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U.S. RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

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When President George H. W. Bush asked the United States Senate in 1991 to give its consent so that he might ratify the International Covenant on Civil and Political Rights, he told the Senate that ratification of that treaty would “strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world.”¹ A plank of U.S. foreign policy in recent decades has been to encourage human rights observance by other states. For countries receiving U.S. economic or military aid, the State Department reports annually on their human rights performance to avoid having the United States fund repressive governments.²

Often, in making criticisms of other states for human rights violations, the United States has been met with the response that it itself has failed to ratify major human rights treaties. It was this problem that President Bush hoped to reduce by ratifying the International Covenant on Civil and Political Rights. After gaining the Senate’s consent, President Bush ratified that treaty on behalf of the United States in 1992.³

A similar issue presents itself today in regard to the U.N. Convention on the Rights of the Child.⁴ This treaty is the most widely ratified human rights treaty, counting 191 states as parties. Among U.N. member states, only the United States and Somalia have not ratified. The United States is criticized on this score, not only in regard to protection of children, but also in regard to its commitment to human rights implementation more generally. The United States cannot

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1. Letter from President George H. W. Bush to Senator Claiborne Pell, Chairman of Senate Committee on Foreign Relations (Aug. 8, 1991) *reprinted in* 31 I.L.M. 645 (1992).

2. *See* 22 U.S.C. § 262d (2002); 22 U.S.C. § 2151n (2002).

3. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 54783, 54784 (daily ed. Apr. 1992).

4. *See* Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter Convention on the Rights of the Child or Convention].

effectively pressure other states when it remains a non-party to major human rights instruments like the Convention on the Rights of the Child.

The United States has a strong self-interest in improved human rights performance by other countries. As a result of its role as the major economic force in the world, the United States has great numbers of its citizens abroad for economic activity and related purposes. To the extent that other countries treat individuals better, U.S. citizens are benefited. Specifically in regard to children, the United States has a particular interest because it plays a major role in seeking resolution of military conflicts around the world, and it is precisely in these situations that children are most seriously at risk. As a state party to the Convention, the United States could participate more effectively in the myriad issues on which children worldwide may be benefited.

Despite compelling reasons to ratify, the United States to date has not done so. Domestic opposition to ratification has centered on concern that ratification would negatively affect the United States. The law relating to children is traditionally handled at the state level in the United States, and the Convention, under the Supremacy Clause of the U.S. Constitution, would be federal law and thus might infringe on the prerogatives of the states. The very concept of legal rights of children is questioned, moreover, on the grounds that it might erode the proper role of parents. Of the rights enumerated in the Convention, some are in the economic realm, and rights of this type are viewed by opponents of ratification as inconsistent with a free market approach to economics. This essay responds to these concerns by reviewing the content of the Convention and its likely role in domestic law in the United States should it be ratified.

What the Convention Does

The Convention on the Rights of the Child was prompted by a widely shared understanding that children, as a result of their vulnerability, are in need of special attention from the international community. In extreme circumstances, such as warfare, children may be affected in ways that require special treatment. In many parts of the world, children are drawn into combat at an early age.⁵ Following a war, children who have been recruited into the military may require recovery assistance.⁶

In famine situations, children are at greater risk than adults. Children are easy victims to those who traffic in human beings.⁷ Children suffering from a physical

5. *Id.* art. 38 (prohibiting the recruiting of children into armed forces).

6. *Id.* art. 39 ("States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts").

7. *Id.* art. 11 ("States Parties shall take measures to combat the illicit transfer and non-return of children abroad"); *id.* art. 34 ("States Parties undertake to protect the child from all forms of sexual

or mental disability require special attention to promote development to the maximum of their capacities.⁸

The Convention, which entered into force only in 1990, appears to be having a positive effect on these and other issues. The Convention is implemented by a monitoring body created by the Convention and funded by the United Nations, called the Committee on the Rights of the Child. The Committee takes periodic reports from states' parties and assesses their compliance.

Other human rights treaties provide for additional procedures whereby states are called to account. These include complaints by one state party against another, brought before the committee that monitors the particular treaty,⁹ and complaints by individuals against a state party, brought before the same committee.¹⁰ The Convention on the Rights of the Child provides for neither of these, limiting itself to periodic reports as the only implementation mechanism at the international level.¹¹

The Committee, through the reporting procedure, exerts pressure on states to observe rights of children. The Committee also assesses state practice on the basis of the articles of the Convention. As with most human rights treaties, many of the articles of the Convention use terms that are open to interpretation; hence the Committee develops something akin to case law.¹²

For the most part, the Committee encourages states to ensure types of protections to children with which the state is in agreement. A state being criticized for inadequacies in its educational system, for example, will not reject the suggestion that its children deserve a good education. States, for the most part, wish they could do what the Committee urges. The Committee is limited in the attention it can devote to each state because it consists of only ten members, who serve in a part-time capacity while maintaining full-time positions in their home countries.

The Committee engages in constructive dialogue with states about their legislative, administrative, and judicial practices affecting children. Many states are surprisingly candid in criticizing their own practice. Non-governmental

exploitation and sexual abuse."); *id.* art. 35 ("States Parties shall take all appropriate . . . measures to prevent the abduction of, the sale of or traffic in children").

8. *Id.* art. 23 ("States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life").

9. See International Covenant on Civil and Political Rights, adopted on Dec. 19, 1966, art. 41, 999 U.N.T.S. 171, 182 (describing procedures for state action against non-compliant state under covenant) (entered into force Mar. 23, 1976) [hereinafter "ICCPR"].

10. Optional Protocol I to the International Covenant on Civil and Political Rights, Mar. 23, 1976, arts. 1-2, 999 U.N.T.S. 171, 6 I.L.M. 383 (1976) [hereinafter Optional Protocol].

11. SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 41 (1999).

12. Cynthia Price-Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 5, 25 (1993).

organizations often present negative information. The Committee may solicit responses by states to negative information or ask other questions based on members' reading of the report.¹³ States typically provide written replies. An oral proceeding is held. The Committee may inform the state in advance of issues it plans to raise at the oral hearing, in order to allow the state to prepare a position.

States typically take the process seriously, in part because they share the Committee's objectives, and in part because states are sensitive to being criticized at the international level and are therefore anxious not to have a particular criticism repeated at the subsequent period's report.

After it completes its review of a state, the Committee issues a document called Concluding Observations, in which it typically applauds the state for certain policies and criticizes it for others. The Committee does not shy away from leveling serious criticism when Committee members consider it warranted. The Concluding Observations for the Committee's early years have been published.¹⁴ Committee documents are available on the web site of the UN High Commissioner for Human Rights.¹⁵

Rights Guarantees for Children

The Convention on the Rights of the Child requires ratifying states to accord to children freedom of expression,¹⁶ of conscience,¹⁷ of association,¹⁸ and a right of privacy.¹⁹ It requires states to allow a child capable of forming his or her own views the right to express them in matters affecting the child, and those views are to be given due weight in accordance with the age and maturity of the child.²⁰ Concerns have been raised that, by giving such rights to children, the traditional role of parents may be eroded.

The United States, however, is already party to the International Covenant on Civil and Political Rights, which guarantees the same rights to everyone, including children. The Convention on the Rights of the Child, while staking out rights that adhere to children, qualifies them by reference to the role of parents. Article 5, a provision that applies to all rights specified in the Convention, requires ratifying states to "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

13. *Id.* at 35.

14. *See generally* CONCLUDING OBSERVATIONS OF THE UN COMMITTEE ON THE RIGHTS OF THE CHILD: THIRD TO SEVENTEENTH SESSION (1993-1998) (Leif Holmström, ed., 2000).

15. *See* Office of the High Commissioner for Human Rights, at <http://www.unhchr.ch>.

16. Convention on the Rights of the Child, *supra* note 4, art. 13.

17. *Id.* art. 14.

18. *Id.* art. 15.

19. *Id.* art. 16.

20. *Id.* art. 12.

recognized in the present Convention.” Hence, the exercise by a child of a right is subject to the guidance of the child’s parents.

In this respect, the Convention would seem to protect a child’s right less fully than human rights treaties of general application, like the International Covenant on Civil and Political Rights. Under the latter treaty, the same civil liberties are guaranteed to all persons, with no proviso for guidance by parents in the case of children.

Concerns About Federalizing Family Law

Concerns have been raised by opponents of U.S. ratification that the Convention would negatively affect the ability of state courts in the United States to deal with legal issues touching children. In particular, concern has been expressed that the Convention would federalize an area of law that is within the purview of state courts and legislatures. Most legal issues affecting children are, to be sure, matters of state rather than federal law in the United States. Basic issues like child custody, parental rights, and removal of children from a home are handled at the state level.

On key issues likely to arise in the courts of the United States, however, the Convention does not require any novel approach. The best interest of the child is posited as a desideratum by Article 3 of the Convention, as it is in case law or statutory law of the states of the United States. As construed by courts in other ratifying states, the rights-guarantee provisions have brought about no revolutionary change in family law. Many domestic courts, referencing the Convention, have focused on those provisions that allow rights to be restricted.²¹ Article 3 requires states to ensure the protection and care of children, a statement that, if unqualified, might seem to elevate the state over the parent. However, Article 3 provides that, in protecting a child, a state must take into account “the rights and duties of his or her parents.” By recognizing the role of parents, the Convention avoids becoming an instrument whereby the state might replace the parent.

The Convention’s particular formulation of the concept of “best interests” has kept it from elevating rights of children in ways that courts might find unacceptable. Article 3 requires ratifying states to make a child’s best interests “a primary consideration” in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.” The word “a” here was substituted for “the” from earlier drafts to make clear that a child’s best interest is not the overriding and only consideration. Hence, if a child argues that sending her father to prison for burglary would deprive her of parental supervision, and hence be contrary to

21. Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159 (1998).

her best interest, a court could readily refer to the word “a” to reply that considerations in addition to her best interest may be taken into consideration.

Economic Rights

The Convention requires ratifying states to accord children various rights in the socio-economic realm, including medical care, social security, nutrition, clothing, and housing. Potentially, such rights could be problematic for the United States, where economic support programs are not regarded as a matter of right, apart from the statutes creating such programs. The United States has not, to date, ratified the major human rights treaty dealing with economic issues, the International Covenant on Economic, Social and Cultural Rights, precisely because of such concerns.²²

The impact of these economic provisions is, however, mitigated by the fact that these rights are formulated in the Convention on the Rights of the Child in ways that accord the state considerable discretion and, moreover, in ways that do not put the state in a central role. In Article 24, States “recognize the right of the child . . . to facilities for the treatment of illness.”²³ However, the provision immediately qualifies this right by declaring, “States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services” and that they “shall pursue full implementation of this right.”²⁴ Thus, the state’s obligation is to make an effort to provide medical services.

In Article 26, States “recognize for every child the right to benefit from social security,” but the article seems to assume that such programs already exist and that a state’s obligation is to ensure that children must be able to benefit from them.²⁵ In Article 27, States “recognize the right of every child” to an adequate standard of living, but the Article specifies that parents have the “primary responsibility” in this regard. States must, “in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”²⁶

As regards all the economic rights specified, the Convention on the Rights of the Child includes a significant qualification. Article 4 provides, “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources.”²⁷ No further explanation is given in the Convention about “available resources.” It is thus left

22. See generally International Covenant on Economic, Social, and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3 (entered into force Mar. 23, 1976).

23. Convention on the Rights of the Child, *supra* note 4, art. 24.

24. *Id.*

25. *Id.* art. 26.

26. *Id.* art. 27.

27. *Id.* art 4.

to a ratifying state to exercise discretion in determining what can be provided consistent with “available resources.”²⁸

Rights Provisions Operating as Domestic Law

Rights provisions in treaties ratified by the United States do potentially create rights that may be invoked in state or federal court. The Supremacy Clause of the Constitution requires judges to apply treaty-based rights as the “law of the land.” The Supremacy Clause’s reference to treaties as the law of the land was included precisely to require compliance by U.S. courts with rights that the United States, by treaty, guarantees to individuals. A principal issue at the time of enactment of the U.S. Constitution was the rights the United States had granted in the Treaty of Paris to British nationals whose property had been confiscated by governments of the colonies. In the Treaty of Paris, the United States agreed to ensure return of such property.²⁹ The Supreme Court vindicated the right of a British creditor to collect on a debt that had been annulled by the legislature of Virginia.³⁰ The Court said that the courts were required to respect the guarantee provision of the Treaty of Paris, even if the law of Virginia was to the contrary.

The Court, however, qualified the broad applicability of treaties as domestic law. The Court noted that, despite the apparent sweep of the Supremacy Clause, not all treaty provisions operate as domestic law. In particular, provisions that contemplate legislative action before achieving their intended effect do not operate as domestic law.³¹ However, if it appears from treaty language that the intent of the parties in a particular treaty provision was to create a right, then the courts consider such a provision to have operative effect.³²

Those treaty provisions that the courts must enforce came to be called “self-executing.” In the 1990s, when the United States ratified several human rights treaties, it appended declarations about non-self-execution. The Senate has typically included a declaration, when giving consent to ratification, that the rights-guarantee provisions are not self-executing. Presidents have typically advised the depository agency of such declarations.

The import of these declarations has been the subject of considerable debate.³³ As persuasively argued by two constitutional scholars:

The Senate has the unicameral power only to consent to the ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in

28. See Todres, *supra* note 21, at 179-80.

29. Treaty of Paris, Sept. 3, 1783, U.S.-Gr. Brit., art. 5, 8 Stat. 80.

30. *Ware v. Hylton*, 3 U.S. 199 (1796).

31. *Foster and Elam v. Neilson*, 27 U.S. 253 (1829).

32. *United States v. Percheman*, 32 U.S. 51 (1833).

33. See generally David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L., 129 (1999).

the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President).³⁴

Although the Supreme Court has not resolved the matter, lower courts have read these declarations as depriving litigants of the right to rely on guaranteed provisions of human rights treaties.³⁵ None of these courts has explained in constitutional terms how a Senate declaration of non-self-execution acquires the force of law.

If this judicial practice holds, the rights guaranteed in human rights treaties ratified by the United States will not be law for state or federal courts. Given the practice in regard to the other human rights treaties, it is likely that the United States, were it to ratify the Convention on the Rights of the Child, would include a declaration that the rights provisions are not self-executing.

U.S. Courts Construe Rights Provisions Narrowly

U.S. courts, moreover, even when they have found a rights-guarantee provision in a treaty to be applicable as domestic law, have construed such provisions restrictively. This practice further reduces the likely impact in U.S. courts of rights-guarantee provisions in the Convention on the Rights of the Child. In one recent case, the Supreme Court restrictively construed a provision guaranteeing to asylum seekers a right not to be returned to a country where they face persecution.

The U.N. Convention Relating to the Status of Refugees forbids a state to return asylum seekers to their states of origin if they would face persecution there. Article 33(1) of the Convention provides: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."³⁶ This provision was effective as domestic law in the United States, having been incorporated by Congress into the Immigration and Nationality Act.³⁷

The U.S. Navy intercepted the Haitians in question while they were on the high seas, apparently en route to the United States. The United States argued in

34. Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI-KENT L. REV. 293, 296 (1991).

35. See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 375-76 (2001).

36. Convention Relating to the Status of Refugees, adopted July 28, 1951, art. 33 (1), 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

37. 8 U.S.C. § 1253(h)(1), *amended by* 8 U.S.C. Section 1253.

court that an obligation not to “expel or return” would arise only if the asylum seeker entered U.S. waters. The Supreme Court agreed, stating that the Haitians in this circumstance were not protected by Article 33(1).³⁸ A dissenting opinion pointed out that Article 33(1) did not limit the obligation not to repatriate to persons located in the national territory.³⁹ The obligation is to refrain from returning a person who is at risk of persecution, and the Convention is silent on the location of the asylum seeker. While “expel” may imply that a person is in the national territory, “return” does not. The Court’s opinion has been subjected to considerable criticism.⁴⁰ Whatever the merits of the Supreme Court’s interpretation in the Haitian case, the fact that treaty-based rights are construed restrictively suggests that the rights-guarantee provisions of the Convention on the Rights of the Child, even if held to be self-executing, would not be read expansively.

Conclusion

Concerns that have been raised in the United States about the Convention on the Rights of the Child should not prevent its ratification. The Convention is not likely to have a significant impact on the courts, or on other agencies of government, in policies towards children. Fears about an intrusive treaty that would usurp the role of parents are based on a misunderstanding of the Convention’s content. U.S. courts, moreover, do not typically rush to enforce treaty-based human rights aggressively. The Committee that implements the treaty enjoys only limited power and has, moreover, exercised its power judiciously.

Ratification by the United States of the Convention on the Rights of the Child would not bring the parade of horrors that some critics of the Convention imagine. Powerful reasons speak in favor of ratification. Ratification would serve the national interest of the United States. The Convention on the Rights of the Child, although quite recent, holds the promise of improving the treatment of children around the world. Given the U.S. role in the world, ratification by the United States would help the Convention achieve its goals.

38. *Sale v. Haitian Centers Council*, 509 U.S. 155, 180-83 (1993).

39. *Id.* at 189-90 (Blackmun, J., dissenting).

40. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 43-45 (1994).

