucian W. Pye, *The State and the Individual: An Overview Interpretation*, in *THE INDIVIDUAL AND THE STATE IN CHINA* 16, 17 (Brian Hook ed., 1996).

¹³⁸ Steven L. Chan, *Differences Between British and Chinese Views of Law Forebode Uncertainties for Hong Kong’s People After the 1997 Transfer*, 15 *UCLA PAC. BASIN L.J.* 138, 175 (1996).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally Carlson, *supra* note 81, at 599-600.

international community should create real sanctions, as opposed to the watered-down, waiver-prone ones of IRFA.

A. The Pull Method

The “pull method” is simply another way of phrasing the adages, “lead by example” and “actions speak louder than words.” According to the “pull method,” three elements are necessary for the realization of religious freedom in China. However, all three require a considerable amount of time and effort. First, the Chinese people must learn the concept of inalienable rights. This can best be accomplished through increased access and “friendly relations” with the outside world.¹⁴² Greater access could be obtained by increasing the number of trade contacts, for example, through membership in the WTO. Imposing sanctions that isolate China would preclude the opportunity to connect with the Chinese people and set an example for them.

Second, rules of law need to be established. This should occur naturally as China becomes more immersed in the global economic community. Without established laws, China cannot successfully conduct business with international partners. As laws are naturally created or adopted, courts of law will be established to oversee the proper interpretation of laws.¹⁴³ Such expansion of the legal system will naturally import a bundle of customary international laws, including labor and human rights laws, into government and public acknowledgment and understanding.

Lastly, the United States must stop its attempt to force China to comply and accept religious freedom. Legislation like IRFA will only be interpreted as an attempt to subordinate China to fit into a Western mold. Rather than pushing China to change, it must “step back and

¹⁴² *Id.* at 601.

¹⁴³ *Id.* at 602.

give China room to make the change.”¹⁴⁴ Statements by Chinese Minister of Justice Xiao Yang indicate that China is on the verge of reform:

[China] appears to be out of step with the times to continue to follow the methods of the war era. . . . From theory to practice we must establish . . . the reform and opening of our leadership. . . . We must continue to reform and perfect the judicial system, raise the quality of the judicial team, strengthen the system of responsibility among judicial personnel. . . overcome local and ministerial protectionism and realize legal justice.¹⁴⁵

B. The Push Method

In light of the slowness of the “pull method” and the grim reality that China’s human rights violations have already resulted in an unknown number of unnecessary deaths, the “push method” advocates a non-negotiable sanctioning system that would put an end to the coddling of criminals. Analogizing the persecution of religious believers in China, Sudan, and other countries to the Holocaust, the Executive Director of the National Jewish Coalition stated, “[f]or far too long, our country has watched as people of faith, all faiths, have been persecuted for their beliefs. . . . [With] action, we believe that the concept of ignorance will be eliminated. As a result, lives will be saved.”¹⁴⁶ The author lists numerous United States and international religious and human rights organizations of varying faiths united in their support for IRFA.¹⁴⁷

¹⁴⁴ *Id.* at 603.

¹⁴⁵ *China Reforming Political System*, JAPAN POL’Y & POL., Dec. 1, 1997 available at WL 8244220.

¹⁴⁶ Christy Cutbill McCormick, *Comment, Exporting the First Amendment: America’s Response to Religious Persecution Abroad*, 4 J. Int’l Legal Stud. 283, 331 (1998).

¹⁴⁷ *Id.* at 330-31. Groups including the U.S. Catholic Bishops’ Conference, the National Association of Evangelicals, the Southern Baptist Ethics and Religious Liberty Committee, the International Campaign for Tibet, the Anti-Defamation League, the Union of American Hebrew Congregations, the Union of Orthodox Jewish Congregations, the Salvation Army, the Christian Coalition, the Family Research Council, Evangelicals for Social Action, Prison Fellowship, the National Jewish Coalition, and the Middle East Christian Committee support the IFRA. *Id.*

The number of martyrs compiled by the World Evangelization Research Center is startling. The center has determined that approximately one hundred sixty-five thousand Christians die each year¹⁴⁸ and that figure is expected to rise to three hundred thousand by 2025.¹⁴⁹ The first nineteen centuries witnessed an estimated total of fourteen million Christian martyrs.¹⁵⁰ At the end of the twentieth century alone, there were approximately twenty-seven million Chinese Christians martyrs.¹⁵¹

As a country that has long championed the cause for religious liberty, the United States seems to be in a position to influence the international community.¹⁵² The United States need not become a de facto international religious police patrol, but neither should it stand idly by. “The only thing necessary for the triumph of evil is for good men to do nothing.”¹⁵³

Governing by the Confucian “i” concept makes sense, because instilling shame can be a powerful deterrent for future criminal behavior.¹⁵⁴ The philosophy of a family-based community system still has force in China; therefore, one family member’s guilt brings shame to the entire family. This concept could be used to spread shame not only to the upper-echelons of China’s government but to their society as a whole. The desire to avoid this type of public humiliation on an international stage could be motivation for the Communist Party to enforce its religious

¹⁴⁸ *Id.* at 333.

¹⁴⁹ *Id.*

¹⁵⁰ See James D. Davis, “Human Tragedy” Millions Gather Today to Engage in The Second International Day of Prayer for the Persecuted Church, FORT LAUDERDALE SUN-SENTINEL, Nov. 16, 1997, at 1A.

¹⁵¹ McCormick, *supra* note 146, at 333.

¹⁵² *Id.* at 329. As McCormick notes, “[t]he United States can also use political pressure through international organizations such as United Nations, the Organization for Security and Cooperation in Europe and the International Court of Justice or through treaties such as GATT, NAFTA, Maastricht, or NATO.” *Id.* at 316.

¹⁵³ Attributed to Edmund Burke, *Thoughts on the Cause of Present Discontents*, Apr. 23, 1770, in FAMILIAR QUOTATIONS 374 (Little, Brown and Company, ed., 1980).

¹⁵⁴ See *supra* text accompanying note 138.

policies according to international mandates. For this to occur, *real* sanctions would have to be brought on by a country like the United States. One country's actions could lead other countries to follow suit in instituting sanctions. With the enforcement of cumulative sanctions, China would have no other choice but to amend its policies.

CONCLUSION

Ordinarily, it makes sense for a country to practice autonomy over domestic issues. However, with the "shrinking" nature of the world and increased globalization and international interaction between nations, cultural relativism becomes difficult to observe. Uniform standards must be implemented. Customary international law recognizes religious freedom as a human right, therefore, individual countries should take unilateral action to enforce religious freedom. China's refusal to comply with international standards violates customary international law and should not be rewarded. Compliance can hopefully be achieved by various methods, but ultimately, when human lives are at stake, the most expedient method should be employed. This could occur if the United State sets an example for other countries to follow by placing real and immediate sanctions on violators, thereby refusing to accept inhuman practices.

On October 10, 2000, President Clinton granted China Permanent Normal Trade Relation status by signing Public Law No. 106-286. This historic compact established a trading relationship providing the United States with unprecedented access to China's markets. This relationship creates the opportunity to influence China's behaviors on issues of human rights. Whether the United States' communications on religious freedom violations by China are made through non-threatening observations or through sanctions, something must be done to hold China accountable to the dignity and freedom due every person. For the United States to leave yet another type of lasting legacy of protecting religious freedom, non-negotiable ultimatums

must be set forth. With a “shrinking” global economy, the status quo of religious persecution cannot continue to be ignored or tolerated.