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**SECURING A FUTURE FOR  
CHILDREN: THE  
INTERNATIONAL CUSTOM  
TO PROTECT THE  
NATURAL FAMILY**



**AMPARAR EL FUTURO DE LOS NIÑOS:  
COSTUMBRE INTERNACIONAL DE PROTEGER  
A LA FAMILIA NATURAL**

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## **ABSTRACT**

The paper argues that Art. 16(3) of the Universal Declaration of Human Rights has become customary international law, and therefore, all States are obliged to promote, protect and give preference to the natural family based on marriage between one male and one female (in a nuclear or extended family arrangement) over so-called “new family forms” (e.g. cohabitating opposite-sex and/or same-sex couples). This means that States breach their obligation under Art. 16 (3) when they treat so-called alternative forms of families as equivalent to the family based on heterosexual marriage (i.e. giving the same benefits). The paper uses Canada as a case study to illustrate how it has breached its obligations. To this end, the paper will consider how and why the Canadian federal government has contributed to the crisis of the natural family in Canada as manifested through increasing rates of separation and divorce as well as of alternative family forms (i.e. cohabitation arrangements and so forth) and their treatment as equivalent to the natural family.

## **KEY WORDS**

Family, marriage, same-sex, human rights, customary international law.

## RESUMEN

El presente escrito sostiene que el artículo 16(3) de la Declaración Universal de los Derechos Humanos se ha convertido en derecho internacional consuetudinario y, por tanto, todos los Estados están obligados a promover, proteger y dar prelación a la familia natural cimentada en el matrimonio entre un hombre y una mujer (como organización nuclear o extendida) sobre las llamadas “nuevas formas de familia” (cohabitación de personas de géneros iguales o distintos, por ejemplo). Esto significa que los Estados incumplen sus obligaciones cuando, bajo el artículo 16(3), otorgan a las llamadas formas alternativas de familia el mismo trato que a los matrimonios heterosexuales concediéndoles, por ejemplo, los mismos beneficios. El artículo analiza a Canadá como caso de estudio para ilustrar de qué manera este país ha incumplido sus obligaciones. Con este propósito, el presente artículo tomará en consideración de qué manera y por qué razón el gobierno federal canadiense ha contribuido a la crisis de la familia natural en ese país, como lo evidencian las crecientes tasas de separación, divorcio y formas alternativas de familia (cohabitación, por ejemplo) y su trato como equivalentes de la familia natural.

### **PALABRAS CLAVE**

Familia, matrimonio, matrimonio entre personas del mismo género, derechos humanos, derecho internacional consuetudinario.

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## INTRODUCTION

The purpose of this paper is to explore the meaning and relevance of art. 16 of the 1948 Universal Declaration of Human Rights (UDHR),<sup>1</sup> which proclaims the “right to marry” and found a “family as the natural and fundamental unit of society [which] is entitled to protection by society and the State.” While there are interest groups promoting alternative definitions of the term *family*, there is but one, and only one definition consistent with the use of the term in the UDHR and its progeny. This paper argues that the State has an international obligation to give special protection to the “natural family” (nuclear or extended), based on marriage between man and woman, for it is an essential unit founded on the dignity of the human person and supported by tradition, culture, and religion. How the natural family is protected, however, will vary among States. Some nations may find it necessary to regulate other living arrangements in the interests of the common good but must clearly give special protection to the natural family, and to avoid any confusion, must educate the public that healthy married families are the best possible familial environment for children as well as adults.

The paper is divided into four sections. Part I gives an overview of some basic international principles with a view to setting the ground work to argue that art. 16 of the UDHR has become a principle of customary international law that obliges all States to acknowledge the right for a man and woman to marry and protect and give assistance to the natural family thereby created. To determine whether a principle has become part of international customary law this section

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 271A (III), U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948), available at <http://www.udhr.org/UDHR/default.htm> (last visited Aug. 9, 2004).

explains that there must be a consistent and general international practice among States and evidence that the State acted pursuant to a conviction *opinio juris*.

Before embarking on the argument that art. 16 is customary international law, however, Part II deals with a preliminary issue regarding the proper meaning of art. 16. To this end, this section looks to basic principles governing treaty interpretation, then turns to a historical review of the negotiation process pertaining to the UDHR, and takes up various issues relating to its interpretation as well as the meaning of art. 16. The main argument is that the UDHR is a meeting place among nations with the point of convergence centered on the human person and his or her dignity. The rights mentioned in the UDHR include the right to marry and found a family, which is fundamental to the human person as a consequence of a natural inclination to marriage based in the complementarity of the female and male sexes. This is borne out in logical sequence in art. 16 when it provides:

1. 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

When one reads art. 16 in conjunction with art. 1, the marital reality does not just imply a physical attraction between the sexes but rather an involvement of the total human person: corporal, affective, and spiritual. This mutual and reciprocal giving and accepting of the person as an integral whole in marriage implies that marriage involves one man and one woman. The proclamation in art. 16(2) that the natural family comes into being upon the consent of the parties (not the consent of the State), implies that there is a natural marriage which predates the State. This in turn means that the right to marry must be distinguished from the *exercise of that right* that may be limited by positive law (e.g. "full age") or require certain formalities (e.g. registration) to protect and support the relationship for the common good of society. In this way, art. 16 recognizes that the right to marry and found the natural family cannot be reduced to a mere freedom to choose void of any appreciation of what it means to be human and his or her final good or end.

Part III takes up the question whether art. 16 has become customary international law by examining state practice. Due the depth and breadth of such an analysis, this paper does not attempt to exhaust all of the relevant sources. Rather it concentrates on important international treaties. This section also notes that several scholars argue that it has become customary international law and responds to the objections of others who take a contrary position.

Part IV contends that the Canadian government is in breach of art. 16 because it has treated alternative forms of families as equivalent to marriage (e.g. giving the same benefits to cohabitating couples, both heterosexual and homosexual, and enacting new legislation to redefine marriage so as to include same sex unions). It has done so without educating the public about important distinctions between family forms and the effect these distinctions have on children, spouses, and society. Further, the inaction of Canada to slow separation and divorce has actually encouraged the growth of alternative forms of families (e.g. single-parent homes, blended families, cohabitation arrangements), all of which have contributed to the desperate plight of children. Statistics show that children living in alternative family forms are more likely to suffer from many problems than children growing up in two-parent (male and female), married homes. These problems include poverty, poor education, mental and physical health issues, teen pregnancy, teen suicide, and teen crime. Canada is clearly in breach of art. 16, arguably part of customary international law, and thereby has failed to give the necessary protection and assistance to the natural family, and in turn, secure a child's future.

## 1. OVERVIEW OF INTERNATIONAL LAW

### 1.1 Preliminary considerations

Before we begin to address the legal significance of art. 16 of the UDHR, it is necessary to clarify four key points, which will be developed later. First, there is a distinction between the natural law reality of marriage (the substance of marriage) and its positive, legal appearances (the form of marriage).<sup>2</sup> The legal formalities presuppose the natural law content of marriage which, as described above, is a profound reality born from the free consent of the man and woman. Marriage is a *sui generis* reality in law and cannot be fully compared to positive, legal notions of contract without obscuring its essence.<sup>3</sup>

Second, it necessarily follows that when we speak of the natural family based on marriage we mean that marriage does not come into being simply because the couple carried out a wedding ceremony in accordance with legal requirements.<sup>4</sup> For example, two persons of the same sex may possess a marriage certificate but such a "marriage" as a natural law reality does not exist nor could it ever exist.<sup>5</sup> Marriage under natural law is founded not on legal formalities but on the funda-

<sup>2</sup> Pedro-juan Viladrich, *The Agony Of Legal Marriage* 143 (1990).

<sup>3</sup> Id. at 190; see also Joan Carreras, *Le Nozze: Festa, Sessualità & Diritto* 30-32 (2001); Hector Franceschi F., *Riconoscimento E Tutela Dello 'Ius Connubii' Nel Sistema Matrimoniale Canonico* 72-94 (2004) (for the explanation of the development of canonical form in canon law, which is the basis of the Judeo-Christian Western legal system on the matter of marriage. The development was in response to the clandestine marriage problem when couples focused on the concept of consent and began to exclude the natural juridical reality of the public ceremony.); Id. at 415-7 (comments with respect to the right to marry in canon law, and the limits of legislature in canon law).

<sup>4</sup> Viladrich, *supra* note 2, at 141.

<sup>5</sup> Id. at 146.

mental characteristics of marriage itself (sexual complementarity, procreative orientation, exclusivity, and indissolubility and then constituted by a public manifestation of consent, thereby creating a natural legal bond – a duty in justice to love). Without the natural law elements of marriage, there remains only the formal, superficial, procedural difference of State registration requirements. And were these latter nonessential elements entirely to constitute marriage, then there would be little difference between a man and woman who live in a de facto union and a man and a woman who marry in accordance with merely positive law requirements.<sup>6</sup> Marriage would be merely a matter of social conformity based solely in the legal ceremony, nothing more than the legislature's view on how sexual relations should or may be conducted.<sup>7</sup>

Third, the right to marry and marriage itself are natural law realities as such and are tied to human nature and its limits. Therefore, they predate the lawmaker's jurisdiction or any consensus among States.<sup>8</sup> This means that no State or group of States has the right to completely ignore the natural reality of marriage and call any type of union a marriage, and in so doing attempt to strip the natural reality of any content to mean nothing more than a piece of paper – a legal document – which grants the status of social acceptability.<sup>9</sup> On the contrary, the State has the obligation to give formal, social, and legal recognition to those real marriages that have been publicly celebrated.

Fourth, when one considers the domestic laws in Western legal cultures, it is trite to say that the right to marry and found a family has an extensive history. Indeed, most Western States have adopted legal formalities based on the canonical form established with the Council of Trent (presence of a priest and two witnesses),<sup>10</sup> which is evidence of the protection and assistance of the natural family. Indeed, natural marriage has been protected in positive law through “a complex of norms” which concerns the “establishment and the rupture of the bonds, which join, in a durable way and in view of procreation, partners of different sexes, and which are characterized by economic cohabitation. These norms determine the reciprocal rights and duties of the spouses as well as of their relatives and their descendents.”<sup>11</sup>

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<sup>6</sup> Id. at 141.

<sup>7</sup> Id. at 144.

<sup>8</sup> Id. at 145.

<sup>9</sup> Id. at 147.

<sup>10</sup> For a discussion of this point see Carreras *supra* note 3, at 74-81. See also, Jean Gaudemet, *Il Matrimonio in Occidente*, 222-286 (1989); For a general discussion of the theoretical and historical basis of the essence and definition of marriage in the 1917 and 1983 Codes of Canon law in relation to the definition and protection in Roman Law see Charles J. Scicluna, *The Essential Definition of Marriage According to the 1917 and 1983 Codes of Canon Law: An Exegetical and Comparative Study* (1995).

<sup>11</sup> Pius Eheobu O. Okpaqloka, *Legal Protection of Marriage and the Family Institutions: A Comparative Study of Major Normative Systems With Special Focus on Nigeria-Africa*, 50 (2002). There have been attempts to codify legal norms concerning natural marriage on the international level as well, see, e.g., the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, General Assembly Resolution 1763 A (XVII) of 7 Nov. 1962, entry into force 9 Dec. 1964.

## 1.2 Sources Of International Law

As is well known, the UDHR is part of the public international law system, which may be defined as the laws regulating the conduct between States and other international legal persons.<sup>12</sup> The international system differs significantly from many national systems in that there are no supreme legislative, executive, or judicial bodies which can create laws that are binding and enforceable against international persons. Consequently, difficulties often arise in determining the sources of international law, in particular customary international law and general principles of international law.

The sources of international law are articulated in article 38(1) of the *Statute of the International Court of Justice*, which has been described as “the most authoritative statement”<sup>13</sup> on the issue. Indeed, international scholars frequently cite this article in describing how international law is created, namely by international treaties, principles of customary international law, and general principles as recognized by civilized nations. Judicial decisions and teachings of qualified publicists also mentioned therein are considered as assisting in the determination of the content of law.

For the purposes of this article, only the two main sources of law will be studied, namely treaties and custom. Therefore, it is beyond the scope of this paper to investigate whether art. 16 is an international obligation *erga omnes* (a human right so important that it is owed to the international community as a whole)<sup>14</sup> or *jus cogens*: a preemptory norm of general international law which renders a treaty void when such a treaty is in conflict with the norm.<sup>15</sup>

### 1.2.1 Treaty Law

A classic understanding of treaties is that they are express agreements entered into between States or other legal persons accepted in international law.<sup>16</sup> They

<sup>12</sup> S.A. Williams & A.L.C. de Mestral, *International Law: Chiefly as Interpreted and Applied in Canada* 13 (H.M. Kindred et al. eds. 5th ed. 1993).

<sup>13</sup> *Id.*

<sup>14</sup> See *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (where the obligation is articulated); See also the following two cases which have applied the principle with respect to the right to self-determination and genocide, respectively: *East Timor (Port. v. Austl.)*, 1995 I.C.J. 89, 90, 102 (June 30); *Bosn. & Herz. v. Yug.*, 1996 I.C.J. 595, 616 (July 11). For a more general discussion of *erga omnes* by scholars see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997); See also a discussion of the obligation in relation to the activities of the World Bank: Fergus MacKay, *Universal Rights or a Universe unto Itself? Indigenous Peoples Human Rights and the World Bank's Draft Operational Policy 4.10 on Indigenous Peoples*, 17 AM. U. INT'L L. REV. 527(2002); See a discussion of *erga omnes* in regard to the right to religious freedom: Peter G. Danchin S. *Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 Colum. J. Transnat'l L. 33 (2002).

<sup>15</sup> See *Vienna Convention on the Law of Treaties*, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331 (entry into force on Jan. 27, 1980); *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, Mar. 21, 1986, arts. 53, 64, 25 I.L.M. 572 (not yet in force). See also *supra* note 14 and the articles cited therein which also discuss the concept of *jus cogens*.

<sup>16</sup> See Williams and de Mestral, *supra* note 12, at 83 for a more complete list. A treaty is also referred to as “convention,” “protocol,” “agreement,” or “covenant.”

are either bilateral or multilateral and must respect the principles that every treaty in force is binding on State Parties and must be performed by them in good faith. Other scholars divide treaties into two categories: legally binding and non-binding, also referred to as hard law and soft law, respectively.<sup>17</sup> International scholar H.M. Kindred explains that the former are intended to have a general or universal effect, while non law-making treaties do not create such an effect.<sup>18</sup> In other words, law-making treaties may codify, interpret or depart from existing customary law, establish new rules, or set up international institutions.

When considering treaties one must also appreciate that State Parties may enter reservations to the treaty. Such reservations modify or alter legal obligations, which in turn, can be objected to by other State Parties on the grounds that it offends the object and purpose of the treaty. In the case of the International Covenant on Civil and Political Rights (ICCPR), art. 23 which virtually repeats art. 16 of the UDHR, although in reverse order, Belgium, for example, entered a reservation stating that it would interpret art. 23 (2) “as meaning that the right of persons of marriage able age to marry and to found a family presupposes not only that national law shall prescribe the marriageable age but that it may also regulate the exercise of that right.”<sup>19</sup> Israel stated “With reference to Article 23 of the Covenant, and any other provision thereof to which the present reservation may be relevant, matters of personal status are governed in Israel by the religious law of the parties concerned.”<sup>20</sup> Similarly, Kuwait reserved declaring that “the matters addressed by article 23 are governed by personal-status law, which is based on Islamic law. Where the provisions of that article conflict with Kuwaiti law, Kuwait will apply its national law.”<sup>21</sup>

In regard to the relationship of State Parties with their citizens, otherwise referred to as the relationships between international law and domestic law, such interaction has been defined and determined with reference to the doctrine of adoption and the doctrine of transformation.<sup>22</sup> The former expression describes the situation in which international law is directly or automatically adopted into domestic law. The latter term describes the situation in which international law is only binding when it has been incorporated or transformed by the government into law, usually by means of statutory enactment. This distinction is sometimes expressed in terms of a treaty being self-executing or non-self-executing. For example, although the Canadian government signed and ratified the 1989 Convention on the Rights of the Child, it has not been directly transformed into a statute so as to become part

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<sup>17</sup> Id. at 82.

<sup>18</sup> Id.

<sup>19</sup> United Nations Treaty Collection, International Covenant on Civil and Political Rights, Declarations and Reservations, available at [http://www.unhchr.ch/html/menu3/b/treaty5\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm) (last updated Feb. 5, 2002). See infra note 95 for the article in full.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> For a discussion of these concepts and application in the Canadian context see Williams and de Mestral supra note 12; ST J. Macdonald, *The Relationship Between International Law and Domestic Law in Canada*, in Canadian Perspectives On International Law and Organization 92-3 (1974); Anne F. Bayefsky, International Human Rights Law: Use in Canadian Charter of rights and Freedoms Litigation 5 (1992).

of Canadian law. One may argue, though, that it has been indirectly transformed into Canadian law outside the normal democratic process due to its references and incorporation into law by policy makers and judges.<sup>23</sup>

### 1.2.2 Customary International Law

With that brief overview, let us further probe the question: what is the international legal significance of art. 16? Article 16 forms part of the UDHR which is a declaration and from its inception was never intended to be a binding treaty. Therefore, to find in it a legally binding obligation one must turn to recognized sources of international law, including, for purposes of our study, customary international law. It is submitted that, under recognized principles of customary international law, 1) all States must acknowledge (in positive, legal terms) the natural right to marry (a man and a woman) which is the basis of the natural family; and 2) that the natural family is entitled to protection by society and the State. To this end, two elements must be established: a consistent and general international practice among States and evidence that the State acted pursuant to a conviction *opinio juris*.

It is generally accepted that the first element requires evidence of a recurrence or repetition of acts described as “constant and uniform usage accepted as law.”<sup>24</sup> Such usage must demonstrate “substantial uniformity” in State practice.<sup>25</sup> The second element requires that the activity be carried out to satisfy compliance with a compulsory rule rather than for “motives of courtesy, fairness, and morality.”<sup>26</sup> Proof of the subjective element, namely intent to be legally bound, is

<sup>23</sup> See, e.g., example the Baker decision wherein Justice L'Heureux-Dubé of the Supreme Court of Canada cited the International Convention on the Rights of the Child as “another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision.” In that case, the Court had to determine whether an immigration officer had abused his discretion in ordering deported a Jamaican mother of four Canadian born children on the grounds that he failed to adequately to take into account her children. *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817.

<sup>24</sup> Bayefsky, *supra* note 22, at 10. See also the working definition of customary international law adopted in The International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, which speaks of “sufficiently extensive and representative number of states,” available at, [http://www.ila-hq.org/htm/layout\\_committee.htm](http://www.ila-hq.org/htm/layout_committee.htm) 0; Barry E. Carter, Phillip R. Trimble, & Curtis A. Bradley, International law 123 (4th ed. 2003); See also: Article 38 of the ICJ statute reads “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . b. international custom, as evidence of a general practice accepted as law . . .” available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm#CHAPTER\\_II](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstext/ibasicstatute.htm#CHAPTER_II) (last visited Sept. 30, 2004). See also *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *Concerning the Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3); *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 245 (Oct. 12); *Concerning the Continental Shelf (Tunis. v. Libya)*, 1982 I.C.J. 18 (Feb. 24); *Fisheries Jurisdiction Case (U.K. v. Ice.)* 1974 I.C.J. 3 (July 25); *North Sea Continental Shelf Cases* (F.R.G. v. Den.) 1969 I.C.J. 3 (Feb. 20); *Southwest Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.) Second Phase* 1966 I.C.J. 6 (July 18); *Fisheries Case (U.K. v. Nor.)* 1951 I.C.J. 116 (Dec. 18); *Asylum Case (Colom. v. Peru)* 1950 I.C.J. (Nov. 20); *The Case of the S.S. Lotus (Fr. v. Turk.)* P.C.I.J. (ser. A) No. 9 (Sept. 7). For an extensive bibliography on the issue of customary law See Institut universitaire de hautes études internationales, Genève available at [http://heiwwww.unige.ch/sections/dr/Site%20conf%20E9rence%20licence%203e/page\\_plan\\_de\\_la\\_conference.htm](http://heiwwww.unige.ch/sections/dr/Site%20conf%20E9rence%20licence%203e/page_plan_de_la_conference.htm). (Last visited Oct. 6, 2004).

<sup>25</sup> Bayefsky, *supra* note 22, at 10.

<sup>26</sup> *Id.*

often inferred from State practice and for this reason the test has been criticized as circular. Indeed, some scholars have even doubted the necessity of the element.<sup>27</sup>

The effect of being considered a principle of customary international law means the principle as articulated in art. 16(3) of the UDHR, and re-affirmed in the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR), is automatically binding on all States.<sup>28</sup> There is one exception, however. It is generally agreed that the rule will not bind those nations which have persistently objected to the principle while the principle was in the process of evolving.<sup>29</sup> The persistent objector rule thus does not “benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage.”<sup>30</sup> Consequently, if art. 16 (3) of the UDHR were found to be a rule of customary international law then more recent State proposals to redefine the family in a way that negates the natural family would not amount

<sup>27</sup> See, for example, the customary international law working definition adopted by The International Law Association, *supra* note 24 (commentary which downplays the importance of the subjective element); See also Sienho Yee, *The News that Opinio Juris “Is Not a Necessary Element of [International] Customary Law” Is greatly Exaggerated*, 43 *German Y.B.* 227 (2000) (evaluates how much change has actually been proposed). For a more general discussion of these issues and others see Carter, Trimble, & Bradley, *supra* note 24, at 123-7.

<sup>28</sup> See *Paquete Habana*, 175 U.S. 677 (1900) (wherein the Court considered whether fishing vessels sailing under the Spanish flag were subject to capture by armed American vessels during the war between the United States and Spain, and found them exempt from capture based on a principle of customary international law).

<sup>29</sup> See Carter, Trimble, & Bradley, *supra* note 24, at 124 (wherein they note the “fairly widespread agreement” on this position). See also: Ian Brownlie, *Principles of Public International Law* 10 (5th ed. 1998). (“The way in which, as a matter of practice, custom resolves itself into a question of special relations is illustrated further by the rule that a State may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of States.”); See also Julio A. Barberis, *Reflexions sur la coutume internationale*, 36 *Annuaire Français de Droit International* 9, 13, 39 (1990). (Some authors who dispute the consent theory of customary international law acknowledge a theoretical problem in the persistent objector rule’s origin in consent but recognize its existence. The Argentine jurist Julio A. Barberis, a follower of Roberto Ago’s theory of spontaneous customary international law, writes: “Un Etat ne peut se dégager des liens d’une norme coutumière que s’il s’y est opposé d’une manière claire et réitérée dès le moment de sa formation. Le cas le plus connu est en l’occurrence l’arrêt de la Cour internationale de Justice dans l’affaire des pêcheries anglo-norvégiennes. La Cour a décidé que cette règle n’avait pas le caractère d’une coutume dès lors que la pratique n’avait pas un caractère de ‘généralité.’”) See *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116, 131 (Dec. 18). (where the rule was applied: “In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law. In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.”) See Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 *HARV. INT’L L.J.* 457, 467-8 (1985). (Many jurists from the developing world support the rule on ideological and practical grounds.) See Gennady M. Danilenko, *The Theory of International Customary Law*, *GERMAN Y.B. INT’L L.* 9, 41-43 (1988) (lawyers operating under the Soviet and other socialist legal systems supported the persistent objector rule.). For a contrary view See: Jonathan I. Charney, *Universal International Law*, 87 *AM. J. INT’L L.* 529, 538-9 (1993); See also Anthony D’Amato, *The Concept of Custom in International Law*, 252-54, 258-62 (1971) (They operate on the assumption that customary international law is not based on consent. Still others point to its infrequent use as evidence of its nonexistence, however, these scholars fail to make a distinction between the existence of the legal rule from the political expediency of employing it in a given situation.)

<sup>30</sup> Carter, Trimble, & Bradley, *supra* note 24, at 124 *citing* the International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law*, *supra* note 24.

to persistent objection. Rather these new proposals would have to be characterized as either mere usage and not binding or something more, such as a new rule of customary international law. This would in turn raise the issue concerning a conflict between rules of customary international law. In addition, it would raise the question of a conflict between explicit treaties reflecting international agreement (e.g. natural family as accepted in treaties such as ICCPR and ICESCR) and alleged but contradictory customary international law. In regard to the latter case scenario, it has recently been argued that "A new rule of customary international law will supersede inconsistent obligations created by earlier agreement if the parties so intend and the intention is clearly manifested."<sup>31</sup>

Another argument is that the new and inconsistent principle of customary international law would have to reach the status of a preemptory norm in international law in accordance with the rules of *jus cogens* in order for it to trump the preexisting principle of customary international law.<sup>32</sup>

Determining whether a principle is customary international law raises a number of ancillary issues and for purposes of this article; only the basics will be considered: 1) who should determine whether a principle has become custom (e.g. international courts or State legislatures or courts) and 2) how should the two-prong customary law test be applied in order to determine the advent and content of a customary rule of law?

The answer to the first question is unresolved and depends largely upon one's perspective of international law. Those who emphasize State sovereignty argue that only States can determine whether a given principle has become international law, while those who are more favorably disposed toward the international system tend to argue that international bodies may determine the question. For example, various international bodies have identified a list of customary international human rights. The International Court of Justice has suggested that freedom from slavery and racial discrimination are principles of customary law,<sup>33</sup> which has received widespread support. However, when the Human Rights Committee proposed a list of customary international human rights norms, the list was challenged by some States, including the United States, France and the United Kingdom.<sup>34</sup>

In response to the second question, States have looked to a number of sources to establish the existence of a rule of customary law. For example, the Supreme

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<sup>31</sup> Barry, Carter, & Trimble, *supra* note 24, at 128 *citing* the 1987 revision of the American Law Institute's Restatement of Foreign Relations Law, sec. 102, commentary *f*.

<sup>32</sup> See e.g. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 71, 1155 U.N.T.S. 331, available at [http://www.unog.ch/archives/vienna/vien\\_69.htm](http://www.unog.ch/archives/vienna/vien_69.htm) (last visited Aug. 10, 2004). There are international scholars who argue that *ius cogens* is not restricted to treaty application. See for e.g. the general discussion of *jus cogens* by Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (2000)

<sup>33</sup> Bayefsky, *supra* note 22, at 13, *citing* *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

<sup>34</sup> Williams Schabas, *International Human Rights Law and the Canadian Courts* n.12 (Oct. 17, 1996) (unpublished manuscript, on file with the author).

Court of Canada has considered “treaties, unilateral state proclamations or decrees, decisions of the International Court of Justice, deliberations of the International Law Commission and comments of its special *rappporteur*, decisions of national courts, and writings of highly qualified authors.”<sup>35</sup> A report of the International Law Commission has also referred to “national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organizations”<sup>36</sup> such as the UN. According to international scholar I. A. Shearer, “[c]ustomary rules crystallize from usages or practices which have evolved in approximately three sets of circumstances: a) Diplomatic relations between States...b) Practice of international organs...c) State laws, decisions of State courts, and State military or administrative procedures.”<sup>37</sup>

## 2. THE MEANING OF ART. 16 OF THE UDHR

### 2.1 Introduction

Before we address whether the UDHR has become customary international law, however, it is necessary as a threshold matter to consider the meaning of art. 16. As previously stated it provides: “1) 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2) Marriage shall be entered into only with the free and full consent of the intending spouses. 3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

The rules of interpretation are set out in the 1969 Vienna Convention on the Law of Treaties.<sup>38</sup> Art. 31 provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Art. 32 permits recourse to supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion “to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable.” Keeping these principles in mind let us now turn to an overview of the UDHR by looking at the history, drafting process and then discuss the meaning of art. 16.

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<sup>35</sup> bayefsky, *supra* note 22, at 11.

<sup>36</sup> *Id.*

<sup>37</sup> Carter, Trimble, & Bradley, *supra* note 24, at 121-2, citing I.A. Shearer, *starke's international law*, 31-35 (11th ed. 1994).

<sup>38</sup> Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 71, 1155 U.N.T.S. 331 (entry into force on 27 January 1980, in accordance with article 84(1)) available at [http://www.unog.ch/archives/vienna/vien\\_69.htm](http://www.unog.ch/archives/vienna/vien_69.htm) (last visited Aug. 10, 2004).

## 2.2 History of Negotiations

The idea of the Universal Declaration of Human Rights was born during the Second World War and given considerable prominence during the drafting of the UN Charter and creation of the United Nations.<sup>39</sup> The concept of human rights is mentioned in several places in the UN Charter. The preamble calls on States “to reaffirm our faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” Art. 1 reinforces this idea in stating that one of the purposes of the United Nations is to respect the “self-determination of peoples” as well as “human rights” and “fundamental freedoms.” Then, art. 56, states “State Parties pledge to promote these rights and freedoms.”

In this way, the universal idea of human rights was embedded in the UN Charter, but the delineation of these rights was yet to be articulated and there was no conviction that any such list of rights could be “acceptable to all nations and peoples, including those not yet represented at the United Nations.”<sup>40</sup> It was the task of the Human Rights Commission to flesh out the idea of human rights in preparation of a declaration of human rights.<sup>41</sup>

Shortly after its first session on the topic in 1947, the Human Rights Commission simultaneously began work on both a draft declaration and a covenant. It was a compromise solution. Some States wanted a simply non-binding declaration, which would preserve national sovereignty, leaving it to States to assure and promote human rights, while others pushed for a convention that would “transform one of its [the United Nations’] major purposes into law.”<sup>42</sup> In other words, the idea was that a declaration embodying good intentions would soon be followed by a covenant with legal binding force; however, “it was not anticipated that establishing those legal obligations would require a score of years.”<sup>43</sup>

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<sup>39</sup> See Mary Ann Glendon, *A World Made New: Eleanor Roosevelt And The Universal Declaration Of Human Rights* 1-32 (2001). See also Mary Ann Glendon, *Knowing the Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998). For another good study of the drafting process See Johannes Morsink, *The Universal Declaration of Human Rights* 289-90 (1999). (The UDHR is a secular document by design despite the many discussions related to God. But the drafters made a strong “connection between human rights and human nature.” This is founded in what he refers to as the “inherence view of human rights.”); Rene Cassin, *From the Ten Commandments to the Rights of Man*, in *Of Law and Man: Essays in Honor of Haim H. COHN* 13 (Shlomo Shoham ed., 1971). (The Ten Commandments differs from the UDHR in that one approaches only duties and the other primarily rights. The “equal dignity inherent in the human person” is the foundation of both documents.); Rene Cassin, *Vatican II et la protection de la personne*, in *La Pensée et L’Action* 151 (1972). (Cassin supports the work done in Vatican II concerning the human person. In particular, he praises the diversity of the council and *Gaudium et Spes*. He draws parallels between the UDHR and *Gaudium et Spes* due to their common concerns for the human person, their universality, and their foundation on a common understanding of human dignity); Rene Cassin, *Historique de la déclaration universelle de 1948*, in *La Pensée et L’Action* 151 (1972). (The process of drafting the UDHR was a difficult one. Ultimately the result was so successful because it represents the universal values that form the basis of humanity. Rather than ignore the various faiths and philosophies to reach this goal, it tried to incorporate them and preserve them.); For a more brief discussion of the history of the UDHR, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982).

<sup>40</sup> Glendon, *supra* note 39, at 19.

<sup>41</sup> Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *The International Bill of Rights: The Covenant on Civil and Political Rights* 33-4 (Louis Henkin ed., 1981).

<sup>42</sup> *Id.* at 34.

The end result is the 1948 UDHR and the two 1966 Covenants which have become collectively known as the International Bill of Rights. The 1948 UDHR was intended to set out the moral rules while the two Covenants, the ICCPR and its first Optional Protocol and the ICESCR, were to describe legal obligations and set up special procedures for securing compliance, which were to be assumed and accepted by State Parties with their signature and ratification. However, the two Covenants did not receive the requisite number of ratifications to enter into force until ten years later in 1976.

The reason for the thirty year delay between the UDHR and the enforcement of the two Covenants is attributed to the deep East and West division, described as the “tug-of-war between partisans of the social and economic rights and those who gave pride of place to traditional political and civil liberties.”<sup>44</sup> In addition, a North and South antithesis gradually formed under the umbrella of two themes: self-determination and developed/ less developed nations.<sup>45</sup> Finally, out of concern for national sovereignty, the United States and the Soviet Union delayed even the most modest measures of implementation.<sup>46</sup>

The time frame between the UDHR and the coming into force of the two Covenants is especially significant. According to international scholar Vratislav Pechota: “the Universal Declaration was called upon to fill the gap, with profound impact on subsequent developments...it has become a standard of reference and a practical guide for UN organs whenever human rights issues face them . . . set[ting] into motion its gradual transformation into a source of customary international law.”<sup>47</sup>

### 2.3 Drafting Process

The Human Rights Commission was composed of an eclectic group of talented persons representing various traditions, cultures, religions and philosophies. The 18- member Commission was made up of the five world powers at the time (USA, UK, Soviet Union, France, and China) and thirteen other States which were rotated at three year intervals.<sup>48</sup> For reasons of efficiency, like most present day UN conferences, the Commission was in turn broken up into subcommittees, most notably into a drafting committee and still further into a working group,

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<sup>43</sup> Id. at 38.

<sup>44</sup> Glendon, *supra* note 39, at 207. Glendon notes that the Eastern position was led by the Soviets and was composed of the Ukraine, Poland, Yugoslavia, Chile, Uruguay, Pakistan and Egypt while the U.S. led Western position included the United Kingdom, France, Australia, Belgium, Sweden, Greece, and China. Lebanon and India were non-aligned but sided with the Soviet position.

<sup>45</sup> Id.

<sup>46</sup> Id. at 213.

<sup>47</sup> Pechota, *supra* note 41, at 38.

<sup>48</sup> Glendon, *supra* note 39, at 32. At the first session, Eleanor Roosevelt of the United States was elected chairman and worked alongside the vice chair, Peng-chun Chang of China, and secretary or rapporteur, Charles Malik of Lebanon, and delegates from Australia, Belgium, Byelorussia, Chile, Egypt, France, India, Iran, Panama, Philippines, Ukraine, USSR, Uruguay, and Yugoslavia.

which reported back to the drafting committee that in turn reported back to the Commission.

The draft was submitted to the Human Rights Commission, and approved with 12 votes in favor, none opposed, and some abstentions.<sup>49</sup> The Third Committee of ECOSOC, in turn, approved the draft, but only after considerable debate over each article and 170 amendment proposals; it was then submitted to the General Assembly of the United Nations.<sup>50</sup> After numerous speeches, the General Assembly members were polled on each article. Remarkably, 23 of the 30 articles were unanimously approved while other provisions received nay votes (art. 1 relating to human dignity (one vote) art. 19 on freedom of opinion and expression (seven votes) and Art. 16 regarding the family (six votes). A few articles received abstentions (articles on human dignity, non discrimination, and others relating to the freedom or right of movement, religion, opinion, expression, education and social and international order).<sup>51</sup>

In the end, the entire draft was adopted (48 votes in favor, no one opposed, eight abstentions and two countries absent).<sup>52</sup> And by that time, the United Nations had grown substantially to contain “four-fifths of the world’s population – twenty-two countries from the Americas, sixteen from Europe, five from Asia, eight from the Near and Middle East, four from Africa, and three from Oceania.”<sup>53</sup> Glendon traces the drafting history of art. 16 and notes the following contributions.<sup>54</sup>

Canadian John Humphrey included the right to marry in his original draft while French delegate René Cassin added the protection for mothers and children, which eventually found its way into art. 25 (2). The Byelorussian delegate reworked the original proposal and included a reference to the protection of marriage and the family by the State. In response, Cassin added the reference to “society” to clarify that “the principle could and should also be implemented by institutions of civil society, such as churches.” Lebanese delegate Charles Malik wanted to reinforce the centrality of the family and suggested the phrase: “The family deriving from marriage is the natural and fundamental unit of society.” American delegate Eleanor Roosevelt suggested that the right to marry be followed by a reference to the equal rights of men and women upon marriage dissolution. The delegate from Mexico added “without any limitation due to race, nationality and religion.” The controversial part of the article was, in the words of Glendon, the “bold proclamation of equal rights for men and women in marriage.”<sup>55</sup> This caused a problem for some Muslim nations who eventually voted against the article in the

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<sup>49</sup> Id. at 129-31.

<sup>50</sup> Id. at 162.

<sup>51</sup> Id. at 169.

<sup>52</sup> Id. at 169-70.

<sup>53</sup> Id. at 50, 169-70.

<sup>54</sup> Glendon, *supra* note 39, at 93, 153. For a good discussion of the debates over God and nature in relation to this article see Allan Carlson, *The Family is the Natural Unit of Society: Evidence from the Social Sciences*, In *The family in the third millenium*.

<sup>55</sup> Glendon, *supra* note 39, at 153.

UN General Assembly while others accepted the language on the condition that it “did not mean identical rights...which might condone discrimination against women.”<sup>56</sup> Johannes Morsink notes that Saudi Arabia abstained due to the “Muslim interdiction to marrying someone of another faith.”<sup>57</sup>

During the entire drafting process, it is noteworthy that there were strong advocates for the rights of women. Both Indian delegate Hansa Mehta and American delegate Eleanor Roosevelt (who actually chaired the Human Rights Commission) were particularly attentive to the rights of women. Mehta was “battling back home against purdah, child marriage, polygamy, unequal inheritance laws, and bans on marriage among different castes.”<sup>58</sup> And Roosevelt “was completely dedicated to equal opportunities in the workplace and public life.” However, Roosevelt, like other delegates, especially those representing Muslim populations, was adamant that differences between the sexes ought to be considered. She credited mothers with a specific role, different from that of men, which more intimately involved the shaping of children’s lives and the promotion of social issues, both of which contributed greatly to the molding of a nation’s identity.<sup>59</sup> Lastly, there was aggressive support from the women’s lobby due to the efforts of the first chairperson of the Commission on the Status of Women, Mrs. Begtrup of Denmark, and the “steady pressure of the Soviet delegation.”<sup>60</sup>

### 3. THE SUBSTANTIVE INTEGRITY OF THE UDHR

#### 3.1 Two Important Points

In regard to the drafting of the initial document itself, the contributions of two people are particularly noteworthy, Canadian international law expert Dr. John P. Humphrey and civil lawyer René Cassin of France. Humphrey and his “multinational staff” at the Human Rights Division of the UN Secretariat provided research and other assistance to the Human Rights Commission and were eventually entrusted to draft a list of rights for discussion purposes.<sup>61</sup> In response, he and his staff prepared a list of rights, 48 in total, after studying materials that

<sup>56</sup> Id. at 154.

<sup>57</sup> Morsink, *supra* note 39, at 24.

<sup>58</sup> Glendon, *supra* note 39, at 90-1.

<sup>59</sup> Id. at 91 citing Eleanor Roosevelt, *Women in Politics*, in Allid M. Black, *Courage in I a Dangerous World: The Political Writings of Eleanor Roosevelt* 69, 90 (1999). Glendon continues at 91 when she quotes Roosevelt: There are certain fundamental things that mean more to the great majority of women than to the great majority of men. These things are undoubtedly tied up with women’s biological functions. The women bear the children, and love them before they even come into the world...[W]e find [concern for children] in greater or less degree in women who have never had a child. From it springs that concern about the home, the shelter for the children. And here is the great point of unity for the majority of women.

In regard to social issues, Glendon notes at 90: “She [Roosevelt] felt these issues would be neglected if women did not push them. It seemed to her that men in power, even men like her husband who sympathized with her goals, had not devoted enough attention to addressing the country’s social ills.”

<sup>60</sup> Morsink, *supra* note 39, at 117 (See pages 116-129 for his discussion of the women’s lobby and women’s rights).

<sup>61</sup> Id. at 32, 47-50, 57-9.

poured in from numerous governmental and non-governmental entities around the world, and after considering national constitutions, as well as both new and old civil and human rights declarations.<sup>62</sup>

This draft was later transformed, with little substantive change, into a document with an overall logical structure. Cassin, a member of the Commission, Committee and Working Group,<sup>63</sup> created such a structure to ensure that the document would be read as an integral whole. In brief, he viewed “the Preamble, with its eight ‘whereas’ clauses, as the courtyard steps moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth.”<sup>64</sup> The Cassin draft was then further refined and reduced mainly through the work of the drafting Committee, the Human Rights Commission in plenary session and the Economic and Social Council’s Third Committee, and eventually the General Assembly of the United Nations.

Harvard Law Professor Mary Ann Glendon, in her article “Knowing the Universal Declaration of Human Rights” explains how Cassin intended for the document to be read:

Cassin often compared the Declaration to the portico of a temple. (He had no illusions that the document could be anything more than an entryway to a future where human rights would be respected). He saw the Preamble, with its eight ‘whereas’ clauses, as the courtyard steps moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth. The general principles of dignity, liberty, equality, and fraternity, proclaimed in Articles 1 and 2, are the portico’s foundation blocks. The facade consists of four equal columns crowned by a pediment. The four pillars are: the personal liberties (Article 3 through 11); the rights of the individual in relation to others and to various groups (Article 12 through 17); the spiritual, public and political liberties (Article 18 through 21); and the economic, social and cultural rights (Articles 22 and 27). The pediment is composed of the three concluding articles, 28 through 30, which establish a range of connections between the individual and society.<sup>65</sup>

From a reading of the declaration in its entirety, two key points emerge. First, the Declaration’s preambular use of certain language in reference to human dignity and rights (“Whereas recognition” and “Whereas the peoples . . . have... reaffirmed”) means that the document does not grant rights but merely proclaims or recognizes those universal and fundamental rights that are inherent in the dignity of the human person. In other words, these rights are natural to the human person and therefore predate the Declaration and exist irrespective of the pressures connected with culture, politics, ideologies, religions, economics and so forth.

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<sup>62</sup> Id.

<sup>63</sup> Id. at 64.

<sup>64</sup> Glendon, *supra* note 39, at 1163.

<sup>65</sup> Id.

Second, the Declaration's drafters deliberately grounded the document in an ultimate value: human dignity. For example, preambular para. 1 recognizes that "the inherent dignity and ...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Again, preambular para. 5 reaffirms "faith in fundamental human rights, in the dignity and worth of the human person." Then, in the Declaration's body, art. 1 proclaims that "All human beings are born free and equal in dignity and rights."<sup>66</sup>

In sum, taking into consideration that the Declaration merely *proclaims* pre-existing rights (natural rights flowing from human dignity) and must be read as an *organic whole*, one can reasonably conclude that the rights expressed in the UDHR reflect a different dimension of the human person, who is by necessary implication also to be treated in his or her totality. Further, Cassin and other important contributors were fully aware of the contentious issues surrounding the topic of human rights, including the basic questions concerning human rights (What are they? What is their origin? Do they have limits?). Cassin understood that the answers to these questions frequently involved: 1) different understandings of man and society; 2) opportunistic interpretations of various rights; and 3) practical problems in application. However, Glendon notes in her study that these issues were anticipated. In response, the UDHR was deliberately founded on the universal value of human dignity and then embedded in a format which integrated certain interpretative limitations, as discussed below.<sup>67</sup>

### 3.2 Human Dignity

The UDHR recognizes in preambular para. 7 that "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge." The assertion is an important one when one considers that different definitions of human dignity mean that the rights that flow from one definition of human dignity might be hard to reconcile with the rights flowing from another. Without any direct reference to God,<sup>68</sup> however, many "God fearing" peoples and States (e.g. Muslim nations and the Holy See), have nonetheless found a common point for conversation between the various religions, traditions and cultures. The Holy See,<sup>69</sup> for example, having served as a Permanent Observer to the United

<sup>66</sup> See Morsink, *supra* note 39, at 290 ("The words 'inherent,' and 'born' in the first recital and in Article 1 make the same point as did the phrase 'by [their] nature' that was traded away. Together the drafting fragments comprising these words add up to what I shall call the inherence view of human rights. This is the view that human rights inhere in people as such; people have these moral rights because of their membership in the human family, not because of any external force.").

<sup>67</sup> *Id.*

<sup>68</sup> See the discussion of this point in Morsink, *supra* note 39, at 284-290.

<sup>69</sup> For an in-depth study of the history and sui generis legal personality of the Holy See, see Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 CATH. U. L. REV. 291, 291-360 (2001); For a discussion of the international legal personality of the Holy See and her involvement with the rights of children, see also Jane Adolphe, *A Light to the Nations: The Holy See and the Convention on the Rights of the Child* (2002) (self published Ph.D. dissertation, Pontificia Università della Santa Croce, Rome) (on file with author and the University).

Nations since the 1960s, centers this point of convergence in the Declaration's "vibrant defense of man and his transcendental, inviolable, inalienable and irreplaceable dignity."<sup>70</sup> In his 1998 message to the UN General Assembly, Pope John Paul II, head of the Holy See delegation, describes it as "one of the most precious and significant documents in the history of law."<sup>71</sup> In the same year, a document issued from the Pontifical Council for the Family argues that the UDHR reflects how "humanity united to affirm the 'value of the human person', together with the due respect and protection...[and] proclaimed universal truths, universal rights and universal values."<sup>72</sup> It goes on to note "the nations agreed to forgo ideologies and go beyond utilitarianism in order to recognize the ends grounded in the nature of each and every person."<sup>73</sup>

Such an interpretation of the Declaration necessarily flows from a consideration of art. 1 when it states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Here one can persuasively argue that the human person is different from other species, he or she transcends them, because he or she is rational, free, social, and has a conscience. Not every choice, however, is congruent with human dignity or worthiness of the human person (e.g. theft, murder). Authentic freedom is exercised only when it is directed towards those goods that are fitting to the human person who comes from others and depends upon others. This uniqueness in comparison with all other living beings marks the uniqueness of the human person which separates him from any other animal. He or she discovers oneself to be more than the mere visible (e.g. a physical body and part of an exclusively biological world) but seeks dialogue with the invisible world (e.g. through ethics, morals, spirituality, faith, and religion). For its part, the concept of human dignity or worthiness may be described as an innate dignity or a quality of being emanating from the very essence or nature of the human person and thereby a reflection of the substantial and transcendental reality of the human person, as well there is an acquired dignity that is attained when he or she makes decisions for the actual good in accordance with one's innate dignity.<sup>74</sup> In this way, the concepts of the human person and human

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<sup>70</sup> Declaration of the Holy See at the meeting in Buenos Aires (August 5, 1999), *The Family and Life Fifty Years after the Universal Declaration of Human Rights*, in *Enchiridion on the Family 1058* (2000), available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_05081999\\_buenos-aires\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_05081999_buenos-aires_en.html) (last visited Aug. 9, 2004). [Hereinafter Buenos Aires Declaration].

<sup>71</sup> John Paul II, *Message to the President of the UN General Assembly on the Occasion of the 50th Anniversary of the Universal Declaration of Human Rights*, *General Assembly 53rd Session 90th Plenary Meeting*, December 11, 1998 A/53/PV.90; See also Buenos Aires Declaration *supra* note 70, at 1057.

<sup>72</sup> *Human Rights and Rights of Family*, *Conclusion of the Meeting held at Vatican City* (October 24, 1998) in *Enchiridion on the Family 1058* (2000), para. 3 available at [http://www.vatican.va/roman\\_curia/pontifical\\_councils/family/documents/rc\\_pc\\_family\\_doc\\_20001115\\_family-human-rights\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20001115_family-human-rights_en.html) (last visited Aug. 9, 2004).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, paras. 13 and 20. (For a completely subjective definition of human dignity see: the Canadian Ontario Court of Appeal decision *Halpern v. Can.*, [2003] 65 O.R.3d 161 at 78 (wherein the court finds that the very dignity of the human person in same-sex relationships has been violated by their exclusion from the institution of marriage in violation of s. 15 (1) of the Canadian Charter of Rights and Freedoms. The notion of human dignity is defined in a purely subjective manner, namely as whether or not "an individual or group feels self-respect and self-worth.")

dignity are capable of definition; they are not empty notions void of meaning, nor are they completely subjective

This view of human dignity is one that is founded in natural law in a particular way, without any appeal to divine law or revelation for knowledge of it and therefore without the need to compete with any particular religious notions, which may, nonetheless, offer a more profound meaning of human existence. For example, “the Christian understanding of man makes it possible to arrive at a deeper foundation of this reality by making it known that man is the only being who has worth in himself and not only by reason of the species... man is created in the image and likeness of God (Gn 1:27) and thus endowed with an absolute value. The human creature is wanted and loved by God as an end in itself.”<sup>75</sup>

However, the vision of human dignity (contained in art. 1 of the UDHR) is not consistent with all secular philosophies and ideologies. It implicitly rejects a purely collectivist approach to human rights. That is, one that treats the State as the fundamental unit or entity, and as such, has rights that the individual may not violate. According to this perspective, human rights are primarily, “class rights” flowing from the individual’s position within society.<sup>76</sup>

Neither does the UDHR accept the characteristically Western and individualistic position that views the human person as an autonomous free chooser without any responsibilities to other individuals or the community as a whole.<sup>77</sup>

Glendon briefly sums up the situation when she writes: “Cassins’s introductory articles (and the Declaration as ultimately adopted) did implicitly take sides against the extremes of capitalist individualism and socialist collectivism. They also implied a position on the nature of man and society.”<sup>78</sup>

### 3.3 Complementarity of the Sexes

By acknowledging in art. 1 that “all human beings are endowed with reason and conscience,” one may appeal to reason and human experience in order to argue

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<sup>75</sup> Human Rights and the Rights of the Family, *supra* note 72, para. 19. In contrast to the Christian view consider the Indian tradition (e.g., Hinduism, Jainism, and Buddhism) where neither the individual nor society is the starting point; rather, the Dharma, the order of the entire reality, keeps the world together. The individual’s role is “to find one’s place in relation to Society, to the Cosmos, and to the transcendent whole.” R. Panikkar, *Is The Notion of Human Rights a Western Concept?*, in *Human Rights Law* 161-88, (Philip Alston ed., 1996); See also Libreria Editrice Vaticana, *Nel rispetto dei diritti umani il segreto della pace vera, Messaggio di sua santità Giovanni Paolo II per la celebrazione della Giornata Mondiale della Pace, 1° gennaio 1999* 4 (1999); Commissione Teologica Internazionale, *Dignità e diritti della persona umana*, 6 October 1984, EV IX (1983-1985), nos. 1036-1063, especially nos. 1053-1057, (wherein the concept of human dignity and human rights are discussed in the context of first, second, and third world situations).

<sup>76</sup> See the description of Marxism by Panikkar, *supra* note 75, at 161-88.

<sup>77</sup> See the discussion of rights discourse in the United States as absolutist, insular, individualistic and missing language with respect to responsibilities, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

<sup>78</sup> Glendon, *supra* note 39, at 68.

that the human person is born male or female and that this sexual complementarity brings couples together in marriage to form a family. Indeed, this human drama is recognized and presented in logical sequence in art. 16 of the UDHR:

1. 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

These elements are further fleshed out in art. 25 (1) and (2) respectively, when it provides that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family." Further, "Motherhood and childhood are entitled to special care and assistance."<sup>79</sup>

Turning now to arts. 1 (on dignity), 16 (on right to marriage and natural family) and 25 (2) (on motherhood and childhood) of the UDHR, one may argue that the 1948 Declaration is acknowledging the fact that "the natural root of the family is marriage and the root of marriage is the personal nature of man (man and woman)."<sup>80</sup> The natural movement to marriage is on two different planes: the union between two personal beings who enjoy equal dignity as human persons but also the union between two personal beings in their different respective sexual dimensions (masculinity and femininity), which is naturally ordered to procreation. This of course does not imply that a marriage does not exist without children, nor that there is an inferiority or superiority of either sexual modality, nor that the value of women should be solely restricted to her natural capacity to procreate, nor that women should be confined to the household or unjustly discriminated against in social, cultural, economic and political sectors of society, nor that persons with homosexual tendencies are worthy of less respect as human beings.<sup>81</sup>

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<sup>79</sup> Art. 25 of the UDHR in full reads: (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection. Universal Declaration of Human Rights, G.A. Res. 271A (III), U.N. GAOR, 3rd Sess., U.N. Doc.A/810 (1948), available at <http://www.udhr.org/UDHR/default.htm> (last visited Aug. 9, 2004).

<sup>80</sup> Viladrich discusses the natural family based on marriage and the significance of these terms not in reference to the UDHR but more generally. Viladrich, *supra* note 2, at 22 ; See also Carreras, *supra* note 3, at 30-2; Franceschi *supra* note 3, at 380-401; Maria Adelaide Raschini, *Ontologia & fenomenologia del matrimonio*, 38 *Studi Cattolici* 536 (1994); Gerald Bradley and Robert George, *Marriage and the Liberal Imagination*, in *Defence of Natural law* (1995); Francesco D'Agostino, *Should the Law Recognize Homosexual Unions?*, in *Christian Anthropology and Homosexuality* 88-9 (1997).

<sup>81</sup> Viladrich, *supra* note 2, at 82-3. See also the natural law theorists which would likely agree with the same propositions, *supra* note 81. In addition, the Holy See has taken great pains to re-affirm that the differences in the sexes should be understood and celebrated instead of labeled or treated as inferior or superior. See Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the collaboration*

Further, it can be persuasively argued that the natural complementarity between the two sexes is, at its most basic, a mutual attraction to one another, which eventually leads to a community of life and love, that is in turn, established by the parties themselves with an act of free consent. The object of this consent is to mutually give and receive each other as persons in their totality (e.g. physical, psychological, emotional and spiritual) and respective sexual dimensions.<sup>82</sup>

Moreover, if the man and woman have just agreed to give and receive each other as a person, and the person is an integral whole, it necessarily follows that the term “totality” must refer to a perpetual, fruitful and exclusive relationship.<sup>83</sup>

This does not mean that persons melt into a single person or that the uniqueness of the person or his or her realization as a human being is suffocated;<sup>84</sup> nor that marriage without children when the couple has been open to the possibility is not a marriage;<sup>85</sup> nor that a woman cannot separate from an abusive husband; nor that divorce is completely prohibited since it could be the last resort (e.g. reconciliation or permanent separation may not be possible) in times of family breakdown to safeguard civil effects: legal rights, protect children or inheritance. In regard to this last point, an important consideration is that any divorce should not be driven and trivialized by a “divorce mentality” (e.g. one has a right to a divorce). Having said that, however, one cannot ignore the fact that the natural family as acknowledged in the 1948 UDHR is presently embedded in Western culture, which now supports and promotes a divorce mentality. Therefore, it is difficult for people to understand that despite divorce spouses have an indissoluble juridical bond founded in nature.

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of men and women in the Church and in the World (July 31, 2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) (last visited Aug. 9, 2004) (which states the following: “Man is a person, man and woman equally so. ...Their equal dignity as persons is realized as physical, psychological and ontological complementarity, giving rise to a harmonious relationship of ‘uni-duality...Sexuality characterizes man and woman not only on the physical level, but also on the psychological and spiritual, making its mark on each of their expressions.’ It cannot be reduced to a pure and insignificant biological fact, but rather ‘is a fundamental component of personality, one of its modes of being, of manifestation, of communicating with others, of feeling, of expressing and of living human love.’”) See also Letter to Women, Pope John Paul II (June 29, 1995) available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/letters/documents/hf\\_jp-ii\\_let\\_29061995\\_women\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_29061995_women_en.html) (last visited Aug. 9, 2004); Apostolic Letter w Mulieris dignitatem (August 15, 1988) available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_letters/documents/hf\\_jp-ii\\_apl\\_15081988\\_mulieris-dignitatem\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html) (last visited Aug. 9, 2004); Letter to Families, Pope John Paul II (Feb. 2, 1994), available at <http://www.priestsforlife.org/magisterium/papal/94-02-02lettertofamilies.htm> (last visited Aug. 9, 2004); John Paul II, Post-Synodal Apostolic Exhortation Familiaris consortio (Nov. 22, 1981) available at <http://wflf.org/FamCons.html> (last visited Aug. 9, 2004).

<sup>82</sup> Viladrich, *supra* note 2, at 165-166.

<sup>83</sup> *Id.* at 105-6. As Viladrich explains, totality can be understood in two senses: in what it contains (the essential) and in how long it lasts (the existential). For example, were a person to give a bag of carnation seeds to a friend, the gift would include everything contained within the bag, namely the totality of the seeds but also the totality of the seeds in their projected natural growth in the future as flowers.

<sup>84</sup> *Id.* at 103-4.

<sup>85</sup> See George *supra* note 80, at 146 (wherein he states that the intrinsic point of sex in any marriage, fertile or not, is the basic good of marriage itself, considered as a two-in-one flesh communion of persons that is consummated and actualized by acts of the reproductive type). In response to the arguments that are made in support of same-sex marriage along these same lines, see also Jane Adolphe, *The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations*, 18 *BYU J. PUB. L.* 479 (2004).

Finally, the consent, which establishes marriage, requires a public manifestation, the form of which is usually established by the State. This is so because of the unique human and social significance of marriage, which transcends even the couple and gives life to the phrase “the fundamental unit of society.”<sup>86</sup> However, this should not obscure the fact that consent alone creates a natural legal bond (a duty in justice to love) which is oriented to: 1) children (their nurturing and education); 2) the good of the spouses (their mutual assistance and support of each other as well as their individual growth as human beings through the raising of children); and 3) the good of society (the birth and education of virtuous citizens and the family’s service to society).

### 3.4 Solidarity

As previously mentioned, the International Bill of Rights (UDHR, ICCPR, and ICESCR) does not embrace the Western view of man as an isolated chooser. The natural reality described above, as particularly embraced by the UDHR, reflects the sociability of the human person. This may also be described as solidarity, an opening towards others, which unfolds in the couples’ sexual relations on essentially three different levels: 1) the establishing of a community between man-woman, the marital community, which creates the publicly acknowledged status as husband and wife; and 2) which, in turn, leads to a community between the parent-child, the parental community, which establishes the publicly important status as mother and father, brother and sister, son and daughter;<sup>87</sup> and 3) then culminates in the societal community, the relationship between the family and the State, where the fullness of the phrase the “family as the basic unit of society” is realized.<sup>88</sup>

The sociability or solidarity of man is specifically recognized in art. 1 of the UDHR when it states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and *should act towards one another in a spirit of brotherhood.*” (Emphasis added.) But it is not just a matter of one article. As was previously noted, the document itself is intended to be read as a whole which begins at “the Preamble, with its eight ‘whereas’ clauses, as the courtyard steps moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth.”<sup>89</sup>

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<sup>86</sup> See D’Agostino, *supra* note 80 (discussion of the natural reality of marriage).

<sup>87</sup> *Id.*; see also Carreras, *supra* note 3, at 26-8 (discussing the role of the marriage feast, which recognized the sacred nature of marriage through the celebration of the physical union of the two sexes. He explains that marriage happened in phases in the Judeo-Christian tradition whereby the couple was given in marriage by the families at a young age in the first phase and then brought together publicly in the second phase where the community celebrated together and then led the girl to the house of her husband for consummation of the marriage and initiation of cohabitation).

<sup>88</sup> Viladrich, *supra* note 2, at 64. It is noteworthy that with respect to the second level, Viladrich uses the expression “family community.” I have chosen the term “parental community” to minimize confusion. In my view the family is created at the moment of the valid exchange of consent. The fact that spouses are unable to bear children does not mean that they are not a family.

<sup>89</sup> Glendon, *supra* note 39, at 1163.

## 4. IS ART. 16. OF THE UDHR CUSTOMARY INTERNATIONAL LAW?

### 4.1 introduction

Returning now to the question whether Art. 16 has become a principle of customary international law, due to the potential depth and breadth of such an analysis this paper does not attempt to exhaust all possible sources that could be relevant to a determination of this issue.<sup>90</sup> Consideration of State practice, and *opinio juris*, the two central elements in the test that a principle has become custom will relate to a review of international treaties that followed the UDHR and the opinion of scholars on the point.

### 4.2 Treaties: Old developments

Both the 1966 International Covenant on Civil and Political Rights (ICCPR)<sup>91</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>92</sup> which set up monitoring committees and special procedures for securing compliance, have been assumed and accepted by State Parties with their signature and ratification.<sup>93</sup> The ICCPR (152 State Parties) and the ICESCR (149 State parties) are legally binding treaties.<sup>94</sup> They have re-affirmed the principle of the natural family and bind the State Parties in their obligations to each other, usually after they have signed and ratified the agreements. Article 23 (1) of the ICCPR expressly repeats art. 16 (3) of the UDHR in declaring “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>95</sup> Art. 10 (1) of the ICESCR takes article 16 of the UDHR a step further, in providing that States must ensure “*the widest possible protection and*

<sup>90</sup> See Gionathon Curci Staffler and Simon Curran, The Evolution of the Legal Concepts “Family” and “Marriage” in the EU Legal System and Its Impact on Society, In *The Family in the third millenium* (forthcoming 2005). (In relation to the European situation, they conclude that “Overall, we can observe a conservative stance; the European Court of Justice is reluctant to redefine the concept ‘marriage’...This not only conforms to sound legal principles, but ultimately reaffirms the court’s emphasis of the necessity of the traditional concept of family.”)

<sup>91</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 24, 1976).

<sup>92</sup> International Covenant On Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S 3 (entered into force Jan.3 , 1976).

<sup>93</sup> ICCPR and ICESCR both entered into force in 1976. As of June 09, 2004, the Covenants have 152 and 149 State Parties, respectively. Office of the UN commissioner for Human Rights, Status of Ratification of Principal International Human Rights Treaties (2004), available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Aug. 18, 2004).

<sup>94</sup> For the status of the two Covenants see: Office of the UN commissioner for Human Rights, Status of Ratification of Principal International Human Rights Treaties (2004), available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Aug. 18, 2004).

<sup>95</sup> Art. 23 of the ICCPR reads in full: 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 24, 1976).

*assistance* should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”<sup>96</sup> (Emphasis added). There are other binding treaties that also proclaim the natural family and its need for protection and assistance. For example, art. 17 of the 1969 American Convention on Human Rights adopts the exact language of article 16 (3) of the UDHR.<sup>97</sup> Art. 15 of the 1988 “Protocol of San Salvador” to the American Human Rights Convention expands on art. 16 (3) and reads: “The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.”<sup>98</sup> Art. 18 of the 1981 African Charter goes even further in recognizing the pedagogical value of the family when it states: 1) “The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals. 2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.”<sup>99</sup>

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<sup>96</sup> Art. 10 of the ICESCR reads in full: States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law. International Covenant On Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S.3 (entered into force Jan.3 , 1976).

<sup>97</sup> American Convention on Human Rights, Nov. 22, 1969, art. 17, 1144 U.N.T.S. 123. The full text reads: Article 17 (Rights of the Family): “(1)The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. (2)The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention. (3) No marriage shall be entered into without the free and full consent of the intending spouses. (4) The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests. (5) The law shall recognize equal rights for children born out of wedlock and those born in wedlock.”

<sup>98</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov 17, 1988, art. 15. O.A.S. Treaty Series No. 69. The remaining text reads: Article 15 (Right to the Formation and the Protection of Families): “(2) Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation. (3) The States Parties hereby undertake to accord adequate protection to the family unit and in particular: a. To provide special care and assistance to mothers during a reasonable period before and after childbirth; b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years; c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities; d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.” See also Article 16 (Rights of Children): “Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.”

Finally, art. 18 (entitled “Protection of the Family”) of the 1990 “African Charter on the Rights and Welfare of the Child,” provides: “The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development.”<sup>100</sup>

In sum, the repeated reaffirmation of this original UDHR family language suggests that it has been elevated to a binding principle of international law. Indeed, repeated inclusion of the language in conventions such as the ICCPR and ISESCR strongly supports the conclusion that it reflects customary international law.

### 4.3 Treaties: New Developments

#### 4.3.1 Introduction

In contrast to the vision of solidarity in the International Bill of Rights there has been a more recent push to promote a Western approach to human rights. Maria Sophia Aguirre and Ann Wolfram explain how various factions have attempted to introduce “a new definition of the family: ‘family in its various forms,’”<sup>101</sup> a definition which “is broader than any prior understanding of nuclear, extended, or even female-headed families and leaves the public and its policymakers with an ambiguous term that potentially includes any group wishing to call itself ‘family.’”<sup>102</sup>

Activists working within the United Nations system argue that the 1948 UDHR is “practically obsolete and in need of major modifications, if not outright substitution.”<sup>103</sup> Such a perspective views “human rights as evolving and thereby regard later, less binding and less comprehensive documents as more important because they are more attuned to progress.”<sup>104</sup> They promote the family and its interrelationships “in terms of an evolving, progressive notion of rights.” For these activists, “the ties that bind the family are no longer permanent or sacred, but transitory, breakable, and subject to intervention and redefinition.”<sup>105</sup>

<sup>99</sup> African [Banjul] Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986). The remaining text reads: (3) The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. (4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

<sup>100</sup> African Charter on the Rights and Welfare of the Child, 1990, art.18, O.A.U. Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999). The remaining text of Article 18: Protection of the Family reads: (2) “States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child. (3) No child shall be deprived of maintenance by reference to the parents’ marital status.”

<sup>101</sup> Maria Sophia Aguirre & Ann Wolfram, *United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends*, 16 *BYU J. PUB. L.* 113, 116-7 (2002).

<sup>102</sup> *Id.* at 117.

<sup>103</sup> *Id.* at 118.

<sup>104</sup> *Id.* at 118.

<sup>105</sup> *Id.* at 118-119.

Such efforts have preferred to use “soft law” (non-legally binding instruments) as the vehicle for changing norms, such as the 1994 International Conference on Population and Development (ICPD) and the Cairo+5 meetings of 1999.<sup>106</sup> However, as noted by Gonzaga Law Professor Robert Araujo, this Western vision often “reflect[s] views of influential NGOs and ‘experts’ assigned to U.N. Committees rather than perspectives of member States.”<sup>107</sup> Further, despite the introduction of “new rights” (e.g. reproductive healthcare, and family planning) and the emphasis on “various forms of family,” States still recognize that “highest levels of protection [are] to be given to families, parents, children, and their relationships with one another.” By way of example, Araujo points to Principle 9 of the ICPD: “The family is the basic unit of society and as such, should be strengthened. It is entitled to receive comprehensive protection and support. In different cultural, political and social systems, various forms of the family exist. Marriage must be entered into with the free consent of the intending spouses, and husband and wife should be equal partners.”<sup>108</sup>

A brief perusal of recent legally binding documents demonstrates that the acknowledgement of different living arrangements need not obscure the special protection and assistance that should be given to the natural family. A study of the three documents comprising the International Bill of Rights and more recent legally binding documents emphasizes how the social dimension of the human person has remained intact, as has the acknowledgement of the natural family. When documents have drifted from this essential position, more than a few States have objected orally and then entered reservations stating their objections. Given the number of such objections, one can reasonably argue that the relatively recent attempts to modify the position established by consensus in the original documents have not succeeded in establishing a contrary custom under international law. To flesh out this argument we will examine some of the international provisions which refer to family-child relationships, parent-child relationships, and female-male relationships. This paper does not treat the issue of transgenerational relationships.

#### 4.3.2 *Family Centered Relationships*

The 1989 Convention on the Rights of the Child, ratified by 192 State Parties, reaffirms the centrality of the natural family founded on marriage in preambular para. 3 when it incorporates the UDHR and International Covenants on Human Rights, which “proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein . . . .”

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<sup>106</sup> Id. at 120.

<sup>107</sup> Robert Araujo, *Sovereignty, Human Rights, and Self-determination: The Meaning of International Law*, 24 *Fordham Int'l Law* 1503 (2001).

<sup>108</sup> Id. at 1507.

Moreover, there are numerous provisions which recognize the fundamental importance of the family and the communitarian perspective of children's rights which treat children as part of a social fabric, born into a social context known as the family, where the value of relationships must be balanced with individual rights and duties.<sup>109</sup>

For example, Preamble paras. 5-7: "[T]he family is the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children: ... the child . . . should grow up in a family environment . . . the child should be fully prepared to live an individual life in society..." Similarly, according to art. 8 the child has a right "to preserve his or her identity including... family relations." Moreover, art. 16: "A child shall not be subjected to arbitrary or unlawful interference with his or her . . . family." Finally, Art 20 provides that where separation of the child from his or her family is required either temporarily or permanently, an alternative family environment setting shall be sought by the State.

#### 4.3.3 Parent-child Relationships

There are also articles which acknowledge the parent-child relationship. For example, article 26 of the UDHR recognizes that "[p]arents have a prior right to choose the kind of education that shall be given to their children." In addition, art. 25 gives prominence to the essential bond between mother and child when it declares "motherhood and childhood are entitled to special care and assistance." Similar themes have been picked up in the 1966 International Covenants. Art. 18(4) of the ICCPR provides that State Parties "undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." ICESCR states in Article 10(2) that "special protection and assistance" should be given to mothers before and after childbirth.

The 1989 Convention is very aggressive about promoting a healthy parent-child relationship through State intervention and assistance, a fact which has been the subject of much debate.<sup>110</sup> However, it nonetheless affirms a key principle well known to many States, namely, the best interests of the child standard embodied in art. 3. Yet this article is very explicit in acknowledging that the rights of the child must be seen within the family context and balanced with those of the parents when it requires that the standard "tak[e] into account the rights and duties of...parent[s]."

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<sup>109</sup> Please note that I have refrained from introducing the full text for reasons of brevity. Therefore, for a consideration of the provisions in full, see Convention on the Rights of the Child, Nov. 20, 1989, 144 U.N.T.S 123, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Aug. 10, 2004).

<sup>110</sup> For a critique of this approach and the Convention itself see Jane Adolphe, *supra* note 69.

Moreover, the familial context and parental rights are once again emphasized in art. 5 which highlights that State Parties must “respect the responsibilities, rights, and duties of parents” in guiding and directing the child’s development. And art. 18(2) admonished States to appreciate that “the primary responsibility for the upbringing and development of the child,” lies with parents or legal guardians, but shall take on the important task of rendering “appropriate assistance to parents.” Indeed, according to arts. 9, 10, and 19, the State has a compelling interest to intervene when a parent is unwilling or unable to comply with his or her primary responsibilities, including that of protecting the child from abuse and neglect. To this end, a child may even be separated from his or her parents according to the best interests principle but when such separation is required the child has a right to “maintain personal relations and direct contact with both parents on a regular basis except if it is contrary to the child’s best interest.”

Finally, children’s rights are no longer defined exclusively as involving care and protection, but on a more controversial note, include political and civil rights, such as art. 13 (freedom of expression), art. 14 (freedom of religion), art. 15 (freedom of assembly), and art. 16 (right to privacy).<sup>111</sup> Undoubtedly, these provisions would require State assistance and intervention if they are directed against the parents as opposed to the State itself or third parties. Hence, due to fear that an overly individualistic interpretation of these rights might unduly increase State intervention into family life, obscure the centrality of the family, and undermine parental duties and rights, many States have entered reservations.<sup>112</sup> Indeed, such a radical interpretation of these “adult-like” rights has often and unfortunately been promoted in recommendations given by the Committee on the Rights of the Child to State Parties.<sup>113</sup> However, such interpretations need not be accepted by State parties, who remain the final interpreters of the document. A more consistent interpretation of the CRC, however, commencing with the preamble that recognizes a communitarian perspective of children’s rights, clearly views children as members of a family. They are not

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<sup>111</sup> This new grouping of children’s rights has contributed to the lack of domestic and international consensus on the meaning of children’s rights under the Convention, the main question being, how are such rights are to be balanced with those of the parents and the family? Two major factors point to this fundamental controversy: 1) the numerous interpretative declarations and reservations that have been entered by State Parties on the topic of parental authority. See Kofi Annan, *CRC/C/2/Rev.7, Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child: Note by the Secretary-General*, Mar. 12 1998. And 2) the conclusions in the Canadian Coalition for the Rights of Children, *The Convention on the Rights of the Children: How does Canada Measure Up* (1999), [hereinafter *Measure Up Report*] available at, <http://www.rightsofchildren.ca/reports.page12.htm> (last visited Sept. 30, 2002). It reads, “In the absence of widespread public discussion, there is little consensus about children’s fundamental freedoms. Are these rights [Arts. 13, 14, 15] inherent or do they need to be earned? What are the reasonable limits? What are unreasonable infringements? How can the tension between children’s rights and parent’s be resolved? How can rights in the private sphere be monitored? How are community and school standards determined in a pluralistic society?”

<sup>112</sup> For a critique of how the provisions of the Convention lend themselves to a radical individualistic interpretation, which has unfortunately been reinforced by the Committee in the Rights of the Child see Adolphe, *supra* note 109. To study the content of the reservations to the Convention on the Rights of the Child, see Doc. A/RES/44/25 and depositary notifications C.N.147.1993. TREATIES-5 of 15 May 1993 [amendments to article 43 (2)]; and C.N.322.1995.TREATIES7 of 7 November 1995 [amendment to article 43 (2)].

<sup>113</sup> For a recent study of the problems associated with the Convention and the Committee on the Rights of the Child see Adolphe, *supra* note 69.

isolated persons - this means that any interpretation of “adult-like” rights must be read in light of and appropriately balanced with familial relationships and parental rights and responsibilities.<sup>114</sup>

#### 4.3.4 Female-Male Relationships

As previously discussed, the natural family endorsed in the UDHR reaffirms the essential and objective truth about the dignity and worth of the human person and in the equal rights of men and women. The theme is picked up again in art. 1 when it provides that “all human beings are born free and equal in dignity and rights.” However, due to problematic trends in societies across the globe, the interests of women have been felt to warrant special emphasis from the international community.

Faced with increasing amounts of unjust discrimination, mistreatment, lack of respect and even violence against women within the family (disturbing and inappropriate distortions of family), as well as in social, political, and economic environments, the United Nations General Assembly responded in 1979 with the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>115</sup> This Convention, ratified by 177 State Parties, acknowledges in preambular para. 6 that discrimination against women is an ongoing concern and reiterates that such discrimination “violates the principles of equality of rights and respect for human dignity.”<sup>116</sup> In specific regard to the family, preambular para. 13 wisely emphasizes “the great contribution of women

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<sup>114</sup> To be consistent with the International Bill of Rights and the Convention provisions relating to family and parental duties/rights, application by States should never be overly individualistic. The applicable rules for interpretation of treaties are set out in the Vienna Convention on the Law of Treaties which requires that a treaty must be interpreted, according to art. 31, in “good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, available at [http://www.unog.ch/archives/vienna/vien\\_69.htm](http://www.unog.ch/archives/vienna/vien_69.htm) (last visited Aug. 10, 2004). It is well accepted that the legislative intent is generally expressed in the “object and purpose” of the treaty and the preamble is the first place in which international scholars and lawyers look. In the case of the Convention on the Rights of the Child, the Preamble (paragraphs 5, 6, 7) reveals that the treaty was drafted to reinforce the importance of the family in relation to children’s rights. Convention on the Rights of the Child, Nov. 20, 1989, art. 5-7, 144 U.N.T.S. 123, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (last visited Aug. 10, 2004). Indeed, the preambular provisions clearly put children’s rights in context, that is, within the family. Therefore, from a consideration of the international rules of interpretation together with the preambular provisions, one may conclude that this new category of children’s rights can never be interpreted in a way that is overly individualistic and absolutist in a way that undermines the natural family based on marriage and the duties/rights of parents. See also Jeff Le Pere, *The Convention on the Rights of the Child: A Familial Perspective 6-7* (1994) (unpublished thesis presented to the Faculty of Simon Greenleaf University in partial fulfillment of the requirements for the Degree Master of Arts in International Human Rights) (on file with the author); Ian Sinclair, *The Vienna Convention on the Law of Treaties* 128 (2d ed. 1984); Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 156-178 (1990).

<sup>115</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with Article 27(1).

<sup>116</sup> See Office of the UN commissioner for Human Rights, Status of Ratification of Principal International Human Rights Treaties (2004), available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Aug. 18, 2004).

to the welfare of the family and to the development of society” and underlines “the role of both parents in the family and in the upbringing of children” and highlights the fact that “the role of women in procreation should not be a basis for discrimination.”<sup>117</sup> Further, art. 16 notes that State parties shall take all appropriate measures “to eliminate discrimination against women in all matters relating to marriage and family relations.” Moreover, State parties must ensure an equal right “to enter into marriage, the right to free consent to marriage, the same rights and responsibilities during marriage and at its dissolution, and the same rights and responsibilities as parents.”

However, there are controversial phrases and provisions. For example, many State parties feared could promote a new paradigm of “polymorphous sexuality”<sup>118</sup> (e.g. heterosexuality, homosexuality, bisexuality, transsexuality, etc.). Preambular para. 14 provides that “changes in the traditional role of men as well as the role of women... in the family [are] needed to achieve full equality between men and women.” State parties are obliged in art. 5(a) to take all appropriate measures “to modify the social and cultural patterns of conduct of men and women... or ...stereotyped roles for men and women.” Another example, is that some State parties opposed the inclusion of abortion under the term “family planning” in art. 14(b) which provides that State parties “shall ensure to such women the right... to have access to... family planning.”

As a result, concerned State parties have entered reservations in an attempt to ensure: 1) that the centrality of the natural family based on the human person (male and female) is sustained and 2) the health and safety of women or the foetus is recognized, both within the limits of national law and/or religious law.<sup>119</sup>

The number and extent of these reservations again demonstrates that the novel interpretations of “family” and human sexuality have not risen to the level of a contrary, binding and preemptive norm of customary international law so as to even arguably supersede the documents comprising the International Bill of Rights and its progeny.

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<sup>117</sup> It is noteworthy that when the document mentions maternity it prefaces the reference with “social significance of” which undermines the natural reality of marriage. The provision in full reads as follows: “Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.”

<sup>118</sup> The expression is taken as used in the Letter to the Bishops of the Catholic Church on the collaboration of men and women in the Church and in the World, paragraph 2 (July 31, 2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) (last visited Aug. 10, 2004).

<sup>119</sup> For the content of the reservations see CEDAW/C/97/4, Reservations, 16th session, New York, 13-31 January 1997, Item 8 of the provisional agenda, available at [http://www.unhchr.ch/tbs/doc.nsf/0/c851d16e4b88f2b6c12563ea00551ec4/\\$FILE/N0603106.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/c851d16e4b88f2b6c12563ea00551ec4/$FILE/N0603106.pdf) (last visited Aug. 18, 2004).

## 4.4 Scholars

### 4.4.1 Proponents

Having reviewed the treaties following the UDHR, the question arises as to what scholars are saying about whether the drafters of the UDHR produced a document that has developed from a mere usage into customary international law and therefore binding on States? To phrase it another way, whether the document has been universally or nearly universally accepted by all States?

In 1947 a group of thinkers gathered together at the behest of the Educational, Scientific and Culture Organization of the United Nations (Unesco) which established a Committee on the Theoretical Basis of Human Rights to consider the origin and source of rights and the meaning of the universality of human rights in a pluralistic world. The Committee, composed of a notable group of philosophers, solicited opinions and papers from other philosophers, scholars and politicians from around the world including thinkers from the Confucian, Hindu, Muslim and European traditions.<sup>120</sup>

This Unesco Committee concluded that various cultures, philosophies and religious traditions have affirmed a set of common beliefs about basic human rights although such convictions had been articulated in various ways (e.g. emphasis on duties instead of rights) and supported with different philosophical principles.<sup>121</sup>

The agreement on certain rights could be viewed, according to the Unesco Committee, "as implicit in man's nature as an individual and as a member of society and to follow from the fundamental right to live."<sup>122</sup> Indeed, when the UDHR was first approved by the UN General Assembly in 1948, only Saudi Arabia made an objection on cultural and religious grounds in claiming that the document was a product of Western thought (e.g. right to marry and the freedom of religion.)<sup>123</sup>

Moreover, various international scholars have argued that the nearly universal acceptance of the UDHR in particular, and the International Bill of Rights as a whole, is very strong evidence of their status as customary international law.<sup>124</sup> As previously mentioned, Vratislav Pechota argued that the "the Universal Declaration ...has become a standard of reference and a practical guide for UN organs whenever human rights issues face them... set[ting] into motion its gradual transformation into a source of customary international law."<sup>125</sup> A leading

<sup>120</sup> Glendon, *supra* note 39, at 51.

<sup>121</sup> *Id.* at 221.

<sup>122</sup> *Id.* at 77.

<sup>123</sup> *Id.* at 222.

<sup>124</sup> See e.g. Sonja Starr & Lea Brillmayer, Family Separation as a Violation of International Law, 21 Berkeley J. Int'l L. 218 (2003); April Adell, Note, Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees, 24 HOFSTRA L. REV. 795-6 (1996).

<sup>125</sup> Pechota, *supra* note 41, at 38.

international law figure Mr. Humphrey Waldock argued as early as 1965 that the UDHR, in its entirety, had become a part of customary international law.<sup>126</sup> In regard to art. 16(3), more recently, scholar and lawyer Leonard Storchevoy has asserted:

In the modern era of legal globalization, protection of family – traditionally, an area in the domain of national law – has become a matter of international law concern. This matter is directly addressed by the United Nations Universal Declaration of Human Rights, an authoritative source of customary international law, which proclaims: “The family is the natural and fundamental group unit of society and is entitled to protection by the society and the State.”<sup>127</sup>

#### 4.4.2 Opponents

However, numerous objections have been raised that call into question the universal character of the document, and thereby its substantial acceptance by States as a legally binding document. The UDHR has been attacked for being a Western document and promoting cultural imperialism. This is not a new objection. According to Glendon, quite early on the UDHR was pulled into “verbal cold war battles” and then utilized by both sides of the political and ideological debate.<sup>128</sup>

The first objection to the UDHR is that many nations were not represented in 1948 when the UN General Assembly vote took place (e.g. States under colonial rule, defeated Axis powers and their allies). This may be true, but in response Glendon notes that when one reflects upon those States that participated in the Third Committee meetings, a different picture comes to light.<sup>129</sup> There was unquestionably a strong Latin and North American, European, and Communist bloc presence. Even Asian cultures were well represented (e.g. China, India, Pakistan, Burma, Philippines and Siam). In addition, there was a strong Islamic presence (e.g. Afghanistan, Egypt, Iran, Iraq, Pakistan, Saudi Arabia, Syria, Turkey, Yemen, India and Lebanon.) And even the Buddhist tradition had a voice (e.g. Burma, China, and Siam), while the African continent also held its own (e.g. Ethiopia, Liberia, and South Africa).

Furthermore, some of the most important and active members on the Human Rights Commission were well versed in a variety of various religious traditions

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<sup>126</sup> See Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 14 INTL & COMP. L.Q. (SUPP. PUBL. NO. 11), 15 (1965). He was Chichele Professor of Public International Law from 1947-1973 ; former President of the International Court of Justice and the European Court of Human Rights ; and former Member, International Law Commission see for example his biography at <http://denning.law.ox.ac.uk/PIL/pilwho.shtml> (last visited March 7, 2005)

<sup>127</sup> Leonard Storchevoy, *The Right to Family Reunification in the Immigration Law of the Commonwealth Caribbean and the United States: A Comparative Study*, 7 TOURO INTL L. REV 177, 178 (1997).

<sup>128</sup> Glendon *supra* note 39, at 194. For a more detailed discussion of the issue see *id.* at 193-219.

<sup>129</sup> *Id.* at 225.

and cultures. Glendon carefully outlines the thoughts and actions of important non-western protagonists behind the UDHR. For example, at one point she describes Charles Malik of Lebanon as a “crossroads of many cultures” and Peng-chun Chang of China as “a playwright, musician, educator, and seasoned diplomat, devoted to traditional Chinese music and literature but conversant with Islamic and Western culture as well.”<sup>130</sup> In regard to both, Glendon notes that

not only did each contribute significant insights from his culture, but each possessed an exceptional ability to understand other cultures and to ‘translate’ concepts from one frame of reference to another. Those skills, indispensable for effective cross-cultural collaboration, were crucial to the successful adoption of the Declaration without a single dissenting vote.<sup>131</sup>

Another objection is that Humphrey’s draft of rights was largely based on the world’s existing and proposed European, North and South American constitutions and declarations. In response again, while correct, this fact alone does not destroy the universal nature of the document. Indeed, Glendon notes that the declaration, as described above by Cassin, is not based on the absolutist individualistic traditions of the Anglo-American tradition founded in the thought of John Locke and John Stuart Mill.<sup>132</sup> Rather the document pays attention to the family and the greater community; it also incorporates a concept of rights that acknowledges correlative duties, all of which is more compatible with the traditions in Africa and Asia.

Professor Robert Araujo succinctly articulates another argument frequently made by international commentators: the UDHR should be “ridiculed for [its] archaic version of human rights and [its] disinterest in ‘true’ liberty,” for protecting “not only the family, the rights of parents, and the interests of the nation, but also the rights of religious and ethnic communities to preserve and protect their traditions.”<sup>133</sup> He rejects this argument and argues that this notion of liberty exalts the autonomous individual and severs him or her from the community. In brief, this predominately Western version of rights rejects the notion of solidarity in favor of an absolutist vision of the human dignity based on a philosophy of rights that is foreign to the UDHR and its progeny.<sup>134</sup>

Further, the notion is in direct conflict with the sovereignty of a people or nation and the right to self-determination, especially in matters relating to the more

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<sup>130</sup> Id. 33.

<sup>131</sup> Id. 226.

<sup>132</sup> Id. 227.

<sup>133</sup> The trend is noted and rejected in Araujo, *supra* note 107, at 1525. For a contrary perspective which accepts the redefinition of family in international law but argues for the protection of all family forms in international law see Stefan A. Riesenfeld, *Family Separation as a Violation of International Law*, 21 *Berkeley J. Int’l L.* 213 (2003).

<sup>134</sup> Araujo, *supra* note 107, at 1530-1.

traditional view of the natural family and the rights and duties of its members.<sup>135</sup> Indeed, Araujo argues that these values are at the “heart of human rights. In order for the rights we claim today to be inviolable, eternal, and universal, they must be shared by those of tomorrow. But if those heirs are carefully selected by the present members of the race, something is inordinately wrong about the meaning of human rights.”<sup>136</sup>

Another objection is raised by a few who argue that the UDHR reflects a vision of marriage and family which rejects polygamous marriages the cornerstone of some religious and cultural practices. In response, it is submitted that such traditions do not necessarily conflict with the development of the natural right to marry (a man and a woman) articulated herein. This is true for the following reasons: 1) the polygamous marriage in Islam is based on a religious perspective of marriage founded in the Koran, and one that does not prohibit the marriage between one man and one woman (Kor. 4:3); 2) polygamy under Islam is limited to four wives and the strict requirement that they be dealt with justly and equitably (in material needs and affection) (Kor. 4:3), has led to an increased practice of monogamy;<sup>137</sup> and 3) strong cultural and traditional customs (e.g. shame of childlessness, heightened social status, occupation for family sustenance) which have supported polygamy in some countries, such as many African countries, are changing with trends toward greater economic development. Indeed, over time “with improved science and technology,... high cost and standard of living, education and other advancements,” monogamy is more and more becoming the norm.<sup>138</sup>

Some argue that the UDHR is grounded in secular relativism that does not produce absolute values. “The root of this conflict is in the lack of the actual theory of universal man with universal human primordial nature, universal innate reason and universal ethical values.”<sup>139</sup> In response, this paper has attempted to make the case that the drafters of the UDHR intended to promote a universal nature of man that has been obscured by opportunistic interpretive analysis. The solution is not to reject the UDHR but to rediscover and reinforce the original intent of its founders.

The objection raised by some social conservatives is that customary international law has been hijacked by liberal activists who attempt to redefine it to their own ends to promote rights to abortion, sexual pleasure, and same-sex marriage,

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<sup>135</sup> Id. at 1530-1. See also Aguirre & Wolgram, *supra* note 101, at 113-4 (like Araujo, they document how in recent decades the natural family has been challenged on the international level by various lobby groups (e.g. environmental, children, population control and women) who “have made persistent efforts to redefine not only the relationships within the family unit, but the very concept of “family” itself”).

<sup>136</sup> Araujo, *supra* note 107, at 1525.

<sup>137</sup> Madelain Farah, *Marriage and Sexuality in Islam: A Translation of Al-Ghazali’s Book on the Etiquette of Marriage from the IHYA*, 12 (2003). See the discussion by Eugene Chuma Iloghalu, *Polygamy: In Igboland, Nigeria and Salvation in the New Era of Evangelization*, 124 (self published Ph.D dissertation, Pontificia Università Lateranense, Rome) (on file with author and the University) (wherein he argues that in living according to the Koran and its important limitations on polygamy; it “has usually been the privilege of a few, rather than a rule for the majority.”)

<sup>138</sup> Iloghalu, *supra* note 137, at 24-8, 125.

<sup>139</sup> A. Ezzati, *Islam and Natural Law*, 198 (2002).

which offend those values in natural law that the International Bill of Rights was intended to protect and preserve. In the view of these conservatives, any support of customary law contributes to this problem, rather than solving it. They suggest that the way to resolve the problem is to focus on explicit treaties and/or disregard or downplay customary international law altogether. Admittedly, attempts have been made to alter and misuse customary international law, but the correction of an improper understanding of customary international law in favor of its proper appreciation and application can hardly be a mistaken path. The wholesale abandonment of customary international law in favor of treaties or even codification, however, would be a radical step. Customary international law is a well-developed and long-recognized.<sup>140</sup> Moreover, it is inconsistent for thinkers who respect tradition, on the one hand, to work for the abandonment of tradition, on the other. Further, custom can be an important filter for determining natural law that with time may refine the general principles into more specific rules.<sup>141</sup>

Custom plays an important role in “probing the usefulness of particular applications of natural law.”<sup>142</sup> This is essentially what has happened with the family based on natural marriage; it has resisted the test of time, perhaps, like no other human institution. Finally, treaties and codification<sup>143</sup> do not end the need to investigate customary international law. Many treaties that codify international law specify that customary norms continue to be applied among the State parties with respect to questions not governed by the treaty.<sup>144</sup> Lastly, a treaty norm does not replace a customary norm; the customary norm still applies to those States not party to the treaty.<sup>145</sup> In addition, States that withdraw from a treaty will cease to be governed by its norm and again be governed by the customary norm.<sup>146</sup>

Strong objections have also come from various women’s rights activists who are promoting the Western ideology of gender. However, it is important to distinguish between those who promote gender as an ideology and those who view gender as simply referring to the differences between the sexes. In terms of the latter approach, many women and men who participate within the United Nations system, especially those who work at the local level, may understand the term to mean simply male and female. In Africa, for instance, it is common knowledge

<sup>140</sup> See, e.g., *supra* note 24.

<sup>141</sup> David Vandrunen, *Law and Custom: The Thought of Thomas Aquinas and the Future of the Common Law*, 109 (Peter Lang ed., 2003).

<sup>142</sup> *Id.* at 110.

<sup>143</sup> See Gerhard Hafner, *The International Law Commission and the Future Codification of International Law*, 2 ILSA J. Int’l & Comp. L. 671 (1996) (Some people point to the Law of the Sea Conventions of 1958, the Convention on the Diplomatic Relations of 1961, on Consular Relations of 1963, the Vienna Convention on the Law of Treaties of 1969, and the Convention for the Protection of Diplomats of 1973 as examples of successful codifications of customary international law).

<sup>144</sup> Julio A. Barberis, *Reflexions sur la coutume internationale*, 36 *Annuaire Français de Droit International* 9, 45-6 (1990). The preamble of the 1961 Vienna Convention on Diplomatic Relations states “Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention . . .” Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 available at <http://www.un.org/law/ilc/texts/diplomat.htm> (last visited Oct. 1, 2004).

<sup>145</sup> Barberis, *supra* note 144, at 46.

<sup>146</sup> *Id.*

that girls do not, as a general rule, receive the same level of education as boys and so references to “gender discrimination” or initiatives designed specifically for the “girl child” are reasonable.

The gender ideologues, however, promote the term “gender” in a way that is completely contrary to the vision of the human person set out in art. 1 of the UDHR. According to this perspective, encountered primarily from Western sources, one’s biological sex may or may not be naturally determined. But all other sex-related differences (e.g. masculinity, femininity, manhood, womanhood, motherhood, fatherhood, heterosexuality) are culturally constructed “gender roles” and, hence, artificial and arbitrary.<sup>147</sup> Indeed, the term “sexual difference” is reduced to the merely biological, having little effect on how the human person thinks, acts, and feels while “gender roles, which are purely cultural, take on considerable significance.”<sup>148</sup> For example, motherhood, a vocation biologically unique to women, is frequently challenged and in fact overtly undermined and demeaned. A fundamental idea underlying gender ideology is that the goal of statistical equality between men and women in the work force, women’s autonomy, and access to political power can never be met “if even a significant percentage of women choose mothering as their primary vocation.”<sup>149</sup>

Such an ideology stands in clear contrast to the views of important female protagonists behind the drafting of the UDHR, including the American delegate Eleanor Roosevelt and the Indian delegate Hansa Mehta. Given their thinking, as

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<sup>147</sup> In accordance with gender ideology, the term “gender” has been defined as follows: “Gender is a concept that refers to a system of roles and relationships between women and men that are determined not by biology but the social, political and economic context. One’s biological sex is a natural given: gender is constructed . . . gender can be seen as the process by which individuals . . . are born into biological categories of . . . women and men through the acquisition of locally defined attributes of masculinity and femininity.” United Nations International Research and Training Institute for the Advancement of Women, *Gender Concepts in Development Planning: Basic Approach*, U.N. Doc. Instraw/SER.B/50, U.N. Sales No. 96.III.C.1 (1995), available at <http://www.un-instraw.org/en/resources/publications.html#a7> [hereinafter, “INSTRAW”]. See also Dale O’Leary, *The Gender Agenda: Defining Equality* 120 (1997) (discussing the development of the term in feminist literature and its employment within the context of UN conferences, e.g., the Cairo and Beijing Conferences); Martha L. de Casco et al., *Empowering Women: Critical Views on the Beijing Conference* (1995) (similar analysis within the scope of the Beijing Conference); Rosemarie Putnam Tong, *Feminist Thought: A More Comprehensive Introduction* (2d ed. 1989) (brief overview of feminist thought); *Human Rights of Women: National and International Perspectives* (Rebecca J. Cook ed., 1994) (overview of feminist thought in the field of human rights).

<sup>148</sup> See the discussion in the Letter to the Bishops of the Catholic Church on the collaboration of men and women in the Church and in the World, paragraph 2 (July 31, 2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) (last visited Aug. 10, 2004).

<sup>149</sup> O’Leary *supra* note 147, at 120-121. This deconstruction of motherhood is a recurring theme in the INSTRAW booklet, where the following quote from Maureen Macintosh appears: “[N]othing in the fact that women bear children implies that they exclusively should care for them throughout childhood . . .” INSTRAW, *supra* note 146, at 18. The booklet continues: “The fact of sexual difference is used to arbitrarily limit women’s autonomy, economic activities and access to political power” *Id.* at 19. To eradicate this problem, INSTRAW advocates increasing, “[w]omen’s access to political and economic power” and the development of a “broad view of human reproduction activities,” including abortion and contraceptive services, thus articulating the connection between production and reproduction *Id.* at 21-22. O’Leary’s review of feminist literature reveals that any woman who aspires to mothering is seen as a threat to other women who have not been so “socially conditioned to want the wrong things” O’Leary, *supra* note 145, at 124. For a review of some of the feminist literature, see Catharine A. Mackinnon, *Toward a Feminist Theory Of The State* (1989).

described above, it is difficult to see how these accomplished diplomats would have accepted this new view of women, especially when it does not promote collaboration and cooperation between males and females but rather competition and conflict, which leads to the emphasis and preference of one sex over the other.<sup>150</sup>

Turning then to the specific arguments of modern gender advocates, one group argues that “marriage” and “family” mean different things to different people and that UDHR presumes a static set of facts, namely, that a man and a woman marry in order to reproduce, a notion that does not correspond to current realities. Men and woman do not marry solely for the purpose of reproduction; many marriages are childless, and often couples remarry when they are beyond child-bearing years. People marry for a number of reasons: love, companionship, stability, financial and emotional support, and sometimes to reproduce. Hence, the best that any State can do is to adopt a flexible or functional approach to the definition of marriage. Further, one cannot speak of only one form of family since there are a plethora of possibilities (e.g. single, blended, polygamous, cohabitating couples [heterosexual and homosexual], married couples [heterosexual and homosexual], and on the basis of equality every family form must be treated equally. This position has fueled, in a few Western States, the treatment of the various family forms (e.g. blended, single, cohabitating – heterosexual and homosexual) as on par with the natural family. A more recent example is the aggressive push for same-sex marriages in some Western nations.<sup>151</sup>

A variation of the above theme attempts to destroy all reference to the natural family. This view argues for the abolition of marriage as supported and promoted by positive law. Some focus on the abolishment of State-recognized marriage and replacement with a private contract, ascription, or an optional State registration scheme by which a wide range of “close personal relationships,” can be protected and supported; in this way, the natural family is ignored and undermined in favor of an unmoored and self-defined family.<sup>152</sup>

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<sup>150</sup> Letter to the Bishops of the Catholic Church on the collaboration of men and women in the Church and in the World, paragraph 2 (July 31, 2004), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html) (last visited Aug. 10, 2004).

<sup>151</sup> For a brief overview of same-sex marriage as discussed in legal literature and treated in various Western legal systems see the website maintained by the Rutgers School of Law <http://law-library.rutgers.edu/ssm.html#fma>; See also the American Federal Marriage Amendment website: <http://www.allianceformarriage.org>, which is a movement opposed to same-sex marriages. A similar movement is being organizing in Canada as well.

<sup>152</sup> See, e.g., Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* (Minister of Public Works and Government Services, 2001), available at <http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp> (last updated June 25, 2002). For example, a version of this line of thinking is behind the 2001 “Beyond Conjuality” report, which argues that the narrow focus on spousal or conjugal relationships does not promote the State’s interest in close personal relationships because it excludes other important relationships. Executive Summary of the Law Reform Commission of Canada at 9. It argues for the abolition of marriage and states: “[t]he State’s interest in marriage is not connected to the promotion of a particular conception of appropriate gender roles, nor is it to reserve procreation and the raising of children to marriage;” rather, the State has an interest in ordering private affairs by “providing an orderly framework in which people can express their commitment to each other, receive public recognition and support, and voluntarily assume a range of legal rights and obligations.” *Id.* at 23-24. The report recommends a registration scheme as

Others argue that “family” is an illiberal concept that cannot be the source of moral principles, which should only derive from autonomy and individual liberty. Indeed, notions of family, family rights, or privacy do great harm since they insulate individual members from State scrutiny and thereby ensure the continuation of violence and oppression within families.<sup>153</sup> In other words, the notion of family preserves a private/public dichotomy in law, which institutionalizes domestic violence because the home is considered the man’s castle and therefore insulated from the law.<sup>154</sup>

In response to such assertions, it is submitted that the real opposition to the natural family is not based in the proposition that to protect and assist the natural family in positive law means to promote violence or a structure of violence. Such arguments are classic “strawmen,” misdefining the opposition in order to discredit it. The natural family as defined herein does not sanction the labeling or treatment of women as inferior to men, nor does it negate the important and essential role woman plays in all sectors of society. Neither does the natural family herein described condone domestic violence. Violence is a social reality that touches all sectors of society. While domestic violence has undoubtedly occurred within a *deformed version of the natural family*, it would defy common sense to see it as the norm. And even if domestic law has failed to deal adequately with this difficult issue, it would be simplistic in the extreme to conclude that due to the state of the law the natural family should not be given special protection and assistance in international law.<sup>155</sup>

Those pushing to abolish or undermine the natural family by putting it on an equal footing with other family forms seem to be seeking an optimal formula for the conduct of sexual relations. And they have decided that marriage alone is too restrictive and does not optimize or adequately allow for freedom of sexual expression in human relations.<sup>156</sup> However, as Professor Pedro-Juan Viladrich notes, the question—what is the optimum formula for sexual relations?—is an

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the best solution to accord legal recognition to a full range of these relationships which include those who are married or live with conjugal partners, (both same-sex and heterosexual relationships), in addition to those who share a home with parents, other relatives, friends, and caregivers (e.g., in the case of the elderly and disabled). *Id.* at 21-25. Should the State not be willing to abolish marriage immediately then, in the interim, the report suggests that marriage be redefined in order to include same-sex couples. *Id.* at 23-25.

<sup>153</sup> For a brief overview of this feminist position and others, see Stefan A. Riesenfeld, *Family Separation as a Violation of International Law*, 21 *Berkeley J. Int’l L.* 231-232 (2003); Fernando R. Teson, *Feminism and International Law: A Reply*, 33 *VA. J. INT’L L.* 647, 657-58 (1993); Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 *AM. J. INT’L L.* 613, 636-37 (1991), in particular, wherein Riesenfeld discusses what the argument looks like on the international level as articulated by Hilary Charlesworth, Christine Chinkin, and Shelley Wright when they argue that “treaty provisions protecting the ‘natural and fundamental group unit of society’... ignore that to many women, the family is a unit for abuse and violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children.” Furthermore, some contend that treaty provisions that link privacy rights to the protection of the family (such as Article 8 of the European Convention) reinforce the role of the public/private dichotomy in international law.

<sup>154</sup> Riesenfeld, *supra* note 151, at 232.

<sup>155</sup> *Id.* at 233. This is a variation of an argument made by Stefan A. Riesenfeld in reference to the family he defined as being socially constructed.

<sup>156</sup> Viladrich, *supra* note 2, at 23.

old one and although many different responses have been tried throughout history (e.g. promiscuity, polygamy, lesbianism, homosexuality and so forth), the natural family based on marriage has been the most constant, consistently successful answer throughout the ages, the only arrangement to have passed the scrutiny of time in all stable, successful cultures of the world.<sup>157</sup> It is the product of the constant reconsideration of sexual relations. And “like a carefully distilled drop, the fruit of a thousand crises, a drop which, unlike many other distilled formulae, happens to be the most purified.”<sup>158</sup>

## 5. THE NATURAL FAMILY IGNORED: THE EFFECTS

### 5.1 Introduction

This section will reflect upon what rejection of the natural family means for children. Here there is a pertinent discussion regarding the increasing rates of 1) separation and divorce; and 2) alternative family forms.<sup>159</sup> To this end, the paper will study Canada and the plight of children. The essential argument here is that empirical data shows there is a “relationship between the family structure and declining child well-being.”<sup>160</sup> Canada has not substantially improved children’s lives because it has failed to come to terms with this reality and has, in fact, aggravated the situation.

### 5.2 Separation and Divorce

It is sad but unavoidably accurate to assert that the increasing prevalence of divorce in Canada has been, at least in part, the result of two acts of the Canadian government. These acts first relaxed the restrictions on obtaining divorces in 1968 through the establishment of the fault regime and then later with the creation of the 1985 no-fault system.

According to the 1998 Report of the Canadian Special Joint Committee on Child Access and Custody, “For the Sake of the Children,” “[d]ivorce rates rose steadily

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<sup>157</sup> Id. at 24.

<sup>158</sup> Id. at 26.

<sup>159</sup> This section of the paper is based on Focus on the Family, *Securing our Children’s Future: A Report Prepared for The United Nations, Committee on the Rights of the Child* (2003) (on file with the author), an NGO report I wrote for and with the assistance of Focus on the Family Canada. It was written in response to Canada’s Second Report to the same.

<sup>160</sup> See Cynthia L. Ewing, Senior Policy Analyst, Children’s Rights Council, Testimony before the US House of Representatives Committee on Ways and Means Sub-Committee on Human Resources (Feb. 6 1995), citing Barbara Defoe Whitehead, Dan Quayle Was Right, *Atlantic Monthly* (Apr. 1993). She states: “If we fail to come to terms with the relationship between the family structure and declining child well-being, then it will be increasingly difficult to improve children’s life prospects, no matter how many new programs the federal government funds. Nor will we be able to make progress in bettering school performance or reducing crime or improving the quality of the nation’s future work force - all domestic problems closely connected to family breakup. Worse, we may contribute to the problem by pursuing policies that actually increase family instability and breakup.” Available at <http://www.peak.org/~jedwards/crc.htm>, (last visited Sept. 30, 2002).

in Canada after 1968, when the first federal divorce legislation was passed, and peaked immediately following the 1985 amendments to the Divorce Act, which introduced marriage breakdown as the single ground for divorce, most often based on separation of at least one year.<sup>161</sup> The same report states that: "In 1994 and 1995, according to Statistics Canada, there were 78,880 and 77,636 divorces in Canada. In each of these years, more than 47,000 children were the subjects of custody orders."<sup>162</sup>

The Committee that published this report was set up and entrusted with the task of "examin[ing] issues relating to custody and access arrangements after separation and divorce with a special emphasis on the needs and best interests of children."<sup>163</sup> Two points from its mission statement are worthy of mention. First, the problem of increasing rates of separation and divorce is not only a Canadian problem. For example, many jurisdictions have enacted legislation in response to the plight of children in this regard: Louisiana,<sup>164</sup> Michigan,<sup>165</sup> and Washington;<sup>166</sup> Australia,<sup>167</sup> and the United Kingdom.<sup>168</sup> Second, the Committee's focus on "after separation and divorce," ignores an entire field of study regarding the cause of the problem, namely, whether attempts to reinforce and strengthen the family based on marriage might not be in fact the best answer to the question

<sup>161</sup> Report of the Special Joint Committee on Child Custody and Access, Parliament of Canada, For the Sake of the Children 3 (1998), available at <http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm> (last visited Aug. 10, 2004). [Hereinafter For the Sake of the Children]. The report also notes on the same page that "Although fault-based grounds of adultery and physical or mental cruelty are still present in the legislation, 1985 is recognized as the beginning of no-fault divorces in Canada."

<sup>162</sup> Id.

<sup>163</sup> Id. at vii. In terms of how the committee carried out its work, "it held meetings nation-wide and heard from over 500 witnesses, including individual parents, grandparents, and children, representatives of women's and father's organizations and experts from the legal, mental health, child development, child protection, and academic fields." Department of Justice, Government of Canada, Government of Canada Response to the Report of the Special Joint Committee on Child Custody and Access: Background 1 (1999), available at <http://canada.justice.gc.ca/en/dept/pub/cca/sjcarp02.html> (last visited Oct. 4, 2002).

<sup>164</sup> The State of Louisiana enacted the 1997 Covenant of Marriage Act. La. Rev. Stat. Ann. 9& 275. The thinking behind the statute seems to be that no-fault divorce should be repealed and that parents should be required to live together. See also similar legislation in Arizona and Arkansas, respectively: Ariz. Rev. Stat. Ann. 25-901-04 (West 2000 & Supp. 2003); Ark. Code Ann. 9-11-801-08 (Michie 2002).

<sup>165</sup> Under Michigan law, the Child Custody Act of 1970, the court decides custody arrangements and reasonable "parenting time" for parents, grandparents and others. MICH. COMP. LAWS& 722.27 (1970). Since 1998, a newly unified court system called the Family Division of the Circuit Court has been resolving divorce and juvenile delinquency issues. "Friends of the Court," a division of the Circuit Court and office responsible for investigating, making recommendations and enforcing orders, plays an important role in the process.

<sup>166</sup> Washington enacted the Parenting Act of 1987, setting out the basic mechanism referred to as the "parenting plan" which the parents have to work out. Wash. Rev. Code& 26.09.260 (1987). The plan requires specific details in three major areas: residential schedule, decision-making allocation, and dispute resolution mechanism, while hotly contested issues go to mediation.

<sup>167</sup> In Australia, the Family Law Reform Act 1995 changes terminology that is thought to create a winner-take-all mentality on separation and divorce: notions of "parental responsibility," "residence," and "contact order" replace the previous legal concepts of "guardianship," "custody" and "access." Family Law Reform Act, 1995 (Austl.) In particular, parental responsibility focuses on the notion of obligations rather than parental rights. It encourages the role of both parents in the care of children and the use of private agreements, and establishes a national court with both a legal and extensive therapeutic arm for dealing with family law matters.

<sup>168</sup> Similarly, the United Kingdom's Children Act 1989 adopts the term "parental responsibility" which continues regardless of the status of the parents with each other, but unlike Australia, recognizes the notion of parental rights which are deemed necessary to carry out corresponding obligations. Children Act c.41 (Gr. Brit.). "The underlying premise is that children are best provided for by their parents with little or no court involvement."

about the “optimal” way to allow for human sexual relations, because it simultaneously serves as a far more effective (and cost-effective) means of curbing the problems of children (and society) stemming from divorce than introducing more and more social programs to apply band-aids.<sup>169</sup> This in turns feeds into the problem noted by the Committee that people think they have a right to divorce irrespective of the interests of children. In the words of the Committee: “if one of the partners finds the relationship unsatisfactory, unhealthy, or unsafe, he or she is free to end the relationship through divorce, however, a ‘parents right to personal happiness’ does not mean that such decisions are ‘automatically in the children’s interest.’”<sup>170</sup> As long as governments reinforce such views, they only exacerbate the problem rather than solving it.

Indeed, of the Report’s 48 recommendations in the area of custody and access, only one addresses means that could assist in preventing child suffering by reducing the possibility of separation, divorce and alternative families.<sup>171</sup> Recommendation No. 29 suggests that “the federal government [should] extend financial support to programs run by community groups for couples wanting to avoid separation and divorce or seeking to strengthen their marital relationship.”<sup>172</sup>

### 5.3 Alternative Family Arrangements

The increase in separation and divorce is correlated with an increase in such alternative relationships as single-parent families, combined or blended families as a result of remarriage, and cohabitation. All compound the complexity and risk in children’s lives.

This fact is noted by the Canadian Province of Quebec when its government states: “The number of single-parent families in Quebec has risen over the past 35 years, and now accounts for 20 percent of all families; blended families represent 10 percent of all Quebec’s families. These changes in family structure and composition are generating new needs. The increase in the number of children living in a single-parent family... is characterized by lower labour force activity and higher poverty . . .”<sup>173</sup>

<sup>169</sup> See e.g. Institute for Marriage and Public Policy Institute for Marriage and Public Policy, at <http://www.marriage Debate.com>; Institute for American Values, at <http://www.americanvalues.org/>; Family Research Council, at <http://www.frc.org>

<sup>170</sup> For the Sake of the Children, *supra* note 161, at 9-10.

<sup>171</sup> They have been considered and summarized in the “Government of Canada’s Response to the Report of the Special Joint Committee on Child Custody and Access.” The Government worked with provincial and territorial governments, which share jurisdiction in the area of family law, to conduct research and develop concrete reform proposals to be submitted to Parliament by May 1, 2002.

<sup>172</sup> For the Sake of the Children, *supra* note 161, at 68.

<sup>173</sup> Canada’s Second Report on the Convention on the Rights of the Child, Quebec’s report 8, available at [http://www.pch.gc.ca/progs/pdp-hrp/docs/crc-2001/intro\\_e.cfm](http://www.pch.gc.ca/progs/pdp-hrp/docs/crc-2001/intro_e.cfm) (last visited Aug. 10, 2004).

## 5.4 The Plight of Children

The increase in separation and divorce and the correlative rise in alternative family forms have, in turn, led to significant problems for children. For example, in 1994 and 1995 more than 47,000 children were the subjects of custody orders under the Divorce Act.<sup>174</sup> All too often these children ended up living in single-parent families; in 1996, 15% of all children under the age of 17 lived in lone-parent families headed by women, and 2% in families headed by men.<sup>175</sup>

The “For the Sake of the Children” report, after a review of numerous research studies dealing with effect of separation and divorce on children, both large and small, found that there were notable increases in children’s school and personal difficulties; drug use and delinquency; depression, aggression and social withdrawal; fear of abandonment; emotional difficulties; and child poverty.<sup>176</sup>

These findings are supported by a more recent study completed after the “For the Sake of the Children” report. In a 2001 study done by Jennifer Roback Morse, she finds that children from single-parent families are more likely to drop out of school, have babies out of wedlock, and abuse alcohol and drugs. Further, these children have 50 to 80 percent higher scores for anti-social behavior, peer conflict and social withdrawal, and are more likely to suffer from anxiety, depression, and hyperactivity.<sup>177</sup>

Having seen just an overview of some of the problems, this brings us to the role of the Canadian government: What should be the proper socio-political attitude towards the natural family and same-sex couples?

## 5.5 STATE ACTION

As previously mentioned, according to the UDHR, art. 16, the natural family is “the fundamental group unit of society entitled to protection by society and the State.” In confronting the reality that the demise of the natural family has led to the suffering of children, the Canadian government must appreciate two things: (1) its fundamental role to provide for the common good; and (2) the need to make distinctions between tolerance, promotion, and preference.

The notion of the common good is centered on the human person as a free and unique being with reason and conscience, and social in nature.<sup>178</sup> The common

<sup>174</sup> Statistics Canada, Catalogue No. 84-213-XPB, Divorces 1995 2 (1996), available at <http://www.statcan.ca/english/studies/82-003/archive/1997/hrar1997009002s0a05.pdf> (last visited Aug. 10, 2004).

<sup>175</sup> For the Sake of the Children, *supra* note 161, at 3.

<sup>176</sup> *Id.* at 10-3.

<sup>177</sup> Jennifer Roback Morse, *Love and Economics: Why the Laissez-Faire Family Doesn't Work* (2001).

<sup>178</sup> For a description of the common good see Jacques Maritain, *The Person and the Common Good* 49 (1946); John Finnis, *Natural Law and Natural Rights* 155 (1980) (defining the common good as “a set of conditions that enables the members of a community to attain for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively or negatively) in a community.”); See also the extensive study in: *Catechism of The Catholic Church* ¶¶ 1905-12 (1995).

good requires those social conditions which allow the human person to freely develop and flourish. In this regard, the State is called upon to make assessments about what will promote authentic human flourishing. Consequently, in realizing the common good, the State is in the business of making distinctions which may require the prohibition of certain behaviors, the toleration of many others, the promotion of some, and the preference of a few.

In the case of alternative modes of family life, tolerance does not involve the coercive power of the State. Canada, however, has gone well beyond the mere tolerance of alternative modes of family life by promoting them through the extension of benefits and in some provinces through legal recognition in the case of civil unions or domestic partnerships. Now the federal government has enacted the 2005 Civil Marriage Act which redefines marriage to include same-sex unions.<sup>179</sup> One might well argue that bias has been shown for cohabitating, same-sex couples through the extension of benefits that have put them on a par with the natural family. In light of the foregoing, however, it is submitted that such actions constitute a breach of both treaty law and customary international law and obscure the truth about the centrality of the natural family for the good of spouses, children and society.

Unfortunately, the Canadian government, when assisting those in alternative families, has tended to equate these relationships with marriage. With regard to custody and access, and spousal and child support, for example, there is no longer any substantial difference between married couples and common law or non-married relationships.<sup>180</sup> In an effort to respond to different unions and their requests for benefit distribution, the federal government prior to the Civil Marriage Act, had passed in 2000 "An Act to Modernize the Statutes of Canada in Relation to Benefits and Obligations." This enactment ensures that benefits and obligations are extended to same-sex partners as well as married, opposite-sex, cohabitating, and common law partners. In the absence of a strong government voice in support of the natural family based on marriage, however, the erroneous message to Canadians is that alternative relationships are just as beneficial as marriage to the healthy and optimal development of children. This has been noted by Professor Lynn Wardle in the American context. After analyzing recent American legislative initiatives for same-sex unions, he criticizes such initiatives as sending "uncritically a message that non-marital cohabitation of any two persons is just as valuable to society, just as important to protect and encourage in law, as marriage."<sup>181</sup>

<sup>179</sup> See Bill C-38 - The Civil Marriage Act - Receives Royal Assent, Press release by the Canadian Parliament (July 20, 2005), available at [http://canada.justice.gc.ca/en/news/nr/2005/doc\\_31578.html](http://canada.justice.gc.ca/en/news/nr/2005/doc_31578.html) (last visited Sept. 24, 2005). The full text of the Bill is available on the Canadian Parliament's website, available at [http://www.parl.gc.ca/38/1/paribus/chambus/house/bills/government/C-38/C-38\\_4/C-38\\_cover-e.html](http://www.parl.gc.ca/38/1/paribus/chambus/house/bills/government/C-38/C-38_4/C-38_cover-e.html) (last visited Sept. 26, 2005).

<sup>180</sup> For a brief overview of the issues from a Canadian lawyer's perspective see MacLean Family Law Group Website, available at <http://www.bcfamilylaw.ca/commonlaw.html> (last visited Aug. 10, 2004).

<sup>181</sup> Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 *BYU L. REV.* 1189, 1210 (2001).

Perhaps most importantly, the debate concerning the promotion of alternative forms of families negates the voice of children, since issues are couched in “adults’ rights talk” with little or no discussion of the rights of children.<sup>182</sup> After perusing a plethora of law review articles supporting homosexual parenting, again Professor Wardle points out that the issue is typically addressed solely from an adults’ rights perspective, thereby undermining a full and complete consideration of issues pertaining to the welfare of children.<sup>183</sup> Even more liberal thinking Professor Nicholas Bala in his article “Context and Inclusivity in Canada’s Evolving Definition of the Family,” notes an important qualification on inclusivity: “whether or not they are married, competent adults should have substantial freedom to contract about the nature of their relationship, provided the interests of the children and those who may be vulnerable are not detrimentally affected.”<sup>184</sup>

It is clear that empirical data shows a direct connection between separation, divorce and alternative family forms, on the one hand, and the litany of ills suffered by children, on the other, such as poverty, low education levels, mental health and behavioral problems, teen pregnancy, crime, suicide, as well as neglect and abuse. The natural family, based on marriage between a man and a woman, is proven to best serve the interests of the child. Canada, therefore, should be solicitous in protecting and supporting this family model, which is the basic fundamental unit of society, meaning that the natural family ought to receive special support and protection. Where interests of the common good require State regulation of other living arrangements, such action ought to never obscure the primary importance of the natural family.

However, Canada has neither recognized nor engaged the empirical data and as a result has not created a plan of action addressing the direct causal connection between family structure, family breakdown and the plight of Canadian children. As a case in point, Canada’s recent report to the Committee on the Rights of the Child merely discussed the family under the heading “Family Environment and Alternative Care.” In this section, it disclosed a patchwork of policies directed largely towards minimizing damage to children once a family has already broken down, with little or no attention given to policies aimed at preventing such breakdown.<sup>185</sup> Further, as previously noted, through litigation, adults in cohabitating relationships (both heterosexual and homosexual) have successfully claimed the right to benefits traditionally granted only to married couples.<sup>186</sup> Courts have framed the question as an adult issue connected with a protected category under the equality provision of the Charter of Rights and Freedoms

<sup>182</sup> For a more detailed discussion of how this has happened in Canada see Adolphe, *supra* note 109.

<sup>183</sup> Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 840

<sup>184</sup> Nicholas Bala & Rebecca Jaremko Bromwich, *Context and Inclusivity in Canada’s Evolving Definition of the Family*, 16 INT’L. J. L. POLY & FAM. 145 at 173 (2002).

<sup>185</sup> See, e.g., the discussion in relation to the following issues: parental responsibilities (art. 18); separation from parents (art. 9); illicit transfer and non-return (art. 11); recovery and maintenance for the child (art. 27); children deprived of their family environments (art. 20); adoption (art. 21); and abuse and neglect (art. 19). *Convention on the Rights of the Child*, Nov. 20, 1989, 144 U.N.T.S 123, available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Aug. 10, 2004).

<sup>186</sup> *M. v. H.*, [1999] 2 S.C.R. 3.

(either marital status or sexual orientation). In so doing, the rights and needs of children have received minimal consideration.

In sum, in an apparent attempt to legislate misguided concepts of tolerance, equality, and egalitarian rights, Canadian legislatures have been loathe to examine these issues from a children's rights perspective or to investigate the history, context, and meaning of the family under legitimate customary international law. Neither have they honestly engaged Canadian tradition, common experience, or readily available empirical data.

## 6. CONCLUSION

Part I presented an overview of the two main sources of international law: treaties and custom. Treaties, understood in the context of this paper, are the agreements between States, and may be legally binding or not legally binding. The UDHR is an example of the latter and therefore for art. 16 to be treated as legally binding, one must establish that it has become a principle of customary international law. To this end, one must argue that there has been a consistent and general international practice among States and evidence that the State acted pursuant to a conviction *opinio juris*, which may be inferred from proof of State practice.

Part II presented the argument that Art. 16 of the UDHR proclaims or recognizes already existing rights and has a logical structure that must be read as an integral whole. Further, when it is read as an organic whole the meanings of arts. 1 and 16 are discernable and support the natural family centered in marriage between a man and a woman. In respect to this last point, it was argued that marriage between a man and a woman is the foundation of the family, the fundamental unit in society, where human sexuality is regulated toward the finality of new human life, where new citizens learn how to live responsibly and engage in the political process. This is not only a cultural or historical reality but rather a principle manifestation of what it means to be human. After all, only human beings, not animals, are called husband, wife, father, mother, brother, or sister. And children develop their personality and gender identity by assumption of family roles created within the institution called marriage: mother-father; sister-brother; mother-daughter; father-son and so forth. Implicit in this view of marriage is the understanding that human sexuality should value the whole person (spouse) in his or her biological, psychological, emotional, ethical, and spiritual reality, expressed in and through the body, by which two persons unite and are able to become mother and father. Significantly, it also requires acceptance of the responsibility of the life that issues from it.

Part III made the argument that the wording of art. 16 has been repeated in many treaties in a way that can be described as "constant and uniform usage accepted as law" which demonstrates "substantial uniformity" in State practice, and thereby reflecting a conviction *opinio juris*. It has been consistently and repeatedly reaffirmed by consensus in many legally binding treaties and therefore

has ripened into a settled principle of customary international law by the general assent of civilized nations. There are of course, scholarly objections to the idea that art. 16 embraces universal values. This paper has attempted to briefly deal with each one in turn. For purposes of these concluding remarks they may be loosely grouped into three main arguments, namely the UDHR: 1) is a Western document due to its lack of State participation, reliance on Western legal declarations and constitutions, and rejection of polygamous forms of marriage; 2) is an outdated document in promotion of the natural family over other family forms, including same-sex marriages; 3) is a discriminatory document in its perpetuation of violence of women through promotion of the family.

First, our study of the drafting history and examination of other treaties in specific reference to art. 16 show high rates of State participation and acceptance from around the world. Second, the polygamous practices of the Eastern and African traditions, founded on the Koran and in many of the tribal religions and traditions of Africa, do not reject marriage of one man and one woman and indeed include specific injunctions for the polygamous husband to assume responsibility for his wives and children, to treat them with justice and equality, and to maintain strict sexual fidelity. These restrictions clearly distinguish such polygamy from outright sexual license, more nearly resembling natural marriage as described above than the sexual freedom envisioned by modern revisionists. Finally, polygamous relationships, with time, are decreasing not increasing thereby further confirming the truth about the natural family. In regard to the second and third objections, these contrary opinions are grounded in a Western ideology of gender that exaggerates the rights of the individual, denies sexual differences, and pits man against woman, a vision that was rejected by the General Assembly of States and States Parties to the 1966 Covenants. Having said this, even if these objections could be translated into an argument that a usage is developing that all family modes should be treated equally or that the use of the term "family" should be obliterated completely, this does not mean that such an interpretation has risen to the level of a contrary principle of customary international law, much less to the degree necessary to overcome the prior express language of "the family is the natural and fundamental group unit of society" incorporated into the two international covenants (ICCPR and ICESCR). Indeed, the challenge to the natural family through the push for equal treatment of various family forms has been promoted largely through the nonbinding admonitions of soft law. Moreover, such activism has met stiff resistance from a substantial number of States by way of dissent or the entering of reservations to legally binding treaties.

Part IV studied the effects of the increasing crisis of separation, divorce, alternative families and their relationships with children using Canada as a case study. It argued that the Canadian government has made the natural family just one of many family forms and has erroneously redefined marriage to include same-sex union which is in breach of international customary law. The Canadian government has failed to appreciate the natural reality of the family and the empirical data connecting this family form to the well being of children. Empirical studies show that when children come from intact two-parent homes made up of

a woman and a man, they are more likely to have higher standards of living; perform better in school; be less likely to drop out of school; have babies out of wedlock; abuse alcohol and drugs; suffer from anti-social behavior, peer conflict and social withdrawal; or experience anxiety, depression, or hyperactivity. To assist Canadian children, then, the government must get to the root of the damage by promoting the well-being of the natural family and children. This is possible only through coherent policy and legal initiatives that: 1) encourage and protect the natural family based on marriage; and 2) assist parents in fulfilling their proper duties/rights. In brief, art. 16 of the UDHR provides: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State," namely, Canada. Therefore, responsible Canadian policy and laws must be directed toward promoting the well-being of the natural family and in helping and encouraging it to fulfill its duties. If customary international law exists on the subject of the family, it supports the "natural family" centered in the marriage of a man and a woman.

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