

What Is Family? Who Is Person? Questions for International Law

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This past summer I was in Rome at the Diplomatic Conference for the Establishment of the International Criminal Court. I—along with many others—had questions about how some previous though well established principles of international law had undergone an interesting and questionable transformation in relatively few years. International law, after all, is established on consensus, a consensus that acknowledges widespread concurrence on important issues of legal significance. Today, I shall confine my remarks at this important gathering on two very simple yet important terms in the world of law—both domestic and international. These terms are: 1) family and 2) person.

I have chosen these two terms for discussion because, while they raise a well understood meaning amongst most people, they have, nonetheless, taken on new meaning in recent years. These new meanings raise perplexing and vexing problems for most of us gathered here today, and, dare I say, most of the law abiding citizens of the world. Now, why would these presumably simple, well understood terms be a matter for examination at this conference? My answer is this: notwithstanding a widely understood meaning of these terms, there are small yet powerful pressure groups at work today laboring to ensure that their understandings of these terms, so important to the world of human rights law, receive their definitions. In short, the well understood concepts of family and person, which undergird the noble statements of important international legal texts such as the Universal Declaration of Human Rights, are not only being challenged but are also being threatened by these new assertions of what is family and who is person.

To make my point early and clearly: the well understood meanings of what family is and who person is are under siege. If my assertion contains merit, then what is to be done? One initial response is to ensure that the many people of goodwill who populate our common home, earth, will be united in their agreement on the following.

What Is Family?

Family means the free coming together of man and woman to carry on the most ancient tradition—“male and female God created them.”¹ Why did God create them female and male? The answer immediately follows: to “be fruitful, multiply, fill the earth, and master it.”² It is clear that the traditional meaning of family has the most ancient of roots.³ For the skeptic who asks whether there would be any particular, exclusive relationship between the male and female of the

human species, I again turn to ancient roots. In the tradition shared by the monotheistic traditions of the world, we see Abraham reminded by his loving and compassionate Creator that he and his wife, Sarah, who had not had children for many years, would finally have descendants as numerous as the stars in the heavens and the grains of sands on the shores.⁴

While some of my secular colleagues in the profession of law will chastise me for introducing the religious element, I respond with this: the tradition of the secular law does reflect the more ancient law of God. Take for example the decalogue:⁵ the prohibitions against murder, adultery, theft, and perjury (false witness), for example, are reflected in most of the civil law codes of the world to this day. So, the criticism directed against my perspective must be evaluated in this context of the mutuality between God’s law and man’s. With this background, I humbly but confidently suggest that the notion of family is the union of man and woman who have the destiny of continuing the human race through their physical and natural act of love; moreover, this relationship does not exist solely for the purpose of propagation, it also exists for the purposes of nurturing, teaching, caring, loving, and sustaining. All of these actions take place in the further context of people, through their blood and matrimonial relationship, being in right relation with one another.

If this is the ancient and historical background, what, if anything, does it mean today in the realm of the term “family”? I think it means this: when the civilized nations of the world convened in San Francisco in the aftermath of the Second World War, many people of goodwill saw the darkness of the past, but they also saw the hope for the future. A part of this hope was the need to establish a bill of rights, if you will, to preserve the dignity of the human person—each created in the image of God.⁶ The horrific sins perpetrated by some of the most cruel despots of history were to be redeemed, in part, by the universal recognition of the dignity of the human person long recognized in the history of mankind. This recognition sets the pace of the Universal Declaration of Human Rights, whose preamble begins with the words recognizing “the inherent dignity and . . . the equal and inalienable rights of all members of the human family” are “the foundation of freedom, justice, and peace in the world.”⁷

While I am tempted to discuss at some length the meaning of the term human family as it appears in the preamble

just quoted, I resist, and turn to the crucial text of Article 16, which states:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. . . . Marriage shall be entered into only with the free and full consent of the intending spouses. . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁸

I hasten to add that pondering on these few, but important words is vital to our task here today. The first point is that the revered tradition of Abraham and Sarah was still alive and well in 1948—a mere fifty years ago.⁹ While these words were crafted a half-century ago, they set the stage for subsequent normative texts which illuminate the meaning of the term family. But before I do that, it would be useful to engage in a preliminary analysis of this text.

The first substantive point made by this article concerning the nature of the family is that it begins with male and female—men and women shall marry and found a family. Once they marry, their union in major part exists to continue the human race through the generative product of their love—this is the founding of the family, the children of their love, of which the article speaks. It is not man and man, or woman and woman, or sole man, or sole woman who founds a family, it is, rather, man and woman who marry one another. The caveat is that they are of some mature, i.e., full age, and their desire to marry one another should not be obstructed by racial, national, or religious considerations.

Now, the drafters of the Universal Declaration realized that children could be born out of wedlock. But if they were, they should still enjoy the “same social protection” as the members of the “family.”¹⁰ Yet, this Article 25 still begins by reiteration that it is through the “natural and fundamental group unit of society”—the family—that standards of living should be protected.¹¹

One of the benefits to be accorded each person is the right to education.¹² Under subparagraph three of Article 26, “Parents have a prior right to choose the kind of education that shall be given to *their* children.” As Professor Bruce Hafen of the BYU law faculty has eloquently argued, it is through the traditional notion of family—both immediate and extended—that the values and beliefs essential to strong democratic institutions are fostered; moreover, it is through this family that healthy social attitudes and habits are instilled in our young.¹³ His are sentiments earlier echoed by Jacques Maritain, a drafter of the Universal Declaration of Human Rights,¹⁴ who noted that man is both a part of the political community and family society, and the “end for which the family exists is to produce and bring up human persons and prepare them to fulfill their total destiny,” including the education of youth.¹⁵

Eighteen years after the drafting of the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic, Social, and Cultural Rights was concluded. This covenant entered into force in January of 1976. Article 10 reiterated themes earlier heard in the Universal Declaration. One of these is that “The widest protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society. . . .”¹⁶ Here, the 1966 drafters again stated that marriage is entered into “with the free consent of the intending spouses.” Moreover, the drafters added something useful for the understanding of who is a person (something that will be examined in the next section) when they stated that, “Special protection should be accorded to mothers during a reasonable period *before* and after childbirth.”

In the same year, UN-sponsored drafters also prepared the 1966 International Covenant on Civil and Political Rights.¹⁷ Article 23 reiterates the Universal Declaration and the ICESCR by once again stating that “The family is the natural and fundamental group unit of society. . . .” Furthermore, this family is to be understood as the unit founded by “men and women of marriageable age. . . .”¹⁸ Thus, Professor Teresa Stanton Collett is correct in her definition of family that asserts a special, lifelong procreative union of a man and woman that established the further important relationship of parent and child.¹⁹

Who Is Person?

Having established the long-standing foundation of what is family, I now extend the discussion into the realm of who is person. While there are good reasons for turning to the Universal Declaration, the ICESCR, and the ICCPR, I shall turn instead to an unlikely but nonetheless helpful source of proving the point so eloquently stated in the American Convention on Human Rights, Article 4, which states:

Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life.²⁰

This last point can be illustrated by examining carefully two principles of international law that have been solidifying for many years up to the present moment. The fundamental and inextricably intertwined principles are first that the pregnancy brings into being not simply a fertilized egg, or potential life, or a fetus, but another human being. The second principle is this: the international human rights law acknowledges both the existence of this person as well as the need to protect this human being’s life.

A brief examination of substantive points made time and again during the past several years will crystallize these principles as recognized norms granting an important legal status to the unborn. For example, in 1996, the United Nations

Commission on Human Rights invited prominent persons to address, among other matters, various forms of sex-based violence that manifest themselves at different stages of human life. It was noted that while violence against girls is manifested in many ways, it begins even before birth in cultures where son preference is prevalent and females are targeted by the violent discriminatory practices of sex-selective abortion and female infanticide.²¹ A similar theme was addressed when sex selection practices were examined by United Nations-sponsored investigations in Namibia. There, experts wanted to know the rate of male infant mortality as opposed to female infant mortality. They wondered if there was a son preference in Namibia. They wanted to know if sex selective facilities were available. Also, they were determined to ascertain why the rate of abortions was high when children outside wedlock were more or less acceptable.²² In the same year, the United Nations Population Fund reported that, "At least sixty million girls who would otherwise be expected to be alive [were] 'missing' from various populations as a result of sex-selective abortions or neglect."²³ Surely, these views raised concerns about the treatment of prenatal human life.

A foundation for these concerns about the unborn child was established at the fourth World Conference on Women held in Beijing in 1995. After acknowledging that the work of this conference had broken important ground, it was noted in the platform that girls are often subjected to various forms of sexual and economic exploitation including harmful practices such as female infanticide and prenatal sex selection.²⁴ Understandably, the platform called for governments and international and nongovernmental organizations to take measures aimed at abolishing traditional practices prejudicial to the health of children.²⁵

In the following year, 1996, the General Assembly of the United Nations received a report of the Third Committee which prompted the General Assembly to include in the agenda of its fifty-first session the item entitled "Promotion and Protection of the Rights of Children." In taking this step, the General Assembly revealed its deep and special concern about discrimination against girls and the violation of the rights of girls. Consequently, the General Assembly urged "all States to enact and enforce legislation protecting girls from all forms of violence, including female infanticide and prenatal sex selection. . . ."²⁶ The General Assembly renewed its concern for the unborn and young females in similar actions in 1997 and 1998.²⁷

The concerns of the United Nations pertaining to the born and unborn young, in part, were raised by individuals such as Ruth Dreifuss, the chief of the Federal Department of the Interior of Switzerland in 1995, who, at the women's conference in Beijing, stated that all acts of violence are not at the same level.²⁸ She indicated that governments should ensure

respect for international humanitarian law that would protect the youngest females against prenatal sex selection and forced abortion.²⁹ Similar concerns were raised at Beijing by Carol Bellamy, the executive director of the United Nations Children's Fund. Bellamy estimated that there are some 100 million fewer women alive today than could be expected through the natural pattern of birth and survival in infancy.³⁰ Part of this enormous list has been attributed to the fact that many girls were never even born because of prenatal sex selection. Of course, abortion has been the means to terminate the lives of these unborn children. As was stated in a 1995 issue of the *Economist*, an internationally-recognized magazine, "When abortion is legal and routine . . . it is almost impossible to regulate sex selection abortion."³¹ Perhaps Her Excellency Gro Harlem Brundtland may have had this very matter in mind when she said at the women's conference that, "We came here to answer the call of billions of women who have lived and the billions of women *who will live*. We now need a tidal change; women will no longer accept the role as second-rate citizens."³²

It would appear then, that to the present day, many who advocate for the protection and redress of abuse against young women and girls have had a particular concern of aborting the unborn female. Why? Because the female unborn is not a thing, is not a potential person, is not a person who might be. This child is, on the other hand, a human being who has been and continues to be subjected to unconscionable acts that violate international legal norms. Having said this, does the unborn girl have any claim to legal protection? That question was raised and answered in the affirmative by a Swiss Federal Councilor at the Beijing conference who acknowledged:

Violence in all its forms is one of the most intolerable violations of human rights and is one of the biggest obstacles to the realization of equality between women and men as well as to the development of a just society . . . one must cite the grave violations of human rights consisting in sexual mutilations, prenatal sex selection, as well as forced abortion and forced sterilization. . . . We are familiar with the terrible discrimination against girls, even before birth. What had obscurely been described as "prenatal sex selection" and the fatal neglect of infant girls are tragic testimonies.³³

This position was echoed by Claudia Nolte, feral minister for family affairs, senior citizens, and women and youth of the German Federal Republic. She argued that human rights for women were the focal point of this conference. She appealed to the delegates to respect human rights for women as an integral part of the universal, indivisible, and inalienable human rights. She continued by stating:

These must not be restricted on grounds of religion, culture, or tradition. They must be guaranteed in order

to ensure that women and girls can fully and truly enjoy them. All of us—our host country as well as all other states in the world—are called upon to denounce, prevent, and punish violence against women as a violation of human rights. This includes infanticide, forced abortion, prenatal sex selection, and trafficking in women and girls. The respect for human rights and combat against violence affecting women are ethical imperatives.³⁴

It should not be assumed that these views simply represented the perspectives of random delegates and speakers at the women's conference. At the conclusion of the conference, the principle committee set out the global framework of the conference and recognized, that "discrimination against women and the girl child 'begins from the earliest stages of life and continues unabated throughout their lives,' and that they are often subjected to forms of sexual and economic exploitation, including 'female infanticide and prenatal sex selection. . .'"³⁵ A representative from the Nordic Council reiterated this concern when she stated:

Governments must respect basic human rights. That includes the rights of women to be protected from exploitation and abuse. . . . Throughout *their entire life cycle*, women's daily existence and long term aspirations are restricted by discriminatory attitudes, unjust social and economic structures, and a lack of resources in most countries that prevent their full and equal participation in society. In a number of countries, the practice of prenatal sex selection, higher rates of mortality among very young girls and lower rates of school enrollment for girls as compared with boys suggest that "son-preference" is a limitation to the access of girl-children to food, education, and healthcare, and even to life itself. *Discrimination against women begins even before birth.* Every effort must be made to combat such discrimination.³⁶

In a follow-up to the fourth World Conference on Women, the secretary general of the United Nations in 1997 reiterated these concerns regarding the status of the unborn female child and the legal mechanisms available to protect her under international law. His analysis of the importance of gender in the enjoyment of human rights began with the resolution concerning the rights of the child. States and international and nongovernmental organizations have been urged to take into account the rights and particular needs of girls, especially in education, health, and nutrition. States have also been urged to eliminate negative cultural practices, to include legislation protecting girls from violence, including female infanticide and prenatal sex selection. Of course, if the unborn female child is protected under international law, so is the unborn male child. A principle reason for these conclusions is that both unborn females and males are persons.

They are persons, because as persons, we all shared in our earlier life their fate, their status. As the Universal Declaration clearly states, "*Everyone* is entitled to all the rights and freedoms" of the Universal Declaration.³⁷ In addition, "*Everyone* has the right to life, liberty, and security of person."³⁸ Moreover, "No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment."³⁹ And abortion in any form and for any purpose (such as prenatal sex selection), are violations of these fundamental norms.

The international community must continue to speak out against crimes against all, not just against some members of the human family. For those wanting to speak out, but not yet sure if they should, the counsel of the German Lutheran Pastor Martin Niemoeller, himself a victim of Nazi atrocities, compels us to act:

First they came for the Jews, and I did not speak out—because I was not a Jew. Then they came for the communists, and I did not speak out—because I was not a communist. Then they came for the trade unionists, and I did not speak out—because I was not a trade unionist. Then they came for me—and there was no one left to speak for me.

Although many of us may not fall into the categories identified by Niemoeller, we all came from the category of the unborn now threatened by the crime of "forced pregnancy" or "enforced pregnancy." Unlike Niemoeller, someone has spoken for us. Now we, the members of the civilized world must speak out for those who are to follow.

Conclusion

I hope that these brief reflections I have offered here today will help those people of goodwill remain steadfast in their resolve to ensure that the revered understanding of what is family and who is person remain strong elements of the mosaic of international human rights law. While some late twentieth century advocates of alternative meanings claim they do so in the name of human rights, their efforts conflict with the long-standing explanations I have attempted to present at the conference. My arguments, while brief, are, I hope, founded on intelligence and reason. And it is intelligence and reason which enable the human person and the human family to flourish and to continue.

I think it no coincidence that the motto of your great university, "The glory of God is intelligence," provides insights into the proper nature of who we are as persons and as members of families—two concepts fundamental to the preservation of human rights for all, not just for some. It is through the intelligence that God has given us that we can acknowledge who we are and to what we belong—we are from our first moments of conception persons created in the image of God, and it is these persons, all of them—all of us—who merit the protection of the best that international human

rights law has to offer. Second, we come into being by the coming together not of reproductive technologies but through the generative love of men and women who create each of us in the nurturing environment of the family, the “natural and fundamental unit of society.” We use our intelligence well when the laws we make and uphold acknowledge this natural and fundamental truth. Moreover, we continue to give glory to our loving and compassionate Maker when we wisely, prudently, courageously, compassionately, and justly rely on this intelligence to protect not only ourselves but those future persons, those future guarantors of individual families and the larger human family.

NOTES

1. Genesis 1:27.
2. *Ibid.* verse 28.
3. See Herbert Titus, *Defining Marriage and the Family*, 3 *William and Mary Bill of Rights Journal* 327, 343 (1994), where the author states, “From the beginning, the law governing sexual behavior between human beings has been established by the Creator. It is one male, one female, for a lifetime. This family has been established in order to promote life, for the heterosexual relationship is the only one that may procreate without having to be dependant upon any person or thing outside the union, itself. While a male/male or female/female union could raise children, it cannot conceive without help from the outside.”
4. Genesis 15:3–5; 22:17; 26:4.
5. Exodus 20:13–17.
6. Genesis 1:27.
7. Universal Declaration of Human Rights, 1948 [hereafter Universal Declaration], *preamble*.
8. Universal Declaration, Article 16.
9. Forgive me for being somewhat personal here in my use of the modifier “mere,” but the Universal Declaration and I share the same birth year, so to speak.
10. Universal Declaration, Article 25.
11. *Ibid.*
12. Universal Declaration, Article 26.
13. Hafen, Bruce. *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 *Michigan Law Review*, 1983, pp. 463, 479–483.
14. See Glendon, Mary Ann. *Knowing the Universal Declaration of Human Rights*, 73 *Notre Dame Law Review*, 1998, pp. 1153, 1156.
15. Maritain, Jacques. *The Rights of Man and Natural Law*, Scribners, 1943, p. 79.
16. International Covenant on Economic, Social, and Cultural Rights, 1966 (hereafter ICESCR).
17. International Covenant on Civil and Political Rights, 1966 [hereinafter ICCPR].
18. ICCPR, Article 23.2.
19. Collett, Teresa Stanton. *Marriage, Family, and the Positive Law*, 10 *Notre Dame Journal of Ethics and Public Policy* 467, 477–478 (1996).
20. American Convention on Human Rights, 22 November 1969. [italics added]
21. UN Commission on Human Rights Res. 1996/49 *See also*, CHR Res. 1997/44.
22. UN Press Release, WOM/977, 8 July 1997.
23. UN Population Fund Report, POP/647, 28 May 1997.
24. Platform for Action, A/Conf. 177/20, ¶ 38.
25. *Ibid.* ¶¶ 277(c), 283 (d).
26. GA Res. 51/76 of 12 December 1996.
27. GA Res. 52/99 and 52/106 of 12 December 1997.
28. Statement of the Head of Delegation of the Swiss Federal Republic, 4–15 September 1995.
29. *Ibid.*
30. Statement of the Director of the UN Children’s Fund, 5 September 1995.
31. *The Economist*, 5 August 1995, quoted in statement of Jeanne Head, RN, 7 September 1995.
32. Closing address of Mme. Brundtland, 15 September 1995.
33. *See* note 28, Head of Swiss Delegation.
34. Statement of Claudia Nolte on behalf of the German Federal Republic.
35. Report of Main Committee, 5th Meeting, 15 September 1995.
36. Statement of Berit Brorby Larsen on behalf of the Nordic Council.
37. Universal Declaration, Article 2.
38. *Ibid.* Article 3.
39. *Ibid.* Article 5.