

Winter 2007

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#### Recommended Citation

John J. Garman, *International Law and Children's Human Rights: International, Constitutional, and Political Conflicts Blocking Passage of the Convention on the Rights of the Child*, 41 Val. U. L. Rev. 659 (2007).

Available at: <https://scholar.valpo.edu/vulr/vol41/iss2/4>

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# INTERNATIONAL LAW AND CHILDREN'S HUMAN RIGHTS: INTERNATIONAL, CONSTITUTIONAL, AND POLITICAL CONFLICTS BLOCKING PASSAGE OF THE CONVENTION ON THE RIGHTS OF THE CHILD

John J. Garman\*

## I. INTRODUCTION

The rights of children were recognized in American constitutional law when the Supreme Court held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>1</sup> The notion of "children's rights" has developed into a term involving the personal freedoms of children, parents' authority over children, and the state's responsibilities regarding children.<sup>2</sup> The Supreme Court has recognized that children are persons with rights; however, the current movement of the Court has been towards increasing the rights of parents over the child.<sup>3</sup> Currently the extent of the basic rights of children in the United States remains unsettled.<sup>4</sup>

Children's rights also exist as international law in the form of conventional law and customary law. Conventional law primarily consists of treaties entered into by sovereign states as a result of domestic ratification that impose legal duties only on those states that become parties to the treaties. In contrast, customary law comes from the general practice of states and can be legally binding on all states that have not objected to the rule as it was developed.

The primary issue to be addressed in this Article is whether or not the United States is prepared to adhere to the international call for children's rights. The first Part will look at what some scholars have called the post-Cold War era "age of globalization" where there are no

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<sup>1</sup> *In re Gault*, 387 U.S. 1, 13 (1967).

<sup>2</sup> Roger J.R. Levesque, *International Children's Rights Grow Up: Implications for Jurisprudence and Domestic Policy*, 24 CAL. W. INT'L L.J. 193, 193 (1994).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

boundaries to conflict and a complex new order based on Institutionalism has replaced the Realist world dominated by sovereign states for so many decades.<sup>5</sup> In a world that, despite recent unilateral United States action, seems to be tumbling ever closer towards resolving its problems more through institutions rather than the old “man versus man” approach, the United States is lagging behind the global effort of establishing international standards for human rights and children’s rights. The United States appears to be clinging to old Realist notions that any international human rights law would affect its status as the sole global superpower. The result is a lack of involvement and a global voice for the United States for human rights and children’s rights in the institutions that seek to further these causes. The United States’ lack of involvement “weakens America’s voice as a principled defender of human rights around the world and diminishes America’s moral influence and stature.”<sup>6</sup>

The second Part will look at the human rights treaties pertaining to the rights of the child, and in particular at the United Nations Convention on the Rights of the Child. The continuing reluctance of the United States to participate will be discussed, and issues of global and domestic politics will be analyzed as possible stumbling blocks to ratification. Finally this Article will discuss customary and conventional international law and the Supremacy Clause<sup>7</sup> of the United States Constitution. The ultimate purpose is to answer the question of whether or not the United States is prepared to adhere to the international call for children’s rights, starting at a global level, by discussing theories of international relations and the treaties themselves, and at the domestic level, by discussing the Supremacy Clause as it pertains to conventional and customary law.

## II. TWO THEORIES OF INTERNATIONAL RELATIONS: A REVIEW OF REALIST THEORY AND INSTITUTIONAL THEORY

### A. *Realist Theory*

The purpose of Part II is to provide the historical development of international relations theory, particularly focusing on the development of Realist and Institutional theory. It is important to discuss the

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<sup>5</sup> Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 303 (2002).

<sup>6</sup> Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347, 347 (2000).

<sup>7</sup> U.S. CONST. art. VI.

similarities between Realist and Institutional thought as well as provide the major differences in order to show what motivates a country to act in the international community. In the post-World War II era, international relations has seen a “schizophrenic battle” between believers in cooperation between nations and those who believe such cooperation is “unachievable and undesirable.”<sup>8</sup>

What has developed in and dominated the field of international relations theory had its beginnings centuries long ago, evidenced by writings describing states aligning with and against one another, constantly looking out for their own interests. It is the Realist notion of international relations theory that suggests that states seek to achieve more power and are at a constant state of war with one another for it. Hobbes' *Leviathan* is one where the Commonwealth is the provider of law and morality for its citizens. The Commonwealth also needs a coercive power to lead it, because “men have grief in coming together if there is no power to overawe them.”<sup>9</sup> As a result, a dilemma arises; even though most are only seeking security, citizens use coercion and power to help achieve it. Accordingly, the suspicion of other states' intentions will always be expected. Hobbes argues that the ultimate state of human relations is a state of war where everyone is governed by individual reason.<sup>10</sup> Similarly, Realist writers base much of their writings on human nature. “Few contemporary realists would share Hobbes's picture of human nature, but his analysis of the state of nature remains the defining feature of realist thought.”<sup>11</sup>

Hans J. Morgenthau made one of the more important statements reflecting the views of Realists towards international relations: “We assume that statesmen think and act in terms of interest defined as power, and the evidence of history bears that assumption out.”<sup>12</sup> Anarchy, according to Realists, does exist internationally and states must do what is necessary to protect their citizens. In the absence of any type of social contract among states, and in the absence of any type of sovereign power, there are also no obligations in the relations of states.

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<sup>8</sup> David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 *GEO. L.J.* 469, 472 (2001).

<sup>9</sup> KENNETH W. THOMPSON, *FATHERS OF INTERNATIONAL THOUGHT: THE LEGACY OF POLITICAL THEORY* 78 (1994).

<sup>10</sup> THOMAS HOBBS, *THE LEVIATHAN* 189 (C. B. Macpherson ed., Penguin Books 1981) (1660).

<sup>11</sup> MICHAEL J. SMITH, *REALIST THOUGHT FROM WEBER TO KISSINGER* 13 (1986).

<sup>12</sup> HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 5 (5th ed. 1978).

Rather, states are interested only in preserving themselves from harm and they will do anything to protect themselves. Accordingly, the two prongs of Realist theory are: (1) states act to preserve power; and (2) power matters more than rules.<sup>13</sup>

In summary, Realists view the world as anarchic and lacking in any type of organized authority of enforcement to resolve conflicts of interests. The only rational actor in the Realist system is the sovereign nation-state that acts out of its own self-interests in order to maintain its own sovereignty. Consequently, there appears to be little room left for any type of organization at the international level because of the situation in which states exist.

*B. Institutional Theory*

The application of Institutional theory to international relations allows the argument that international law has a direct effect on how nations behave in the international community.<sup>14</sup> For years the nation-state alone has been considered to be the lone actor and motivator in global affairs. Other groups, such as international and transnational organizations, also have an effect on the international system; the United Nations and multinational corporations are just a few of these many long-standing international groups. More recently, the increasing strength of the European Union and international trade organizations, such as General Agreement on Tariffs and Trade ("GATT") and North American Free Trade Agreement ("NAFTA"), are bringing about new types of cooperation.<sup>15</sup> Formal organizations are commonplace, from the local level and national governments all the way up to international

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<sup>13</sup> Claire R. Kelly, *Realist Theory and Real Constraints*, 44 VA. J. INT'L L. 545, 563 (2004).

<sup>14</sup> Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT'L L. 501, 508 (2004).

<sup>15</sup> See BRADLY J. CONDON, NAFTA, WTO, AND GLOBAL BUSINESS STRATEGY: HOW AIDS, TRADE, AND TERRORISM AFFECT OUR ECONOMIC FUTURE 11-13 (2002). Condon explains that NAFTA began as a free trade agreement between Canada and the United States. *Id.* Concerns over losing Canadian sovereignty lost out to the proposed increase in competition caused by the agreement that would create more jobs and strengthen the Canadian economy. *Id.* American concerns over Mexico's lower labor and environmental standards would lead to a "race to the bottom" were not as strong considering there was no fear of the U.S. losing its identity or sovereignty due to its strength and position in the agreement. *Id.*; see *id.* at 8. Condon argues that GATT was created by a desire to avoid another world war. *Id.* Organizers realized that the depression of the 1930's which brought about an increase in fascism would not have occurred if the nations involved had experienced prosperity and been linked in international trade. *Id.*

regimes, and all of them are “tools fashioned to address some collective problem.”<sup>16</sup>

In fact, institutions are an integral part of existence from the lowest levels of local society to the international system. These institutions are the machines that allow all levels to function together. Institutions in international relations are not exclusively limited to large-scale organizations such as the United Nations. Human rights conventions, the International Monetary Fund (“IMF”), NAFTA, and the World Trade Organization (“WTO”) all fall under the guise of international institutions.<sup>17</sup> “An effective organization requires, at a minimum, substantial consensus on the functional boundaries of the group and on the procedures for resolving disputes which come up within those boundaries.”<sup>18</sup> Autonomy and coherence are closely linked, as autonomy helps to establish a more coherent organization. It is important that once an organization establishes itself and becomes autonomous, it is clear and concise in its purposes and goals. “States often cooperate by creating international law and by complying with the commitments they have undertaken.”<sup>19</sup>

Like all complex organizations, international regimes are purposeful systems constructed to achieve goals that single actors cannot achieve alone. Their chief function is to make and implement joint decisions in order to achieve collective aims and reduce uncertainty. The survival and effectiveness of long-term cooperation depends on successful decision formulation and implementation. The hope of Institutional theory is that international treaties and agreements allow nations to

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<sup>16</sup> Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1754 (2003).

<sup>17</sup> See About the International Monetary Fund, <http://www.imf.org/external/about.htm> (last visited Dec. 20, 2006). Founded in 1945, the IMF “was established to promote international monetary cooperation, exchange stability, and orderly exchange arrangements,” as well as “to foster economic growth and high levels of employment,” and to provide economic assistance to countries requiring help easing balance of payments adjustment. *Id.*; see CONDON, *supra* note 15, at 9. Between 1986 and 1993, GATT members met and during the Uruguay Round created the WTO. CONDON, *supra* note 15, at 9. By the end of the Uruguay Round, 119 countries became members of the WTO with the requirement for membership being acceptance of almost all of the agreements negotiated at the round. *Id.*

<sup>18</sup> SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 22 (Yale Univ. Press 1968).

<sup>19</sup> Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 692 (2003).

maintain cooperative relationships, which will ultimately lead to greater aggregate welfare gains for all members.<sup>20</sup>

C. *Differences Between Realists and Institutionalists*

Realist theory does not account for institutions in the international system. However, Realists do not deny that states occasionally will cooperate through international institutions. Instead, to Realists, states are acting in what is considered to be their own best interest in order to maintain some type of balance of power. “[T]he most powerful states in the system create and shape institutions so that they can maintain their share of world power or even increase it.”<sup>21</sup> In Institutional theory, international agreements are a means of facilitating interstate cooperation. In other words, treaties are driven by nations’ opportunities for mutual gain at the international level and less by what effects the treaty would have on the domestic level.<sup>22</sup>

Institutions provide “a set of rules that stipulate the ways in which states should cooperate and compete with each other.”<sup>23</sup> The rules are brought about as the result of states agreeing, through some type of formalized agreement, to cooperate. Institutions are not an attempt to create a world government; rather, “[s]tates themselves must choose to obey the rules they created.”<sup>24</sup> In fact, what motivates states to act in the way they do is often the focal point of the argument between Realists and Institutionalists. Perhaps the most famous passage that defends this notion of relative gains was written by Kenneth Waltz:

When faced with the possibility of cooperating for mutual gain, states that feel insecure must ask how the gain will be divided. They are compelled to ask not “Will both of us gain?” but “Who will gain more?” If an expected gain is to be divided, say, in the ratio of two to one, one state may use its disproportionate gain to implement a policy intended to damage or destroy the other. Even the prospect of large absolute gains for both

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<sup>20</sup> Brewster, *supra* note 14, at 508.

<sup>21</sup> See generally John J. Mearsheimer, *The False Promise of International Institutions*, INT’L SECURITY, Winter 1994-95, at 5-49.

<sup>22</sup> Brewster, *supra* note 14, at 508.

<sup>23</sup> Mearsheimer, *supra* note 21, at 8.

<sup>24</sup> *Id.* at 9.

parties does not elicit their cooperation so long as each fears how the other will use its increased capabilities.<sup>25</sup>

Most significantly for this Article, human rights have played a significant role in United States foreign policy; however, the United States has been reluctant to allow international agreements to influence domestic policy. This can be seen in the failure of the United States to ratify major human rights documents and the limited use it makes of those it has ratified.<sup>26</sup> “[N]o authoritative American court has applied these international rules of human rights to condemn the conduct of the United States or any of its state and local entities . . .”<sup>27</sup> It appears that the major concern is that the terms of a human rights convention would allow other states to use the convention to influence the United States approach to human rights. Once the United States ratifies a human rights convention, it is obliged to follow the obligations as required by it. This result is counter to the Realist notion of sovereign power: failure to follow the obligations of a human rights convention would allow other states to take issue and proceed through channels implemented in the convention to enforce adherence to the convention’s requirements.<sup>28</sup>

### III. REVIEW OF INTERNATIONAL COVENANTS ON CHILDREN’S RIGHTS

#### A. *A Brief Overview of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*

The International Covenant on Civil and Political Rights (“ICCPR”)<sup>29</sup> and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”)<sup>30</sup> were both Cold War responses to human rights issues. Different countries, with different political and social ideologies, gave priority to one category over the other. In other words, the capitalist

<sup>25</sup> KENNETH N. WALTZ, *MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS* 105 (1959).

<sup>26</sup> See DAVID P. FORSYTHE, *HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED* 27 (1988) (discussing President Carter’s decision to continue business as usual with Uganda’s President Idi Amin in spite of Congress’s unanimous decision to restrict trade with the nation).

<sup>27</sup> Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 587 (1990).

<sup>28</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 9 (1987) (remedies for violations of international law).

<sup>29</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.cirp.org/library/ethics/UN-covenant/> [hereinafter ICCPR].

<sup>30</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/english/law/cescr.htm> [hereinafter ICESCR].



nations in the west favored civil and political rights, and communist nations favored economic, social, and cultural rights.<sup>31</sup>

The ICCPR is monitored by the United Nations Human Rights Committee, a group of eighteen individuals who meet three times a year to consider reports submitted by member states on their compliance with the treaty.<sup>32</sup> Members of the Human Rights Committee are elected by United Nations member states, but do not represent any particular nation.<sup>33</sup> Additionally, the ICCPR contains protocols whereby individuals in member states can submit complaints to be reviewed by the Human Rights Committee.<sup>34</sup>

#### 1. The International Covenant on Civil and Political Rights

In 1966, the United Nations adopted two instruments protecting human rights, the first of which was the ICCPR. The United States signed the covenant in 1977 and the United States Senate ratified the ICCPR on September 8, 1992.<sup>35</sup> As of 2004, 152 total countries have ratified the ICCPR.<sup>36</sup>

Article 24 of the ICCPR states that "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."<sup>37</sup> Similarly, Article 26 of the ICCPR states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."<sup>38</sup> These two provisions guarantee a child freedom from arbitrary interferences with

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<sup>31</sup> J.A. Lindgren Alves, *The United Nations: Postmodernity and Human Rights*, 32 U.S.F. L. REV. 479, 498 (1998).

<sup>32</sup> Allison Cole, *Reconceptualising Female Trafficking: The Inhuman Trade in Women*, 12 CARDOZO J.L. & GENDER 789, 807 (2006).

<sup>33</sup> FRANCISCO FORREST MARTIN, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES AND ANALYSIS 228 (2006).

<sup>34</sup> Ambika Kumar, *Using Courts To Enforce the Free Speech Provisions of the International Covenant on Civil and Political Rights*, 7 CHI. J. INT'L L. 351, 354 (2006) (introducing the ICCPR and explaining what it does).

<sup>35</sup> UNITED NATIONS, OFFICE OF THE HIGH COMMISSION ON HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (June 16, 2006), <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>.

<sup>36</sup> *Id.*

<sup>37</sup> ICCPR, *supra* note 29, at art. 24.

<sup>38</sup> *Id.* at art. 26.

their liberty and to equal protection of the law.<sup>39</sup> In contrast, the United States Constitution does not contain any language that is comparable to these provisions.<sup>40</sup> Additionally, the ICCPR establishes that “family is the natural and fundamental group unit of society.”<sup>41</sup> In 1992, President George H. W. Bush said of the ICCPR: “U.S. ratification would also 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.”<sup>42</sup>

Although the ICCPR has been adopted and generally accepted, it has not fared well in the courts. On June 29, 2004, Justice Souter’s opinion in *Sosa v. Alvarez-Machain* negated any strict adherence of the covenant in United States courtrooms.<sup>43</sup> Although the case was not related to children’s rights, Justice Souter declared that the covenant does not forcibly impose obligations on the United States as a matter of international law.<sup>44</sup> In a final blow to the ICCPR, Justice Souter stated, “although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”<sup>45</sup> Justice Souter pointed out that the Senate has refused to even allow federal courts to interpret and apply international human rights law.<sup>46</sup> When the Senate ratified the ICCPR, it proclaimed that “the provisions of Articles 1 through 27 of the Covenant are not self-executing.”<sup>47</sup> Furthermore, the Senate declared that “the Covenant will not create a private cause of action in U.S. Courts.”<sup>48</sup> Thus, the Congress and the Supreme Court are in agreement with regard to the United States’ approach to the ICCPR.

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<sup>39</sup> Sanford J. Fox, *Beyond the American Legal System for the Protection of Children’s Rights*, 31 FAM. L.Q. 237, 240 (1997).

<sup>40</sup> Symposium, *The Energizing Effect of Enforcing a Human Rights Treaty*, 42 DEPAUL L. REV. 1341, 1372 (1993).

<sup>41</sup> Maria Sophia Aguirre & Ann Wolfram, *United Nations Policy and the Family: Redefining the Ties that Bind a Study of History, Forces and Trends*, 16 BYU J. PUB. L. 113, 133 (2002).

<sup>42</sup> S. EXEC. REP. NO. 102-23, at 25 (1992).

<sup>43</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 2763.

<sup>47</sup> 138 CONG. REC. S4781-01, § I(2) (daily ed. Apr. 2, 1992).

<sup>48</sup> S. EXEC. REP. NO. 102-23, at 15 (1992).

More specifically, the juvenile death penalty was the primary issue regarding children's rights that arose when discussing the ICCPR. Article 6(5) specifies that the "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." <sup>49</sup> When the United States Senate ratified the ICCPR, it reserved the right for the United States to "subject to its Constitutional constraints, to impose capital punishment on any person . . . including such punishment for crimes committed by persons below eighteen years of age." <sup>50</sup> Of the 144 signatories, the United States is the only country with a reservation to Article 6(5). <sup>51</sup> With a growing number of countries looking at the United States' refusal to adhere to this clause of the ICCPR as a violation of international law, <sup>52</sup> scholars have argued that the United States' reservation to Article 6(5) of the ICCPR was contrary to the object and purpose of the treaty. <sup>53</sup> Consequently, the United States seemed to be faced with three choices in regards to the ICCPR: (1) withdraw its reservations; (2) implement legislation to bring current laws into compliance with international law; or (3) withdraw from the ICCPR all together. <sup>54</sup> However, in 2005, the United States Supreme Court apparently resolved the issue with its decision in *Roper v. Simmons*. <sup>55</sup>

Prior to *Roper v. Simmons*, in 1989, in *Stanford v. Kentucky*, <sup>56</sup> the Supreme Court had determined that "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." <sup>57</sup> At the time, the United States Senate had not considered the ICCPR. Regardless, the opinion in *Stanford* gave no indication that the Court ever considered looking towards the international community

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<sup>49</sup> ICCPR, *supra* note 29, at art 6(5).

<sup>50</sup> 138 CONG. REC. S4781-01, § I(2).

<sup>51</sup> Erica Templeton, *Killing Kids: The Impact of Domingues v. Nevada on the Juvenile Death Penalty as a Violation of International Law*, 41 B.C. L. REV. 1175, 1186 (2000).

<sup>52</sup> Elizabeth A. Reimels, Comment, *Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty—The U.S. Wants To Play the International Human Rights Game, but Only if It Makes the Rules*, 15 EMORY INT'L L. REV. 303, 304 (2001).

<sup>53</sup> *Id.* at 348.

<sup>54</sup> *Id.*

<sup>55</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>56</sup> *Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>57</sup> *Id.* at 380.

to determine whether a worldwide consensus supporting the execution of minors existed.<sup>58</sup>

In 2003, the Supreme Court first heard arguments in the Missouri case of *Roper v. Simmons*.<sup>59</sup> In that case, the Missouri Supreme Court had predicted that “the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age violates the ‘evolving standards of decency that mark the progress of a maturing society . . . .’”<sup>60</sup> As a result, the Missouri Supreme Court determined that applying the death penalty to a seventeen-year-old accused of robbery and murder would violate the Constitution’s ban on cruel and unusual punishment.<sup>61</sup>

As predicted, in March 2005, the Supreme Court upheld the Missouri Supreme Court decision, holding that executing an offender for crimes committed before he was eighteen years old would be cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.<sup>62</sup> The decision was 5-4; Justice O’Connor was in the dissenting group along with Justices Scalia and Thomas and Chief Justice Rehnquist. In the majority decision, Justice Kennedy utilized international law and the laws of other nations in writing his majority opinion and concluded that “the United States now stands alone in a world that has turned its face against the juvenile death penalty.”<sup>63</sup>

Perhaps expecting a strong dissent, Justice Kennedy looked back to several other cases where the United States Supreme Court interpreted aspects of the Eighth Amendment using international law in its rulings on cruel and unusual punishment.<sup>64</sup> From *Trop v. Dulles*,<sup>65</sup> he quoted the majority opinion, stating that “The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”<sup>66</sup> From *Atkins v. Virginia*,<sup>67</sup> he quoted that “within the world

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<sup>58</sup> Reimels, *supra* note 52, at 306.

<sup>59</sup> *Roper*, 543 U.S. 551.

<sup>60</sup> *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003) (quoting *Atkins v. Virginia*, 536 U.S. 304 (2002)) (arguing that since the United States Supreme Court had banned the death penalty against mentally retarded individuals in *Atkins*, the same reasoning should apply to banning the juvenile death penalty).

<sup>61</sup> *Id.*

<sup>62</sup> *Roper*, 543 U.S. at 579.

<sup>63</sup> *Id.* at 578-79.

<sup>64</sup> *Id.* at 561-62.

<sup>65</sup> *Trop v. Dulles*, 356 U.S. 86 (1958) (holding that the Eighth Amendment did not permit Congress to take away petitioner’s citizenship as a punishment for crime).

<sup>66</sup> *Roper*, 543 U.S. at 575 (quoting *Trop*, 356 U.S. at 102-03) (internal quotations omitted).

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community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>68</sup> Additionally, he quoted from the plurality opinion in *Thompson v. Oklahoma*,<sup>69</sup> its acknowledgment of the abolition of the juvenile death penalty “by other nations that share our Anglo-American heritage, and by the leading members of the Western European community,” and that “[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”<sup>70</sup> Drawing from *Enmund v. Florida*,<sup>71</sup> he quoted the observation that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”<sup>72</sup> Finally, Justice Kennedy quoted the plurality decision from *Coker v. Georgia*,<sup>73</sup> stating that “It is . . . not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”<sup>74</sup>

Additionally, Justice Kennedy also looked to foreign sources in his opinion. Specifically, he noted the United Kingdom’s abolition of the juvenile death penalty in 1948, long before any international covenants required it, and emphasized that the Constitution’s Eighth Amendment was modeled on British law.<sup>75</sup> Moreover, Kennedy did not fail to stress the importance of the United States Constitution, noting that it “sets forth, and rests upon, innovative principles original to the American experience . . . [that are] essential to our present-day self-definition and national identity.”<sup>76</sup> According to Justice Kennedy, however, acknowledgement of the rights of other nations “does not lessen our

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<sup>67</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded individuals was cruel and unusual punishment under the Eighth Amendment).

<sup>68</sup> *Roper*, 543 U.S. at 575 (quoting *Atkins*, 536 U.S. at 317) (internal quotations omitted).

<sup>69</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (holding that the imposition of the death penalty on individuals under sixteen is prohibited by the Eighth and Fourteenth Amendments).

<sup>70</sup> *Roper*, 543 U.S. at 575-76 (quoting *Thompson*, 487 U.S. at 830-31) (internal quotations omitted).

<sup>71</sup> *Enmund v. Florida*, 458 U.S. 782, 796-97 (1982) (holding that allowing capital punishment for felony murder violated the Eighth Amendment) (internal quotations omitted).

<sup>72</sup> *Roper*, 543 U.S. at 576 (quoting *Enmund*, 458 U.S. at 796-97).

<sup>73</sup> *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (holding that imposition of the death penalty for rape cases where death did not occur was cruel and unusual punishment under the Eighth Amendment).

<sup>74</sup> *Roper*, 543 U.S. at 576 (quoting *Coker*, 433 U.S. at 596) (internal quotations omitted).

<sup>75</sup> *Id.* at 577.

<sup>76</sup> *Id.* at 578.

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fidelity to the Constitution or our pride in its origins.”<sup>77</sup> Yet, after affirming the importance of the Constitution, Justice Kennedy nonetheless determined that it is “proper” to acknowledge international law regarding the juvenile death penalty and that international law “provide[s] respected and significant confirmation for our own conclusions.”<sup>78</sup>

In light of previous statements she had made, praising the growth in importance of international law, Justice Sandra Day O’Connor was expected to cast a critical vote in the decision. For example, on October 27, 2004, she had been quoted as saying “International law is no longer a specialty . . . It is vital if judges are to faithfully discharge their duties,” and that “International law is a help in our search for a more peaceful world . . . .”<sup>79</sup>

Statements like these notwithstanding, Justice O’Connor rejected Justice Kennedy’s reasoning and wrote her own separate dissenting opinion, arguing that

it defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence. Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.<sup>80</sup>

She did agree with Justice Kennedy, however, that the Court has used international law in the past in the decisions cited by him, but emphasized that such decisions were not surprising, given that there are numerous values that cross international boundaries.<sup>81</sup>

In contrast, Justice Scalia’s dissent took on a scolding tone with venomous comments directed at the majority, beginning with the all-encompassing comment that “the laws of the rest of the world—ought to be rejected out of hand.”<sup>82</sup> Justice Scalia, referring to the origins of the Eighth Amendment from English law, noted that the United Kingdom

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> WorldNetDaily, *O’Connor Praises International Law* (Oct. 27, 2004), [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=41143](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=41143) (internal quotations omitted).

<sup>80</sup> *Roper*, 543 U.S. at 602.

<sup>81</sup> *Id.* at 604-05.

<sup>82</sup> *Id.* at 624.

also has relaxed standards on illegally seized evidence and illegally obtained confessions, and has fewer jury trials.<sup>83</sup> He spoke generally of the world community, noting that most countries have stricter limitations on abortion, no separation of church and state, and relaxed standards on admission of evidence and when jury trials may be demanded.<sup>84</sup> In short, Justice Scalia portrayed the majority opinion as self-serving: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."<sup>85</sup>

In summary, the *Roper* Court did what the Senate refused to do when it ratified the ICCPR: banned the death penalty throughout the United States as a punishment for offenses committed by minors.

## 2. The International Covenant on Economic, Social and Cultural Rights

The ICESCR entered into force on January 3, 1976.<sup>86</sup> A child's right to protection by the government is a positive social right under the ICESCR.<sup>87</sup> Specifically, Article 10(3) of the ICESCR asserts that "Special measures of protection and assistance should be taken on behalf of all children and young persons," and Article 12 speaks of "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."<sup>88</sup>

The first major issue of the ICESCR is the right of a child to education. Article 13 of the ICESCR mandates that education must be accessible to everyone in law and in fact.<sup>89</sup> It also states that education should contribute to the "full development" of the child's personality, and establishes requirements for various levels of education.<sup>90</sup> Additionally, Article 14 requires those states that do not provide free primary schooling "to work out and adopt a detailed plan of action for the progressive implementation . . . of compulsory education free of charge for all."<sup>91</sup> The ICESCR also requires participating states to reduce

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<sup>83</sup> *Id.* at 626.

<sup>84</sup> *Id.* 624-27.

<sup>85</sup> *Id.* at 626-27.

<sup>86</sup> ICESCR, *supra* note 30.

<sup>87</sup> *Roper*, 543 U.S. at 626-27.

<sup>88</sup> ICESCR, *supra* note 30, at arts. 10(3), 12.

<sup>89</sup> *Id.* at art 13.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at art. 14.

and eventually eliminate fees until education is free from both direct and indirect costs.<sup>92</sup>

Second, the ICESCR explicitly addresses the issue of child labor. Article 10(3) recognizes children's right to a just and favorable working condition and an adequate standard of living.<sup>93</sup> The ICESCR specifically states that nations should protect children from economic exploitation and child labor; preserve children's health, morals, and development; and make the exploitation of children punishable by law.<sup>94</sup> Arguably the United States is already adhering to the strict standards as applied in the ICESCR as it relates to child labor, both with domestic legislation and international agreements like NAFTA and GATT. However, some argue that the United States should ratify the treaty because multinational corporations based in the United States are not adhering to similar standards in business activities abroad.<sup>95</sup>

In 1993, Secretary of State Warren Christopher announced the intent of President Bill Clinton to push for ratification of the ICESCR.<sup>96</sup> However, some critics believe that the Republican wins in the House and Senate in 1994 eliminated any chance of the ICESCR being adopted.<sup>97</sup> Currently, the administration of President George W. Bush has yet to take any significant steps towards reconsidering ratification of the ICESCR.<sup>98</sup> In fact, the treaty is effectively not an issue at this time and it does not appear it will be considered for ratification at any point in the near future.

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<sup>92</sup> ICESCR, *supra* note 30, at art. 14, gen. cmt. 11: Plans of Action for Primary Education art. 14 (1999), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.4.En?OpenDocument).

<sup>93</sup> ICESCR, *supra* note 30, at art. 10(3).

<sup>94</sup> *Id.*

<sup>95</sup> See Lena Ayoub, *Nike Just Does It – and Why the United States Shouldn't: The United States' Obligation To Hold MNC's Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395 (1999) (proposing that the United States has a duty under international law to create legislation that would punish multinational corporations headquartered in the United States that violate the labor rights of foreign workers).

<sup>96</sup> Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 308 (2002).

<sup>97</sup> *Id.*

<sup>98</sup> See Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKELEY J. INT'L L. 607, 614-15 (2003) (generally discussing the human rights record of the United States under George W. Bush's administration).



B. *The United Nations Convention on the Rights of the Child*

The passage of the Convention on the Rights of the Child (“CRC”) by the United Nations on November 20, 1989, institutionalized concepts of international law as it pertains to children, and brought into a single document many of the ideas previously separated into the ICCPR and the ICESCR.<sup>99</sup> The CRC changed international law for children by recognizing the rights of the “whole child” and not limiting the child’s rights to those that related to “care and protection.”<sup>100</sup> It came about as a proposal from Poland in 1978, leading up to 1979’s United Nations-sponsored International Year of the Child.<sup>101</sup> The CRC was opened for signatures on January 26, 1990, and the treaty was entered into force on September 2, 1990.<sup>102</sup> As of 2004, 177 total countries have either signed the CRC or have become state parties to it by ratification, accession, or succession.<sup>103</sup> The United States signed the convention on February 16, 1995, but the Senate has yet to ratify it.<sup>104</sup>

To protect the child’s interest, the CRC has four primary areas of concern for children: the survival, development, protection, and participation rights.<sup>105</sup> The CRC specifically states that at all levels of society and government, “the best interests of the child shall be a primary consideration.”<sup>106</sup> Each of these rights will be discussed individually.

First, survival rights require participating states to recognize an “inherent right to life” and to ensure to the “maximum extent possible the survival and development of the child.”<sup>107</sup> Perhaps the most significant assurance of survival rights include access to the “highest

<sup>99</sup> Susan O’Rourke Von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children’s Convention and International Response to Children’s Human Rights*, 18 SUFFOLK TRANSNAT’L L. REV. 589, 590 (1995).

<sup>100</sup> Cynthia Price Cohen, *Role of the United States in Drafting the Convention of the Rights of the Child: A New World for Children*, 4 LOY. POVERTY L.J. 9, 10 (1998) [hereinafter Cohen, *Role of the United States*].

<sup>101</sup> UNICEF, *Convention on the Rights of the Child*, <http://www.unicef.org/crc/convention.htm> (last visited Oct. 18, 2005).

<sup>102</sup> *Id.*

<sup>103</sup> United Nations, Office of the High Commission on Human Rights, Ratifications and Reservations, <http://www.unhcr.ch/tbs/doc.nsf/newhvstatbytreaty?OpenView&Start=1&Count=250&Expand=11.2#11.2> (last visited Oct. 18, 2005).

<sup>104</sup> *Id.*

<sup>105</sup> Von Struensee, *supra* note 99, at 594.

<sup>106</sup> Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/736, art. 3, Nov. 20, 1989, available at <http://www.unhcr.ch/html/menu3/b/k2crc.htm> [hereinafter CRC].

<sup>107</sup> *Id.* at art. 3.

attainable standard of health and to facilities for the treatment of illness” and that the state “ensure that no child is deprived of his or her right of access” to these facilities.<sup>108</sup>

Development rights require states to ensure the children’s rights to an “equal opportunity” education that is “free to all.”<sup>109</sup> States are also required to make higher education and vocational education “accessible to all.”<sup>110</sup> And while the child is getting his free education, schools must be wary of administering punishment that is “in a manner consistent with the child’s human dignity.”<sup>111</sup> Development rights also include a right of access to information. States must recognize the right of the child to have access to mass media material “aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.”<sup>112</sup> Further, the state is required to encourage the mass media to create more children’s material and make it easier for children to understand the information being distributed. Under the CRC, along with education and information, States must recognize and promote the right of the child to “cultural, artistic, recreational and leisure activity.”<sup>113</sup> Finally, the CRC requires that states respect the child’s “freedom of thought, conscience and religion.”<sup>114</sup> Interestingly, this is the only clause discussed so far that actually brings the parents into play to “provide direction to the child.”<sup>115</sup>

Protection rights in the CRC require the states to guard children against every evil that society may have to offer. This includes protecting against economic exploitation in the workplace that is “hazardous or . . . interfer[es] with the child’s education.”<sup>116</sup> To meet this end, states must seek measures at all levels of government to insure a minimum wage, proper working conditions, and proper hours. Protective measures must also be taken by the states to protect children from “sexual exploitation and sexual abuse.”<sup>117</sup> Perhaps the most significant protection rights in the CRC protect children from cruelty. Articles 19 through 21 address instances of abuse and how the state should deal with it. Specifically, Article 19 requires the state to address

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<sup>108</sup> *Id.* at art. 24.

<sup>109</sup> *Id.* at art. 28.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at art. 17.

<sup>113</sup> *Id.* at art. 31.

<sup>114</sup> *Id.* at art. 14.

<sup>115</sup> *Id.* at art. 14.

<sup>116</sup> *Id.* at art. 32.

<sup>117</sup> *Id.* at art. 34.

at all levels of government “measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”<sup>118</sup> In order to protect the child, states should make “effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child.”<sup>119</sup> These programs include alternative care, such as foster care or adoption, that constitute “special protection and assistance provided by the State.”<sup>120</sup>

Article 21 also permits adoptions and gives specific standards for states to monitor inter-country adoption. Under the CRC, states must ensure that with all adoptions “the best interests of the child shall be the paramount consideration.”<sup>121</sup> Finally, the CRC requires states to ensure that “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”<sup>122</sup> This includes a ban on capital punishment and life imprisonment for children under eighteen. The remainder of Article 37 deals with the child’s rights while being detained. Specifically, any detention must be a “measure of last resort and for the shortest appropriate period of time.”<sup>123</sup> If children are to be detained, they must be able to maintain their dignity, be separated from adults, maintain contact with their parents, and be able to seek out and receive legal representation.<sup>124</sup>

Additionally, participation rights under the CRC provide basic respect for a child’s opinion. States must ensure that children have the right to develop their own views and the right to “express those views freely in all matters affecting the child.”<sup>125</sup> States must also ensure that the child has the right to “freedom of expression,”<sup>126</sup> “freedom of thought, conscience and religion,”<sup>127</sup> and “freedom of association and to freedom of peaceful assembly.”<sup>128</sup>

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<sup>118</sup> *Id.* at art. 19.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at art. 20.

<sup>121</sup> *Id.* at art. 21.

<sup>122</sup> *Id.* at art. 37.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at art. 12.

<sup>126</sup> *Id.* at art. 13.

<sup>127</sup> *Id.* at art. 14.

<sup>128</sup> *Id.* at art. 15.

Along with the rights discussed above, the CRC requires participating states to initiate standards for various classes of children. Article 20 protects orphans and entitles them to “special protection and assistance provided by the State.”<sup>129</sup> If for any reason a state happens to house refugees, children, with or without their parents, those children are entitled to “appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”<sup>130</sup> Mentally or physically handicapped children “should enjoy a full and decent life” and are entitled to “special care” that is to be provided by the State “free of charge.”<sup>131</sup> The final class discussed in the CRC is any class considered a minority in the participating state, who should “enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”<sup>132</sup>

A United Nations treaty on human rights is a legal instrument but it is “not a ‘law’ in the ordinary sense” of the term since it does not detail specific rules and sanctions if and when those rules are not followed.<sup>133</sup> Human rights treaties, such as the CRC, have general principles, which must be applied by individual nations “as national law in order for the rights to be actualized.”<sup>134</sup> The CRC was drafted with generalized terms and principles to meet the needs of various countries and cultures so there is no confirmed interpretation of the text; consequently, most party nations are forced to come to their own conclusions as to the true meaning.<sup>135</sup>

The disappointing conclusion of the CRC is that the United States participated so heavily in its drafting, but now can do nothing to shape its continuing development. Because of the United States’ involvement in writing the treaty, personal freedoms like freedom of expression, thought, religion, and assembly from Articles 13 through 16<sup>136</sup> have

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<sup>129</sup> *Id.* at art. 20.

<sup>130</sup> *Id.* at art. 22.

<sup>131</sup> *Id.* at art. 23.

<sup>132</sup> *Id.* at art. 30.

<sup>133</sup> Cynthia Price Cohen, *The Jurisprudence of the Committee on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 201, 202 (1998) [hereinafter Cohen, *Rights of the Child*].

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> CRC, *supra* note 106.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart

displayed to the rest of the world some of the freedoms instilled in the Bill of Rights. Without these “individual personality” articles, it is likely the rest of the world would not have had the benefit of their language.<sup>137</sup>

Accordingly, it would seem that, with such heavy involvement by the United States in the construction of the treaty itself, there would be no problem with ratification. Even the rules on implementation appear to be fairly harmless. In United Nations human rights treaties, including the CRC, there “are no formal ‘enforcement’ procedures, . . . [and] no sanctions for failing to meet the treaties’ standards.”<sup>138</sup> These treaties assume an aspect of good faith, and once a state has ratified the treaty it

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information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

*Id.*

<sup>137</sup> Cohen, *Role of the United States*, *supra* note 100, at 39.

<sup>138</sup> Cohen, *Rights of the Child*, *supra* note 133, at 202.

is presumed that, beyond a formal report to the Committee on the Rights of the Child, there is no direct penalty or punishment or criticism of domestic law that comes into play.<sup>139</sup>

During negotiations for the CRC, the American delegates had to juggle a variety of influences when making their decisions. Constitutional and other policy concerns were at stake causing the delegates to respect the demands of the Department of Justice, the Pentagon, the Department of Health and Human Services, and ultimately the United States Supreme Court.<sup>140</sup> But considering the time frame in which the treaty was written, there were obvious tensions between the East and West. There is clearly a taste of Western democracy in the CRC.<sup>141</sup> At that time, perhaps the United States' interests were less on the side of children and more on the side opposite the Soviet Union.<sup>142</sup>

Has the CRC received international legitimacy with all member nations of the world but the United States and Somalia ratifying it? The common perception around the international community is that it is not enough that 191 members to the CRC have ratified it because effective guidance of social and political actions of nations on behalf of the child requires full participation by all states.<sup>143</sup> The "validity of the claims to legitimacy" for the articles of the CRC must be based "on a belief in the legality of enacted rules."<sup>144</sup> In other words, the common notion is that the CRC must become a part of the administrative, legislative, and legal foundations of all states to achieve full legitimacy.

Such a transformation of international agreements and standards into the laws, practices, and belief systems of each participating nation is what is meant when the term "implementation" is used in the Convention itself. Once we disaggregate the meaning of "implementation of the Convention," the difficulties that confront such attempts become immediately apparent. At stake are not only the good intentions of legislators, government officials, and

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<sup>139</sup> See generally *id.*, for a detailed discussion of the jurisprudence of the CRC.

<sup>140</sup> Cohen, *Role of the United States*, *supra* note 100, at 40.

<sup>141</sup> Gertrud Lenzer, *The Human Rights Agenda and the Rights of Children*, 21 WHITTIER L. REV. 107, 110 (1999).

<sup>142</sup> Cohen, *Role of the United States*, *supra* note 100, at 40.

<sup>143</sup> Lenzer, *supra* note 141, at 108.

<sup>144</sup> 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968).

administrators to honor the terms of these international agreements, but also the values, belief systems, customs, and traditional practices, which have heretofore governed society's attitudes and behavior towards children and youth. When it is considered in its entirety, the Convention both presupposes and requires formidable changes in the political, economic, social, and cultural realities of children. These changes will often run against the grain of popular beliefs and practices of elected officials, administrators, and the generality of citizens. The task of implementing the Convention goes far beyond the legal realms of the international community and nations. The problem is to achieve legitimate authority for the Convention.<sup>145</sup>

Note here, however, that the notions of Realist International theory come into play.

A great deal has been said in recent years about the emergence of various international and transnational non-state actors in international politics, but it is generally agreed that states remain the primary actors in the international system. This is certainly the case for human rights treaties. States—and only states—can ratify such treaties, so they can be expected to play the most important role in drafting them.<sup>146</sup>

In defense of United States policy towards the CRC, the Realist approach for now may be the better option. "The United States government maintains that the reason for the sluggish pace of ratification reflects the degree to which it takes multilateral human rights treaties seriously."<sup>147</sup> Other nations are quick to ratify the treaty but do little to follow up to ensure implementation, while the United States will only agree to adhere to the CRC when it knows it can implement and enforce the treaty provisions.<sup>148</sup> This is not to say that the United States fails to see the merits behind an institutional approach to human rights. In true Realist

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<sup>145</sup> Lenzer, *supra* note 141, at 109.

<sup>146</sup> *Id.* at 117 n.3 (citing LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS 26 (1995)) (some internal citations and quotations omitted).

<sup>147</sup> 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, 631 (1997).

<sup>148</sup> *Id.*

fashion, however, international institutions only come into play when they serve to benefit the state and provide it with some relative gain.<sup>149</sup>

Enforcement of the CRC, one would assume, would cause concern in the United States over possible intrusion into domestic human rights concerns. In practice, however, the CRC is essentially a toothless agreement with no formal enforcement mechanisms on participating states.<sup>150</sup> Specifically, the CRC has no provisions that allow participating states to file complaints on other states. However, the CRC does create the Committee on the Rights of the Child that monitors the progress of adherence to the treaty through a series of reports submitted from states.<sup>151</sup> The CRC also calls for other United Nations organs, such as the United Nations Children's Fund to submit reports that are relevant to children's rights issues.<sup>152</sup> The CRC contains the assumption that all participating states intend to be responsible for their own actions when implementing the treaty and that any violations are dealt with under its provisions.<sup>153</sup> As a result the CRC emphasizes "education, facilitation, and cooperation rather than confrontation."<sup>154</sup> But the CRC lacks a procedure for children to make individual claims of violations and any remedies for violations.<sup>155</sup> The result is that the CRC has no direct enforcement body that can influence domestic agendas through the watch of any ruling committee. Therefore, the United States' sovereignty is not at issue.

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<sup>149</sup> See *supra* Part II.A (discussing Realist theory in regards to institutions).

<sup>150</sup> See Cohen, *Rights of the Child*, *supra* note 133, at 202.

All United Nations human rights treaties have similar implementation mechanisms. There are no courts, are no formal "enforcement" procedures, and as previously stated, no sanctions for failing to meet the treaties' standards. Nations that ratify United Nations human rights treaties are presumed to have done so in good faith. Proof of this good faith must be exhibited in a formal report that is submitted periodically to a committee of experts, who have been elected in keeping with the particular treaty's requirements.

*Id.*

<sup>151</sup> CRC, *supra* note 106, at art. 44.

<sup>152</sup> *Id.* at art. 45.

<sup>153</sup> Levesque, *supra* note 2, at 218.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 219.

Since the Convention fails to establish any concrete means of enforcement at the international level, it may be concluded that the Convention is a fundamentally weak document which places focus on individual Nation States enforcing the Convention themselves, rather than using the more traditional approach of having Nation States guard each other.

*Id.*



Along with international issues and the importance of United States involvement in the international community there are also domestic political issues at play perhaps holding the CRC back from ratification. In 1995, the Clinton administration announced its intentions to push to have the CRC ratified.<sup>156</sup> Immediately afterward, Senator Helms submitted a resolution to the Senate Foreign Relations Committee where he announced, "If the President does attempt to push this unwise proposal through the Senate, I want him to know, and I want the Senate to know, that I intend to do everything possible to make sure that he is not successful."<sup>157</sup>

Although the CRC never mentions abortion specifically, the inferences made in its words have become a heated source of right-versus-left arguments regarding ratification of the treaty. As Article 6 of the CRC recognizes an "inherent right to life" for the child, one would think that it would be supportive of the anti-abortion movement. The problem appears to be that Article 1 of the CRC recognizes a child as any "human being below the age of eighteen years[,]" but does not recognize any bottom age. So the question of whether a child becomes a viable human being at conception is not answered. Some have interpreted the provisions of the CRC to impose a position on abortion; however, "the history of the drafting process indicates that the treaty was drafted in such a way as to enable each State party to determine its own policy regarding abortion."<sup>158</sup>

Education and discipline provisions of the CRC are other sources of heated domestic political debate. Article 29 of the CRC requires states to direct the child's education towards understanding "human rights and fundamental freedoms" and to develop respect for "cultural identity" of the child's own country and "civilizations different from his or her own."<sup>159</sup> This led to concern by conservative groups that this would allow the state to prevent parents from teaching children according to their religious beliefs.<sup>160</sup> In regard to discipline, Article 19 of the CRC requires States to take measures to end all "forms of physical or mental violence, injury or abuse, neglect or negligent treatment" and Article 28 requires states to "ensure that school discipline is administered in a

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<sup>156</sup> Ambassador Madeleine Albright, Remarks at the State Department Conference on Crises (Apr. 3, 1995) (available on LexisNexis with key words "Ambassador Madeleine Albright" and "Remarks at the State Department Conference on Crises").

<sup>157</sup> S. Res. 133, 104th Cong. (1995).

<sup>158</sup> Renteln, *supra* note 147, at 634.

<sup>159</sup> CRC, *supra* note 106, at art. 29.

<sup>160</sup> Renteln, *supra* note 147, at 634.

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manner consistent with the child's human dignity." Many have interpreted these clauses to mean an end to spanking at home and corporal punishment at school.<sup>161</sup>

Abortion, education, and discipline are all major issues, but the real issue is the rights of parents to raise their children as they see fit. Senator Jesse Helms has been quoted as saying "the United Nations Convention on the Rights of the Child is incompatible with the God-given right and responsibility of parents to raise their children."<sup>162</sup> The natural first place to look is at the individual rights of Article 13, freedom of expression; Article 14, freedom of thought, conscience, and religion; Article 15, freedom of association and peaceful assembly; Article 16, right to privacy; and Article 17, access to information. Conservative groups feel that "[w]hile these types of rights are acceptable for adults, they are objectionable for children."<sup>163</sup> Interestingly, despite all the concerns over parents' rights to raise their children as they see fit Article 5 specifically ensures that "States Parties shall respect the responsibilities, rights and duties of parents."<sup>164</sup>

Perhaps the most unfortunate aspect of the failure to ratify the CRC is that the United States had such an involved role in the CRC, but is not bringing the CRC's rules back home. Because the United States has not ratified the CRC and become a state party to the convention, it cannot take part in developing it and seeing to its adherence in the international community. No American delegate can be elected to the Committee on the Rights of the Child until the United States ratifies the CRC. As a result, any future interpretation and implementation of the articles of the CRC will take place without the United States' involvement. Finally, and perhaps the most hypocritical action by the United States, is a report published by the Department of State regarding human rights violations around the world, including violations of the CRC.<sup>165</sup>

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<sup>161</sup> *Id.*; see CRC, *supra* note 106, at arts. 19, 28.

<sup>162</sup> S. Res. 133, 104th Cong. (1995).

<sup>163</sup> Renteln, *supra* note 147, at 634.

<sup>164</sup> CRC, *supra* note 106, at art. 5.

<sup>165</sup> Cohen, *Role of the United States*, *supra* note 100, at 40.

IV. CONFLICTS OF LAW: THE SUPREMACY CLAUSE, CONVENTIONAL LAW,  
AND CUSTOMARY LAW

A. *The Supremacy Clause and International Law*

In a merging of Realist thought and Institutionalism, the United States continues to participate in international lawmaking as a means of protecting national interests.<sup>166</sup> The issue is to what extent the United States will relinquish its sovereignty for the sake of international relations. More specifically, the conflict of international law lies in the potential undermining of United States sovereignty by subjecting the nation to the will of others, which is in direct opposition to the democratic notion that “people choose the rulers and the rules that govern them.”<sup>167</sup>

The Supremacy Clause of the Constitution is clear that treaties will become the supreme law of the land, regardless of the involvement of other foreign nations.<sup>168</sup> The Supremacy Clause and the constitutional treaty power allow the President and the Senate to create federal law without the involvement of the House of Representatives, even though Article I states that “[a]ll legislative Powers herein granted” are vested in Congress as a whole.<sup>169</sup> The Constitution confirms the significance of this delegated power, by both granting treaties the force of federal law under the Supremacy Clause and expressly denying to the states any authority to negotiate treaties on their own.<sup>170</sup> The same section also prohibits states, without the consent of Congress, from concluding “any Agreement or Compact . . . with a foreign Power.”<sup>171</sup> Finally, the Constitution’s description of the judicial power in Article III includes the final branch of government in treaty interpretation. Section 2 of Article III provides that “The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties made, or which shall be made” under U.S. authority.<sup>172</sup> Once the President signs the treaty and the

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<sup>166</sup> T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1990 (2004).

<sup>167</sup> *Id.* at 1991.

<sup>168</sup> U.S. CONST. art. VI, cl. 2. “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” *Id.*

<sup>169</sup> *Id.* at art. I, § 1, cl. 1; *id.* at art. II, § 2, cl. 2 (providing that the President shall have the power to make treaties “by and with the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur”).

<sup>170</sup> *Id.* at art. I, § 10, cl. 1 (prohibiting the states from entering “into any Treaty, Alliance, or Confederation”).

<sup>171</sup> *Id.* at art. I, § 10, cl. 3.

<sup>172</sup> *Id.* at art. III, § 2, cl. 1.

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Senate ratifies it, the responsibility of interpretation and application to specific cases and controversies lies with the federal courts.

While what the framers of the Constitution intended was clear at the time, it is questionable as to whether that intent remains.

[H]istoric patterns of expectation demonstrate that most of the Framers intended all treaties *immediately* to become binding on the whole nation, superadded to the laws of the land; to be observed by every member of the nation; to be applied by the courts whenever a cause or question arose from or touched on them; and to prevail over and preempt any inconsistent state action.<sup>173</sup>

Chief Justice Marshall wrote several of the more significant opinions regarding the application of international law. In 1801, he broadly stated that: "If the law be constitutional, . . . I know of no court which can contest its obligation."<sup>174</sup> In 1809, he again wrote: "Whenever a right grows out of, or is protected by, a treaty . . . it is to be protected."<sup>175</sup> In several cases decided through 1829, treaty law was considered on equal footing with federal law, especially in the face of inconsistent state law.<sup>176</sup>

Then, in 1829, the United States Supreme Court considered one of the most significant cases regarding treaty-making power and the Supremacy Clause. The Supreme Court established in *Foster v. Nelson*<sup>177</sup> that, in addition to the Constitution or Acts of Congress, treaties of the United States also may operate as directly applicable federal law.<sup>178</sup> Specifically Chief Justice Marshall compared the United States' approach to treaties with other nations:

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution

<sup>173</sup> Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 764 (1998).

<sup>174</sup> *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801).

<sup>175</sup> *Owings v. Norwood's Lessee*, 9 U.S. 344, 348 (1809).

<sup>176</sup> Paust, *supra* note 173, at 765.

<sup>177</sup> *See Foster v. Neilson*, 27 U.S. 253, 314 (1829) (holding that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision").

<sup>178</sup> *See id.*

declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.<sup>179</sup>

According to Chief Justice Marshall's reasoning, the Supremacy Clause "automatically turns treaty obligations into U.S. law."<sup>180</sup> This notion of a self-executing treaty bypasses legislative review and allows federal "courts to interpret treaties directly without interference from the executive or legislative branches."<sup>181</sup>

*Foster* carries great significance in international law and the Supremacy Clause because it started the great debate over self-executing and non-self-executing treaties.<sup>182</sup> Marshall declared that a treaty is "carried into execution . . . whenever it operates of itself."<sup>183</sup> This means that a self-executing treaty is operable at signing and a non-self-executing treaty requires further domestic action to become executed. Marshall maintained that every treaty was "the law of the land," but his suggestion that some treaties did not operate automatically created a problem. To be a self-executing treaty, the measurement as to whether or not it was to be "carried into execution" was to be the language of the treaty itself. It was to be carried into execution "whenever it operates of itself," and it was not to be self-executing if the language of the treaty read as such. More specifically, the test that Marshall created in *Foster* to determine whether a treaty was self-executing or non-self-executing was as follows:

(1) Self-executing Treaty: "all treaties, to the extent of their grants, guarantees or obligations . . ."

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<sup>179</sup> *Id.*

<sup>180</sup> David N. Cinotti, *The New Isolationism: Non-Self Executing Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1287 (2003).

<sup>181</sup> John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1314 (2002).

<sup>182</sup> See Christopher A. Britt, *The Commissioning Oath and the Ethical Obligation of Military Officers To Prevent Subordinates from Committing Acts of Torture*, 19 GEO. J. LEGAL ETHICS 551, 562-63 (2006).

<sup>183</sup> *Foster*, 27 U.S. at 314.

(2) Non-Self-executing Treaty: "those, which, by their terms, required domestic implementing legislation . . . to produce direct legal effect."<sup>184</sup>

Generally, Chief Justice Marshall's test has significant acceptance even in the recent case law above and it is generally considered in line with the intent of the Constitution's framers.<sup>185</sup> His test is simple in context: all treaties, to the extent of their grants, guarantees, or obligations, are self-executing. Non-self-executing treaties, by their terms, require domestic legislation or otherwise express an intention that they not be self-executing.

In *Foster*, Chief Justice Marshall classified treaty provisions as self-executing and non-self-executing based on the nature of the international legal obligation embodied in the treaty.<sup>186</sup> Marshall's standard for distinguishing between self-executing and non-self-executing treaty provisions lies in the nature of the international legal obligation.<sup>187</sup> He assumed that different domestic legal consequences would flow from different types of treaty obligations. An executed treaty provision "operates of itself without the aid of any legislative provision."<sup>188</sup> In contrast, "the legislature must execute" a non-self-executing treaty provision "before it can become a rule for the court."<sup>189</sup> If the treaty requires immediate performance as a matter of international law, it is self-executing. A treaty provision is non-self-executing if a participating state must accomplish a result in the future, some time after signing the treaty; however, neither requires nor prohibits any particular action immediately upon entry into force.<sup>190</sup> In other words, a treaty that obligates the United States to take unspecified steps toward achieving an agreed upon objective at an unspecified future time requires action by the political branches in order to execute the treaty.

What is most interesting about the Constitution is that it nowhere states that treaties must come into force through legislative action through Article I. As a result, this so-called self-executing treaty can become a powerful document that operates as federal law even without

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<sup>184</sup> Paust, *supra* note 173, at 768.

<sup>185</sup> *Id.* at 775.

<sup>186</sup> *Foster*, 27 U.S. at 314-15.

<sup>187</sup> David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 21-22 (2002).

<sup>188</sup> *Foster*, 27 U.S. at 314.

<sup>189</sup> *Id.*

<sup>190</sup> Sloss, *supra* note 187, at 22.

a vote of the House of Representatives. In the 1984 case, *Trans World Airlines, Inc. v. Franklin Mint Corp.*, the Supreme Court described a self-executing treaty as one where “no domestic legislation is required to give the Convention the force of law in the United States.”<sup>191</sup> In 1888, in *Whitney v. Robertson*, the Supreme Court held that treaty provisions are self-executing when they “require no legislation to make them operative”:<sup>192</sup>

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.<sup>193</sup>

*Whitney* and *Foster* go hand in hand when considering treaties—the Constitution stops automatic conversion of a particular international legal rule into domestic law,<sup>194</sup> but if there is an existing rule of constitutional law, a treaty in conflict has no domestic legal force because the Constitution will always take precedence over a treaty.<sup>195</sup>

Constitutional questions really appear to be the primary concern with treaty-making. Specifically, there are three considerations when measuring a treaty against the Constitution. First, constitutionally protected individual rights of a United States citizen will always take precedence over a treaty.<sup>196</sup> Second, the treaty power is subject to federalism limitations.<sup>197</sup> Finally, under the Supremacy Clause, a treaty provision cannot automatically become primary domestic law because the Constitution limits the treaty-makers’ power to create primary domestic law by specifying that treaties are the “supreme Law of the Land” only if they are “made, under the Authority of the United

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<sup>191</sup> *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

<sup>192</sup> *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

<sup>193</sup> *Id.*

<sup>194</sup> Sloss, *supra* note 187, at 29, 31.

<sup>195</sup> *Doe v. Braden*, 57 U.S. 635, 657 (1853).

<sup>196</sup> *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

<sup>197</sup> *See Missouri v. Holland*, 252 U.S. 416, 432-34 (1920).

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States.”<sup>198</sup> All three of these provisions can be summed up by concluding that if a treaty interferes with constitutionally protected individual rights, states’ rights, or Congress’s lawmaking powers it does not become primary law.<sup>199</sup> Even if a treaty is considered to supersede domestic law, the Supreme Court placed a fail-safe in the process by declaring that “A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”<sup>200</sup>

B. *Conventional Law*

The rule governing the relationship between treaties and domestic law is set out in the United States Constitution. Article VI, clause 2 states:

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.

Clause 2 of Article VI thus creates the notion of conventional international law being binding upon the United States domestic law. Section 2 of Article II sets out the following requirements for a treaty to be binding: “He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .” As discussed above, the Supreme Court has distinguished between self-executing and non-self-executing treaties, such that self-executing treaties, “intended to take effect in United States law, will in fact be interpreted and applied in United States courts.”<sup>201</sup>

The Supreme Court has clearly taken the obligations of the United States in the international community seriously once a convention has been ratified. In an early case from 1804, Justice Marshall indicated that domestic law should be construed in such a way as to avoid a violation of the international obligations of the United States, regardless of

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<sup>198</sup> U.S. CONST. art. VI, cl. 2.

<sup>199</sup> Sloss, *supra* note 187, at 31.

<sup>200</sup> *The Cherokee Tobacco Case*, 78 U.S. 616, 621 (1870).

<sup>201</sup> Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in American Courts: A Comparative Perspective*, 14 MICH. J. INT’L L. 1, 42 (1992).



whether the treaty was self-executing or non-self-executing.<sup>202</sup> This proposition was followed in 1913 by an opinion by Justice Day in *MacLeod v. United States*, which held that:

The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.<sup>203</sup>

The ICCPR is one of the few human rights conventions ratified by the United States and it is subject to declarations of non-self-execution. It appears that this treaty will become the standard approach with future human rights treaties.<sup>204</sup> Consider that when ratifying the ICCPR, the United States Senate attached the following declaration: “The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”<sup>205</sup> The Senate may condition its consent to a treaty by amending its resolution of ratification by adding material through means of a reservation, understanding, interpretation, declaration, or statement.<sup>206</sup> The Senate may also amend the resolution of ratification and insert a conditional requirement that the President, upon ratification, amend the treaty.<sup>207</sup>

In regard to human rights treaties, conventional law that has been ratified by the United States and is non-self-executing will likely continue to face difficulty becoming a direct source of domestic rights.<sup>208</sup> As all human rights treaties are “non-self-executing at the time of

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<sup>202</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

<sup>203</sup> *MacLeod v. United States*, 229 U.S. 416, 434 (1913).

<sup>204</sup> Bayefsky & Fitzpatrick, *supra* note 201, at 42 (explaining that “[t]wo of the few major human rights treaties . . . ratified by the [U.S.] . . . were subject to declarations of non-self-execution”).

<sup>205</sup> S. REP. NO. 102-23, at 23 (1997). Articles 1 through 27 are the rights-granting provisions of the ICCPR; Articles 28 through 41 establish and create responsibilities for a Human Rights Committee. *Id.*

<sup>206</sup> S. REP. NO. 106-71, at 124 (2001); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (1987).

<sup>207</sup> S. REP. NO. 106-71, at 124 (2001); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 (1987).

<sup>208</sup> Bayefsky & Fitzpatrick, *supra* note 201, at 45.

ratification," they will "remain presumptively unenforceable."<sup>209</sup> The two options are that Congress can pass legislation enacting a treaty or the judiciary can extend itself into foreign affairs. Unfortunately, both seem unlikely.

### C. Customary International Law

Customary international law is one of the two sources of international law. Along with the conventional law of treaties, customary law makes up the bulk of international law rules.<sup>210</sup> Although there are a large number of arguments regarding customary international law, scholars have apparently agreed at least in part on the definition as being "(1) the general practice of States, which is (2) generally accepted as law by States."<sup>211</sup> In other words, while conventional law of treaties is contractual in nature, customary law requires state practice guided by a legal obligation to the international community. It is the application and duration of these two elements that eventually allows customary international law to become binding. Customary international law has typically "covered areas of international law such as the laws pertaining to territory, immunities, the law of the sea, and the use of force by one State against another."<sup>212</sup> Additionally, customary international law "descended from the 'law of nations,'"<sup>213</sup> and "[i]n its broadest usage, the law of nations comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states."<sup>214</sup> In 1900, in *Paquete Habana*,<sup>215</sup> the Supreme Court held that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ."<sup>216</sup> This notion that customary international law is part of the federal common case law

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<sup>209</sup> Timothy K. Kuhner, *Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Basis, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419, 422 (2003).

<sup>210</sup> Daniel H. Joyner, *A Normative Model for the Integration of Customary International Law into United States Law*, 11 DUKE J. COMP. & INT'L L. 133 (2001).

<sup>211</sup> Michelle M. Kundmueller, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudo-Legislation?*, 28 J. LEGIS. 359 (2002).

<sup>212</sup> Joyner, *supra* note 210, at 134.

<sup>213</sup> Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822 (1997).

<sup>214</sup> Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1999).

<sup>215</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>216</sup> *Id.*

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has dominated much of the scholarly debate in recent years,<sup>217</sup> and although its words are quite clear, this “modern approach” to customary law is currently being brought into question.

The so-called “modern position” on customary international law has based its rationale on general acceptance of customary international law as being part of the federal common law.<sup>218</sup> Additionally, the modern position appears to also have gained wide support in the federal courts.<sup>219</sup> The *Restatement (Third) of Foreign Relations Law of the United States* suggests that “the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”<sup>220</sup>

The criticisms of the modern position are that customary international law has achieved equal ground with federal common law, it “preempts inconsistent state law pursuant to the Supremacy Clause,” and it can even “supersede prior inconsistent federal legislation.”<sup>221</sup> The traditional understanding of customary international law “governed relations among nations, such as the treatment of diplomats and the rules of war.”<sup>222</sup> Interpretations of the modern position tend to demonstrate regulations of the relationship between a nation and its citizens, particularly prohibition against torture, genocide, and slavery, as well as applying economic and social rights.<sup>223</sup>

It is also argued that the sources of customary international law have changed from the norms that states practice towards “General Assembly resolutions, multilateral treaties, and other international pronouncements.”<sup>224</sup> The result is that customary law is motivated less

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<sup>217</sup> Bradley & Goldsmith, *supra* note 213, at 816; see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (concluding that the act of state doctrine must be treated exclusively as a matter of federal law).

<sup>218</sup> Bradley & Goldsmith, *supra* note 213, at 816.

<sup>219</sup> See *id.* at 817 n.3 (citing *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996)) (It is a “settled proposition that federal common law incorporates international law.”) (internal quotations omitted); see *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is . . . well settled that the law of nations is part of federal common law.”); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (“[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law.”).

<sup>220</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (Reporters’ Note 3) (1987).

<sup>221</sup> Bradley & Goldsmith, *supra* note 213, at 817.

<sup>222</sup> *Id.* at 818.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 839.

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by a consensus of states and more by a majority, which results in a country being forced to apply norms that are not part of either domestic practice or of international agreements with which the country has concurred.<sup>225</sup> These norms then become relied upon, instead of evidence of consistent state practices and proof that most states accept the norms as being legally binding on them.<sup>226</sup>

Along with criticism of the modern position come suggestions for change. The so-called "revisionist" approaches vary greatly. The first argument is that customary international law is not a source of federal law and is not binding on the states under the Supremacy Clause. As a result:

(1) "[A] case arising under [customary international law] would not by that fact alone establish federal question jurisdiction."<sup>227</sup>

(2) Federal court interpretations of customary international law would not be binding on the federal political branches or the states.<sup>228</sup>

(3) If a state chooses to incorporate customary international law into state law, then the federal courts would be bound to apply the state interpretation of customary international law on issues not otherwise governed by federal law.<sup>229</sup>

(4) If a state did not, in fact, incorporate customary international law into state law, the federal court would not be authorized to apply customary international law as federal or state law.<sup>230</sup>

The second argument is that customary international law should be abandoned altogether as a source of international law because it "undermines the integrity of the international legal system which in turn

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<sup>225</sup> Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 103 (1987).

<sup>226</sup> J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 485 (2000).

<sup>227</sup> Bradley & Goldsmith, *supra* note 213, at 823-24.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

encourages disrespect for the entire system of international law.”<sup>231</sup> A third argument is that customary international law should only be used “when its application can be satisfactorily justified on the basis of an independent domestic source of authority.”<sup>232</sup>

Adopting any of these revisionist proposals would represent not only a dramatic shift in traditional thinking about customary international law, but also strike a blow to the international human rights movement, particularly the children’s rights movement, which has sought to rely on customary international law to impose norms through the courts of the United States.

#### V. THE FUTURE OF THE CONVENTION ON THE RIGHTS OF THE CHILD

The United States participated heavily in drafting the Convention on the Rights of the Child, creating unlimited possibilities for children around the world. The insistence of the United States delegation to include Articles 13 through 16 regarding individual rights and child participation has had beneficial effects around the world as children take more active roles in education, civics, and the media.<sup>233</sup> With such heavy involvement in the drafting of the Convention, it is unfortunate that the United States cannot participate in its continued implementation, especially since the CRC has become an important part of international human rights.<sup>234</sup>

The CRC is “one of the most significant steps taken toward improving the lives of children throughout the world.”<sup>235</sup> It appears that the real work began after the treaty was written, as activists and advocates have strived for universal ratification by the party nations and have put pressure on those nations to adopt laws and policies to implement the provisions of the CRC.<sup>236</sup> Much of the attention on the CRC has been focused on ratification and implementation by the United States. Although there have been domestic political issues as previously discussed, perhaps another reason for the delay in ratification is a

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<sup>231</sup> Kelly, *supra* note 226, at 540.

<sup>232</sup> Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 672 (1986).

<sup>233</sup> Cohen, *Role of the United States*, *supra* note 100, at 38.

<sup>234</sup> *Id.*

<sup>235</sup> 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).

<sup>236</sup> *Id.*

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general lack of knowledge of the treaty by the professional community and the general public in the United States.<sup>237</sup>

The role of children, and their continued development, is important to the future of the United States and the world at large. The CRC strives to accomplish a mutual respect among adults and children with particular focus on the worth of the child as a vital part of society. This would result in recognition of the dignity, development, and valued opinion of the child.<sup>238</sup> Ultimately it is the choice of individual nations to interpret the CRC. If approached with a positive eye towards mutual respect for the rights of the child, the United States would be viewed as stronger, and ultimately more respected, in the eyes of the global community. The CRC is in the best interest of the future of all mankind because of its safeguarding of the health, survival, and progress of children.<sup>239</sup>

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<sup>237</sup> Von Struensee, *supra* note 99, at 592.

<sup>238</sup> *Id.* at 626.

<sup>239</sup> *Id.*