

DOES THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD MAKE A DIFFERENCE?

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INTRODUCTION

The 1954 U.S. Supreme Court decision of *Brown v. Board of Education*² was about equality. It was about giving every child an equal chance at life, liberty, and the pursuit of happiness.³ It was about deciding that the law will no longer tolerate a system that allows some children to thrive, while failing to protect and

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2. 347 U.S. 483 (1954).

3. See *id.* at 691 (describing education as a right and questioning a child's ability to succeed in life without an education).

nurture other children.⁴ In a way, the Convention on the Rights of the Child⁵ was intended to accomplish the same thing.⁶ While this treaty establishes a worldwide right to education, it also addresses every other major area of law that touches children's lives.⁷ The Convention on the Rights of the Child sought, like the *Brown* case, to take the first significant steps toward creating a world in which any child—even the most vulnerable separated immigrant child—can be aided to reach his or her full potential.

The Convention on the Rights of the Child (CRC) is a multilateral treaty designed to promote the protection of children worldwide.⁸ At the behest of President Ronald Reagan and those in his Administration, the United States played a major role in precisely drafting the CRC *to accord with American values*,⁹ and

4. *See id.* (providing that “[t]o separate [some children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be done.”).

5. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 44 [hereinafter CRC].

6. *See id.* at 45 (recognizing “that everyone is entitled to all the rights and freedoms . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” and declaring that “children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”).

7. *See id.* at 47, 52-54 (enumerating the rights of a child, including the right to a name, nationality, healthcare, education, and freedom from economic exploitation).

8. *See id.* at 44 n.1 (listing the countries that ratified the CRC and listing the countries in which the CRC enters into force in the United Nations Treaties Series); *Id.* at 45 (proclaiming that everyone is entitled to the rights enumerated in the Convention, “particularly children, [who] should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community”).

9. *See* LUISA BLANCHFIELD, CONG. RESEARCH SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: BACKGROUND AND POLICY ISSUES 1 (2009), available at <http://fpc.state.gov/documents/organization/134266.pdf> (noting that the Reagan and Bush Administrations played a significant role in drafting the CRC but did not support U.S. ratification due to concerns regarding the impact on state and federal laws and U.S. sovereignty).

it quickly became the most universally ratified human rights treaty in world history.¹⁰ One hundred ninety-three countries are party to it.¹¹

As of today, only three countries in the world have yet to ratify the CRC: Somalia, the new nation of South Sudan, and the United States.¹² This is most unfortunate, given that the United States, since 1948, has been a leader on the world stage in the promotion of special legal protections for children.¹³ That year, the United States was *instrumental* in the drafting and adoption of the first United Nations document that recognized protective rights for children.¹⁴ The *Universal Declaration of Human Rights* (UDHR), in its Article 25(2), states, “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.”¹⁵

10. *Id.*

11. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION (Oct. 12, 2013, 5:11 AM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

12. *Id.*

13. See BLANCHFIELD *supra* note 9 at 2, 17 (pointing out that the U.S. is an internationally leader on children’s rights and that the “U.N. member states first collectively recognized the rights of children in the Universal Declaration of Human Rights, a non-binding resolution adopted by the U.N. General Assembly in 1948.”).

14. Universal Declaration of Human Rights art. 25 ¶ 2, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?hereinafter+UDHR>. The UDHR passed by a vote of 48 in favor, zero against, and eight abstentions with the United States voting in favor. U.N. GAOR, 3d Sess., 183d plen. mtg. at 933, U.N. Doc. A/PV.183 (Dec. 10, 1948), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NL4/812/23/PDF/NL481223.pdf?OpenElement>. See, e.g., Mary Ann Glendon, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001); Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 415 (1979).

15. UDHR, *supra* note 14, art. 25 ¶ 2.

I. THE U.S.' ANTI-RATIFICATION POLITICAL CLIMATE

In 1959, under the Eisenhower Administration, the U.S. voted with the rest of the world to adopt the Declaration on the Rights of the Child (Declaration) unanimously in the United Nations General Assembly.¹⁶ The Declaration asks parents and governments to ensure certain critical rights for children, such as name and nationality, access to healthcare, treatment for disabilities, free education, and protection from exploitation and neglect.¹⁷ Finally, the U.S. is a party to the 1966 International Covenant on Civil and Political Rights (ICCPR), which, in Article 24, addresses the special status and protection of children:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.¹⁸

The United States played a pivotal role in the drafting of the CRC between 1979 and 1989, when the treaty was adopted by the General Assembly.¹⁹ Specifically, the Reagan and George H.W. Bush Administrations actively contributed to negotiating

16. Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/RES/1386(XIV) (Nov. 20, 1959), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1386%28XIV%29&Lang=E&Area=RESOLUTION.

17. *Id.*

18. International Covenant on Civil and Political Rights, art. 24, Dec. 16, 1966, 999 U.N.T.S. 14688 [hereinafter ICCPR]. The United States ratified the ICCPR on June 8, 1992. *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION (Oct. 12, 2013, 5:11 AM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

19. Chris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 13* (Jonathan Todres, et al., eds., 2006).

the treaty's text.²⁰ Under these two Republican presidencies, the United States "made textual recommendations for 38 of the 40 substantive law articles" of the CRC and contributed more new substantive provisions (which had not been in the original draft of the document) than *any other country*.²¹ Specifically, it was the U.S. that submitted initial proposals for the CRC articles that establish a child's *right to family reunification, freedom of expression, freedom of religion, freedom of association and assembly, privacy, protection from abuse, and periodic review of treatment*.²²

Although the Clinton Administration signed the treaty, it never submitted it to the Senate for its advice and consent to ratification because of strongly stated personal opposition led by the then-Senate Foreign Relations Committee Chairman, Jesse Helms.²³ The George W. Bush Administration opposed the Convention, citing federalism, sovereignty, and parental rights concerns.²⁴ However, that Administration pushed for ratification of two CRC *Optional Protocols*: one on *Children in Armed Conflict* and the other on the *Sale of Children, Child Pornography, and Child Prostitution*; the U.S. ratified both Protocols in December of 2002.²⁵

The current political climate, in which all Republican members – more than a third of the U.S. Senate – have expressed opposition to the CRC, is dooming ratification. A good deal of this opposition, like that against the more recent U.N. Disabilities Convention, is based on anti-United Nations views,

20. *Id.*

21. *Id.*

22. *Id.* at 14.

23. Alison Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 629, 632-33 (1997).

24. BLANCHFIELD, *supra* note 9, at 5-6

25. Chris R. Revas & Jonathan Todres, *The Optional Protocols to the U.N. Convention on the Rights of the Child and the Impact of U.S. Ratification*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 294 (Jonathan Todres, et al., eds., 2006).

which, unfortunately, some significant portion of the U.S. electorate share.²⁶

In 2004, according to one polling organization, a minority of 44% of U.S. citizens had a favorable view of the United Nations.²⁷ This number continued to decline steadily, and two years later, in 2006, that number with favorable views had fallen to 31%.²⁸ However, when opinions about the U.N. are asked differently, there is a more positive public response.²⁹ For example, in 2006, only slightly over a quarter (26%) of Americans said that “the U.S. should not be involved” with the United Nations, with a moderate majority (57%) supporting the idea that the U.S. should remain a U.N. member.³⁰ A 2008 poll showed that 39% found it “very important” – and 21% “not important” – to strengthen the U.N.³¹

There is a lot about the U.N. that Americans do not know. According to the United Nations Association of the United States of America, each year, the United Nations provides food to 90 million people in 73 countries; vaccinates 58% of the world’s children, saving 2.5 million lives a year; and promotes maternal health, saving the lives of 30 million women a year.³² Yet, distortions about what the U.N. does or might do, to undermine U.S. sovereignty, are being spread by those with

26. *See 38% Have Favorable Opinion of U.N.*, RASMUSEN REPORTS, (Apr. 27, 2004), http://www.rasmussenreports.com/public_content/politics/current_events/united_nations/38_have_favorable_opinion_of_u_n2.

27. *Id.*

28. *See Should the United States continue to participate in the United Nations?*, RASMUSEN REPORT, (Sept. 26, 2006), <http://legacy.rasmussenreports.com/MembersOnly/2006%20Dailies/September%202006/September%2025-26.htm>

29. *Id.*

30. *Id.*

31. *Global Views 2008 – Foreign Policy Report*, CHICAGO COUNCIL ON GLOBAL AFFAIRS, 1, available at http://www.thechicagocouncil.org/UserFiles/File/POS_Topline%20Reports/POS%202008/2008%20Public%20Opinion_Foreign%20Policy.pdf.

32. *Every day the United Nations Works to Tackles Global Challenges*, UN, available at http://www.un.org/en/aboutun/pdf/2012%20English%20Every%20Day%20Poster_Web.pdf.

political clout to get state legislatures, for example, to consider anti-U.N. resolutions.³³ An example is the Agenda 21 initiative, which is touted as a threatening United Nations global plot.³⁴ Anti-U.N. forces falsely claim that Agenda 21 calls for governments to take control of all land use and not leave any decision making in the hands of private property owners.³⁵

What actually is Agenda 21?³⁶ It is a nonbinding U.N. resolution signed by more than 170 world leaders, including President George H.W. Bush, at the 1992 Earth Summit in Rio de Janeiro as a way to promote sustainable development in the face of a rapidly growing global population.³⁷ It is not a call for governments to take control of private land. Despite this, state legislatures are considering and passing resolutions, saying that nothing in Agenda 21 can infringe on private property rights without due process of law, which of course is already a long-engrained American legal principle that the U.N.'s actions could never undermine.³⁸

In another recent anti-U.N. campaign, the National Rifle Association (NRA) has been stepping up its opposition to a new U.N. treaty aimed at halting the illicit trade of guns into conflict zones.³⁹ Human rights advocates claim that the NRA's campaign is designed to stir up anti-U.N. panic ahead of a U.N. conference

33. *See Anti-Agenda 21 Legislation/Resolutions*, AGENDA 21 TODAY, http://americanfreedomwatchradio.com/?page_id=1880 (listing state legislative efforts to oppose the U.N.'s Agenda 21).

34. *See id.*

35. *See id.*

36. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.1), Annex II, at 9, U.N. Sales No. E.93.I.8 (1993), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.151/26/Rev.1%20%28Vol.%201%29&Lang=E.

37. *Id.*

38. *See Anti-Agenda 21 Legislation/Resolutions*, *supra* note 33 (listing state legislative efforts to oppose the U.N.'s Agenda 21).

39. *No Compromise: NRA Takes On United Nations*, NRA, (Jul. 15, 2011), <http://www.nrapublications.org/index.php/11466/no-compromise-nra-takes-on-united-nations/>.

on the Arms Trade Treaty.⁴⁰ The NRA has claimed in its literature and fundraising drives that there is an international conspiracy to “grab your guns.”⁴¹ Supporters of the treaty have accused the NRA of deceiving the public about the pact, which would have no impact on U.S. domestic gun ownership, since it would apply only to gun exports and is an effort to effectively address the inter-country transfer of large numbers of military weapons that leads to human rights abuses across the globe.⁴² But probably the saddest impact of anti-U.N. rhetoric led to the failure of the U.S. Senate, last year, to ratify the U.N. Convention on the Rights of Persons with Disabilities, which according to the Home School Legal Defense Association, would have “surrendered U.S. sovereignty to unelected U.N. bureaucrats, and... threaten parental decision making for children with disabilities.”⁴³ Despite the fact that 89-year-old former Senate Majority Leader Bob Dole was sitting in a wheelchair outside the Senate chamber to greet his one-time conservative colleagues, urging them to vote “yes” on the treaty, it fell five votes short of the required two-thirds vote needed for ratification.⁴⁴

In a classic deception on the treaty’s intent, former Senator Rick Santorum stated that, instead of allowing parents to make

40. See *id.* (noting that the chief of campaigns and programs at Amnesty International USA said they had witnessed a resurgence in the NRA’s attempts to influence lawmakers and to use its opposition to the UN treaty as an opportunity for fundraising).

41. Ed Pilkington, *NRA’s silence on UN arms treaty surprises gun control campaigners*, GUARDIAN, (Mar. 9, 2013), <http://www.theguardian.com/world/2013/mar/09/nra-silence-un-arms-treaty>.

42. See *id.*; American Bar Association, Center for Human Rights, White Paper on the Proposed Arms Trade Treaty and the Second Amendment, Feb. 26, 2013, available at <https://www.documentcloud.org/documents/612012-aba-white-paper.html>.

43. *Senate Expected to Vote on Tuesday to Surrender U.S. Sovereignty*, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, (Dec. 3, 2012), <http://www.hslda.org/docs/media/2012/201212030.asp>.

44. Jennifer Steinhauer, *Dole Appears, but G.O.P. Rejects a Disabilities Treaty*, N.Y. TIMES, (Dec. 4, 2012), http://www.nytimes.com/2012/12/05/us/despise-doles-wish-gop-rejects-disabilities-treaty.html?_r=0.

critical health-care decisions for their child with a disability, the Convention would permit “a well-meaning, but faceless and distant United Nations bureaucrat” to make those decisions.⁴⁵ It is interesting to note, however, that Mr. Santorum *correctly* stated something that other critics of the CRC *have misstated* about the effect of U.S. ratification of the CRC: Santorum said that the United States ratification of the Disabilities Convention would *do nothing to force* any government to change their laws or to spend resources on the disabled. Those actions, he said, are for *individual governments to decide*.⁴⁶ He is correct, and, likewise, ratification of a U.N. Convention does not force a national government, or its citizens, to do anything.⁴⁷

It is all this distorted, and often untruthful, anti-internationalist opposition to *all international law* – coming from the U.N. conspiracy-theorist wing of America’s conservative movement, those that fear a socialist plot (which, of course, they believe President Obama will be a part of) to create a one-world government – that today, apparently, dooms our acceptance of international human rights treaties. As long as there are 34 Senators willing to block any U.N. treaty, we’ll be at a standstill.⁴⁸ In the last Congress, a resolution in the Senate, S.R. 99 garnered 37 *sponsors*.⁴⁹ It stated that, because the use of international treaties to govern policy in the United States on families and children is contrary to principles of self-government and federalism, and that, because the United Nations Convention on the Rights of the Child undermines traditional principles of law in the United States regarding parents and children, the

45. Rick Santorum, *Santorum: U.N. Disabilities Treaty Would’ve Had Bureaucrats Unseat Parents*, DAILY BEAST, (Dec. 5, 2012), <http://www.thedailybeast.com/articles/2012/12/05/santorum-un-disabilities-treaty-would-ve-had-bureaucrats-unseat-parents.html>.

46. *Id.*

47. *Id.*

48. See U.S. CONST. art. III, § 2 (providing the President with the power “by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur”). This allows one-third, or 34, of 100 Senators to disagree without blocking the treaty.

49. S. Res. 99, 112th Cong. (2011) (unenacted).

President should not transmit the Convention to the Senate for its advice and consent.⁵⁰

Opponents of U.N. treaties also claim that it is self-abasing for the U.S. to periodically be required to put together an interagency report on our record of implementation of a treaty's provisions and send a federal delegation to Geneva to appear before an international panel.⁵¹ They claim this process often vilifies our country's human-rights record, and they've referred to this as a "national spanking" in which we must throw ourselves in front of a committee just to get smacked around and told we're doing a terrible job.⁵² These critics simply don't want the U.S. *ever* answering to a U.N. body when we are the self-acclaimed leader of the world on a particular issue. In reality, the institution that interprets that treaty, the Committee on the Rights of the Child, has no authority to force any government to submit a report or to impose a sanction on any country.⁵³

All of this anti-U.N., anti-international law, political activity has a major impact on the United States becoming a party to the CRC. However, as we marked, in 2009, the 20th anniversary of the CRC's entry into force, the Obama Administration signaled that it was beginning to conduct a legal review of the Convention, something that is generally done under the leadership of the State Department to determine whether the President should submit it to the Senate for its advice and consent.⁵⁴ Such a U.S. Government review is also supposed to determine the reservations, understandings, and declarations (or

50. *Id.*

51. *See, e.g. Why Should The US Ratify The UN Disability Treaty? There Are Plenty Of Reasons Not To*, LONELY CONSERVATIVE, (Dec. 3, 2012), <http://lonelyconservative.com/2012/12/why-should-the-us-ratify-the-un-disability-treaty-there-are-plenty-of-reasons-not-to/>.

52. *Id.*

53. Steven Groves, Convention on the Rights of Persons with Disabilities (Treaty Doc. 112-7), Testimony before the United States Senate Committee on Foreign Relations, July 12, 2012, <http://www.heritage.org/research/testimony/2012/11/convention-on-the-rights-of-persons-with-disabilities>.

54. Blanchfield, *supra* note 9, at 5.

RUDs) the Administration should propose to condition the Senate's ratification of the CRC.⁵⁵ And attaching those RUDs to a human rights treaty is nothing new; the U.S. *always* conditions its ratification of international human rights treaties, often with a non-self-executing clause, meaning that no changes in American law will automatically come about simply because the U.S. becomes a party to a treaty.⁵⁶

II. WHY THE U.S. SHOULD RATIFY THE CRC

Why is it important that the United States finally, at long last, ratifies this Convention? I hope to answer this question and also address some of the major specific critiques of the Convention offered by those who oppose our country's ratification of it.⁵⁷ Simply put, I believe the United States should ratify the Convention principally because *international leadership* on the protection of vulnerable human beings – from protecting children against being forced into armed combat to ending children's sex slavery – is best practiced *from the inside*, as an active participant in the global process of advancing human rights.

A. The Failure to Ratify the CRC and the Resulting Foreign Policy Costs

When we fail to ratify a major human rights treaty, we pay great foreign policy costs.⁵⁸ First, the U.S. is precluded from

55. *Id.*

56. BARRY E. CARTER ET AL., INTERNATIONAL LAW 178 (5th ed. 2007).

57. The views expressed here are our own, but we do want to note that the American Bar Association has long supported U.S. ratification of the Convention on the Rights of the Child. *U.S. Ratification of Convention on the Rights of the Child--Supplemental Action*, ABA (Aug. 1994), http://www.americanbar.org/groups/child_law/tools_to_use/attorneys/u_s_ratificationofconventionontherightsofthechild--supplementala.html.

58. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 414 (2000).

playing an influential role in the creation of highly relevant, evolving international human rights law for children because, as a non-party to the core underlying treaty, it cannot participate in the work of, or have membership on, the Committee on the Rights of the Child.⁵⁹ The Committee also establishes inter-country norms and decides upon the need for and development of additional related protocols or other instruments.⁶⁰

Second, non-participation in the Convention's implementation impedes the greater success of American diplomacy, because the U.S. cannot credibly encourage other nations to embrace human rights norms for children if it has not itself embraced those norms.⁶¹ Acknowledging the importance of joining major human rights treaties, so as to strengthen the legitimacy of U.S. foreign policy around the world, during the 2008 presidential campaign, then-candidate Obama specifically remarked on the U.S. non-ratification of the CRC, stating that, "[i]t is embarrassing to find ourselves in the company of Somalia, a *lawless land*. I will review this treaty and other treaties to ensure that the United States resumes its international leadership in human rights."⁶²

We have not always failed to become parties to important human rights treaties. The U.S. has ratified four major human rights treaties in addition to the two Optional Protocols of the CRC.⁶³ They are the Genocide Convention in 1988,⁶⁴ the International Covenant on Civil and Political Rights in 1992,⁶⁵ and, in 1994, both the Torture Convention and the Convention

59. *See id.*

60. *See id.*

61. *See id.*

62. Patrick Geary, *United States: Is Obama's Win Also a Victory for Children's Rights?*, CHILD RTS. INFO. NETWORK (Nov. 7, 2008), <http://www.crin.org/resources/infoDetail.asp?ID=18874&flag=news> (emphasis added). A video of the statement is hyperlinked to the online article. *Id.*

63. Bradley, *supra* note 58, at 416.

64. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 278.

65. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 172.

on Elimination of All Forms of Racial Discrimination.⁶⁶ Indeed, a good example of how the U.S. has become a leader in implementing human rights treaties that it has ratified is the progressive work we have accomplished after ratifying, with bipartisan political support,⁶⁷ the CRC's Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution in 2002.⁶⁸ Since then, significant child protection related amendments to the U.S. *Trafficking Victims Protection Act* have become law, the U.S. *PROTECT Act* has strengthened the work of those who prosecute sexual exploitation of children, and the *Adam Walsh Child Protection and Safety Act* has enhanced the oversight of convicted child sex offenders.⁶⁹ These and other federal and state laws have closed loopholes that had inhibited victim protection, increased penalties for those who would abuse and exploit children at home or abroad, and improved assistance programs for child victims, including enhancing a special visa program for immigrant child victims of trafficking, abuse, neglect, and parental abandonment.⁷⁰ Through U.S.-based organizations, such as the International Centre for Missing and Exploited Children, we share with other countries what we have learned.⁷¹

The U.S. should also ratify the CRC because it is, contrary to the naysayers' writings and website postings, an effective international instrument to advance the protection of children.

66. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 212. See also Bradley, *supra* note 58, at 416.

67. See *The Optional Protocol to the United Nations Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography*, U.S. DEP'T OF STATE, (Dec. 23, 2002), <http://2001-2009.state.gov/r/pa/prs/ps/2002/16216.htm> (acknowledging the unanimous ratification of the Protocol by the Senate).

68. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (May 25, 2000), 2171 U.N.T.S. 227, 247.

69. Revas & Todres, *supra* note 25, at 301-03.

70. *Id.*

71. See INTERNATIONAL CENTER MISSING & EXPLOITED CHILDREN, <http://www.icmec.org/missingkids/servlet/PublicHomeServlet>.

Despite what the CRC fear mongers say about threats of forced U.N. interventions into individual family lives or coercive intrusions into national legal or judicial systems, no international police force or punitive sanctions exist to enforce provisions of *any* international human rights treaty.⁷² Some treaties, including human rights treaties, provide countries with a legal cause of action to seek remedies in special tribunals to enforce the terms of that treaty. While human rights treaties create international law that can be enforced against parties through the mechanisms specifically established by each treaty, they essentially represent agreements between countries to commit themselves to achieving certain common aspirations, and to – which is only fair – open themselves up to scrutiny by the international community as to whether they are living up to the provisions of the treaty.

In December 2011, the U.N. General Assembly approved a third optional protocol to the CRC on what it calls a “[c]ommunications [p]rocedure” to simply allow an individual child to submit a complaint to the Committee on the Rights of the Child alleging specific violations of their rights under the Convention or its first two optional protocols.⁷³ The Committee would then examine the child’s complaint and, in response, could merely *request* that the child’s government take actions to prevent any further damage to the complainant.⁷⁴ That Protocol has to be ratified by ten countries before it takes effect, and even then only affects those nations that ratify it separately.⁷⁵ As of

72. See *supra* notes 40–48 and accompanying text (discussing opposing arguments to the treaty and the lack of authority the treaty would have over the United States).

73. Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, G.A. Res 66/138, art. 5, U.N. Doc. A/66/138 (Dec. 19, 2011), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=%20A/RES/66/138.

74. *Id.* arts. 5–6.

75. *Id.* art. 19.

March 2013 there were only three nations to have ratified it: Gabon, Germany, and Thailand.⁷⁶

B. Hard and Soft Law as National and Local Level Tools

Through the steady development of what legal scholars call “hard and soft law” at the national and local levels, the CRC has proven to be a powerful tool in the hands of child protection advocates and reformers for almost a quarter century.⁷⁷ According to the Campaign for US Ratification of the Convention on the Rights of the Child, and based on UNICEF data, the CRC has resulted in over 70 countries incorporating child codes into national legislation as a part of law reform.⁷⁸ To truly understand the impact of the CRC, it is important to understand the distinction between what legal scholars call “hard law” and “soft law.” Hard law is what we normally think of as law: legislatures write it, the executive branch enforces it, and courts interpret it and make final, enforceable judgments based on it.⁷⁹ The 70 national child codes are part of that.

Soft law, on the other hand, is often expressed in the form of declarations, statements, guidelines, and initiatives; it is essentially hortatory or aspirational, that is it expresses hope that a country will comply, but has no power to make it.⁸⁰ Much of its force is in *moral persuasion, and shaming bad behavior* by shedding a light on it.⁸¹

76. U.N. Treaty Collection, Multilateral Treaties Deposited With the Secretary General, Chapter VI 11 D., (Oct. 12, 2013, 8:12 AM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en.

77. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 319 (2006).

78. *How Does the CRC Impact Children*, CAMPAIGN FOR US RATIFICATION OF THE CRC, (last visited Oct. 3, 2013), <http://www.childrightscampaign.org/the-facts/how-does-crc-impact-children>.

79. JAMES B. ATLESON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKER'S RIGHTS IN THE GLOBAL ECONOMY 8 (2008).

80. *Id.*

81. *Id.*

Despite lacking “enforcement teeth,” soft law can be very powerful when it comes to encouraging actions by governments to better protect vulnerable populations. It has incredible norm-creating value, as agendas of advocacy organizations and corporate codes of conduct (such as on exploited child labor or sex tourism) are shaped and bolstered by soft law principals and policies. Soft law is most frequently a precursor to instruments that may have elements of hard law,⁸² just as the non-binding *Declaration on the Rights of the Child*⁸³ was the precursor to the *Convention on the Rights of the Child*.⁸⁴ While international treaties are not typically thought of as soft law, importantly the CRC did *not include* a traditional enforcement mechanism, such as a right of action in an international tribunal or the threat of sanctions.⁸⁵ Therefore, perhaps the CRC’s influence is most deeply felt in the not-easily-quantifiable area of soft law, as its very existence prompts norm-influencing discussions – from the classroom to the legislature, to hopefully, the boardrooms of multinational corporations.

In addition to inspiring the creation of soft law to promote increased protection of children, the CRC generates its own additional soft law through the written reports and recommendations of the Committee on the Rights of the Child.⁸⁶ The Committee is an 18-member body of child protection experts that reviews periodic reports by signatory nations, usually supplemented by independent reports from international and domestic non-governmental organizations.⁸⁷ These

82. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 320 (2006).

83. Declaration on the Rights of the Child, *supra* note 16.

84. UDHR, *supra* note 5.

85. Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, in THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 28 (Jonathan Todres, et al., eds., 2006).

86. *Cf. id.*

87. LAURA THEYTAZ-BERGMAN, SAVE THE CHILDREN SWEDEN, WHAT HAPPENED? A STUDY ON THE IMPACT OF THE CONVENTION ON THE RIGHTS OF

recommendations often help international and domestic, civil society set priorities for change in a particular country.⁸⁸ For example, in one report, Save The Children Sweden wrote that because of the CRC, the world's most vulnerable "[c]hildren have become more visible over the last [twenty] years."⁸⁹ This increased visibility has led to increased concern and action.

III. LEGAL REFORMS STEMMING FROM COMMITTEE'S RECOMMENDATIONS

When countries actually undertake legislative reforms in response to the Committee's recommendations, harmful practices, such as judicial canings and female genital mutilation, have been challenged and, sometimes for the first time, debated. Soft law becomes hard law when new legislative initiatives by a sovereign nation are successful. Indeed, I know of several reports that have surveyed the effects of the CRC on legal reform and, most importantly, on how legal reforms have improved the lives of children.⁹⁰

THE CHILD IN FIVE COUNTRIES: ESTONIA, NEPAL, PERU, UGANDA AND YEMEN 5 (2009) [hereinafter *SAVE THE CHILDREN*], available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/2910.pdf>.

88. *Id.*

89. *Id.*

90. LAURA LUNDY ET AL., THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A STUDY OF LEGAL IMPLEMENTATION IN 12 COUNTRIES (2012) [hereinafter *12 COUNTRIES*], available at http://www.ipjj.org/fileadmin/data/documents/reports_monitoring_evaluation/UNICEF-UK-QUB_Convention_Implementation12Countries_2012_EN.pdf; *SAVE THE CHILDREN*, *supra* note 87; UNICEF, LAW REFORM AND THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD (2007) [hereinafter *LAW REFORM*], available at http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf; UNICEF, PROGRESS FOR CHILDREN: REPORT CARD ON CHILD PROTECTION NUMBER 8 (2009) [hereinafter *PROGRESS*], available at http://www.unicef.org/protection/files/Progress_for_Children-No.8_EN_081309%281%29.pdf.

A. UNICEF Report on CRC Legal Implementation

In a 2013 UNICEF report on CRC legal implementation, a research team selected twelve countries to demonstrate the variety of ways in which countries with common law or civil law legal systems have provided for children's rights at the national level by taking steps to implement the CRC.⁹¹

In Australia, the report indicated that the CRC has best been integrated in the application of "the best interests principle," putting best interests of the child at the forefront in child law cases and in having their Adoption of Children Act of 2000 modeled on Article 21 of the CRC.⁹² In Belgium, their Flemish Youth Care Act of 2004, dealing with care of youth and the legal position of minors, was considered to be hugely influenced by the CRC.⁹³

In 2004, Canada produced a National Plan of Action entitled "A Canada Fit for Children" to "promote and protect the human rights of all children," and it "is underpinned by the CRC."⁹⁴ In 2002, a Danish Act on Custody and Access, which provided for court-related interviews with children over 12, "unless it was assumed to be detrimental to the child or without any importance for the decision of a case," was amended to provide that children under 12 can also be interviewed in proceedings [] "where the child's maturity and general circumstances of the case warrant such an interview."⁹⁵ Here, "Article 12 of the CRC was cited as the main reason for this amendment."⁹⁶

In Germany, the report indicated that Article 9(3) of the CRC was cited as one of the reasons behind changes to the enforcement of child custody and access rulings in its Family Court.⁹⁷ Ireland, influenced by the provisions of the CRC, in

91. 12 Countries *supra* note 90, at 3.

92. *Id.* at 31.

93. *Id.* at 37.

94. *Id.* at 73.

95. *Id.* at 78.

96. *Id.*

97. *Id.* at 46.

2012 voted to amend its constitution to protect and improve children's rights.⁹⁸ The CRC has mostly been integrated into New Zealand's implementation of best interests of the child principles, where a Care of Children Act of 2004 required that the welfare and best interests of the child be the paramount consideration in family court proceedings.⁹⁹ In Norway, a recognized national leader on children's rights, the CRC influenced improvements in professional competence, resulting from training provided to lawyers and judges, thus providing greater visibility of children involved in legal proceedings.¹⁰⁰ In South Africa, a Child Justice Act of 2009 enshrined the rights of children in conflict with the law in statutes consistent with the CRC.¹⁰¹

Finally, this report noted that Sweden has integrated aspects of the CRC's provisions throughout its legislation, including best interests, non-discrimination, children's health and development, and the right of children to be heard in legal matters affecting them.¹⁰² In 2010, its Parliament passed a constitutional amendment requiring public institutions to safeguard the rights of children.¹⁰³ The researchers who worked on the report suggested that the CRC has become that country's most important tool for enhancing the status of children and has been a driver for legal reform.¹⁰⁴

In other countries and areas of legal reform, the impact of the CRC is also very impressive. Among 52 countries in Asia, Africa, Europe, the Middle East, and the Americas, UNICEF found that 21 had incorporated some or all of the CRC into their national constitutions.¹⁰⁵ Two-thirds had incorporated the Convention directly into their domestic law, and nearly every

98. *Id.* at 51.

99. *Id.* at 84.

100. *Id.* at 61.

101. *Id.* at 90.

102. *Id.* at 95-96.

103. *Id.* at 95.

104. *Id.* at 100-01.

105. LAW REFORM, *supra* note 90, at 13-16.

country had either adopted comprehensive children's codes based on the CRC, or was engaged in a gradual, systematic reform of existing law.¹⁰⁶

There have also been, throughout the world and facilitated by language in the CRC, extensive reforms in the areas of civil rights, health care, education, family law, responses to abuse and neglect, sexual exploitation, and refugee law. In the area of civil rights, the right of a child to nationality, through birth registry and citizenship, is fundamental to the ability of children to engage in civil society and enjoy social benefits such as public education. The Convention has inspired law reforms to increase birth registrations in poor countries and, on the recommendation of the Committee on the Rights of the Child, Sweden and the U.K. discontinued the practice of not granting citizenship to children born in their territory to unwed native fathers and non-native mothers.¹⁰⁷ Several Convention-promoted law reforms have focused on improving health care for children, especially through free and universal immunization, AIDS prevention, pre- and post-natal care, and specialized care for children with disabilities.¹⁰⁸ For example, several countries have passed legal provisions that mandate free immunizations to help stop the spread of communicable diseases; these have included Nigeria, Indonesia, Japan, India, Egypt, and several Latin American countries.¹⁰⁹

B. Education and Family Law Legal Reforms

Major legal reforms in the area of education have mainly involved state provision of free and compulsory primary education, including raising the age of compulsory schooling and increasing opportunities for girls and children with disabilities to attend school. Girls, children with disabilities, and poor children around the world continue to be denied educational

106. *Id.* at viii.

107. *Id.* at 35.

108. *Id.* at 18-19.

109. *Id.* at 39-40.

opportunities. Chief Justice Warren remarked in the *Brown* case that it was doubtful any child could reasonably be expected to succeed in life if “denied the opportunity of an education. . . [.]” and that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”¹¹⁰ His words should inspire us to continue to fight for educational equity both at home and around the world, something that is a key part of the CRC.

In the area of family law, the Convention has promoted increased services and support for poor families and working mothers and prodded important cutbacks in the overuse of government institutional care of children.¹¹¹ A UNICEF report states (contrary to what American critics claim) that: “[t]he provisions of the Convention concerning the family as the ideal setting for satisfying the needs of children, has struck a responsive chord, encouraging a shift away from reliance on State institutions to social programmes that provide benefits to children through their families.”¹¹² Thus, a CRC-inspired Romanian law has established parental rights to ‘raise and ensure the proper development of the child’ as well as to “receive information and specialized assistance that are necessary for upbringing, caring [for], and raising the child.”¹¹³ Another law, in Italy, reinforces assistance to families with children with disabilities to reduce the institutionalization of such kids that has created countless thousands of *social orphans* throughout the world.¹¹⁴ Finally, many countries in Latin America and around the world are increasingly recognizing the *equal* rights and responsibilities of *both* parents to take care of their children,

110. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

111. LAW REFORM, *supra* note 90, at 52.

112. *Id.*

113. *Id.* at 51 (quoting On the protection and promotion of the rights of the child, Law no. 272/2004, § 30 (3) (2004), OFFICIAL GAZETTE, Part I, no. 557 (June 21, 2004) (Rom.)), available at <http://tdh-childprotection.org/documents/law-no-2722004-on-the-protection-and-promotion-of-the-rights-of-the-child>.

114. *Id.* at 52.

meaning that legal reforms to recognize the paternity and role of unwed fathers are underway.¹¹⁵

In cases of abuse, abandonment, and neglect, countries working to comply with the Convention are adopting measures to increase family foster care and decrease institutionalization of children who must be removed from their homes for their safety. For example, in Belarus, the law requires that “[c]hildren may be placed in an institution only when placement in a family is ‘impossible.’”¹¹⁶ In addition, many countries, such as Slovenia, have been developing laws to protect child victims in the criminal prosecution of child abuse cases.¹¹⁷ In that country, for example, children under the age of 15 may not testify at trial; rather, their testimony is presented in the form of a pre-trial deposition.¹¹⁸ Were it not for the CRC, we would also not have had the related development, through the U.N., of something I am proud to have been an initial part of drafting, called Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Commentary.¹¹⁹

The United Nations counts harmful and discriminatory customs and practices as forms of abuse which should be outlawed, and I can’t believe anyone in the U.S. would disagree with ending them. These include female genital mutilation, virginity testing of brides, ritual sacrifices of children, abandonment of children with birth defects, honor killings, and young child marriages.¹²⁰ Among countries that have passed laws, inspired by the CRC, to ban these harmful practices are

115. *Id.* at 53-54.

116. *Id.* at 60 (quoting Law of the Republic of Belarus On Child’s Rights, No. 2570-XII, art. 29, (Nov. 19, 1993) (Belr.), *available at* <http://www.crin.org/Law/instrument.asp?InstID=1282>).

117. *Id.* at 68.

118. *Id.*

119. *See generally* U.N. OFFICE ON DRUGS AND CRIME [UNODC], JUSTICE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME: MODEL LAW AND COMMENTARY (2009), *available at* http://www.unodc.org/documents/justice-and-prison-reform/UNODC_UNICEF_Model_Law_on_Children.pdf (discussing model laws for crimes involving children).

120. LAW REFORM, *supra* note 90, at 69.

Burkina Faso, Togo, Ethiopia, South Africa, Nigeria, Nepal, Korea, India, Sri Lanka, Egypt, Lebanon, Jordan, and Bangladesh.¹²¹

To specifically address the sexual exploitation of children, many countries have raised the age of legal consent for sexual relations, amended their criminal codes to include the sexual exploitation of minors through trafficking and pornography, and provided for increased enforcement against adult pimps and perpetrators of child sex abuse.¹²² Since 1990, Fiji, India, Indonesia, Japan, Nepal, Philippines, Korea, Sri Lanka, and Vietnam have passed new laws concerning the sexual exploitation of children.¹²³ One notable example is the revision of Sri-Lanka's 100 year-old Penal Code, which now criminalizes trafficking of children for the purpose of sex, provides for protection of victims of both sexes, raises the age of consent from 12 to 16 years old, and eliminates the requirement of physical injury to prove lack of consent to sex.¹²⁴

In Honduras, child rape victims no longer have to bring a complaint in order for their perpetrator to be charged; the responsibility for prosecution now rests with law enforcement.¹²⁵ Several countries, such as Guatemala, are doing away with the practice of barring prosecution when the offender marries his child victim.¹²⁶ Finally, many European countries have created new legislation to establish jurisdiction over their own nationals who commit child sex offenses while travelling abroad.¹²⁷ These provisions are especially important to address child sex tourism.¹²⁸

There have also been many positive legal reforms for refugee and asylum-seeking children around the world. In Slovenia,

121. *Id.* at 69-70.

122. *Id.* at 72.

123. *Id.* at 72.

124. *Id.* (citing the Sri Lankan Penal Code).

125. *Id.* at 73.

126. *Id.*

127. *Id.*

128. *Id.* at 75.

children whose applications are denied are not returned to their country until safe arrangements can be made¹²⁹ In the U.K., children who cross borders unaccompanied are given priority in asylum interviews and can request reunification with family members in lieu of custodial detention¹³⁰ Italian law now provides for humanitarian visas for vulnerable children who do not receive refugee status.¹³¹ Canada's Immigration Act Guideline 3 from the Chairman of Canada's Immigration and Refugee Board issued pursuant to section 65(3) of the Immigration Act now explicitly requires that "all decisions concerning children should be guided by Article 3" of the Convention, which articulates the best interests of the child principle.¹³²

Unfortunately, because the United States has not ratified the CRC, *we were not a part of aiding any of those reforms*. As I've stated, this is a distressing failure of U.S. foreign policy, since the United States has so much expertise to potentially share through promotion of CRC reforms in areas where our country has developed model laws, policies, and practices. Changing laws already on the books is only the beginning of reform; new laws have to be promulgated and enforced to be meaningful to children in need of protection from harm. While comprehensive studies that would yield a wide range of quantifiable data are still needed, there is positive, quantitative data on important new child protection legislation in the areas of juvenile justice, health care, and child trafficking and exploitation.¹³³ I want to highlight some of those achievements. Article 37's prohibition on torture or other cruel, inhuman or degrading treatment or punishment against children has caused a tradition of brutal judicial canings

129. *Id.* at 96.

130. *Id.*

131. *Id.* at 97.

132. *Id.* (citing Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues, Immigration and Refugee Board of Canada (Sept. 30, 1996), available at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir03.aspx>).

133. *See infra* notes 139-145 and accompanying text (providing examples).

to become outlawed in South African and Uganda.¹³⁴ In South Africa, children were sentenced to be caned in over 35,000 cases per year before the Supreme Court decided in 1996, based on a new provision on the rights of the child in their constitution, that the practice was unconstitutional.¹³⁵ In Uganda, beatings by law enforcement have also been outlawed as a sentence for children.¹³⁶

Article 24 of the Convention, establishing the child's right to health, has had significant impact.¹³⁷ New laws prohibiting the practice of female genital mutilation have resulted in prosecutions in Egypt, Burkina Faso, Ghana, Senegal, and Sierra Leone.¹³⁸ In Egypt, the practice has already been reduced by 20 percent.¹³⁹ New legislation in Nepal has led to 63% of households using iodized salt, which prevents goiter.¹⁴⁰ The Indian Supreme Court referenced Article 24 when it held that free lunches must be provided to hungry children in government-run primary schools.¹⁴¹ Article 32, recognizing the child's right to protection from economic exploitation, inspired legislation that created a national anti-trafficking agency in Nigeria.¹⁴² In the first twelve months of the agency's existence, it rescued hundreds of children who had been abducted and forced to labor in quarries and on plantations.¹⁴³

All of these are but a few examples of how the CRC is inspiring and guiding meaningful legal reforms that have significant positive consequences for children in need of greater

134. LAW REFORM, *supra* note 90, at 69.

135. *Id.* at 111.

136. SAVE THE CHILDREN, *supra* note 87, at 33.

137. CRC *supra* note 5, at 52.

138. PROGRESS, *supra* note 90, at 23, 28.

139. LAW REFORM, *supra* note 90, at 111.

140. *Id.* *Goiter – Simple*, U.S. NATIONAL LIBRARY OF MEDICINE, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002161/>.

141. *People's Union for Civil Liberties v. Union of India & Ors.*, (2004) 12 S.C.C. 104 (India), available at <http://www.righttofoodindia.org/orders/nov28.html>.

142. CRC, *supra* note 5, at 53.

143. LAW REFORM, *supra* note 90, at 111.

protection. However, despite these hugely positive global effects over three decades, the CRC continues to have many detractors within our own country.

IV. ANALYZING THE CRITIQUES OF THE CRC

Critiques of the CRC come in three general forms. First, some simply call the CRC ineffective because it has no enforcement teeth.¹⁴⁴ They claim the CRC is simply ineffective to stop the world's most horrifying abuses of children – such as child trafficking for sexual exploitation, compulsory child labor, child soldiering and forcible child marriage – because it has *no enforcement mechanisms* adequate to end them. While they are correct to say these atrocities violate the rights of children as set out in the CRC, the conclusion that their continued occurrence is evidence of the ineffectiveness of the Convention is simply wrong, as illustrated by the above examples.¹⁴⁵

Critics also claim the CRC would undermine U.S. sovereignty. They contend that the CRC violates our American principle of federalism.¹⁴⁶ Finally, they call the CRC anti-family and say it will reduce parental control over children in favor of government control.¹⁴⁷ I'll address each of these in turn. First, child trafficking and soldiering are largely perpetuated by *criminals and outlaws*, not governments that are parties to the Convention. Likewise, harmful cultural practices are *carried out by families and religious groups*, not formally by governments. The CRC is focused on government obligations.¹⁴⁸ Second, the Convention is the first step, never meant to be the last, in addressing these problems. The CRC is not a criminal enforcement statute; rather, by establishing positive legal rights

144. Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT'L L. REV. 57, 63, 82, 87 (2009).

145. See *supra* Part III (discussing the impact of the CRC).

146. BLANCHFIELD, *supra* note 9, at 7-8.

147. *Id.* at 8.

148. See CRC *supra* note 5, at pmbl (listing the parties to the agreement as States, not people or individuals).

for children to be protected from abusive and harmful treatment, it provides an important legal framework that legislators and reformers can and should use, and have used, to advocate for domestic legislation, policies, and practices that enforce those rights within their own countries.

As I previously indicated, many CRC critics fear that our U.S. ratification would undermine United States sovereignty and the principle of federalism. These concerns are neither new nor completely invalid. However, it is critical to note that the U.S. *has adequately addressed them in the other human rights treaties it has ratified* for over half a century through the use of Reservations.¹⁴⁹ Reservations are an international treaty tool that allows countries to harmonize treaties with their domestic law and to leave all domestic implementation of treaty provisions to their legislatures.¹⁵⁰ Some Reservations are more substantive, explicitly declining to consent to particular treaty obligations. One example is a U.S. reservation to the *International Covenant on Civil and Political Rights* restriction on propaganda for war, and hate speech.¹⁵¹ In that instance, a Reservation was taken out of concern that this restriction might conflict with U.S. First Amendment guarantees.¹⁵² Other Reservations provide key interpretive limitations, such as the U.S. Reservation attached to the *Torture Convention's* prohibition on “cruel, inhuman, or degrading treatment or punishment.”¹⁵³ That reservation says that this clause is interpreted to mean “cruel and unusual punishment” within the meaning of our Eighth Amendment to

149. CARTER, *supra* note 56, at 107.

150. *Id.*

151. *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION (Oct. 12, 2013, 5:11 AM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

152. Bradley, *supra* note 58, at 417.

153. *Id.* at 418 (quoting Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., para. 4 Dec. 10, 1984, 1465 U.N.T.S. 85, 113).

the Constitution.¹⁵⁴ In addition, the U.S. generally attaches what are called “Non-Self-Execution Declarations” to human rights treaties, so that they will not, and do not, automatically change federal or state laws, and so that their provisions will *not be enforceable in U.S. courts*, without very specific implementing legislation from Congress.¹⁵⁵ I am fairly certain that the CRC, if ratified by the U.S., would contain such a declaration.

Finally, the United States routinely places “Federalism Understandings” on human rights treaty ratifications to establish that any new treaty obligations can only be “implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein.”¹⁵⁶ This is so that the laws of state and local governments will not be federalized through Congress’s exercise of the treaty power.¹⁵⁷ A Federalism Understanding would be essential to the U.S. ratification of the CRC, because regulation of child and family issues is generally left for the states. Notably, the U.S. attached a Federalism Understanding to its ratification of the CRC’s Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution.¹⁵⁸

Fears have also been expressed by CRC opponents that U.S. sovereignty would be threatened by Article 44, the modest enforcement mechanism of the Convention, which asks States parties to “undertake to submit to the Committee... reports on the measures they have adopted.”¹⁵⁹ Here it must be again noted that the Committee responds to State reports only with

154. Bradley, *supra* note 58, at 418 (quoting Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., para. 4 Dec. 10, 1984, 1465 U.N.T.S. 85, 113).

155. *Id.* at 419; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 111 (1987).

156. Bradley, *supra* note 58, at 422 (quoting U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992)).

157. *Id.*

158. Revas & Todres, *supra* note 25, at 300.

159. Convention on the Rights of the Child, art. 44, Nov. 20, 1989, 1577 U.N.T.S. 3, 59 [hereinafter CRC].

Observations and Recommendations *that are not binding*, and rather function as their name suggests: *to recommend areas for improvement*.¹⁶⁰ Thus, if the Committee were to say that under Article 19 we should be taking steps to discourage parents from smacking their kids, because scientific evidence establishes that this physical violence can be highly injurious, it simply can't compel our federal government, or our states, to do anything about it.

The CRC's mechanism to respond to government shortcomings in implementation of its aspirations is actually *considerably weaker* than those of other international human rights conventions that the U.S. government has actually ratified.¹⁶¹ For example, the *International Covenant on Civil and Political Rights* provides for state-to-state complaints; the CRC only allows an international committee to *comment* on a State party report.¹⁶² The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* vests an International Committee Against Torture with power to receive and process complaints against State parties by individuals.¹⁶³ Although, as I earlier mentioned, there is a new CRC Optional Protocol to permit children to make complaints about violations of their rights to the Committee on the Rights of the Child, it is far from going into effect, and in any event the U.S. may opt to not ratify that particular Optional Protocol.

Finally, critics of the CRC within our country allege that conferring rights on children will undermine parental care and control by pitting, through the Convention's elements, *children against their parents* – in court or in the home. In fact, a careful analysis of the CRC and its history shows the contrary is true.

160. See *Frequently Asked Questions*, UN, (last visited Mar. 6, 2014), <http://www.un.org/esa/socdev/enable/convinfaq.htm> (explaining that the recommendations and observations are not binding).

161. See *infra* notes 166-168 and accompanying text (listing examples of conventions the U.S. has ratified that have had more authority than the CRC).

162. Todres, *supra* note 85, at 28 n. 32.

163. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 113. See also Jonathan Todres, *supra* note 85, at 28 n. 32.

First, the Convention does not provide *any means* for a child to bring a lawsuit against his or her parents in court. Laws in the United States already allow a child to sue a parent for physical injuries resulting from intentional violence or gross parental negligence.¹⁶⁴ Ratification would not change this right of action, and it would also *not add any other basis* for child-parent litigation.¹⁶⁵ Of the dozens of official Committee Observations directed at different countries that I have reviewed, *none have suggested* that countries create any private rights of action for children to sue their parents in order to comply with the CRC.

Far from encouraging strife between children and parents, the essential role of parents in raising their children is listed prominently within the Convention, directly after the provision on the child's right to life. This highlights the protected role of the family within the CRC.¹⁶⁶ In fact, almost all of the Committee Observations that I reviewed have actually encouraged countries to *do more to support struggling families* in order to make sure children stay under the care and control of their parents, rather than enter the custody of the government.¹⁶⁷ In the Committee's Observation on Sweden, for example, it recommended that state programs "give priority to protecting the natural family environment,"¹⁶⁸ and in recommendations to Bolivia, the Committee stressed that all necessary measures should be taken "to return [children] to their families whenever

164. *Id.* at 24.

165. *See* CRC *supra* note 5 (lacking any basis for child-parent litigation).

166. CRC, *supra* note 5, arts. 1-7. In fact, after the first four articles (which establish the definition of a child, the principles of non-discrimination and the best interests of the child, and State responsibility to undertake to pass legislation implementing the Convention), article 5 requires that States "respect the responsibilities, rights, and duties of parents," article 6 recognizes a child's "inherent right to life," and article 7 establishes the child's "right to know and be cared for by his or her parents." *Id.*

167. *See, e.g., infra* notes and accompanying text 110-114.

168. *Concluding Observations of the Comm. on the Rights of the Child: Sweden*, U.N. Comm. on the Rights of the Child, 51st Sess., ¶ 35, U.N. Doc. CRC/C/SWE/CO/4 (June 12, 2009).

possible and consider placement of children in institutions as a measure of last resort and for the shortest possible period.”¹⁶⁹

Some have also expressed fear that Article 14’s requirement that the government “respect the right of the child to freedom of thought, conscience, and religion”¹⁷⁰ would undermine parents’ attempts to raise their child in their own religious tradition. The opposite is true. In its twenty plus year history, the Committee has only commented on religion when governments, especially through their educational systems, have tried to *limit religious freedom* or have engaged in practices that *discriminate against certain religious groups*.¹⁷¹ For example, the Committee expressed disapproval of a law that banned religious symbols in German schools because “this does not contribute to a child’s understanding of the right to freedom of religion.”¹⁷² The Committee further recommended that both Korea and France take measures to ensure that children do not experience discrimination based on their religious traditions.¹⁷³

Some critics have expressed particular concern that the Convention’s provisions requiring states to provide an adequate education to all children *might undermine homeschooling*.¹⁷⁴

169. *Concluding Observations of the Comm. on the Rights of the Child: The Plurinational State of Bolivia*, U.N. Comm. on the Rights of the Child, 52nd Sess., ¶ 46, U.N. Doc. CRC/C/BOL/CO/4 (Oct. 2, 2009).

170. CRC, *supra* note 5, art. 14, 1577 U.N.T.S. at 49.

171. *See infra* notes 175-176 and accompanying text (providing examples of Committee efforts to protect religious freedom).

172. *Concluding Observations of the Comm. on the Rights of the Child: Germany*, U.N. Comm. on the Rights of the Child, 35th Sess., ¶ 30, U.N. Doc. CRC/C/15/Add.226 (Feb. 26, 2004).

173. *Concluding Observations of the Comm. on the Rights of the Child: Democratic People’s Republic of Korea*, U.N. Comm. on the Rights of the Child, 50th Sess., ¶ 30, U.N. Doc. CRC/C/PRK/CO/4 (Mar. 27, 2009); *Concluding Observations of the Comm. on the Rights of the Child: France*, U.N. Comm. on the Rights of the Child, 52st Sess., ¶ 46, U.N. Doc. CRC/C/FRA/CO/4 (June 11, 2009).

174. *Concluding Observations of the Comm. on the Rights of the Child: Great Britain & Northern Ireland* U.N. Comm. on the Rights of the Child, 49th Session, Concluding Observations: United Kingdom of Great Britain & Northern Ireland, ¶¶ 33, 45, 65, 67, U.N. Doc. CRC/C/GBR/CO/4 (Oct. 20, 2008).

Again, I found the opposite to be true. For example, homeschooling in Great Britain, which ratified the CRC in 1991, rose by 80 % in 2007.¹⁷⁵ Yet the Committee's observations, communicated to the British Government in 2008, did not even comment on this trend, but rather expressed concern about how the British public school system was excluding or inadequately serving children with disabilities, children seeking asylum, and poor children.¹⁷⁶

On every report I reviewed, the Committee expressed similar concerns about deprivation of the rights of girls, children with disabilities, immigrant children, and poor children to access quality, free public education.¹⁷⁷ In these same reports, the Committee has never commented about homeschooling.¹⁷⁸ This trend in Committee Observations corresponds to the position of a group known as the Homeschooler's Model U.N. Club. They correctly say that the Convention does not circumvent the role of parents, but rather protects children and their families from government intrusion. Despite this, I believe, to overcome the principal opposition to the CRC by certain American home schooling supporters, that there should be language attached to U.S. ratification that indicates the CRC should in no way be interpreted as interfering with a parent's right to home school their child, as regulated under state and local law.

CONCLUSION

In summary, world experience with regard to the CRC demonstrates that it is helping countries make a collective

175. Katie Razzall & Lewis Hannam, *UK home-school cases soar*, CHANNEL 4 NEWS, (Sept. 26, 2007), <http://www.channel4.com/news/articles/society/education/uk+homeschool+cases+soar/847157>.

176. *Concluding Observations of the Comm. on the Rights of the Child: Great Britain & Northern Ireland* U.N. Comm. on the Rights of the Child, 49th Session, Concluding Observations: United Kingdom of Great Britain & Northern Ireland, ¶¶ 33, 45, 65, 67, U.N. Doc. CRC/C/GBR/CO/4 (Oct. 20, 2008).

177. *Id.*

178. *Id.*

difference in the lives of their most vulnerable children. However, there is still much more work to be done, including work on topics in which *the U.S. has made huge advancements and has incredible expertise to contribute*. The world can greatly benefit from more direct U.S. leadership in protecting children. The fact that our country has ratified other human rights treaties, without any of the horrible consequences that the CRC's detractors suggest will occur, clearly suggests, as others have observed, that "it is possible for the U.S. to ratify international human rights instruments related to children without conceding sovereignty, disturbing principals of federalism, or detracting from the valuable role of parents and family."¹⁷⁹ Thus, ratification can and should be achieved in the U.S. It might even lead to the U.S. government creating a National Children's Ombudsman Office – as I have written about and advocated for, and other nations have established – as a mechanism to address child rights issues in the context of the CRC.¹⁸⁰ Ratification is *well worth the effort*, regardless of how long it will take.

While I have provided only a narrow snapshot of constitutional and statutory reforms, as well as some concrete evidence of improvements in the lives of children resulting from CRC-inspired reforms, it is impossible to fully quantify how the Convention is changing the way people and governments think about children. Convention detractors have apparently failed to see, or certainly to acknowledge, this progress. Instead, they are choosing to focus on sovereignty and federalism, and more egregiously, promoting fears of loss of parental control, which

179. Revas & Todres, *supra* note 25, at 309.

180. Howard Davidson, *A U.S. National Ombudsman for Children, in BIG IDEAS: GAME-CHANGERS FOR CHILDREN 74* (FIRST FOCUS 2010), available at http://www.firstfocus.net/sites/default/files/Big%20Ideas%20Journal%202010_for%20web%20viewing_single%20pages.pdf. The United Kingdom has created, through its Children's Act of 2004, a Children's Commissioner for England as an independent champion for the views and interests of children and youth, taking the CRC's provisions into account. *See generally* Children Act, 2004, c. 31 (U.K.) (establishing office of the Children's Commissioner), available at http://www.legislation.gov.uk/ukpga/2004/31/pdfs/ukpga_20040031_en.pdf.

have been addressed successfully in other human rights treaties that we have ratified. The truth is, the Convention protects children, preserves and strengthens families, and is unquestionably improving the lives of kids throughout the world. Just as the effort to address the adverse impact of climate change takes cooperation of every country in order to tackle a problem so big and so vital to survival of the human race, so too will U.S. ratification of the CRC bolster the efforts of the world community in safeguarding its *most valuable natural resource*. And finally, the deferred dreams of too many *American children* need the CRC to motivate necessary changes in *our* federal and state law, policy, and practice that will enhance the safety, permanency, and well-being of America's most marginalized children.