MENDING BROKEN PROMISES: ANALYZING THE LEGALITY OF U.S. WITHDRAWAL OF UNITED NATIONS POPULATION FUND APPROPRIATIONS AND THE NEED FOR BINDING UN COMMITMENTS

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I. INTRODUCTION

The appropriate amount of funding, if any, towards international population planning has been the subject of hotly contested debate in United States’ politics since 1965. As numerous administrations with differing policies have led the United States throughout the past several decades, the United Nations Population Fund (UNFPA) is one of the major international organizations feeling the brunt of this wavering support. The latest U.S. position on international population funding came in July 2002 when President George W. Bush cut the entire UNFPA appropriation of $34 million to all 142 affected countries. The primary reason given for withdrawing funds is the Bush administration’s belief that the UNFPA’s involvement in China goes so far as to aid in maintaining the Chinese one-child policy and in furthering coercive abortions.

The United States was the sixth largest contributor to the UNFPA in 2000, and the sudden withdrawal of such an influential donor detrimentally affects every service in which the UNFPA is involved. The Executive Director of the UNFPA, Thoraya Obard, stated that “the denial of these funds will, unfortunately, significantly affect millions of women and children worldwide for whom the life-saving services provided by the UNFPA will have to be discontinued. Women and children will die because of this decision.”

President Bush’s strong opposition to providing for abortions in family planning resulted in his imposition of the “global gag rule” during his first days in office. The global gag rule focuses on the healthcare providers that

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5 Id.
6 UNFPA, supra note 4.
7 Id.
the United States supports through funds. The global gag rule received tremendous disdain from influential parties such as Secretary of State Colin Powell and former Environmental Protection Agency (EPA) Administrator Christine Todd Whitman. This overwhelming disapproval and uncertainty of the global gag rule within the small circle of Washington, D.C., is simply a microcosm of the irresolute opinions of the United States' populace.

In enacting such a strong, anti-abortion regulation, the U.S. government hampers the dissemination of essential information to women about their safe and legal options. In turn, more countries will provide unsafe abortions leading to more than 70,000 deaths. Deterring these healthcare providers from aiding in safe abortions for fear they will not receive U.S. funds may result in more negative results than the President imagined in implementing the global gag rule.

The underlying effects of the global gag rule have carried over to the present dilemma of the U.S. withdrawal from UNFPA funding. However, in determining whether the government should withhold UNFPA funds, the ultimate question was whether the Kemp-Kasten amendment precluded these appropriated funds. The Kemp-Kasten Amendment to the Foreign Assistance and Related Programs Appropriations Act prohibits the availability of funds to programs supporting the management of coercive abortion or involuntary sterilization. Recently, in 2002, the U.S. government prohibited the use of

9 Id.
10 Id.
11 Id. (repeating Whitman's comment, "I was sorry he did that, and I obviously don't agree with that" from Crossfire (CNN television broadcast, Feb. 26, 2001)).
12 See id.
13 Id.
14 Id.
15 See id. (describing the "chilling effect" that the global gag rule emits to healthcare providers as they are given incentives to distance themselves from the entire subject of abortion).
any of its appropriated UNFPA funding towards programs in the People’s Republic of China.\(^{18}\)

The U.S. government analyzed UNFPA’s possible coercive abortion aid in China by initially examining UNFPA briefings, Chinese law, and human rights’ reports.\(^{19}\) Subsequently, a three-member team entered the People’s Republic of China in May, 2002 to observe the involvement of the UNFPA.\(^{20}\) The team found that China imposed high fines and penalties on families with more than the allowed number of children.\(^{21}\) The U.S. government ultimately determined that the UNFPA’s mere involvement with and contributions to a country such as China, which has laws sanctioning coercive abortions, disqualifies the organization from receiving U.S. funds under the Kemp-Kasten amendment.\(^{22}\)

The U.S. announcement to abstain from UNFPA funding effected a true shock to other donor countries and individual U.S. citizens. Some countries such as Sweden, New Zealand, and the Netherlands decided to increase their contributions in a meager attempt to compensate for the U.S. deficit.\(^{23}\) A number of U.S. citizens spoke out in sharp criticism against Bush’s actions by generating statistics reflecting that the effect of this withdrawal “will result in two million more unwanted pregnancies and 800,000 more abortions.”\(^{24}\) These vehement outcries suggest the strong international opposition to Bush’s actions from within and without his own country.

In addition to a tremendous lack of support, this U.S. action is also directly correlated to its neglected responsibilities and expectations as a leading donor to the UNFPA. Although there is no treaty by which member donors to the UNFPA have to abide, they do have expectations they are required to meet because a significant number of people rely on their assistance.\(^{25}\) The UNFPA derives its goals and effectuates its programs through the policies of the 1994


\(^{19}\) Bureau of Population, supra note 16.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id.


International Conference on Population and Development of Cairo (ICPD). The Programme of Action was introduced at this conference to ensure the human right to development among the international population. The Programme requires a total commitment from participating governments of the United Nations. Therefore, the United States must question if it is living up to this implied international requirement. By deciding to retract funds because of a domestic policy that does not draw full support from its constituents, this U.S. action does not fulfill UN expectations.

Because the non-committal U.S. attitude towards the UNFPA’s Programme of Action carries such harmful repercussions to fellow donor and donee countries, it is of imperative necessity to bind member states to uphold their commitments. This Note will argue that the implementation of customary law is a viable mechanism through which the UNFPA can assure that non-compliant United Nations’ member states, like the United States, will uphold their obligations and reinstate funding. Leading to this conclusion, this Note explores the relationship between the United States withdrawing UNFPA support and its role as an international donor under the Cairo Programme of Action. In detail, this Note discusses how U.S. domestic policy and laws interact and conflict with the requirements imposed by the ICPD. In its presentation of an overview of the UNFPA’s policies and bases, this Note seeks to establish what this program attempts to accomplish. Then, this Note describes the basic Chinese one-child policy in addition to recent Chinese law modifications. This Note gives an historical overview of international population conferences before and after the Cairo conference. After this introductory explanation, the Note analyzes U.S. policy and statutory developments affecting funding towards population and developmental areas. By examining the U.S. role in the UNFPA and obligations under international law, this Note explains the great difficulty in legally and morally justifying how the United States can withdraw its funds while considering possible options for the UNFPA in an attempt to bind the United States to re-establish its role as chief donor.

26 Id.
28 Id.
II. THE UNDERLYING POLICIES AND ROLE OF THE UNFPA IN RELATION TO THE INTERNATIONAL COMMUNITY

The UNFPA is the largest internationally-funded source providing population aid; UNFPA exercises direct management over one-quarter of world population assistance. The UNFPA is the primary United Nations organization with a principle objective of carrying out the 1994 ICPD. The three main goals of UNFPA policies are: (1) commitment to reproductive rights; (2) gender equality and male responsibility; and (3) autonomy and empowerment of women. The underlying thrust of these objectives is that any method of coercion of reproductive control is not tolerated.

Reproductive health is a primary priority of the Programme produced during the ICPD. The UNFPA focuses on safe motherhood in caring for expectant mothers pre- and post-natally, assisting deliveries, and reducing maternal and infant mortality. The Fund also volunteers family planning information, counsels about infertility, and prevents and tends to sexually-transmitted diseases and other types of reproductive infections.

Other Programme priorities which the UNFPA addresses through its services are population and development strategies and advocacy of ICPD policies. The strategic advice about population policies is directed to the countries' governments so that this process is uniformly implemented to each constituent. Along with population planning, the Fund assists each country in beginning and improving its ability to employ research and data collection.

The entire source of income for the UNFPA is purely voluntary; hence, this magnifies the significance of dependable donors. The various contributors

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30 UNFPA Mission Statement, supra note 27, at 2.
31 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 See UNFPA, Resources and Management, supra note 29, at 26.
range from governments, individual alliances, NGOs, foundations, and corporations. In 2000 alone, the UNFPA offered aid to 142 countries.

The UNFPA Executive Board recently adopted its first funding framework that should improve its expected income and enable it to project for future endeavors. The novel framework described three goals which the UNFPA expects to meet through the project’s implementation: (1) universal good reproductive health; (2) a balance between population dynamics and social and economic development; and (3) gender equality and women’s empowerment.

The UNFPA performs an analysis for each donee country regarding the specific goals in order to provide a more efficient funding projection. In order to aid in providing the UNFPA with sufficient funds to carry out its important causes, the United States instituted the U.S. Committee for UN Population Fund in 1998. The mission of this committee is “to raise moral, political and financial support in the United States for the work of the UN Population Fund.” The Committee lists three mechanisms in support of the UNFPA: education, advocacy, and financial support. Through these mechanisms, some examples of the Committee’s work include distributing informational material, updating the U.S. public and government on recent developmental international issues, and increasing support for the UNFPA’s programs.

The U.S. Committee played a tremendous role in re-establishing the U.S. contributions to the Fund by raising $3.1 million from individuals, foundations, and schools. Other instances of the Committee’s involvement in supporting the UNFPA include leading a group of U.S.-elected members to African nations to better educate them in the AIDS and population crises in these areas. This U.S. Committee represents an American voice buttressing the policies and actions of the UNFPA.

40 UNFPA, Resources and Management, supra note 29, at 27.
41 Id.
42 Id.
43 Id.
45 Id.
46 Id.
47 Id.
49 Id.
III. THE CHINESE ONE-CHILD POLICY AND THE EXTENT OF UNFPA INVOLVEMENT IN THIS REGION

In terms of population in 2000, China soared above other countries with a total population of about 1.3 billion people,\(^50\) with an annual increase of about thirteen million. The country has an annual population growth rate of about 1.1 percent and total fertility rate of 1.8 children per woman.\(^51\) The country has finally headed toward stabilization with a projected population of 1.6 billion by 2050.\(^52\)

Implementation of the "one-child policy" began in 1979, including incentives such as contraceptives, abortion, and sterilization in order to aid in maintaining the birth quota.\(^53\) The Chinese government believes that the imposition of such a policy is necessary for the populace to maintain a comfortable standard of living.\(^54\)

Basic objectives of this "one-child policy" are later marriages, a longer amount of time between births, and fewer children.\(^55\) A controversial requirement of the policy is the mandate to fit women with intrauterine devices after the delivery of their first child.\(^56\) When a woman becomes pregnant with her second child, she must endure an abortion, and if a woman actually gives birth to two or more children, sterilization ensues.\(^57\) This type of program is not well supported as some critics claim that "sanctions specifically designed to discriminate against second and subsequent children are in derogation of international law."\(^58\)

Although China was an attendant of the ICPD in Cairo and a member of the Programme of Action,\(^59\) its means of carrying out its objectives raise suspicion about the country’s dedication to ICPD goals. China implements various


\(^{51}\) *Id.*

\(^{52}\) *Id.*


\(^{55}\) *Id.* at 639.

\(^{56}\) *Id.* at 643.

\(^{57}\) *Id.*

\(^{58}\) Gregory, *supra* note 53, at 87.

\(^{59}\) *Country Programme Outline for China, supra* note 50.
incentives to convince constituents to follow its family planning policies. Although each local region determines the level of imposed incentives, each province derives its regulations from the National Family Planning Commission. Some incentives for couples promising to have only one child are in the form of rewards consisting of longer maternity leave, enhanced living quarters, and more valuable land. Monetary rewards and pension enhancements are given to women voluntarily undergoing sterilization after their first child.

Just as couples receive generous incentives by adhering to the “one-child policy,” they will also suffer penalties when they defy the policy. The government imposes substantial fines resulting in wage-earnings, decreases in salary, or employment termination. Not only does the government punish parents having more than one child, but it also penalizes the second and third children by banning their access to free education and health services. The Chinese government denies that this type of treatment is “coercive”; however, after examining the instrumentalities used and results obtained, this policy is difficult to comprehend as anything but forceful.

In response to the widespread criticism surrounding the “one-child policy,” the Chinese government attempted to ameliorate the harsh law. The new rule replaces the strict fines with a “social support fee” that couples must pay if they wish to have multiple children. In the past, local governments were left to oversee this “one-child policy,” but with the implementation of the new rule, the national treasury will receive these social support fees.

Although this new law may seem to improve the coercive Chinese approach to population control, the reality of its effects does not project much difference in the end. Although this change may not convey the type of improvement the United States and other countries would like to see, it does show that the Chinese government is aware of the strong opposition the “one-child policy” receives from other parts of the world and that they are attempting to improve their image and system.

60 Cirando, supra note 54, at 643-44.
61 Id.
62 Id. at 645.
63 Id.
64 Id. at 646.
65 Id.
66 See id. at 642.
68 Id.
A. Before the 1994 ICPD

The United Nations held its first population conference in Bucharest, Romania in 1974 with its prime focus on implementing a population-control strategy.\(^6^9\) The Bucharest Plan of Action emphasized supplying contraceptives but lacked a focus on informing women of their options and rights.\(^7^0\) Although a decline in natality followed the 1974 convention, countries faced several problems and realized that they could not enact a population policy to replace development in other areas.\(^7^1\) Therefore, the solution required the combination of population and country development in order to attain beneficial effects.\(^7^2\)

After much contemplation on improving the Bucharest Plan, the United Nations formed the Mexico City convention in 1984.\(^7^3\) The participating countries did not view population growth as a negative factor at this convention but sought to develop economic policies emphasizing open markets and strengthening the private sector.\(^7^4\) President Ronald Reagan’s Administration was the frontrunner of this economic plan and stressed the importance of family planning “to attain only humanitarian aid and health goals, but never to encourage abortion.”\(^7^5\)

In contrast to the Bucharest and Mexico City conventions, the 1992 Earth Summit\(^7^6\) held in Rio de Janeiro, Brazil, was not a population conference but allowed non-governmental organizations (NGOs) to attend.\(^7^7\) The Summit produced Agenda 21 which outlined a method to control development internationally and served as a model in future UN conferences.\(^7^8\)

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\(^{70}\) See id. at 446-47.

\(^{71}\) Id. at 447.

\(^{72}\) Id.

\(^{73}\) Nowels, supra note 1, at 2.

\(^{74}\) Id. at 3.

\(^{75}\) Marshall, supra note 69, at 448.

\(^{76}\) The Earth Summit was also referred to as the UN Conference on Environment and Development (UNCED). Id. at 449.


\(^{78}\) Id. at 4.
influence of Agenda 21 on the Cairo Programme of Action is quite extensive. Some policies integrated in Agenda 21 included the requirement of international cooperation, a financing system consisting of burden-sharing by developed countries, and a method of review of the Agenda's positive and negative effects in future years.79

B. The 1994 ICPD Conference in Cairo

The primary matter debated and discussed at the Cairo Conference involved the prevailing issue of female rights and reproductive health.80 The leaders of the conference faced substantial hurdles in overcoming various countries' male-preferred legal systems that enforced female coercion.81 In response to these struggles, the primary focus of this conference emphasized strengthening women's roles and providing females with more control over their own reproductive rights.82 In order to fulfill this objective, the conference planners worked primarily to increase education and employment prospects, eliminate female discrimination and violence, and advance female policy-making.83 These policies and initiatives can be found in the conference's Programme of Action.84

The Cairo Programme of Action is similar to the Bucharest Plan of Action in its desire to prioritize health and education in effectuating its goal of voluntary recession of births and alleviation of international population levels.85 The conference implemented a theme of changing not only the female traditional societal role but also the male.86 The United States, under the Clinton Administration, greatly contributed to the Programme and supported family planning, the improvement of women's status, and aid towards access to safe abortions.87 However, the abortion debate loomed over this conference

80 Marshall, supra note 69, at 451.
81 Id.
82 Id.
83 Id.
85 Id.
86 Id. at 13.
87 Nowels, supra note 1, at 3.
and eclipsed other significant objectives. This abortion dispute foreshadowed many discrepancies yet to come in the realm of the Cairo Programme of Action.

The most significant factor of the Cairo ICPD involved its high demands of member countries in regard to contributions. During the general time period of the Cairo Conference, the total of all donations for family planning and reproductive programs was four to five billion dollars. However, the Programme required the spending level to triple and for donor countries, including the United States, to increase their contributions by at least twenty-five percent. The United States, like many other donor countries, did not commit itself to altered financing at the Cairo Conference. This non-binding attitude of several powerful, developed nations left this aspect of the Programme uncertain.

Overall, the ICPD impressed many with its enactment of qualitative goals as opposed to simply numerical objectives. Most importantly, “Choices and Responsibilities” was a central theme of the conference, emphasizing the ultimate significance of donor allegiance and promises to the Programme of Action. The great importance placed upon the obligation of individual donor countries in contributing to the Programme only accentuated the underlying theme of the requirement for donor countries to work together to achieve these high-reaching objectives. The call to donor countries to reassess their contributions to population support was reflected in statistics proving that developing countries “allocate less than one percent of their budget spending to family planning programs, however, nineteen percent of their budgets go to military spending.” Government donors must agree to a minimum amount of support for reproductive programs in order for their combined contributions to have a beneficial effect on these developing countries.

Since the UNFPA is the guiding UN organization set out to implement the Cairo Programme of Action, it has a great responsibility to develop sound

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88 Lasher, supra note 84, at 16.
89 Id. at 17.
90 Id.
91 Id.
92 Marshall, supra note 69, at 461.
93 Id.
94 Id. at 488.
95 See id. (describing how governments have responsibility to integrate the Programme’s goals and begin focus on population support).
96 UNFPA Mission Statement, supra note 27, at 2.
and logical standards for the Programme's future use. By implementing its operations, the UNFPA attempts to use these standards and objectives while members of the ICPD are continually amending and revising different aspects of the Programme to conform to changing times.97

C. ICPD +5 Hague Forum

In accordance with the ICPD standard of continual review of the Programme of Action, delegations reconvened at the Hague Forum in 1999 to discuss the successes and needed improvements to the Programme's structure.98 This UNFPA-organized forum was only one of many review sessions that would ultimately lead to a special UN General Assembly Session in New York.99 A major issue throughout this forum was the reiteration that abortion is not endorsed as a method of family planning through the Programme of Action.100

Although many crucial educational and healthcare assistance programs have been provided over the past five years since the ICPD, the foreboding issue of donor contribution remained a large problem.101 Various spokespeople coercively suggested the necessity for advanced countries to reassess their budget allocations to attempt to meet the Programme's expectations.102 For example, Ibrahim Hussain Zaki, the Minister of Planning and National Development of The Maldives, stressed that "many advanced countries have not met the internationally agreed target of 0.7 per cent of their gross national product for official development assistance."103 Hence, the lack of sufficient donor contributions has amounted to a perpetual deficit of financial resources in the Programme and endures still today.

97 See generally id. (explaining UNFPA's ongoing focus to reach population stabilization while ensuring that ICPD goals are met).
99 Id.
100 Id. at 2.
101 See id. at 1.
102 Id. at 5.
103 Id. at 3.
D. U.N. General Assembly Meetings

The formal meetings of the General Assembly were well-attended, including twelve UN specialized agencies, one intergovernmental organization and eleven NGOs. In explaining the assessment of the Hague Forum, the Assembly reported that the Committee addressed five areas requiring further action: (1) creating an enabling environment for further implementation of the Programme; (2) enhancing gender equality, equity, and empowerment of women; (3) promoting reproductive health; (4) strengthening partnerships; and (5) mobilizing and monitoring resources for further implementation of the Programme.

The lack of financial resources may be one of the primary obstacles for overall successful execution of the Programme of Action. After calculating the 1999 contributions, the projected 2000 donor contribution of $17 billion proved to be an unreachable goal.

This Special Session compiled a list of “Key Actions” to be required in future population involvements relating to the Programme of Action. In devising these new benchmarks, the member states accounted for changes in the population such as aging, “international migration, internal migration and urbanization, and resultant dislocations.” One of the most reverberating appeals was for developed countries to begin greater efforts in funding the Programme in order to advance the ICPD’s population goals. The Special Session also announced plans to regularly convene in the future to review and amend the Programme’s progress.

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105 Id.
106 Id.
107 Id.
108 Id.
109 Id. § III.B ¶ 23.
110 Id. § III.B ¶ 25.
111 Id. § IV ¶ 30.
E. Johannesburg Summit

The World Summit on Sustainable Development, held in Johannesburg in 2002, was composed of nations’ leaders, delegates from NGOs, and business leaders who united in implementing programs to ameliorate the quality of life for needy population members.\footnote{Johannesburg Summit 2002, Basic Information, at http://www.johannesburgsummit.org/html/basic_info/basicinfo.html (last visited Feb. 23, 2004).} The overall premise of the Summit was to review the successes of the Earth Summit’s Agenda 21 and to conceive methods of improvement.\footnote{Id.} Because of Agenda 21’s great influence on the Cairo Programme of Action, the Johannesburg Summit further demonstrates the diligence of International Population Conference delegations in continually revising and improving programs. Because of the delegations’ adaptability and member nations’ numerous opportunities to voice concerns about the programs, donor countries have less of a reasonable excuse to continue their practices of unfilled contributions.

V. The United States’ Disconnected Theory and Vacillating Support for International Population Programs

The 1960s and 1970s marked a strong era of U.S. resource allocation for population assistance.\footnote{Lasher, supra note 84, at 18.} Since the 1980s, however, political considerations concerning abortion have impeded the liberal U.S. concern and support for these programs.\footnote{Id.} In furtherance of this anti-abortion policy, the Reagan Administration began a crusade relying on the Kemp-Kasten Amendment as justification for reducing U.S. support.\footnote{Id.}

The effective wording of the Kemp-Kasten Amendment suggests that if the President determines that a program supports or is involved in coercive abortion or involuntary sterilization, the United States will not distribute funding to that program.\footnote{Foreign Assistance & Related Appropriations Act, Pub. L. No. 99-88, ch. 5, 99 Stat. 293, 323 (1985).} Relying on the Kemp-Kasten Amendment, the Reagan Administration announced the Mexico City Policy at the 1984 Mexico City Population Conference and refused funding to NGOs if proof of their
connection with abortions surfaced. The Reagan Administration relied on the Kemp-Kasten Amendment again to refuse funding to the UNFPA in 1986. Both the Reagan and current Bush Administrations have viewed "coercive abortion" as a wide-ranging term and used the amendment to justify the refusal of all funding to foreign NGOs and international organizations that perform or actively promote abortions as a method of family planning.

The particular U.S. administration in power at the time proves to be the deciding factor regarding interpretation of the Kemp-Kasten Amendment. The Clinton Administration, possessing much more liberal views on abortion than its predecessors, overrode the Mexico City Policy in 1993 and reallocated funding for the UNFPA. This wavering support does not provide sound U.S. strategy for the implementation of the ICPD’s Programme of Action. Even though the Clinton Administration fully supported UNFPA funding, the conservative legislature insisted upon imposing Mexico City policy, the global gag rule.

In evaluating UNFPA’s involvement in China, President George W. Bush delegated the authority to Secretary of State Colin Powell to determine whether the United States should invoke the Kemp-Kasten Amendment and withdraw funding. Powell found that no funds would be directed to UNFPA for 2002 because of its support or participation in the management of coercive abortions.

The key to understanding the United States’ varying support to UNFPA is acknowledging the continual ambiguous interpretation of the Kemp-Kasten Amendment. In 1986, a challenge to the construction of Kemp-Kasten resulted in the D.C. Circuit Court determining that "special deference should be accorded the executive in those activities that impinge on foreign affairs." The court was intent on leaving this determination to the executive branch’s discretion without the judiciary’s review.

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118 Lasher, supra note 84, at 18.
119 Id.
120 Nowels, supra note 1, at 5.
121 Id.
122 Id. at 7.
124 Id.
126 Id. at 1069.
An opposing decision occurred in a 1994 challenge to the construction of the amendment. In that case, a congressman sued the administrator of USAID for failing to determine that UNFPA was barred from receiving funds.\textsuperscript{127} Prior to this case, other administrators had found that because of UNFPA involvement in managing coercive abortions in China, the United States would not further fund the UNFPA.\textsuperscript{128} However, the current administrator formulated a novel interpretation of the Kemp-Kasten Amendment and stated that it would only find the UNFPA in violation of the Kemp-Kasten Amendment if "there is clear evidence that UNFPA knowingly and intentionally provides direct funding or other support for those abuses."\textsuperscript{129} Although the court found that the issue was moot in this case, it allowed the administrator to modify and restate the standard for Kemp-Kasten analysis.\textsuperscript{130} The clarification results in a narrower interpretation. The Kemp-Kasten Amendment is not "triggered by activities which are unintentional or remote, or which only indirectly or marginally relate to a program of coercive abortion or involuntary sterilization."\textsuperscript{131}

Although this was the determined standard in 1994, one must appreciate the contrasting broad interpretation used by the Reagan and current Bush administrations. Powell's 2002 interpretation of the Amendment reflects more of the 1994 USAID administrator's view by requiring more than just tangential involvement in coercive abortions to invoke the Kemp-Kasten Amendment.\textsuperscript{132} With such an uncertain approach to domestic policy regarding multi-national population funding, the United States finds itself in a difficult position in attempting to execute the objectives of ICPD'S Programme of Action on an international level.

VI. AN ANALYSIS OF ICPD REQUIREMENTS FOR DONOR COUNTRIES UNDER THE PROGRAMME OF ACTION AND THE DEGREE THE U.S. AVOIDS ITS RESPONSIBILITIES BY ATTEMPTING TO UPHOLD AN UNCERTAIN DOMESTIC POLICY

In assessing donor countries' responsibilities to the Programme of Action, it is essential to concentrate on the pertinent text created at the Cairo

\textsuperscript{128} Id. at 913.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 915.
\textsuperscript{131} Id.
\textsuperscript{132} See Mosher, supra note 123, at 2-3.
Conference. The Programme "reflects international consensus and will most likely act as the standard to which governments and donors will refer for the next two decades." Notwithstanding the Programme of Action's non-binding nature on donor countries, the effects of a dominating country's withdrawal of funds are nevertheless felt on many levels. Maydaleine Willame-Boonen, Belgian Member of Parliament, commented on the U.S. defunding: "[I] would like to know if [Belgium] is working towards a European cohesion which would compensate for this American deflection which is as brutal as it is unjust."

In attending the ICPD, the United States agreed to the overwhelmingly-supported Programme of Action. The actual ideals and underlying concepts of the Programme emit a recurring theme of international cooperation. In describing its expectations of donor countries, the Programme's preamble states, "the formation and implementation of population-related policies is the responsibility of each country and should take into account the economic, social, and environmental diversity of conditions in each country." Since the Programme takes into account various countries' own policies, the United States does have a qualified right to support its beliefs on abortion and invoke the Kemp-Kasten Amendment when justified. However, each country must balance its convictions with its responsibilities to the ICPD. When a country like the United States has such laws that have undergone varying interpretations and support throughout the past decades, one must question if these convictions are strong enough and supported by sufficient U.S. fervor to override its commitment to the Programme of Action.

Through this balancing process, it is imperative to identify closely the express responsibilities of each country. The Programme states that "international cooperation has been proved to be essential for implementation of population and development programmes." It also directly addresses the
problem of contributing countries that abruptly change their policies leading
to either a drastic increase or decrease of funds which can severely impede
upon existing UNFPA programs. Because of nations' unexpected behaviors,
the Programme demands "a new clarification of, and commitment to,
reciprocal responsibilities among development partners."139

The United States must be aware of this strong caution found within the
Programme's text. The shifting attitudes, from the Reagan Administration to
the current Bush Administration, have ranged from similar to diametrically
opposite abortion policies and interpretations of the Kemp-Kasten Amend-
ment.141 This wide policy range and unpredictable behavior is exactly what
this Programme focuses on in warning countries to reassess their commitments
and viewpoints.142 In so doing, the UNFPA would be able to more accurately
foresee certain fluctuations in funding from specific countries because of their
previously-expressed values and commitments regarding certain subject
matter. If large member states like the United States had more consistent
ideals and predictable patterns, the UNFPA could budget in a more precise
manner and experience fewer surprises.143

The Programme of Action's listed objectives are also a key resource in
determining its expectations of donor countries. The Programme sets out to
"develop long-term joint programmes between recipient countries and between
recipient and donor countries."144 This goal reiterates the Programme's
expectation that each donor country have well-established domestic policies
in order to sustain long-term relationships. When a country's policy undergoes
radical transformation with every new administration, the projected enduring
commitment cannot be fulfilled.

Another significant objective endeavors to "increase the commitment to,
and the stability of, international financial assistance in the field of population
and development by diversifying the sources of contribution, while striving to
avoid as far as possible a reduction in the resources for other developmental
areas."145 Stability is a resounding theme throughout the Programme of

139 See id. § 14.2.
140 Id.
141 See generally Lasher, supra note 84 (delineating U.S. involvement and attitude towards
coercive abortion and international population assistance since Reagan era).
142 See Programme of Action, supra note 136, § 14.2.
143 See id. (stating the importance of each donor adhering to its own national priorities in
order to provide for uniform UNFPA policies and implications).
144 Id. § 14.3(d).
145 Id. § 14.10(b).
Action, emphasizing the necessity of international cooperation. Organizations like the UNFPA which implement this Programme strive to attain full commitments and allegiance from donors in order to meet expansive needs of developing countries through activities that transfer technology and knowledge to these recipient nations.146

VII. THE IMPACT OF A UN COMMITMENT AND THE DEGREE OF LEGAL ENFORCEABILITY ON MEMBER COUNTRIES

Although United Nations’ conferences and most UN agreements do not have a legally binding effect, they have a significant influence at the international level.147 Since the UN handles such important peacekeeping issues, it is imperative that their policies and programs reach the peak of efficiency. “Thus, it is crucial that the United Nations formulate an effective policy that is acceptable to both United Nations member states and other states that rely on international economic and developmental assistance.”148

In attempting to define the binding nature of United Nations’ agreements, the logical starting point is to examine the UN Charter to which all member states must consent.149 The Charter has a chapter simply devoted to international economic and social cooperation, highlighting150 the significance of this issue within the UN. The critical article in this chapter discusses the goal of “creating 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... higher standards of living, full employment, and conditions of economic and social progress and development.”151 The United States consented to fulfilling this important objective in providing stability and promoting social development by signing the UN Charter.

146 See id. § 14.4.
148 Id. at 370.
149 See id. at 378 (beginning with an analysis of the U.N. Charter and the exact language to which each member state binds itself).
150 See U.N. CHARTER ch. 9.
151 Id. art. 55. Other significant sections of this article promote “solutions of international economic, social, health, and related problems; and international cultural and educational cooperation” and “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Id.
This one UN objective is precisely what the UNFPA attempts to execute through its Programme of Action. Regardless of the U.S. agreement to carry out the Charter's goals, there lacks an explicit regulatory and binding force which will compel the United States to fulfill its commitment to UN policies and, specifically, to the UNFPA.

In analyzing the regulatory authority of the UN, the Assembly and other organs of the U.N. have no legislative authority to establish legally binding obligations for member states in the population field, but the great contribution of the U.N. system can be to provide a means through which a consensus on world community policy can be developed, and through which that policy can be implemented on the basis of co-operative action voluntarily undertaken by Member States.

Executing this policy effectuated by voluntary states is a difficult feat without firm regulations and binding duties. Therefore, there are many advocates who support UN policy as a form of international customary law.

"A general practice accepted as law is an international custom." In order to support a finding of customary law, there is usually a requirement of a consensual state practice and a "manifestation of conviction that a practice is binding or obligatory." Often, this type of manifestation can range from an explicit writing like a UN resolution or declaration to a subtle action where silence is interpreted as assent.

It is possible to view the Programme of Action as customary law. Three factors supporting such a view are: (1) a specific General Assembly resolution adopted the ICPD Programme of Action as a consensus document; (2) several reports exist which document updates and progress of the UNFPA; and (3)

152 See Programme of Action, supra note 136, § 1.1 (setting forward a plan to "promote sustained economic growth in the context of sustainable development in all countries").
153 See 21-22 UNFPA, ANNUAL REVIEW OF POPULATION LAW, 1994-1995, 257 (1998) (citing U.N. Doc. A/RES/49/128, which recognizes that "the implementation of the recommendations contained in the Programme of Action of the ICPD is the sovereign right of every country").
155 Id. at 211.
156 Weber, supra note 147, at 382.
157 Id. at 383.
158 Id.
member states overwhelmingly promote developmental stability and education to donee nations.\textsuperscript{159} This perspective of the Programme of Action would enable a UN-supported programme like the UNFPA to have the same effect as "customary law obligations for member states that would be equally as binding as they would have been had the obligations stated in the declaration been incorporated in a ratified treaty."\textsuperscript{160}

In addition to the UNFPA using the customary law rationale to enforce its policies on donors, another possibility for regulation and execution is for the UNFPA to revert to other agencies apart from the UN when in need of additional assistance in organizing and effectuating its actions.\textsuperscript{161} Although, in all likelihood, this method is not so well-supported as using customary law to enforce binding obligations on member states, it is yet another legitimate proposal lending credence to the possibility that the Programme of Action may, in fact, have binding characteristics.

The key to enforcing a so-called customary law is the existence of specific programs and plans which articulate the exact duties of each donor country participating in accordance with UNFPA.\textsuperscript{162} This is precisely what the Programme of Action attempts to accomplish in its provision specifically addressing donor country responsibilities.\textsuperscript{163} In order to gain support in enforcing UN requirements through customary law, it may be prudent to create even more specific and unambiguous duties for each member state while considering each country’s individual values and possible objections to various programs.\textsuperscript{164}

The importance of donor contributions to the UNFPA is a resounding theme throughout its programs, not just regarding its work in China.\textsuperscript{165} The significance of the issue is a controlling factor in determining whether a mere implication can evolve into a customary and legally-binding duty.\textsuperscript{166} Without


\textsuperscript{160} Partan, supra note 154, at 211.

\textsuperscript{161} Id. at 211-12.

\textsuperscript{162} Cf. Weber, supra note 147, at 388 (addressing international obligations to famine aid and not to population development and explaining the crucial components that must exist and merge in order to fully justify enforcing a customary law).

\textsuperscript{163} See Programme of Action, supra note 136, at ch. 14 (detailing specific responsibilities of partners in development).

\textsuperscript{164} See Weber, supra note 147, at 388 (stating that this type of additional document secures a member nation’s duty according to international legal principles).

\textsuperscript{165} Marshall, supra note 69, at 488.

\textsuperscript{166} See Weber, supra note 147, at 388 (explaining that giving force to customary law requires
financial commitments from donor countries, the UNFPA's actions and programs have no hope of success. It is of utmost importance to attempt to oblige the United States to fulfill its prior duties; without the presence of customary law legally binding member states, programs and conferences like those established by the UN have neither durability nor international acceptance.

VIII. RESULTING BENEFITS FROM A REFORMED U.S. STRATEGY LENDING GREATER ECONOMIC AID TO NEEDY COUNTRIES

UN conferences exert a direct and influential role on the international community in uniting and mobilizing individual countries to assist those in need, and "have served as catalytic agents in the process of redirecting and reforming the UN system." Like any successful program, the Programme of Action needs to undergo constant revision and change to reflect modern international policies and developing issues. Since the Programme of Action disseminates information to women through highly-advanced technology and methods, it is evident that the Programme is already making leaps mirroring the rapidly-evolving world.

In addition to the Programme of Action adapting to changing times, the United States must undergo the same transformation. Those countries receiving aid exchange reciprocal benefits with the United States. Through its economic contributions to impoverished and under-educated countries, the United States not only participates in improving their standards of living but

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167 See Marshall, supra note 69, at 490 (stating that under the Programme of Action, donor countries are expected to satisfy one-third of costs, estimating $6.1 billion in contributions in 2005).

168 See Nafis Sadik, Reflections on the International Conference on Population and Development and the Efficacy of UN Conferences, 6 COLO. J. INT'L ENVTL. L. & POL'Y 249, 249 (1995) (detailing the importance of updating UN policies that "can only be met through consensus and joint action").

169 Id. at 253.

170 See id. at 252 (qualifying the importance of upholding the partnership commitment to the ICPD's Programme of Action).

171 See Programme of Action, supra note 136, § 14.4 (encouraging technology cooperation, joint ventures, and other forms of technical assistance to population and development).

also enhances global stability.\textsuperscript{173} This added bonus creates a more serene international environment with increasing trade and economic prospects.\textsuperscript{174}

In order for the United States to continue its leadership role in the international community, it must re-evaluate its foreign aid policy. Carrying the status of such a wealthy and dominating Western nation, it is unacceptable for the United States to withdraw millions of dollars from all UNFPA programs in 142 countries simply because its domestic policy conflicts with the Chinese one-child policy.

Shortly after the implementation of the Programme of Action, various suggestions surfaced regarding the U.S. expansion of worldwide developmental aid.\textsuperscript{175} Although practically a decade later, these proposals are appropriate for U.S. implementation today to ameliorate its foreign aid procedures. Using the combined efforts and powers of the President, program managers, and Congress, the suggestions require constructing initiatives to improve the quality of population services while still assessing the needs and capacity for development in an economically efficient manner.\textsuperscript{176}

These suggestions focus on each branch’s involvement in forming the U.S. policy on foreign aid and upholding its high standards to the Programme of Action. The United States is a nation like no other, a status with an influential effect on the rest of the world, specifically leading nations. If the United States can easily withdraw $34 million in funding from such an essential UN organization like the UNFPA, other large donors will either follow this irresponsible pattern or become frustrated by this unfair “decency gap” and refuse to uphold this large deficiency burden.\textsuperscript{177}

\begin{thebibliography}{9}
\bibitem{174} \textit{Id.}
\bibitem{175} \textit{See Lasher, supra note 84, at 22.}
\bibitem{176} \textit{See id. at 22-23 (describing the three-fold plan in implementing the Programme of Action: (1) Using the executive branch to rebuild the case for U.S. involvement in global population stabilization; (2) Program managers to build ongoing initiatives to improve the availability and quality of family planning services while increasing investments in other reproductive health and developmental interventions; (3) The Administration and Congress working together to find additional financial resources to meet the U.S. obligation for funding international population assistance).}
\bibitem{177} Press Release, Reproductive Health in Developing Countries: The Commission Moves to Fill the Decency Gap with €32 Million Package (July 24, 2002), \textit{available at} http://www.planetwire.org/details/3011 (describing the European Commission’s disappointed response to the U.S. withdrawal of funding) [hereinafter Decency Gap].
\end{thebibliography}
Finding a method to require the United States to uphold its obligations to the Programme of Action is ultimately important for several reasons, namely in order to highlight the seriousness and strict nature of UN policies and to spread an overall impression of impartiality over this UN programme regarding all voluntary donors. "Congress must restore funds in order for the United States to get back on the path of carrying its fair share of Cairo funding commitment and to meet the responsibility that comes with its wealth and role as a world leader."  

IX. CONCLUSION

In response to previous unreliable U.S. donative behavior to the UNFPA under the Cairo Programme of Action, the United Nations must take an initiative to legally bind member nations to enforce their promised contributions to the UNFPA. After narrowly examining how each U.S. administration has had a novel approach to interpreting the Kemp-Kasten Amendment, one can readily observe the great need for a stable U.S. approach to international funding, specifically concerning programs which seek to benefit human life. The Programme of Action, while respecting each member nation’s own beliefs, also requests a commitment to support the UNFPA in order for the Fund to sustain itself, if nothing else. Using the Programme of Action’s objectives as the structure of the UNFPA, each member nation should strive to attain each element.

Nevertheless, there is obvious need for greater enforcement as seen through prior non-committal attitudes and unfulfilled donations from independent, contributing nations. If the United Nations imposes international customary law on these delinquent nations, it has a stronger and more effective method to execute and maintain its programs. Once a general practice is established, a custom evolves which leads to possible enforcement of this gradually-evolved norm. Using customary law to enforce donor nations’ commitments

178 Lasher, supra note 84, at 23.
179 See Nowels, supra note 1, at 5; Lasher, supra note 84, at 18 (discussing various administrations and conflicting methods of determining a violation of Kemp-Kasten Amendment).
180 Programme of Action, supra note 136, § 1.11.
181 Weber, supra note 147, at 369 (discussing world famine crisis saying “it is crucial that the United Nations formulate an effective policy that is acceptable to both United Nations member states and other states that rely on international economic and developmental assistance”).
182 Id. at 382.
is a plausible method to finally eradicate the problem of scarce resources that has historically hindered UN programs.

Along with a legally binding regulatory scheme, international UN conferences must continue with regularity to address current global demands and necessities. Without these conferences and the UN General Assembly, there lacks a true body of leadership that has the potential to congregate so many nations, assign responsibilities, and effectuate beneficial policies.

Since President Bush's devastating cut of all UNFPA funding in July 2002, there have been some signs of hope from the United States government in recent months. In September 2002, the House Appropriations Committee approved a $16.5 billion FY03 Foreign Operations spending bill which consisted of $25 million delegated to the UNFPA. In addition, the Chairman also approved a $200 million alteration from the FY03 Defense Spending to Foreign Operations. However, the Committee will not permit this newly-appropriated funding to support China's birth policy.

Although these are promising signs of improving U.S. funding, one never can predict where this wavering policy may stand in the future. With such irregular support, the United States and every other member nation needs the rigidity of binding regulations. Providing economic assistance to other nations gives the United States a convenient device to realize its own global ideals. This balance provides stability which leads to growing markets and diminishing international crises such as terrorism and environmental destruction. In addition, financial support to foreign nations tends to improve U.S. national security, development, and humanitarian objectives.

Since this continuous aid is difficult to sustain, the great need for a new strategy is quite imperative. The United States will be on steady footing if the approach addresses essential international elements with which constituents agree and legislatures support. If the United States follows an established

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183 Sadik, supra note 168, at 249.
184 See id. at 249 (describing the necessity of UN conferences and the global commanding role it plays to meet current demands).
186 Id. at 1.
187 Id.
188 Id. at 2.
189 Anderson, supra note 172, at 98.
190 Id.
191 Id.
192 See id. at 98-99 (explaining the necessity of an economic aid strategy consisting of four
plan when implementing any foreign assistance project, it will produce the stability that is the resounding theme throughout the Programme of Action.\textsuperscript{193} When the UNFPA is able to rely on a certain appropriated amount from each promising donor nation, it can economically forecast which programs and services are feasible to fully execute while providing the best possible assistance.\textsuperscript{194}

If the UN does not pursue stricter enforcement of its policies and rigid repercussions for negligent nations, this problem is likely to spiral into an unmanageable predicament.\textsuperscript{195} One nation’s unreliable behavior not only affects the UN and the dependant countries but also financially burdens all other contributing nations who now feel this large “decency gap.”\textsuperscript{196} The Development and Human Aid Commissioner, Poul Nielson, stated that “the U.S. decision is regrettable and counter-productive. The decision to cut funding may well lead to unwanted pregnancies, unsafe abortions and increased dangers for mothers and infants. The losers from this decision will be some of the most vulnerable people on this planet.”\textsuperscript{197}

These disappointed views are not only expressed by other donor nations. According to UNFPA Executive Director, Thoraya Obaid, the $34 million per year is capable of preventing two million unwanted pregnancies, 800,000 induced abortions, 4,700 maternal deaths, 60,000 cases of serious maternal illness, and more than 77,000 infant and child deaths.\textsuperscript{198} The reality of these predictions runs counter to the stated rationale behind President Bush’s withdrawal of UNFPA funding, which was perceived UNFPA involvement in China’s one-child policy and assistance in coerced abortions.\textsuperscript{199}

criteria: (1) support a national economic and security strategy and protect fundamental American values; (2) cover all significant bilateral and multilateral economic assistance programs; (3) focus on a minimum set of strategic objectives; (4) enable the United States to respond to changing global forces).

\textsuperscript{193} See Programme of Action, supra note 136, § 14.10(b) (stating an objective regarding the importance of a commitment to and stability of international financial assistance).

\textsuperscript{194} See id. § 14.2 (acknowledging if each donor adheres to stable policies, it allows UNFPA to also apply uniform standards and predictable implications).

\textsuperscript{195} See Anderson, supra note 172, at 110 (stating that if United States does not develop new strategy, remaining support for economic aid will steadily erode).

\textsuperscript{196} See Decency Gap, supra note 177 (describing the European Commission’s added support to the UNFPA since the U.S. withdrawal in July 2002).

\textsuperscript{197} Id.

\textsuperscript{198} Noy Thrupkaew, Money Where His Mouth is; Bush talks a good game on women’s rights. But talk is cheap, AM. PROSPECT, Sept. 23, 2002, at 17, LEXIS, News Group File.

\textsuperscript{199} UNFPA, supra note 4.
In the end, this rationale is questionable since the U.S. investigation of UNFPA involvement in China never led to absolute certainty of abortion assistance. President Bush’s action in withdrawing this funding strongly resembles his implementation of the global gag rule when he first entered office. That rule, similar in effect to cutting UNFPA funds, bans foreign NGOs from disseminating information about legal abortions and prohibits public support and debate on the topic in exchange for much-needed family-planning funding.

In order for all member nations to refrain from forcing its own domestic policies on the international arena through terminating promised funds, the United Nations must regulate these delinquencies through a firm system. Although the United States may not presently face legal consequences for its actions, the future must entail binding obligations with harsh ramifications to remiss donor countries in order to keep these much-needed and highly-revered United Nations’ programs alive and prosperous.

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201 Id.
202 Id.