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Asking the Family Question

BERTA ESPERANZA HERNÁNDEZ-TRUYOL*

I. Introduction

International law recognizes the family as the “natural and fundamental group unit of society entitled to protection by society and the State.” Notwithstanding this exalted position in the international realm, a position also enjoyed by the family in domestic realms, the international community has failed to center the family in everyday international life. The family is not a core issue that internationalists consider when they develop and implement international norms, policies, laws, and relations.

Today, the international community is taking strides to address the needs/concerns of the family and to develop norms regarding its protection. For example, development initiatives increasingly recognize and take into account the role of family. However, principles of international law that address issues regarding the family are relatively new. Moreover, to date, these principles have primarily focused on certain specific rights, such as

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children's rights, women's rights, and child labor rights, rather than incorporating family well-being as a central aim of all international law and relations.

This essay proposes a fundamental shift in the approach to international policy and law-making, as well as the engagement of international relations, to include a family-sensitive, culturally inclusive, and socially friendly perspective. I urge that a key component to all international norm-making and relations be the asking of the family question. This approach requires, as a central inquiry in any process of international norm creation, that the norm-makers ask what impact, if any, a particular international law or policy will have on children and families. It emphasizes the need for a holistic approach to all matters of international norm-making that includes the consideration of the impact of a norm on the "natural and fundamental unit of society" in any and all of its culturally diverse forms. To develop this proposed approach, this paper first presents the existing recognition of international law in the role and protection of the family. Next, it turns specifically to focus on the development of standards for the protection of children. Having put forward the existing norms, this essay utilizes the example of the U.S. economic embargo of Cuba to show that, without an approach to international norm-making and relations that incorporates the family question, international laws and policy initiatives can have unintended consequences. For example, they can result in inadvertent and undesirable deleterious results for families and children as well as be disruptive of that fundamental societal unit.

II. The Family in International Law

Although family units in myriad forms and expressions have been the central unit of social cohesion since time immemorial, international norms addressing the family are a relatively new phenomena. Because of the strong cultural underpinnings of family formations and expression, family-centered norms have been viewed as a matter of local, not global, concern. Thus, it is not surprising that family norms at the international level have been heavily influenced by the concepts of nationality and domicile. These ideas were influenced by the Italian politician, Pasquale Mancini, who, embracing the idea of family as local, posited that matters relating to a person's status should be governed by that individual's domicile.\(^2\) Inspired by Mancini's nationality principle, Latin American countries joined together to create international treaties that accorded superiority to and expressed a preference for the local as family regulator and protector.\(^3\) Indeed, in the attempt

3. Id. at 628.
to reach an international consensus regarding the treatment of the family, a
to number of European and Latin American countries created multilateral
treaties that codified the domicile principle. Despite these treaties, families,
mainly children, did not receive adequate protection under international law.

Largely as a result of the World Wars, family separation, family support
and, particularly, child protection became a great concern for most coun-
tries. Emphasizing the need to protect the interests of the child, the League
of Nations, in 1924, passed the Declaration on the Rights of the Child,
which was followed in 1959 by the United Nations Declaration on the
Rights of the Child. As declarations, however, these instruments were not
binding on states. The first binding document specifically protecting rights
of the child was created in 1961, namely the Convention Concerning the
Powers of Authorities and the Law Applicable in Respect of the Protection
of Infants, a convention that dealt largely with choice-of-law issues in
guardianship cases. This convention and subsequent ones, such as the 1989
Convention on the Rights of the Child (CRC), which codifies the "best
interests of the child" standard first articulated in the 1959 Declaration,
have guided states in protecting children all over the world.

Through international proclamations, the world has acknowledged the
special and precarious status of families and children and has taken measures
to protect them. One of the principal ways of protecting children is by pro-
tecting families through human rights instruments recognizing the family

4. Id. at 629 (noting that the United States and the United Kingdom did not join in the con-
ventions. Eventually, the Inter-American system produced the Bustamante Code of 1928 as well
as revised series of the Montevideo Conventions in 1939 and 1940. These conventions tried to
create a definition of domicile.)
5. Id. at 630.
7. Declarations are not sources of "international law" as they are nonbinding and are designed
to essentially function as noncontroversial instruments that promote international cooperation and
consensus. See, e.g., Statute of the International Court of Justice, Department of State publication
2353, Conference Series 74, ratified July 28, 1945, entered into effect Oct. 24, 1945, at art. 38(1)
(lays out the sources of international law as "a. international conventions, whether general or par-
ticular, establishing rules expressly recognized by the contesting states; b. international custom, as
evidence of a general practice accepted as law; c. the general principles of law recognized by civ-
ilized nations; [and] d. judicial decisions and the teachings of the most highly qualified publicists
of the various nations, as subsidiary means for the determination of rules of law").
8. Convention Concerning the Powers of Authorities and the Law Applicable in Respect of
9. Id. See also Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International
[hereinafter CRC]. The CRC is the world’s most widely ratified treaty.
11. See infra notes 46-55 and accompanying text.
as the "natural and fundamental group unit of society entitled to protection by society and the State."12 Significantly, one finds the same conceptualization of the family—in terms of its key role in society and its technical definition—across the spectrum of human rights documents: those that protect civil and political rights,13 such as the right to vote, free speech, and fair trials, as well as those that protect social, economic, and cultural rights,14 such as the right to health, work, education, shelter, and cultural expression. Other instruments, such as the Declaration on Race and Racial Prejudice,15 acknowledge the sensitive and often precarious location of families and provide for their protection.

The right to family life is protected by a number of international conventions. In many instruments, the right to family is protected in tandem with privacy protections, with the underlying theme of these instruments being the prevention of arbitrary interference with the family. For example, Article 12 of the Universal Declaration of Human Rights (Universal Declaration) provides: "No one shall be subjected to arbitrary interference with his[her] privacy, family, home or correspondence, nor attacks upon his[her] honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."16 Article 17 of the International Covenant on Civil and Political Rights17 (ICCPR) provides similarly-worded protection of privacy rights for the family and prohibits arbitrary interference with the right to family.18

Article 10 of the International Covenant on Economic, Social and Cultural Rights19 (Economic Covenant) also acknowledges the need to protect the family, specifically providing that "[t]he 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."20

12. See supra note 1.
13. See ICCPR, supra note 1.
15. Declaration on Race and Racial Prejudice, U.N. GCESCO 20th Sess., Nov. 27, 1978, E/CN.4/Sub.2/1982/2/Add.1, annex V (1982), at art. 9(3) ("Population groups of foreign origin, particularly migrant workers and their families who contribute to the development of the host country, should benefit from appropriate measures designed to afford them security and respect for their dignity and cultural values and to facilitate their adaptation to the host environment and their professional advancement with a view to their subsequent reintegration in their country of origin and their contribution to its development; steps should be taken to make it possible for their children to be taught their mother tongue").
16. Universal Declaration, supra note 1, at art. 12.
17. ICCPR, supra note 1.
18. Id. at art. 17(1)-(2).
20. Id. at art. 10(1).
This is significant in light of this author's proposal to make the family question a central consideration in international norm-making because Article 10 creates a positive obligation on states not only for the protection of the family in general, but also, in particular, with respect to the well-being of children. Thus, state policies that consciously or inadvertently erode family establishment and protection run afoul of this positive state duty.

Regional conventions on human rights provide similar definitions and visions for protection of the family. Article 11 of the American Convention on Human Rights (American Convention) provides: "Everyone has the right to have his/her honor respected and his/her dignity recognized. No one may be the object of arbitrary or abusive interference with his/her private life, his/her family, his/her home, or his/her correspondence. . . ."22

Similarly, the European Convention for the Protection of Human Rights and Freedoms (European Convention) provides for the protection of family and privacy in Article 8(1): "Everyone has the right to respect for his/her private and family life, his/her home and his/her correspondence. . . ."24 Regarding the privacy aspect, Article 8(2) provides a margin of appreciation: "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society. . . ."25 In addressing concerns about protecting the family, especially children, the European Court of Human Rights (ECHR) did not fully globalize what have been viewed as a local concern. Rather it gives discretion to national authorities, pursuant to the margin of appreciation principle, to act in accordance with cultural norms. The ECHR has interpreted Article 8 of the European Convention to provide fairly robust privacy protection, and it emphatically protects the family against state interferences,26 thus recognizing that there are cultural family tropes that will be respected within the limitations of human rights protections.

22. Id. at art. 11(1)-(2).
24. Id. at art. 8(1).
25. Id. at art. 8(2).
26. See, e.g., Marckz v. Belgium, (1979) 2 E.H.R.R. 330. In this case, the European Court of Human Rights held that Article 8 of the European Convention forbids states from legally discriminating against illegitimate children, and set forth the principle that Article 8 does not simply impose negative restrictions on the state's authority to interfere with family life. To create domestic legal safeguards for the family, the Court stated that "there may be positive obligations inherent in an effective 'respect' for family life. . . . [The State] must act in a manner calculated to allow those concerned to lead a normal family life." Id. at 31.
Finally, a significant regional document that addresses the importance of protection of the family is the African [Banjul] Charter on Human and Peoples’ Rights\textsuperscript{27} (Banjul Charter). Much like the other regional instruments, Article 18 of the Banjul Charter provides: “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 moral[s].”\textsuperscript{28} To stress the importance of the family, the Banjul Charter imposes a duty on state parties to assist in the development of the family because the family is the core of society and the community.\textsuperscript{29} But the Banjul Charter goes even further than other international and regional documents by imposing duties not only on state parties but also on individuals by specifically obligating them “to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his[/her] parents at all times, to maintain them in case of need.”\textsuperscript{30} This provision, noting the importance of cooperation by the public and private actors to protect the family, as well as by noting families,’ and in particular children’s, rights and obligations, \textit{inter se} as well as vis-à-vis the state, civil society, and the family unit, underscores the significance and necessity of a cooperative and holistic approach for the well-being of this fundamental unit of society.

### III. Protection of Rights of the Child

As discussed above, the protection of the family is indivisible from the protection of children’s rights. However, beyond the general family provisions, children—generally defined as persons under the age of eighteen\textsuperscript{31}—are singled out in both general and specific human rights documents as needing special protections and safeguards. For example, Article 24 of the ICCPR provides that “[e]very child shall have, without any discrimination . . ., the rights to such measures of protection as are required by his[/her] status as a minor, on the part of his[/her] family, society and the State.”\textsuperscript{32} It further specifies that “[e]very child shall be registered immediately after birth and

\begin{itemize}
\item \textsuperscript{27} African [Banjul] Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), \textit{entered into force} Oct. 21, 1986 [hereinafter Banjul Charter]. The Banjul Charter is the most progressive regional document. It is unique because it deals with civil and political rights as well as with economic, social and cultural rights in one document. It also sets out the obligations of human beings as well as their rights, and it deals with the rights of peoples as well as those of individuals. Note that the Banjul Charter does not contain privacy protections.
\item \textsuperscript{28} \textit{Id.} at art. 18(1).
\item \textsuperscript{29} \textit{Id.} at art. 18(2).
\item \textsuperscript{30} \textit{Id.} at art. 29; see also art. 27(1) (“Every individual shall have duties towards their family and society, the state and other legally recognized communities and the international community”).
\item \textsuperscript{31} CRC, \textit{supra} note 10, at art. 1.
\item \textsuperscript{32} ICCPR, \textit{supra} note 1, at art. 24(1).
\end{itemize}
shall have a name," and shall have a right to nationality. Article 10 of the Economic Covenant recognizes that the family "is responsible for the care and education of dependent children" and that "[s]pecial 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 are also specifically mentioned for protection from "economic and social exploitation . . . [through] employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development. . . ." There are several other international conventions that specifically address the protection of children in labor and from trafficking, slavery, and organized crime.

Although most international instruments mention children’s rights, the two documents that exclusively focus on the protection of the rights of children are the Children’s Declaration and the CRC. Significantly, as international covenants link the family to notions of privacy, so too does the CRC. Article 16 of the CRC protects the privacy rights of children, stating that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks upon his or her honour and reputation." Also, Article 10 of the African Charter on the Rights and Welfare of the Child echoes this sentiment:

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reason-

33. Id. at art. 24(2).
34. Id. at art. 24(3).
35. Economic Covenant, supra note 1, at art. 10(1).
36. Id. at art. 10(3).
37. Id.
40. CRC, supra note 10.
41. Id. at art. 16.
able supervision over the conduct of their children. The child has the right to
the protection of the law against such interference or attacks.\textsuperscript{43}

The preambular language in the Children’s Declaration establishes the
standard that guides the protection to which children are entitled. Generally,
the Declaration recognizes that “the child, by reason of his/her physical
and mental immaturity, needs special safeguards and care, including
appropriate legal protection, before as well as after birth”\textsuperscript{44} and therefore
“[hu]mankind owes to the child the best it has to give.”\textsuperscript{45} In Principle 2,
the Declaration provides:

The child shall enjoy special protection, and shall be given opportunities
and facilities, by law and by other means, to enable him/her to develop physically,
mentally, morally, spiritually and socially in a healthy and normal manner and
in conditions of freedom and dignity. In the enactment of laws for this purpose,
the best interests of the child shall be the paramount consideration.\textsuperscript{46}

Thus, the Declaration articulates the “best interests of the child” standard,
which is the applicable international legal standard in analyzing conduct
that affects children, to ensure through policies and practice that the rights
of children are protected. It is the standard reiterated in legally binding form
in Article 3 of the CRC, which states that “[i]n all actions concerning chil-
dren . . . the best interests of the child shall be a primary consideration.”\textsuperscript{47}
Article 18 also provides that “[p]arents . . . have the primary responsibility
for the upbringing and development of the child”\textsuperscript{48} and consequently the
child’s best interests are “[the parents’] basic concern.”\textsuperscript{49} It also recognizes
“the right of every child to a standard of living adequate for the child’s
physical, mental, spiritual, moral and social development.”\textsuperscript{50}

Provisions that create responsibility for parents and states to ensure the
protection of the rights of the children are particularly relevant in evalu-
ating the meaning of the “best interests” standard and in elucidating why
centering the family question in international norm-making and foreign
relations is necessary and proper. The CRC places on “parent(s) . . . the
primary responsibility to secure . . . the conditions of living necessary for
the child’s development”\textsuperscript{51} and in states the obligation “to assist parents . . .

\textsuperscript{43.} Id. at art. 10.
\textsuperscript{44.} Children’s Declaration, supra note 6, Preamble.
\textsuperscript{45.} Id.
\textsuperscript{46.} Id. at Principle 2.
\textsuperscript{47.} CRC, supra note 10, at art. 3(1).
\textsuperscript{48.} Id. at art. 18(1).
\textsuperscript{49.} Id.
\textsuperscript{50.} Id. at art. 27(1); see also art. 3(1) (“In all actions concerning children whether undertaken
by public or private social welfare institutions, courts of law, administrative authorities or legis-
lat ive bodies, the best interests of the child shall be a primary consideration”).
\textsuperscript{51.} Id. at art. 27(2).
to implement this right" and to create programs and provide assistance "particularly with regard to nutrition, clothing and housing." The CRC also obligates states "to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad." Most significant in embracing a holistic view of international rule-making are provisions in the CRC, which create in states an obligation to reach agreements that ensure the states' ability to see that local obligations of individuals with the financial responsibility for children can be enforced globally: "[W]here the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements." This clause exposes the need to incorporate the family question in international policy and law-making.

IV. Critical Observations on Families and Children

Before fully developing the family question paradigm, it is necessary to raise two significant conflicts that occur when discussing the importance of children's rights. First, there is tension when the rights of the child and those of the parents are at odds. The separate protections for children—separate from the obligations of parents to the children and the rights of parents as individuals as well as the conventional obligations of states and society to the well-being and development of the child—create the potential for discord if all interests are not aligned. The tensions are heightened particularly if the interests of the parent(s) and the child compete against each other. The CRC, recognizing this potential conflict, specifically acknowledges and contextualizes the need to address the rights of the child within the framework of parental rights and obligations, by requiring "State Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her." Significantly, this clause, read in the framework of the "best interests" standard, in no way allows individual parental rights, for example, the right to travel, to trump either parents' obligations to children or the supremacy of the child's well-being.

Second, creating international legal standards for the care and protection

52. Id. at art. 27(3).
53. Id.
54. Id. at art. 27(4).
55. Id.
56. Id. at art. 3(2).
of children runs squarely into the heart of the relativism/universalism debate. The meaning of "best interests"—a standard incidentally originally derived from U.S. family law—is not absolute. Indeed, there must be flexibility. Notwithstanding the myriad global and local cultures, practices, family forms, and beliefs, the best interests standard applies to children all over the world. The care and protection of children requires flexibility and sensitivity, but the best interests of the child must always be the paramount consideration, regardless of cultural context.

Moreover, as numerous conventions address, the cultural conflict issue may hide a majority desire to preserve an unacceptable status quo that is harmful to some children and thus not in their best interest. For example, the African Children's Charter prohibits "traditional" practices that are harmful to girls. Thus, culture cannot be used as pretext for a practice that, by being harmful, is not in the best interests of the child. Similarly, the Convention on the Elimination of All Forms of Discrimination against Women provides that states must "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

In sum, culture and tradition are not grounds upon which either the state or the parents can justify actions that are harmful to the protected person. With respect to the meaning of the "best interests of the child," culture should not be used as an imperial sword by majority (western) cultures to impose their views concerning child care and development or the appropriate location of children in society on other cultures; nor should tradition or culture be used by cultural groups as a shield against protection of children from abuse or deprivation of their needs—whether health, education, welfare, shelter, or nutrition-related.

To be sure, this does not require homogenization of culture or tradition. Practices and policies adopted in the best interests of the child can differ depending on culture, while nonetheless benefitting the child. Norms need not, indeed, should not be identical; identical norms applied across borders of culture could lead to dramatically different results. Both different norms with children's best interests in mind and identical norms applied

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57. African Children's Charter, supra note 42.
58. Id. at art. 21(1) (encourages States Parties to "take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status").
60. Id. at art. 2(f).
Asking the Family Question

Asking the Family Question differently in light of cultural or traditional differences might still be compatible with the international desire to satisfy the “best interests of the child” standard.

International family law is a difficult and complex arena. In the national sphere, family law raises the issue of the interactions between and among the state, society, the family, and the child. In the international imagination, these ever-changing interactional locations of rights and duties are often further complicated by the state-to-state relations that are generally subject to the ever-changing and elusive concept of sovereignty.

Cultural tropes and traditions create complexities in establishing a framework of international family law. Therefore, to further complicate the landscape by urging that the family question be embedded in all international policy and law-making requires strong justification. However, such justification is indeed simple: asking the family question is the necessary and proper thing to do, just like it is appropriate and right to ask the woman question, the race question, and the culture question. Yet, while much has been written about the propriety (and indeed necessity) of asking these other questions, no such suggestion has been made about the family question.

Interestingly, if we look at the world’s children whose best interests we are seeking to protect, the geographies of race, sex, and culture, as well as of poverty, health, and education, become plainly evident. In 2000, if all the children were reduced proportionately to a cohort of one hundred children, forty-seven would have been born in industrialized countries; three in Central and Eastern Europe, Commonwealth of Independent States and Baltic states; five in Latin American and the Caribbean; fourteen in East Asia and the Pacific, sixteen in South Asia; four in the Middle East and North Africa; and eleven in sub-Saharan Africa. The birth of thirty-three of these children would have gone unregistered, resulting in children with no official existence, no recognition of nationality contrary to established international norms. Undoubtedly, this lack of identity

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would impede some of the children’s access to health facilities or school as there would be no proof of age. Given global and local responsibilities for children, it is appropriate to consider their well-being in all matters in international law.

VI. Family and Trade: The Case of Cuba

If indeed we have a global best interests standard, then it is unacceptable that many families and children still suffer from poverty, malnutrition, and lack of education. Today’s children are tomorrow’s world leaders. To have a productive global agenda, it is desirable to make the well-being of families and children a central value in international policy-making. Failure to consider the family when dealing with, for example, trade in a system that acknowledges that families and children have economic rights as well as civil and political rights—rights that are acknowledged to be indivisible, interdependent, and inalienable—may have quite deleterious, adverse, albeit unintentional, consequences that could be avoided by simply asking the family question.

Cuba provides a poignant example of how trade and family policies can intersect. I stumbled upon this startling reality while indulging in one of my recent legal obsessions—the relationship between law and culture. In trying to figure out why, in some cases, law manages to be a terrific catalyst for cultural change and in others a wholly inefficient vehicle, I used as the basis of my inquiry what I call the “two Cubas”—one, the island sovereign, the other the diaspora, mainly Miami. Notwithstanding the different social, economic, and political climates in the two Cubas, strong, culturally entrenched constructs remained constant. One such construct is reverence for the family; another is the persistent gender-based cultural family tropes. Regardless of the political, socio-economic differences that have been confirmed by legal barriers and contrasting political climates, the uniform reverence for family demonstrates the need for international norms, including trade policies, to center the family. In the case of Cuba, the U.S. economic embargo, a local law in furtherance of its international goal of promoting democracy and ending communism, has a destructive effect on families and operates in opposition to international legal family norms.
law principles of furthering the best interests of the child and the obliga-
tion of parental support.

The following hypothetical captures the essence of an increasingly
common scenario. A parent, typically a father, leaves la isla and a family
behind. The parent resettles in the United States, where he/she becomes
established, and may even start a new family. The parent in the United States
quickly forgets about la familia en la isla and either chooses to end ties or
simply loses contact with those family members. Notwithstanding Cuban
family law, which provides that a parent who leaves the island still has a
child-support obligation, the parent living in the United States may not pay
support. A parent unwilling to satisfy such an obligation presents the most
difficult case; but even if a parent were well-meaning, dedicated, and want-
ing to fulfill his/her support obligations, he/she would encounter obstacles
in meeting them because of the legal framework of U.S.-Cuba relations.

A version of the abandoning parent scenario was played out in the high
profile case of Cuban defector-turned-major league baseball player Rey
Ordoñez who had a $19 million four-year contract with the New York Mets
baseball team. Four days prior to leaving Cuba, Ordoñez divorced his wife.
The Cuban courts ordered him to pay $1.50 per month in support based on
his annual salary (in Cuba) of $1,416 or $118 per month. However, two
years after his departure, his ex-wife came to the United States and sought
to increase the support payments to almost $8,000 per month based on his
lucrative baseball contract. She finally settled out of court with Ordoñez
agreeing to pay $6,500 per month in child support, as well as $30,000 in
back child support and $25,000 for his ex-wife’s legal fees.

Although one could only speculate what a court might have done, this
real life example shows the need for global cooperation with respect to
meeting the child’s best interests. A noteworthy difference between the
Ordoñez case and the suggested hypothetical is the importance of both
parents’ presence in the United States. In any litigation, it is much more
difficult for a person in one country to enforce obligations against a person
in a different geographic location. In this regard, it is especially onerous
for a parent who remains in Cuba to enforce child support obligations

68. See infra notes 78-104 and accompanying text.
70. Id.
72. T.J. Quinn, Rey to Add to Child Support, DAILY NEWS (NEW YORK), May 23, 2001, at 59.
73. Dead-beat dads are rare in Cuba because divorced spouses are required to pay a per-
centage of their salary to child support until the child graduates from the university. See
Stephanie Murphy, Divorce ‘Just Paperwork’ in Cuba, COX NEWS SERVICE, May 8, 2001.
against a parent who moves to the United States because of the U.S. legal framework limiting U.S.-Cuba relations.\(^74\)

In the hypothetical scenario, if the original couple had divorced in Cuba, jointly owned assets would have been sold and divided evenly.\(^75\) Thereafter, under Cuban law, primary custody would typically be awarded to the mother, and child support payments would be based on need and the father’s income.\(^76\) Minor children remaining in Cuba would remain under patria potestad,\(^77\) the Cuban legal concept of parental responsibility to the child, which by express legal mandate is shared by both parents. However, neither the Cuban Family Code nor U.S. law address the complex issue of collecting child support when a parent leaves a Cuban family behind and moves to the United States (or elsewhere).

Further, U.S. laws, particularly the U.S. embargo on Cuba,\(^78\) create a complex legal maze to be negotiated when analyzing ways to enforce any child support obligation once a parent leaves Cuba and moves to the United States. The U.S. embargo against Cuba, which started in the 1960s under

\(^{74}\) Once in the United States, the migrating parent becomes subject to strict laws on child support of any children and spouse who also reside in the United States. The U.S. courts have upheld the constitutionality of the Child Support Recovery Act of 1992, 18 U.S.C. § 228, which criminalizes the failure of an out-of-state parent to pay child support. See United States v. Mussari, 95 F.3d 787, 790 (9th Cir. 1996). It is unlikely at this point, because of economic conditions, a spouse in the United States would seek to enforce support from a spouse who remains in Cuba. However, this scenario, if it occurred, would also be fraught with many of the same difficulties as the representative of the U.S. spouse still would require a license to work in and travel to Cuba for any necessary proceedings.

\(^{75}\) Cuban Fam. Code § 5, art. 38. See also Debra Evenson, Revolution in the Balance 181 (1994). It should be noted that a United States state court would honor a Cuban court divorce decree that was issued by a court with proper jurisdiction. See, e.g., Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950) (recognizing Cuban divorce decree obtained on proper substituted service). On the other hand, Cuba would not recognize a U.S. court’s divorce decree as divorces obtained abroad by Cuban nationals are only “valid as long as the Cuban consulate in the country where it was granted certifies that it was substantiated and granted according to the laws of that country” and Cuba has no consulate in the United States. Cuban Fam. Code, art. 64. However, there is no reciprocity requirement in the U.S. Restatement (Third) of the Foreign Relations Law of the United States § 481 comment [hereinafter Restatement Foreign Relations] (“A judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed”).


\(^{77}\) See, e.g., Cuban Fam. Code ch. 2 § 1, arts. 82-87; § 3, art. 92 (describing patria potestad being terminable in only four prescribed circumstances: (1) death of parent or child, (2) coming of age of child, (3) marriage of minor child, or (4) adoption of child).

the Trading with the Enemy Act (TWEA), effectively creates barriers to the collection of any support payments and thus works against the local and global best-interests-of-the-child standards. The purpose of the TWEA was to give the President authority to prohibit, limit, and regulate trade with nations that are regarded as hostile in times of peace in an effort to protect national security. In 1992, the Cuban Democracy Act further strengthened the embargo against Cuba, and in 1996, President Bill Clinton signed the Helms-Burton Act which intensified the embargo by expanding its reach to other nations that trade with Cuba. The purpose was to deter third-party countries, as well as the nationals of third-party countries, from trading with and investing in Cuba, a move that has been loudly condemned as an illegal exercise of extraterritorial jurisdiction.

Significantly, in late 2003, President George W. Bush established an interagency commission to address ways to “hasten Cuba’s transition to a free and open society and . . . [to] assist the Cuban people during such a transition.” Based on the commission’s findings, effective June 30, 2004, the Cuban Assets Control Regulations (CACR) were amended in order to implement changes consistent with President Bush’s policy with respect to U.S. relations with Cuba. In seeming contrast to the stated purpose, the changes impose stricter—some say draconian—sanctions. For U.S. travelers visiting relatives in Cuba, these changes narrow the category of “relatives” who can be visited in Cuba; restrict travel to once-per-three year period

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79. Trading with the Enemy Act of 1917, 40 STAT. 411 (1917), as amended (1941-76); 50 U.S.C. app. § 5(b) (allowing extension of embargo annually by presidential action).
84. U.S. Dep’t of the Treasury, Office of Foreign Assets Control, Changes to Cuban Assets Control Regulations, Published June 16, 2004, Effective June 30, 2004, at 1 (2004), available at: http://www.ustreas.gov/offices/eotl/ofac/sanctions/tl1cuba.pdf (hereinafter Changes to CACR). On October 10, 2003, the President established the Commission for Assistance to a Free Cuba. Subsequently, the Commission recommended to the President that, among other things, a number of changes be made to the CACR sanctions. On May 6, 2004, the President directed the implementation of certain of the Commission’s recommendations. Id.
85. 31 C.F.R. § 515.
86. Changes to CACR, supra note 83. By way of an interim final rule, the Office of Foreign Assets Control is amending the CACR. Id. Other amendments affect fully-hosted travel, importation of Cuban merchandise, exportation of accompanied baggage, participation in international sports competitions, attendance at professional meetings, educational activities, NGO remittances, and remittance-related transactions by banks and other depository institutions. Id. at 1-6.
87. Id. at 3 (under § 515.561, replaces “close relative” with “member of a person’s immediate
and for no more than fourteen days, and require a specific license;\textsuperscript{88} eliminate additional visits;\textsuperscript{89} reduce the amount of money travelers may spend for living expenses while in Cuba;\textsuperscript{90} restrict remittances to members of the remitter's immediate family;\textsuperscript{91} and reduce remittance amount travelers may carry to Cuba.\textsuperscript{92}

The U.S. control of the flow of money from the United States to Cuba also means that if money is recovered by a Cuban national who is a plaintiff in a U.S. court, the money cannot simply be collected and taken home; rather, the money has to be paid into an account in a U.S. financial institution from which monies cannot be sent to Cuba—a Cuban Blocked account.\textsuperscript{93} As this regulation applies in all instances, even if a U.S. court were to enter an order for child support or alimony in favor of a child who remains in Cuba, the CACR would serve as a barrier to actually getting support beyond the allowable family limits to the family in Cuba who is entitled to receive it.\textsuperscript{94}

Of course, issues of legal representation, discovery, and language further exacerbate this legal maze. The legal difficulties created include problems faced by U.S. lawyers who seek to represent Cuban nationals in U.S. courts. In order to engage in such a representation, a U.S. attorney must obtain a special license granting permission to represent a Cuban national living in

\textsuperscript{88} Id. (under § 515.561(a), replaces "[t]he once-per-twelve-months general license" with unlimited duration of first visit with "specific licenses authorizing travel-related transactions incident to visits to members of a person's immediate family who are nationals of Cuba once per three-year period and for no more than 14 days" and also provides "[f]or those who emigrated . . . and have not since that time visited a family member in Cuba, the three-year period will be counted from the date they left Cuba. For all others, the three-year period will be counted from the date they last left Cuba pursuant to the preexisting family visit general license or, if they traveled under a family visit specific license, the date that license was issued").

\textsuperscript{89} Id. (under § 515.561(b), eliminates issuance of specific licenses for additional visits: "No additional visits will be authorized").

\textsuperscript{90} Id. at 4. (under § 515.515.560(c)(2) reduces travelers' living expenses in Cuba from $167 per day "plus additional funds needed for transactions directly incident to visiting that relative" to "$50 per day plus up to an additional $50 per trip, if needed, to pay for transportation-related expenses in Cuba that exceed the $50 per day limit").

\textsuperscript{91} Id. at 6. (under § 515.570(a), changes authorization for quarterly $300 remittances "to any household of a national of Cuba" "to members of the remitter's immediate family" and specifically provides not to "certain government officials and certain members of the Cuban Communist Party").

\textsuperscript{92} Id. (amends § 515.560(c)(4)(I) "reduce the total amount of quarterly $300 remittances that an authorized traveler may carry to Cuba from $3,000 to $300").

\textsuperscript{93} 31 C.F.R. § 515.580.

\textsuperscript{94} 31 C.F.R. § 515.201(b)(1)&(2).
Cuba. And, because access and travel to Cuba are severely limited, it is unlikely that regular visits to a client would be permissible under the intense travel restrictions set out in the CACR. Challenges to these regulations, claiming that they unlawfully restrict the right to travel, have failed.

Even if these obstacles are overcome, other problems exist. For example, even if a formal order of child support from a Cuban court existed, comity considerations will influence whether U.S. courts will enforce the judgment. Comity, as well as express statutory enactments such as the Uniform

95. 31 C.F.R. § 515.512(a) ("The provision of the following legal services to or on behalf of Cuba or a Cuban national is authorized, provided that all receipts of payment of professional fees and reimbursement of incurred expenses must be specifically licensed: (1) Provision of legal advice and counseling on the requirements of and compliance with the laws of any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part; (2) Representation of persons when named as defendants in or otherwise made parties to domestic U.S. legal, arbitration, or administrative proceedings; (3) Initiation and conduct of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. jurisdiction; (4) Representation of persons before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons; and (5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense"); the CDA does not specifically provide nor prohibit provision of legal representation to a Cuban national, but does note that licenses are needed for transactions. CDA, supra note 80, at § 6004(d)(2). Section 6005(d) clarifies applicability of sanctions by noting "[t]he prohibitions . . . of this section shall not apply with respect to any activity otherwise permitted by section 6004 or section 6006 of this title or any activity which may not be regulated or prohibited under section 5(b)(4) of the Trading With the Enemy Act." Id. § 6005(d).

96. 31 C.F.R. § 515.560(a) (detailing the travel-related transactions permitted to/from Cuba—which do not specifically include legal representation) & (b)(additional restriction clarifying that "no specific licenses will be issued . . . in connection with activities other than those referenced in paragraph (a)").

97. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996).

98. Hilton v. Guyot, 159 U.S. 113, 163-164 (1895) ("Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

99. See, e.g., Popper v. Popper, 595 So. 2d 100 (Fla. 1992) (holding that "[w]hen the out-of-state decree is one entered by the court of a foreign nation . . . the Florida court has discretion as to whether to recognize it and give it effect - - a matter of 'comity'"); citing Pawley v. Pawley, 46 So. 2d at 464, cert. denied, 340 U.S. 866 (Fla. 1950) (recognizing Cuban divorce decree obtained on proper substituted service in Cuba); Pawley, 46 So. 2d at 464 (upholding, based on comity, a husband’s Cuban divorce decree in an action for alimony, unconnected with divorce, based upon reasoning that a divorce, while dissolving marital status, may not extinguish all obligations incidental to marital status); Hachez v. Hachez, 1 A.2d 845 (1938) (noting that "[i]t is now the generally accepted rule, sometimes said to be grounded in what has been termed 'comity between nations,' that . . . decree of a foreign court of competent jurisdiction awarding custody of a minor child to either parent is enforceable in other jurisdictions"); Quintana v. Quintana, 101 N.Y.S.2d 593 (1950) (holding on husband's action for annulment that divorce decree by Cuban court is binding on the parties but custody decree was ineffective to award wife custody of child or to require husband to pay child support because it is "well established law
Foreign Money-Judgments Recognition Act,\textsuperscript{100} may permit the enforcement of foreign judgments. However, the Act expressly excludes the enforcement of "a judgment for support in matrimonial or family matters."\textsuperscript{101}

One U.S. court that confronted the support issue specifically refused to uphold a Cuban court's divorce decree for child support and alimony. In \textit{Zalduendo v. Zalduendo},\textsuperscript{102} an Illinois court, relying on the Uniform Foreign Money-Judgments Recognition Act held, "that provisions in a foreign decree regarding child support or alimony are unenforceable in Illinois."\textsuperscript{103} Thus, with respect to the issue of alimony, the court concluded it lacked the power to enforce a decree issued by a Cuban court, and, therefore, found the ex-husband was not under obligation to pay alimony.\textsuperscript{104}

Interestingly, the court took a different approach to the issue of child support, upon which the Cuban decree was silent. The court found no statutory basis for awarding child support, but found jurisdiction to decide the issue "in the common law under the plenary jurisdiction of courts of equity over the persons and estates of minors and under the provisions of article II, section 19 of the Illinois Constitution."\textsuperscript{105} The part of the decision that finds state constitutional authority to award child support is wholly consonant with the "best interests" doctrine.

Although other barriers may well exist, those few discussed above frame the difficulties that the current state of U.S.-Cuba relations pose to family well-being. In general, U.S. society is very supportive of strong

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\textsuperscript{100.} \textsc{Unif. Foreign Money-Judgments Recognition Act} (1963), 13 \textsc{U.L.A.} 261 \textit{et seq.}, National Conference of Commissioners on Uniform State Laws. Currently, twenty-five states have adopted the Act.

\textsuperscript{101.} \textsc{See, e.g.}, \textsc{Alaska Stat.} § 09.30.170(2).


\textsuperscript{103.} \textit{Id.} at 390. The court noted that the Illinois Supreme Court, "drew the same distinction regarding comity that [this Court] ha[s] drawn in regard to the Uniform Foreign Money-Judgments Recognition Act: The rule of comity between nations would justify our [re]cognition of a decree of a foreign country, but we do not believe comity would require us to [e]nforce a foreign decree for alimony where no law exists here granting power to our chancery courts for that purpose. Thus, if a court of this state may only recognize a foreign decree, and not enforce its provisions, there must be some other jurisdictional basis to sustain an award of child support."

\textsuperscript{104.} \textit{Id.}

\textsuperscript{105.} \textit{Id.} at 391.
family values, which includes parents caring for their children, even in the sad context of nonintact families. Similarly, cubanas/os in both Cubas have a strong dedication and commitment to *familia*. This commitment certainly should translate to a desire by persons in both Cubas to see that family support obligations are met to ensure family stability and well-being. Yet, a likely unintended consequence of the embargo may well be to place children’s well-being at risk by denying them access to support funds that can be utilized to ensure their health and welfare.

VI. Conclusion

The example of Cuba shows how trade relations between states can affect the family—the fundamental unit of society. This unit, comprised of mixed forms, is a complex structure where individuals have rights and obligations to each other and to the state in so far as the well-being of children is concerned. International relations and norms are sure to have an impact on the family as a unit and its members, as well as its obligations. Yet, to date, international norm-making and relations have taken place in a family vacuum.

Because of the centrality and ubiquity of the family, notwithstanding its myriad compositions, it is appropriate to urge changes to the existing international norms, laws, and relations to facilitate meeting families’ and children’s needs—such as support obligations. Although the family should not trump all other concerns, this work suggests that the drafters of domestic legislation and international agreements ask the family question in order to directly consider and address the possible repercussions of laws on this significant social and cultural unit. Such a methodological approach to norm-making would utilize the existing wealth of international law that protects families. Today, such norms are not even considered in the deliberations of international rule-making or in passing domestic laws that have international consequences, a case well illustrated by the Cuban example developed in this paper.