
Volume 1

Issue 1 *DePaul International Human Rights Law*

Article 4

Journal: *The Inaugural Issue*


2015

And Then There Were Two: Why is the United States One of Only Two Countries in the World That Has Not Ratified the Convention on the Rights of the Child?

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Recommended Citation

Engman, Mark (2015) "And Then There Were Two: Why is the United States One of Only Two Countries in the World That Has Not Ratified the Convention on the Rights of the Child?," *International Human Rights Law Journal*: Vol. 1 : Iss. 1 , Article 4.

Available at: <https://via.library.depaul.edu/ihrlj/vol1/iss1/4>

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And Then There Were Two: Why is the United States One of Only Two Countries in the World That Has Not Ratified the Convention on the Rights of the Child?

Cover Page Footnote

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I. Introduction

Twenty-five years ago, the United Nations General Assembly ('U.N. General Assembly') unanimously adopted the Convention on the Rights of the Child (hereinafter the "CRC"), which became the most widely accepted human rights treaty in history.¹ Today, every nation in the world is a party to the CRC – except for two: Somalia,² and the United States.³⁴

This article will analyze the politics behind America's failure to ratify this treaty. That may seem a little out of place in a law journal, but in reality the United States' ('U.S.') acceptance or rejection of international law is as much a matter of politics as it is of policy.

II. The U.S. Treaty Ratification Process

To understand the political motivators behind the U.S.' failure to ratify the CRC, it is imperative to acknowledge the treaty process. The U.S. Constitution gives the President the authority to make treaties, although the Senate must concur by 2/3 majority of the present Senators.⁵ Additionally, the Constitution explicitly recognizes treaties to be part of "the supreme Law of the Land":

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁶

¹ *A World of Difference: 25 CRC Achievements*, U.N. Children's Fund (June 18, 2014), http://www.unicef.org/crc/index_73549.html.

² Although the Somali Government celebrated its decision to ratify the CRC in January 2015, Somalia still has not officially completed the process by depositing its instruments of ratification at the United Nations. See "UN lauds Somalia as country ratifies landmark children's rights treaty" <http://www.un.org/apps/news/story.asp?NewsID=49845#.VUvX7I5Viko>

³ The full list of parties to the CRC: See U.N. Convention on the Rights of the Child, 1577 U.N.T.S. 3, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>. The list includes South Sudan, but not Somalia.

⁴ Until recently, South Sudan had been on the list of non-parties to the CRC. However, South Sudan ratified the Convention in January 2015, and completed the formal ratification process. See <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15919&LangID=E#sthash.LYpDNkqE.dpuf>

⁵ U.S. Constit. article II, § 2.

⁶ *Id.* at art. VI.

Although the treaty ratification process itself is extensive, the ratification of a treaty is rather straightforward:⁷

- i) **Negotiation:** Representatives of the President work with those from other governments to agree on the substance, terms, wording, and form of an international agreement.⁸
- ii) **Signature:** If the President decides that a treaty is in the Nation's best interests, the President (or designated representative; such as an Ambassador or the Secretary of State) will **sign** the treaty.⁹ However, signing a treaty does not in itself create law. When the President signs a treaty, it commits the President to seeking its ratification. In addition, the U.S. Government is obligated to refrain, in good faith, from acts that would defeat the purpose of the treaty, even before ratification.¹⁰
- iii) **Treaty Submission to the U.S. Senate:** The next step in the ratification process is for the Executive Branch to present the treaty to the U.S. Senate.¹¹ Unfortunately, it is not as simple as just sending the text of the treaty. The U.S. Department of State is responsible for compiling a package of documents that accompany the treaty by addressing the policy benefits to the United States, as well as potential

⁷ *Treaties: The Senate's Role in Treaties*, U.S. Senate, available at <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm>; See also Staff of Cong. Research Serv. Library of Cong., 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* (Comm. Print 2001).

⁸ *Id.*

⁹ According to Harold Koh, three explanatory pathways help explain state compliance with international law; these explanations can also help provide a framework for understanding why states do or do not sign on to treaties. Under the three pathways that Koh provides, whether the U.S. decides to sign on to a treaty depends on a weighing of self-interest, domestic structure, and international norms embodied in the treaty that the U.S. also accepts and respects. The first explanation is a rationalistic instrumentalist explanation that views international rules as instruments whereby states seek to attain their national interests. In essence, states obey international law when it serves their short or long term self-interest to do so. The second explanation focuses on rule-legitimacy and national identity. A nation's domestic structure determines whether it complies with international law. Under this view, a liberal state, one that has a form of representative government, guarantees of civil and political rights, and a judicial system dedicated to the rule of law, is more likely to comply with international law. The third explanation is constructivist which suggests that states and their interests are socially constructed by "commonly held philosophical principles, identities, norms of behavior, or shared terms of discourse." This explanation focuses on the role that norms play in forming national identities. Norms determine who the actors are and what rules they must follow if they wish to ensure that particular consequences follow from specific acts. See generally Harold Koh, *Why Do Nations Obey International Law?*, 106 Yale L. J. 2599, 2632 (1997).

¹⁰ Michael John Garcia, Cong. Research Serv., *International Law and Agreements: Their Effect Upon U.S. Law*, (2015), available at <http://fas.org/sgp/crs/misc/RL32528.pdf>.

¹¹ *Treaties: The Senate's Role in Treaties*, *supra* note 6.

risks.¹² The package must include: (1) whether the proposed treaty may have a significant regulatory or environmental impact, and (2) an analysis of the issues surrounding the treaty's implementation (for example: whether the agreement is self-executing or whether domestic implementing legislation or regulations are necessary to comply with the treaty obligations).¹³ In addition, the Department of State may propose a set of Reservations, Understandings, and/or Declarations ('RUDs'); these provisions define how the U.S. would interpret and implement the treaty, if ratified.¹⁴

- iv) Senate Consideration and “Advice and Consent”:** With the treaty package in hand, the Senate Foreign Relations Committee can begin its consideration. The Committee can vote to send the treaty to the full Senate for action, with a favorable or unfavorable recommendation, or without any recommendation at all.¹⁵ The Committee could also decide to ignore the treaty entirely.¹⁶ If the Committee fails to act on the treaty, it is not returned to the President.¹⁷ Treaties, unlike Bills and other legislative measures, remain available to the Senate from one Congress to the next, until they are disposed of or withdrawn by the President. If a treaty is presented to the full Senate, the Senate considers whether to give its “advice and consent.”¹⁸ Approval requires 2/3 majority, or 67 votes out of 100 total Senators.¹⁹ The Senate may make its approval conditioned on the consent resolution amendments to the text of the treaty, its own RUDs, or other statements.²⁰
- v) Return to the President:** Only the President, acting as the chief diplomat of the United States, has the authority to ratify a treaty.²¹ With the Senate's approval, the President can proceed with the formal process of ratification.²² The formal

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; See also Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Declarations and Reservations, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en#EndDec.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

process includes submitting documents proving the U.S. Government's agreement to abide by the treaty, as well as any RUDs, to an institution (called a "depository").²³ The deposit of the instruments of ratification establishes the consent of a country to be held accountable to the terms of the treaty.²⁴ Once the treaty has been ratified by U.S., the treaty must first be ratified by the specified number of States (each treaty is different, and the number is stipulated in the treaty itself) before the treaty can enter into force and become binding on the member States.²⁵

III. Brief History of the CRC

The CRC was originally drafted as the result of a Polish proposal for the 1979 International Year of the Child, which commemorated the twentieth anniversary of the 1959 Declaration of the Rights of the Child.²⁶ After ten years of negotiations, on November 20, 1989, the U.N. General Assembly voted unanimously to approve the treaty and send it out for signatures. By September of 1990, the requisite number of 20 countries had ratified the treaty, so the treaty was now in force.²⁷

Although other international human rights treaties mention children, the CRC incorporated a comprehensive set of rights relevant to children – economic, social, cultural, and political.²⁸ The CRC consists of 54 articles,²⁹ built on four core principles:

- 1) Non-discrimination: rights provided herein are guaranteed to all children, without exception (Article 2);
- 2) Best interests of the child: all stakeholders must consider the impact of its actions (or inactions) on children (Article 3);
- 3) Right to life, survival, and development (Article 6); and,
- 4) Respect for the views of the child, according to age and maturity (Article 12).³⁰

To address ongoing concerns about children in armed conflict and the exploitation of children, two Optional Protocols to the CRC were adopted by the U.N. General Assembly in May 2000, and came into force in early 2002. The Optional Protocol on the

²³ *Id.*

²⁴ *Id.* See also Staff of the Congressional Research Service, 106th Cong., Rep. on *Treaties and Other International Agreements: The Role of the United States Senate* (Comm. Print 2001), available at <http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>.

²⁵ *Id.*

²⁶ *Legislative History of the Convention of the Rights of the Child*, U.N. Office of the High Comm'r for Human Rights, Vol. 1, No. HR/PUB/07/1 (2007), available at .

²⁷ U.N. Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Nov. 20, 1989).

²⁸ *The State of the World's Children Special Edition: Celebrating 20 Years of the Convention on the Rights of the Child*, U.N. Children's Fund at 2, U.N. Sales No. 10.XX.1 (2009).

²⁹ U.N. Convention on the Rights of the Child, *supra* note 26.

³⁰ *The State of the World's Children Special Edition*, *supra* note 27, at 6-9.

Involvement of Children in Armed Conflict (CRC-OPAC) requires governments to prohibit the conscription of anyone under 18 into armed forces, and to criminalize the recruitment of children under 18 into non-government armed forces.³¹ The Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (CRC-OPSC) includes obligations to criminalize such practices, to strengthen enforcement of relevant laws and prosecution of offenders, and to protect and assist child survivors of such exploitation and abuse.³²

In addition, a third Optional Protocol to the CRC on Communications Procedures (OP3-CRC) sets out a complaints procedure for children, or their representatives, from states that have ratified the protocol to bring complaints about violations of their rights directly to the U.N. Committee on the Rights of the Child, only after all domestic remedies have been exhausted.³³ The third protocol entered into force in April 2014 when it was ratified by a tenth State.³⁴ The protocol currently has 48 signatories, of which only 16 States have ratified it.³⁵

All parties to the CRC, as well as to the Optional Protocols, are required to report regularly to the Committee on the Rights of the Child ('CRC Committee') on their progress in implementing the treaties.³⁶ The CRC Committee is a body of 18 independent experts, elected periodically by State parties to the Convention.³⁷ In addition, the CRC Committee welcomes reports from Non-Governmental Organizations (NGOs) and from key international organizations, such as the United Nations Children's Fund, better known as UNICEF.³⁸³⁹

The CRC Committee examines each report and addresses its concerns and issues recommendations to the State party in the form of "concluding observations."⁴⁰ In addition, the CRC Committee publishes its interpretations of specific human rights

³¹ U.N. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/Res/54/263 (Feb. 12, 2002).

³² U.N. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, U.N. Doc. A/Res/54/263 (Jan. 18, 2002).

³³ U.N. Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, A/RES/66/138 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (Dec. 19, 2011).

³⁴ *Id.*

³⁵ *Id.*

³⁶ U.N. Convention on the Rights of the Child, *supra* note 26, at art. 44.

³⁷ U.N. Committee on the Rights of the Child: Membership, U.N. Office of the High Comm'r on Human Rights, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Membership.aspx>.

³⁸ U.N. Committee on the Rights of the Child: Information for Partners, U.N. Office of the High Comm'r on Human Rights, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/InfoPartners.aspx>.

³⁹ UNICEF is specifically mentioned in the CRC in Article 45.

⁴⁰ U.N. Committee on the Rights of the Child, Concluding Observations, U.N. Office of the High Comm'r for Human Rights, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5.

provisions, known as “general comments” on thematic issues, and organizes “days of general discussion” to address important and timely topics.⁴¹

It is important to note that even though the CRC Committee’s concerns and recommendations can be pointed and controversial, the CRC Committee is not afforded any enforcement mechanisms to carry out these recommendations.⁴² The CRC Committee’s reports may help add to public pressure for specific policy changes by a government, but the CRC Committee cannot mandate any government to make a specific policy change.⁴³

IV. The U.S. and the CRC

The U.S. played a pivotal role in drafting the CRC between 1979 and 1989.⁴⁴ In fact, the Reagan and George H.W. Bush Administrations actively contributed to negotiating the treaty’s text.⁴⁵ U.S. negotiators pushed for the inclusion of articles addressing individual rights, based on the U.S. Constitution’s Bill of Rights.⁴⁶ These included family reunification, freedom of expression, freedom of religion, freedom of association and assembly, privacy, and protection from abuse.⁴⁷

In 1989, Republicans praised the final draft of the treaty. Rep. Chris Smith (R-NJ), in his capacity as representative of the U.S. delegation to the United Nations before the Third Committee of the U.N. General Assembly, said in a statement:

After 10 years of constructive dialogue, seemingly endless consultations, and finally an agreement, the Commission on Human Rights has presented the Convention on the Rights of the Child to the UN General Assembly for adoption. The United States participated actively in the drafting of the convention. We believe that it represents a notable step forward in the needed promotion and protection of the rights of children. Although the convention is far from perfect – no agreement ever is – the United States strongly believes in the enumerated commitments and goals of the convention, and it is our hope that the General Assembly will adopt the text without change.”⁴⁸

⁴¹ U.N. Committee on the Rights of the Child: Monitoring Children’s Rights, U.N. Office of the High Comm’r for Human Rights, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>.

⁴² U.N. Convention on the Rights of the Child, *supra* note 26, art. 45(d).

⁴³ See e.g., *UN CRC Committee Issued Concluding Observations for 12 Countries*, ECPAT, (Feb. 6, 2015), <http://www.ecpat.net/news/un-crc-committee-issued-concluding-observations-12-countries>.

⁴⁴ Jonathan Todres, Mark E. Wojcik & Cris R. Revaz, *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification*, (Transnational Publishers 2006).

⁴⁵ *Id.* at 14.

⁴⁶ Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOYOLA POVERTY L.J. 9, 25-26 (1998).

⁴⁷ *Id.*

⁴⁸ See U.N. Doc. A/C.3/44/SR.38 (Nov. 10, 1989).

A Bush Administration official, Ambassador Tom Johnson, Representative to the U.N. Commission on Human Rights, said that he was pleased to affirm his delegation's support for the draft resolution.⁴⁹

However, the support of Bush Administration officials at the U.N. for the CRC did not translate into immediate progress toward ratification. Instead, citing concerns on how U.S. ratification would conflict with state laws on capital punishment and abortion, President Bush did not sign the treaty.⁵⁰

When President Clinton took office in 1993, pro-CRC advocates hoped that the President would quickly sign the CRC in light of significant Congressional support. With support from hundreds of nonprofit organizations, the U.S. Campaign for Ratification of the CRC⁵¹ led a major effort to push the Clinton Administration to sign the treaty.⁵² A bipartisan Senate resolution introduced in early 1993 noted that the U.S. was the only Western industrialized country to not sign or ratify the CRC, and called on the President to promptly sign and present the treaty to the Senate. The resolution had 45 supporters, including Sen. Richard Lugar (R-IN), Sen. Mark Hatfield (R-OR), Sen. David Durenberger (R-MN), and Sen. Jim Jeffords (R-VT).⁵³ Despite this pressure, the Clinton Administration held off and refused to sign the CRC until the review process was completed.⁵⁴

In honor of longtime UNICEF Executive Director Jim Grant's dying request to President Clinton, at his memorial service, First Lady Hillary Rodham Clinton made an announcement that took everyone by surprise: the United States would sign the Convention on the Rights of the Child.⁵⁵ "We owe it to him and to the children of the world, to whom he dedicated his life," said Clinton.⁵⁶ In February 1995, U.S. Ambassador to the United Nations, Madeleine Albright, signed the convention on behalf of President Clinton.⁵⁷

The Clinton Administration failed to complete the CRC treaty package and send it to the Senate, partly in light of serious Republican opposition. However, in July 2000, the

⁴⁹ See U.N. Doc. E/CN.4/1989/SR.55/Add.1 (June 26, 1989).

⁵⁰ Cf. Saul Friedman, *Bush holds back on UN convention*, *Newsday*, Oct. 1, 1990, at 3.

⁵¹ *Support U.S. ratification of the United Nations Convention on the Rights of the Child (CRC), joining the rest of humanity in helping children live better lives*, The Campaign for U.S. Ratification of the Convention on the Rights of the Child (CRC), <http://www.childrightscampaign.org>.

⁵² Questions and Answers, The Campaign for U.S. Ratification of the Convention on the Rights of the Child (CRC), <http://childrightscampaign.org/the-facts/questions-a-answers-about-the-crc>.

⁵³ S. Res. 70, 103rd Cong. (1993-94).

⁵⁴ Susan P. Limber & Brian L. Wilcox, *Application of the UN Convention on the Rights of the Child to the United States*, 51 *Am. Psychologist* 1246 (1996).

⁵⁵ See Child's Rights: The Progress of Nations, U.N. Children's Fund, <http://www.unicef.org/pon95/chil0005.html>.

⁵⁶ Catherine Langevin-Falcon, *Second Class Citizens*, *The Humanist Magazine* (Nov/Dec 1998), <http://www.thirdworldtraveler.com/Children/SecondClassCitizens.html> (last visited Mar. 19, 2015).

⁵⁷ *Id.*

Clinton Administration signed and submitted to the Senate the first two CRC optional protocols.⁵⁸ The third optional protocol was not yet open for signature.

Optional Protocols to human rights treaties are treaties in their own right. This means that they are open to signature, must be ratified, and are only legally binding upon entry into force. For this reasons, States may be a party to an Optional Protocol even if they are not a party to the original treaty, as is the case with the United States and the first two Optional Protocols to the CRC.

Upon taking office, President George W. Bush made it clear that it would not send the CRC to the Senate.⁵⁹ Like President Clinton, the Bush Administration supported the two Optional Protocols to the CRC; the Senate approved these instruments in June 2002, and the United States officially became a party to these protocols in January 2003.⁶⁰

With President Obama's election in 2008, pro-CRC advocates once again had high expectations that the Administration would move the CRC forward. After all, President Obama had even mentioned the U.S. failure to ratify the CRC during his Presidential campaign. In response to a question about the CRC during the Presidential Youth Debate, Obama said, "It's embarrassing to find ourselves in the company of Somalia, a lawless land. I will review this and other treaties and ensure that the United States resumes its global leadership in Human Rights."⁶¹ Moreover, during Susan Rice's confirmation hearing to be U.S. Ambassador to U.N., Sen. Boxer asked her about the CRC. Rice said that the Obama Administration supported CRC objectives and would conduct a legal review of the treaty, though she acknowledged that it was a "complicated" treaty.⁶²

At the time of this writing, the Obama Administration has not submitted the CRC to the Senate. At a recent meeting with CRC advocates and National Security Council officials, it was clear that the Administration is NOT currently preparing the CRC treaty package.⁶³

⁵⁸ S. Treaty Doc. No. 106-37 (2000).

⁵⁹ The Bush Administration's Representative to the U.N. Commission on the Status of Women, Ambassador (and former Republican Congresswoman) Ellen Sauerbrey, said that "The CRC... represents an international attempt to ensure children's well being... However, the Convention then veers off by granting – not protective rights for children – but autonomy rights that may actually harm rather than strengthen the child." See U.N. & Family Policy, U.S. Dep't of State, Remarks to The World Congress of Families III, Mexico City, Mexico, (March 29, 2004), <http://2001-2009.state.gov/g/wi/31215.htm>.

⁶⁰ *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*, U.S. Dep't of State, <http://www.state.gov/documents/organization/218912.pdf>.

⁶¹ Walden University, Question 12: Human Rights Answers from Senators McCain and Obama, Youth Debate 2008, <http://www.youthdebate2008.org/video/question-12/#content>.

⁶² *Nomination of Hon. Susan E. Rice to be U.N. Representative*, S. Hrg. 111–257, Jan. 15, 2009, at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg54640/pdf/CHRG-111shrg54640.pdf>.

⁶³ Interview with CRC campaign leaders and NSC officials, Feb. 13, 2015.

V. Opposition to the CRC

Conservative organizations were quick to attack the CRC, labeling it as a threat to U.S. sovereignty and to parent's rights; these claims still form the basis of the opposition's arguments today. In June 1991, the cover article in *The New American* called the CRC "a whole new socialist manifesto for America" because it imposes open-ended obligations on federal and state governments, and it gives "revolutionists in our state and federal judiciaries... the opportunity to use this UN Convention in judicial assaults against state and federal laws, state constitutions, and even the U.S. Constitution itself."⁶⁴ In July 1991, an editorial in *Concerned Women* claimed, "this treaty would supersede the Constitution" and weaken the role of parents.⁶⁵ Another July 1991 article, in *Focus on the Family's Citizen*, stated: "Warning! There is bipartisan support with Congress for a legally binding United Nations treaty that could give our children unrestricted access to abortion, pornography, gangs and the occult."⁶⁶

The conservative assault on the CRC continued well into the Clinton Administration. A fundraising letter for Phyllis Schlafly's Eagle Forum claimed that "...Hillary Clinton and her liberal friends at the 'Children's Defense Fund' are pushing to use the UN to sneak their radical 'children's rights agenda' into law!" Their goal, the letter says, is for "government to take over the raising of children."⁶⁷

One of the most vociferous and longstanding critics of the CRC is Michael Farris, leader of the Home School Legal Defense Association (HSLDA). For example, in 1999, HSLDA issued a report called appropriately, *The UN Convention on the Rights of the Child: The Most Dangerous Attack on Parents' Rights in the History of the United States*. It said that "...America will have its domestic policy subjected to foreign control through the arbitrary whims of this Committee of Ten... It drastically subverts the sovereignty of our nation." And: "Under the UN Convention on the Rights of the Child, a parent's right to control the religion, health, and training of his child is virtually nonexistent."⁶⁸

These organized and extremely active conservative groups impacted Republican legislators. By the time the Clinton Administration signed the treaty in 1995, Republicans were firmly entrenched in their opposition. Sen. Jesse Helms (R-NC), the chairman of the Senate Foreign Relations Committee, sponsored a Senate resolution

⁶⁴ William F. Jasper, *Child Grab: Why Does The United Nations Want To Control Our Kids?*, *The New American*, June 18, 1991, at 4.

⁶⁵ *The United Nations: Encroaching on the Rights of America's Parents*, *Concerned Women*, July 1991, at 3.

⁶⁶ *U.N. Treaty Strips Parents of Rights*, *Focus on the Family Citizen*, Vol. 5 No. 7, July 17, 1991, at 1.

⁶⁷ Fax from Phyllis Schlafly on fundraising, President, Eagle Forum, to author (Sept. 25, 1995) (on file with author).

⁶⁸ Christopher J. Klicka, Christopher J. & William Estrada, *The UN Convention on the Rights of the Child: The Most Dangerous Attack on Parents' Rights in the History of the United States*, National Home School Legal Defense Association (November 1, 1999), http://nche.hslda.org/cap/un_treaty_31607.pdf.

stating bluntly that “[t]he President should not sign and transmit to the Senate that fundamentally flawed convention.”⁶⁹

Anti-CRC sentiment seems to have become Republican doctrine; both the 2008 and 2012 Republican Presidential Platform documents include specific opposition to the CRC. In 2012, the platform read:

Under our Constitution, treaties become the law of the land. So it is all the more important that the Congress—the Senate through its ratifying power and the House through its appropriating power—shall reject agreements whose long-range impact on the American family is ominous or unclear. These include the U.N. Convention on Women’s Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the U.N. Arms Trade Treaty...⁷⁰

Farris’s latest strategy to counter the CRC and protect parents’ rights is to amend the U.S. Constitution itself. He led efforts to introduce a joint Congressional resolution proposing an amendment to the Constitution that enshrines parents’ rights. In the 113th Congress, the House resolution had 81 supporters.⁷¹

VI. Responding to the Opposition’s Arguments

A. If ratified, would the CRC take precedence over the U.S. Constitution, and federal and state laws?

A common argument is that because treaties automatically become “the supreme Law of the Land,” the provisions of the CRC would automatically take effect; even if it violates current federal and state laws or the Constitution itself.

This is simply not true. Human rights treaties ratified by the United States are considered “non-self-executing,” meaning that the provisions of the treaty cannot be binding without specific legislative action at federal and state levels.⁷² In *Medellin v. Texas*, the United States Supreme Court addressed the issue of whether an International Court of Justice ruling on U.S. compliance with its international obligations under the Vienna Convention on Consular Relations automatically constituted binding federal law enforceable in U.S. courts. The Court stated that treaties create binding international obligations for the U.S., but do not create binding federal law enforceable in U.S. courts in the absence of implementing legislation from Congress.⁷³

⁶⁹ S.Res. 133, 113th Cong. (as introduced June 14, 1995).

⁷⁰ *We Believe in America: 2012 Republican Platform*, Committee on Arrangements for the 2012 Republican National Convention, 2012, at 45, available at <https://cdn.gop.com/docs/2012GOPPlatform.pdf>.

⁷¹ S.Res. 133, 113th Cong. (1995); H.R.J. Res. 50, 113th Cong. (2013).

⁷² *Human Rights Treaties Becoming Part of US Law: Q & A*, University of Nebraska-Lincoln, http://www.unlhumanrights.org/01/0105/0105_04.htm.

⁷³ *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

Furthermore, the majority opinion in *Reid v. Covert* stated that treaties had to be made while “observing constitutional prohibitions.”⁷⁴

It is true that under the Supremacy Clause, treaties are considered part of the law of the land. However, while Congress has the power to ratify a treaty and enact implementing legislation, the federal government has been reluctant to use its treaty power to infringe on state sovereignty.⁷⁵ Federalism is a fundamental aspect of the U.S. government and its principles would not be destroyed by U.S. ratification of the CRC.

B. Would U.S. ratification of the CRC impose federal authority over states in sectors such as education, family law, juvenile justice, etc.?

During the ratification process, the U.S. Government must address the Nation’s separation of powers between the federal government and states. The CRC definitely touches on many areas that are regulated by states, such as family law, education, and juvenile justice. As with all treaty ratifications, the Senate would include a set of RUDs that define the application of the CRC within the United States, including limits on its application to state laws.⁷⁶ This package of RUDs traditionally includes a clause that ensures the United States would leave implementation of the treaty largely to the states.

C. The CRC requires State Parties to report periodically to the CRC Committee, which makes recommendations and interpretations. Can the Committee tell us that we have to change our laws, such as banning corporal punishment?

The CRC requires State Parties to report periodically on implementation of the treaty to the CRC Committee. The CRC Committee is empowered to ask questions and make recommendations regarding a country’s children. Based upon the provisions of the CRC, the CRC Committee could, and probably would, tell the United States to ban corporal punishment.⁷⁷

However, there is absolutely no provision in the CRC that gives the CRC Committee, the U.N., or any other international body any authority to enforce such

⁷⁴ Miliff, *supra* note 76.

⁷⁵ Law, *supra* note 71, at 1870.

⁷⁶ In 1994 the American Bar Association proposed a set of RUDs for the CRC, addressing issues including corporal punishment, private education, and juvenile justice. See *Individual Rights and Responsibilities (Report No. 103)*, American Bar Association, available at http://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/humanrights/rightsofthechild02_94.auctheckdam.pdf.

⁷⁷ In 2011, the CRC Committee issued General comment No. 13 on the right of the child to freedom from all forms of violence, that recommended an absolute prohibition in of all forms of violence against children. See U.N. Committee on the Rights of the Child, 56th Sess., General Comment No. 13, CRC/C/GC/13 (Feb. 17, 2011).

recommendations.⁷⁸ U.S. policy related to children would still, and always, be governed by domestic legislation and not by international standards and norms. The CRC Committee's recommendations and interpretations are not binding in any way on any of the countries that are not to the CRC.

In fact, the United States already reports to the CRC Committee, without any loss of U.S. sovereignty, as a party to the Optional Protocol to the CRC on the Sale of Children, Child Prostitution, and Child Pornography; and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.⁷⁹ U.S. participation in the reporting processes for these treaties has been a positive and useful exercise, and provides a mechanism for the involvement of U.S. NGOs to help raise and address issues that affect American children.

D. Does the CRC grant children rights at the expense of parents' rights?

The CRC is not about pitting children's rights against parents' rights – it is about ensuring that governments recognize the rights and needs of both children and parents. Under the CRC, parental responsibility is protected from government interference. The CRC repeatedly emphasizes the pivotal role parents play in their children's lives. It recognizes the family “as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children...” and acknowledges “that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love, and understanding.”⁸⁰ The CRC recognizes the role of parents many times throughout the document; obligating states to take into account the rights and duties of parents,⁸¹ specifying that, “[p]arents... have the primary responsibility for the upbringing and development of the child.”⁸²

The rights embodied in the CRC are rooted in the U.S. Declaration of Independence, the U.S. Constitution, and federal and state law affecting the rights of American children and parents. In fact, the Reagan and Bush Administrations contributed to the treaty negotiations by pushing for articles on freedom of thought, conscience, and religion; freedom of expression; freedom of association and assembly; privacy; protection from abuse; family reunification; and periodic review of treatment – these articles are congruent to longstanding U.S. federal and State laws. Their goal was to ensure that the CRC recognized parents' rights and focused on individual rights, rather than promote socialism and government interference.

⁷⁸ See U.N. Convention on the Rights of the Child, *supra* note 26.

⁷⁹ U.N. Optional Protocols to the Convention on the Rights of the Child, *supra* notes 31, 32.

⁸⁰ U.N. Convention on the Rights of the Child, *supra* note 26, see preamble.

⁸¹ *Id.* art. 3, 5.

⁸² *Id.* art 18.

The apparent conflict between parental rights and the CRC stems from a misreading of the CRC.⁸³ Far from downplaying the importance of parents in a child's life, the CRC provides in Article 18 that "Parents...have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."⁸⁴ Moreover, Article 5 states, "States Parties shall respect the responsibilities, rights and duties of parents...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."⁸⁵ Therefore, ratification of the CRC would not abridge parental rights. Rather, it acknowledges that children have rights and parents play a crucial role in protecting those rights and helping a child grow and develop. The existing social and legal structure of the U.S. allows parents this type of agency and so compliance with the CRC would not drastically affect existing U.S. law.⁸⁶

E. Does the CRC give children the right to sue their parents who violate their rights?

The CRC does not give children the "right" to sue their parents. Any legal action brought by children against their parents must be based on existing federal or state laws, not on provisions contained in the CRC.⁸⁷

F. Because the CRC calls for freedom of religion, does it prevent parents for making their children go to church, or prevent parents from keeping children out of cults?

The Convention grants children the right to practice their religion free from *government* interference. The CRC specifically recognizes the rights and responsibilities of parents to guide their children in religious matters. This probably explains why the Holy See and many countries with strong religious traditions have ratified the CRC. In addition, many faith-based organizations support U.S. ratification of the CRC; such as Covenant House, Evangelical Lutheran Church of America, Church Women United, World Vision, the Anti-Defamation League, the Baha'is, the United Methodist Church, among others.

G. Would the CRC's provision on freedom of association prevent parents from keeping their children out of violent gangs?

The CRC does not usurp parents' authority to prevent their children from associating with persons of "dubious" character, such as pedophiles, gang members, etc. Parents are responsible for ensuring their children do not associate with people who do not have the best interests of their children in mind.

⁸³ Miliff, *supra* note 76.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Cynthia Price Cohen and Susan H. Bitensky, *The United Nations Convention on the Rights of the Child: Answers to 30 Questions*, Child Rights International Research Institute (1994).

As does the First Amendment to the U.S. Constitution, the CRC recognizes the right of children to peacefully assemble – but within the context of parents’ responsibilities to guide and protect their children.

H. Does the CRC provide children with an “unrestricted” right to access any information they want, including pornography off the Internet?

As does the U.S. Constitution, the CRC recognizes that children have rights to information. But there is no language in the CRC that grants children the right to “unlimited” freedom of information, including access to pornography and other obscene materials. The CRC specifically notes the rights and responsibilities of parents to guide and protect children.

I. We already have strong laws and institutions regarding children. Why should the United States ratify the CRC?

Americans care deeply about conditions for children around the world, and believe that our Nation should try to help them. However, because the U.S. has not ratified the CRC, it cannot partner with organizations like UNICEF in using the CRC as a tool to support children and families around the world. This limits the U.S. from exerting the strongest possible leadership internationally in making a difference for the world’s children.

U.S. ratification of the CRC would reinforce America’s leadership to help children and families, and strengthen our ability to partner with UNICEF and other organizations to help governments respond to the needs of children and families.

The U.S. ratifying the CRC would provide guidance for evaluating inconsistent existing policies for children. Many different agencies and departments release policies regarding children’s issues, such as health, education, welfare, and abuse.⁸⁸ . The CRC provides a comprehensive framework for our country to look at conditions for children and families, to document and share publicly information on those conditions, and to identify areas where we can strengthen laws and systems that support children and families.

The CRC requires certain reporting requirements during the treaty’s implementation and enforcement.⁸⁹ The process of assessing the CRC’s implementation provides opportunities for the CRC Committee, and for U.S. NGOs, to raise questions and

⁸⁸ Examples of agencies include, but are not limited to, Administration for Children and Families, the Department of Education, and the Department of Child and Family Services.

⁸⁹ See U.N. Convention on the Rights of the Child, *supra* note 26, at art. 44.

concerns about the condition of children in the U.S, and to push the U.S Government to be more accountable for its policies.⁹⁰

The U.S. Government already reports to the CRC Committee on implementation of the Optional Protocols on Children in Armed Conflict and the Sale of Children, and that process has proven to be very important to highlighting and addressing issues facing children in the United States

Ratification would give the U.S. the opportunity to be represented on the Committee on the Rights of the Child.⁹¹ This would allow the U.S. to continue to participate in the ongoing international dialogue on children's issues and to maintain a credible presence in the international human rights conversation.

Failure to ratify shows the world that the U.S. remains silent against children's rights. If the U.S. did speak up for children, it would be easy to question the U.S. credibility and ignore its voice.⁹²

J. Does the CRC make any difference for children around the world?

Clearly, the CRC is not a panacea to solve all problems facing children – even after twenty-five years of the CRC, many children around the world still cannot go to school, continuously experience exploitation and sexual abuse, and lack access to basic health services.

However, as a result of nearly every nation ratifying the CRC, the CRC gives international institutions, local organizations, and citizens a powerful tool to ask governments whether everything possible is being done to protect the nation's children.

The ability to use the CRC to focus on specific issues has helped make the world a better place for children. This is exemplified in:

- a) Malawi, which has the highest incidence of child marriage in the world, has seen local organizations use Malawi's ratification of the CRC to help convince tribal leaders to speak out against this harmful traditional practice – which resulted in hundreds of communities agreeing to stop the practice.⁹³

⁹⁰ Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 *Transnat'l L. & Contemp. Probs.* 437, 459 (1996).

⁹¹ U.N. Convention on the Rights of the Child, *supra* note 26, at art. 43(3).

⁹² Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, *The ANNALS of the American Academy of Political and Social Science* Vol. 633, 83 (2011).

⁹³ *Malawi's Parliament Voted Unanimously to End Child Marriage*, *Ms. Magazine* (Feb. 15, 2015), <http://www.msmagazine.com/news/uswirestory.asp?ID=15461>.

- b) Egypt saw the CRC used as a major tool in the campaign against female genital mutilation, leading to a ministerial decree and a statement by the country's top Muslim institution against the practice.⁹⁴
- c) India instituted universal, free elementary education as a response to its ratification of the CRC.⁹⁵
- d) UNICEF used Ukraine's ratification of the CRC to help the Ukrainian government transform the State's childcare system to support foster family care for orphaned children instead of institutionalizing them.⁹⁶

Throughout the world, UNICEF and other organizations have used the CRC to improve birth registration, a fundamental right under the CRC. Birth registrations are crucial to children's ability to access education, health care, and social services.⁹⁷

VII. Conclusion

This article unequivocally supports U.S. ratification of the CRC. More importantly, however, is the notion that the debate around ratification must be based on reality and facts, rather than paranoia and misinformation. Let me leave you with a passage from a blog by John Boonstra, writing about the tactics of the CRC opposition:

[If the CRC is ratified] [n]o ill-willed judges will be found knocking on every front door to lay down their unsolicited and unimpeachable pronouncements of whether or not a child can be sent to his room. The example is extreme to the point of frivolousness, but to hear opponents' wild claims – "a group of unaccountable so-called experts in Switzerland [would] have a say over how children in America should be raised, educated and disciplined," claims Steven Groves of the Heritage Foundation – the caricature is not unwarranted. Only by creating a fictitious behemoth, an utterly chimerical beast of UN tyranny, can such frantic fear-mongers distort what is an international agreement affording children certain basic human rights. That America has not given its full-fledged support to this premise is scandalous, and to allow

⁹⁴ *Media Backgrounder: Female Genital Mutilation/Cutting (FGM/C) in Egypt*, UNICEF Media Center, http://www.unicef.org/egypt/media_4115.html.

⁹⁵ *From Today, Every Child Has a Right to Education*, The Times of India (Apr. 1, 2010, 09:48AM), <http://timesofindia.indiatimes.com/india/From-today-every-child-has-a-right-to-education/articleshow/5749632.cms>.

⁹⁶ *Ukraine, Child Protection Programme*, UNICEF, http://www.unicef.org/ukraine/activities_11386.html (last visited Mar. 19, 2015).

⁹⁷ *Child Protection from Violence, Exploitation and Abuse*, UNICEF, http://www.unicef.org/protection/57929_58010.html (last updated Jan. 13, 2014).

such shrill voices to win the day would be an abdication of both our principles and the very concept of reason.⁹⁸

Unfortunately, until now, that is exactly what has happened, and the United States remains a lonely holdout in ratifying the most widely accepted human rights treaty in history.

⁹⁸ Boonstra, John. *The UN is Going to Steal Our Children*, UN DISPATCH (Feb. 26, 2009, 11:09AM), <http://www.undispatch.com/the-un-is-going-to-steal-our-children/>.