

Does the U.N. Convention on the Rights of the Child Make a Difference?

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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. It was about deciding that the law will no longer tolerate a system that allows some children to thrive, while failing to protect and nurture other children. In a way, the Convention on the Rights of the Child was intended to accomplish the same thing. While this treaty establishes a worldwide right to education, it also addresses every other major area of law that touches children's lives. 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* (which I'll often refer to as the "CRC") is a multilateral treaty designed to promote the protection of children worldwide. 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*,³ and as you may know it quickly became the most universally ratified human rights treaty in world history. One hundred ninety-three countries are party to it.⁴

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. This is most unfortunate, given that since 1948 the United States has been a leader on the world stage in the promotion of special legal protections for children. That year, we were *instrumental* in the drafting and adoption of the first United Nations document that recognized protective rights for children. The *Universal Declaration of Human Rights* ("UDHR"),⁵ 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."⁶

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* unanimously in the United Nations General Assembly. 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.⁷

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² 347 U.S. 483 (1954).

³ Luisa Blanchfield, Cong. Research Serv., *The United Nations Convention on the Rights of the Child: Background and Policy Issues*, at 1 (2009) (on file with the authors).

⁴ UNITED NATIONS TREATY COLLECTION, STATUS OF TREATIES,

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited March 21, 2013).

⁵ *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).

⁶ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) *available at* <http://www.un.org/en/documents/udhr/index.shtml#a25> [hereinafter UDHR]. The UDHR passed by a vote of 48 in favor, zero against, and eight abstentions. The United States voted in favor.

⁷ Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc A/4354 (Nov. 20, 1959) *available at* <http://daccess-ods.un.org/TMP/3311433.html>.

Finally, the U.S. is a party to the 1966 *International Covenant on Civil and Political Rights* (“ICCPR”), which addresses the special status and protection of children in its Article 24:

*“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.”*⁸

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.⁹ Specifically, the Reagan and George H.W. Bush Administrations actively contributed to negotiating the treaty’s text. 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*.¹⁰ 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*.¹¹

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 then-Senate Foreign Relations Committee Chairman Jesse Helms.¹² The George W. Bush Administration opposed the Convention, citing federalism, sovereignty, and parental rights concerns.¹³ However, that Administration pushed for ratification of two CRC *Optional Protocols: on Children in Armed Conflict* and on the *Sale of Children, Child Pornography, and Child Prostitution*, and the U.S. ratified both Protocols in December 2002.¹⁴

The current political climate, in which more than a third of the U.S. Senate, all Republican members, 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, which unfortunately some significant portion of the U.S. electorate share.

According to one polling organization, in 2004 a minority of 44% of U.S. citizens had a favorable view of the United Nations. This number continued to decline steadily, and two years later, in 2006, that number with favorable views had fallen to 31%. However, when opinions about the U.N. are asked differently, there is a more positive public response. 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 our remaining a U.N. member. A 2008 poll showed that 39% found it “very important” and 21% “not important” to strengthen the U.N.

There’s a lot about the U.N. that Americans don’t 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. Yet, distortions about what the U.N. does, or might do, to undermine U.S. sovereignty are being spread by those with political clout to get state legislatures, for example,

⁸ International Covenant on Civil and Political Rights art. 24, Dec. 16, 1966, 999 U.N.T.S. 14688 (entered into force for the United States on Sept. 8, 1992) [hereinafter ICCPR].

⁹ THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 13 (Jonathan Todres, Mark E. Wojcik & Cris R. Revaz, eds., Transnational Publishers 2006) [hereinafter Todres].

¹⁰ *Id.*

¹¹ *Id.* at 14.

¹² 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).

¹³ *Id.* at 1, 6.

¹⁴ Todres, *supra* note 9, at 294.

to consider anti-U.N. resolutions. An example is what is called the Agenda 21 initiative, which is touted as a threatening United Nations global plot. 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.

What actually is Agenda 21? 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. 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 nothing the U.N. does could ever undermine.

In another recent anti-U.N. campaign, the National Rifle Association has been stepping up its opposition to a new U.N. treaty aimed at halting the illicit trade of guns into conflict zones. Human rights advocates claim that the NRA's campaign is designed to stir up anti-U.N. panic ahead of a U.N. conference on the Arms Trade Treaty. The NRA has claimed in its literature and fundraising drives that there is an international conspiracy to "grab your guns". 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 intercountry transfer of large numbers of military weapons that leads to human rights abuses across the globe.

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." 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.

In a classic deception on the treaty's intent, former Senator Rick Santorum stated that instead of allowing parents to make critical health-care decisions for their child with a disability, that Convention would permit "a well-meaning, but faceless and distant United Nations bureaucrat" to make those decisions. It is interesting to note, however, that Mr. Santorum stated *correctly* something 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*. He's correct, and likewise ratification of a U.N. Convention doesn't force a national government, or its citizens, to do anything.

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. In the last Congress, a resolution in the Senate, S.R. 99 garnered 38 *sponsors*. 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 President should not transmit the Convention to the Senate for its advice and consent."

Opponents of U.N. treaties also claim how self-abasing it is 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. 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. 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.

All of this anti-U.N., anti-international law political activity has a major impact on us 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.¹⁵ Such a U.S. Government review is also supposed to determine the reservations, understandings, and declarations (or RUDs) the Administration should propose to condition the Senate's ratification of the CRC.¹⁶ 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 that means that no changes in American law will automatically come about simply because the U.S. becomes a party to a treaty.¹⁷

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.¹⁸ 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.

When we fail to ratify a major human rights treaty, we pay great foreign policy costs.¹⁹ First, the U.S. is precluded from 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. The Committee also establishes inter-country norms and decides upon the need for and development of additional related protocols or other instruments.²⁰

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.²¹ 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: "It 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."²²

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. They are the *Genocide*

¹⁵ Blanchfield, *supra* note 3, at 5.

¹⁶ *Id.*

¹⁷ BARRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 178 (5th ed. 2007).

¹⁸ 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.

¹⁹ Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 414 (2000).

²⁰ *Id.*

²¹ *Id.*

²² Patrick Geary, *United States: Is Obama's Win also a Victory for Children's Rights?*, CHILD RIGHTS INFORMATION NETWORK, Nov. 7, 2008, www.crin.org/resources/infoDetail.asp?ID=18874&flag=news. A video of the statement is hyperlinked to the online article.

Convention in 1988, the *International Covenant on Civil and Political Rights* in 1992, and in 1994 both the *Torture Convention* and the *Convention on Elimination of All Forms of Racial Discrimination*.²³

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 bi-partisan political support, the CRC's *Optional Protocol on the Sale of Children, Child Pornography, and Child Prostitution* in 2002.

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.²⁴ 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.²⁵ Through such U.S.-based organizations as the International Centre for Missing and Exploited Children, we share with other countries what we have learned.

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. 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.

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 “Communications Procedure” 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.²⁶ 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. That Protocol has to be ratified by ten countries before it takes affect, and even then only affects those nations that ratify it separately. As of March 2013 there were only three nations to have ratified it: Gabon, Germany, and Thailand.

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. According to the Campaign for US Ratification of the Convention on the Rights of

²³ Bradley, *supra* note 19, at 415.

²⁴ Todres, *supra* note 9, at 301-03.

²⁵ *Id.*

²⁶ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (last accessed March 21, 2013).

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.²⁷

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.²⁸ 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 “we hope you will comply, but we can’t do anything to make you.” Much of its force is in *moral persuasion, and shaming bad behavior* by shedding a light on it.²⁹ 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,³⁰ just as the non-binding *Declaration on the Rights of the Child* was the precursor to the *Convention on the Rights of the Child*. 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.³¹ 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.³² 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. These recommendations often help international and domestic civil society set priorities for change in a particular country.³³ 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.”³⁴ This increased visibility has led to increased concern and action.

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.³⁵

²⁷ <http://www.childrightscampaign.org/the-facts/how-does-crc-impact-children> (last accessed on March 22, 2013).

²⁸ JAMES B. ATLESON, ET AL., *INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKER’S RIGHTS IN THE GLOBAL ECONOMY* 8 (2008).

²⁹ *Id.*

³⁰ Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 320 (2006).

³¹ Todres, *supra* note 9, at 28.

³² *Cf. id.*

³³ SAVE THE CHILDREN SWEDEN, *WHAT HAPPENED? A STUDY ON THE IMPACT OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN FIVE COUNTRIES: ESTONIA, NEPAL, PERU, UGANDA AND YEMEN*, 40 (2009) (on file with the authors) [hereinafter SAVE THE CHILDREN].

³⁴ *Id.* at 5.

³⁵ The U.N. Convention on the Rights of the Child: A Study of Legal implementation in 12 Countries (UNICEF United Kingdom, 2013), http://www.ipjj.org/fileadmin/data/documents/reports_monitoring_evaluation/UNICEF-UK-QUB_ConventionImplementation12Countries_2012_EN.pdf (last accessed on March 21, 2013); SAVE THE CHILDREN, *supra* note 32;

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. In Australia, the report indicated that the CRC has best been integrated in the application of "best interests of the child" principles, 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. 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. 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. 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. Here, Article 12 of the CRC was cited as the main reason for this amendment.

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. Ireland, influenced by the provisions of the CRC, in 2012 voted to amend its constitution to protect and improve children's rights. 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. 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. 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.

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. In 2010, its Parliament passed a law requiring public institutions to safeguard the rights of children. 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.

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.³⁶ Two-thirds had incorporated the Convention directly into their domestic law, and nearly every country had either adopted comprehensive children's codes based on the CRC, or was engaged in a gradual, systematic reform of existing law.³⁷

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

UNICEF, LAW REFORM AND THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD (2007) [hereinafter LAW REFORM]; UNICEF, PROGRESS FOR CHILDREN: REPORT CARD ON CHILD PROTECTION NO. 8 (2009) [hereinafter PROGRESS].

³⁶ LAW REFORM, *supra* note 33 at 13-16.

³⁷ *Id.*

practice of not granting citizenship to children born in their territory to unwed native fathers and non-native mothers.³⁸

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. 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.³⁹

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 opportunity. 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 such an opportunity, where the state has undertaken to provide it, is a right which must be available to all on equal terms.”⁴⁰ 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. 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.”⁴¹

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.”⁴² 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.⁴³ 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, meaning that legal reforms to recognize the paternity and role of unwed fathers are underway.⁴⁴

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.’”⁴⁵ In addition, many countries, such as Slovenia, have been developing laws to protect child victims in the criminal prosecution of child abuse cases. 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.⁴⁶ Were it not for the CRC, we would also not have had the

³⁸ *Id.* at 35.

³⁹ *Id.* at 39-40.

⁴⁰ *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

⁴¹ LAW REFORM, *supra* note 33, at 52.

⁴² *Id.* at 51.

⁴³ *Id.* at 52.

⁴⁴ *Id.* at 53-54.

⁴⁵ *Id.* at 60.

⁴⁶ *Id.* at 68.

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*.⁴⁷

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.⁴⁸ Among countries that have passed laws, inspired by the CRC, to ban these harmful practices are Burkina Faso, Togo, Ethiopia, South Africa, Nigeria, Nepal, Korea, India, Sri Lanka, Egypt, Lebanon, Jordan, and Bangladesh.⁴⁹

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. Since 1990, Fiji, India, Indonesia, Japan, Nepal, Philippines, Korea, Sri Lanka, and Vietnam have passed new laws concerning the sexual exploitation of children.⁵⁰ 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.⁵¹

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.⁵² Several countries, such as Guatemala, are doing away with the practice of barring prosecution when the offender marries his child victim.⁵³ Finally, many European countries have created new legislation to establish jurisdiction over their own nationals who commit child sex offenses while travelling abroad. These provisions are especially important to address child sex tourism.⁵⁴

There have also been many positive legal reforms for refugee and asylum-seeking children around the world. In Slovenia, children whose applications are denied are not returned to their country until safe arrangements can be made.⁵⁵ 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 detention.⁵⁶ Italian law now provides for humanitarian visas for vulnerable children who do not receive refugee status.⁵⁷ Canada's 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.⁵⁸

Unfortunately, because we have 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 we have so much expertise to potentially share through promotion of CRC reforms in areas where our country has developed model laws, policies, and practices.

⁴⁷ U.N. Office on Drugs and Crime [UNDOC], *Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Commentary* (April 2009) available at www.unodc.org/documents/justice-and-prison-reform/UNODC_UNICEF_Model_Law_on_Children.pdf.

⁴⁸ LAW REFORM, *supra* note 33, at 69.

⁴⁹ *Id.* at 70.

⁵⁰ *Id.* at 72.

⁵¹ *Id.*

⁵² *Id.* at 73.

⁵³ *Id.*

⁵⁴ *Id.* at 75.

⁵⁵ *Id.* at 96.

⁵⁶ *Id.*

⁵⁷ *Id.* at 97.

⁵⁸ *Id.*

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. 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 to become outlawed in South African and Uganda. 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.⁵⁹ In Uganda, beatings by law enforcement have also been outlawed as a sentence for children.⁶⁰

Article 24 of the Convention, establishing the child's right to health, has had significant impact. New laws prohibiting the practice of female genital mutilation have resulted in prosecutions in Egypt, Burkina Faso, Ghana, Senegal, and Sierra Leone.⁶¹ In Egypt, the practice has already been reduced by 20 percent.⁶² New legislation in Nepal has led to 63% of households using iodized salt, which prevents goiter.⁶³ The Indian Supreme Court referenced Article 24 when it held that free lunches must be provided to hungry children in government-run primary schools.⁶⁴

Article 32, recognizing the child's right to protection from economic exploitation, inspired legislation that created a national anti-trafficking agency in Nigeria. 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.⁶⁵

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

Critiques of the CRC come in three general forms. First, some simply call the CRC ineffective because it has no enforcement teeth. 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.⁶⁶ 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. Examples include the laws I've already referred to.

Critics also claim the CRC would undermine U.S. sovereignty. They contend that the CRC violates our American principle of federalism. Finally, they call the CRC anti-family and say it will reduce parental control over children in favor of government control. I'll address each of these in turn.

⁵⁹ *Id.* at 111.

⁶⁰ SAVE THE CHILDREN, *supra* note 33, at 33.

⁶¹ PROGRESS, *supra* note 33, at 23, 28.

⁶² LAW REFORM, *supra* note 33, at 111.

⁶³ *Id.*

⁶⁴ People's Union for Civil Liberties v. Union of India & Ors., (Nov. 28, 2001), *available at* <http://www.righttofoodindia.org/orders/nov28.html>.

⁶⁵ LAW REFORM, *supra* note 33, at 111.

⁶⁶ 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 (Summer 2009).

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.

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 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. 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.⁶⁷

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. In that instance, a Reservation was taken out of concern that this restriction might conflict with U.S. First Amendment guarantees.⁶⁸ 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.” That reservation says that this clause is interpreted to mean “cruel and unusual punishment” within the meaning of our Eighth Amendment to the Constitution.⁶⁹ In addition, the U.S. generally attaches what are called “Non-Self-Executing 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.⁷⁰ 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.”⁷¹ This is so that the laws of state and local governments will not be federalized through Congress’s exercise of the treaty power. 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.⁷²

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.”⁷³ Here it must be again noted that the Committee responds to State reports only with Observations and Recommendations *that are not binding*, and rather function as their name suggests: *to recommend areas for improvement*. Thus, if the Committee were to say that

⁶⁷ CARTER, *supra* note 17 at 107.

⁶⁸ Bradley, *supra* note 19, at 417.

⁶⁹ *Id.* at 418.

⁷⁰ *Id.* at 419; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

⁷¹ Bradley, *supra* note 19, at 422 (quoting U.S. federalism understanding to the ICCPR).

⁷² Todres, *supra* note 9, at 300.

⁷³ Convention on the Rights of the Child, art. 44, G.A. Res. 45/25, art. 37, U.N. Doc. A/RES/44/25 (Dec. 12, 1989) [hereinafter CRC].

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. 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.⁷⁴ 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.⁷⁵ 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. 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.⁷⁶ Ratification would not change this right of action, and it would also *not add any other basis* for child-parent litigation. 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.⁷⁷ 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.

In the Committee's Observation on Sweden, for example, it recommended that state programs "give priority to protecting the natural family environment,"⁷⁸ and in recommendations to Bolivia, the Committee stressed that all necessary measures should be taken "to return [children] to their families whenever possible and consider placement of children in institutions as a measure of last resort and for the shortest possible period."⁷⁹

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"⁸⁰ would undermine parents' attempts to raise their

⁷⁴ Todres, *supra* note 9, at 28 n. 32.

⁷⁵ *Id.*

⁷⁶ *Id.* at 24.

⁷⁷ 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." CRC, *supra* note 73, arts. 1-7.

⁷⁸ U.N. Comm. on the Rights of the Child, 51st Session, Concluding Observations: Sweden, ¶ 35, U.N. Doc. CRC/C/SWE/CO/4 (June 12, 2009).

⁷⁹ U.N. Comm. on the Rights of the Child, 52nd Session, Concluding Observations: The Plurinational State of Bolivia, ¶ 46, U.N. Doc. CRC/C/BOL/CO/4 (Oct. 2, 2009).

⁸⁰ CRC, *supra* note 73, art. 14.

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*. 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.”⁸¹ The Committee further recommended that both Korea and France take measures to ensure that children do not experience discrimination based on their religious traditions.⁸²

Some critics have expressed particular concern that the Convention’s provisions requiring states to provide an adequate education to all children *might undermine homeschooling*. Again, I found the opposite to be true. For example, homeschooling in Great Britain, which ratified the CRC in 1991, rose by 80 percent in 2007.⁸³ 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.⁸⁴

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. In these same reports, the Committee has never commented about homeschooling. 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.

In summary, world experience with regard to the CRC demonstrates that it is helping countries make a collective difference in the lives of their most vulnerable children. However, there is still much 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.”⁸⁵ 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.⁸⁶ Ratification is *well worth the effort* regardless of how long it will take.

⁸¹ U.N. Comm. on the Rights of the Child, 35th Session, Concluding Observations: Germany, ¶ 30, U.N. Doc. CRC/C/15/Add.226 (Feb. 26, 2004).

⁸² U.N. Comm. on the Rights of the Child, 50th Session, Concluding Observations: Democratic People’s Republic of Korea, ¶ 30, U.N. Doc. CRC/C/PRK/CO/4 (Mar. 27, 2009); U.N. Comm. on the Rights of the Child, 52st Session, Concluding Observations: France, ¶ 46, U.N. Doc. CRC/C/FRA/CO/4 (June 11, 2009);

⁸³ 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>.

⁸⁴ 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);

⁸⁵ Todres, *supra* note 21, at 309.

⁸⁶ Howard Davidson, *A U.S. National Ombudsman for Children*, in *Big Ideas: Game-Changers for Children*, at 74 (First Focus 2010). 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.

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 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.