

The International and National Past, Present and Future of the  
Convention on the Rights of the Child

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## Table of Contents

<i>I. Introduction</i> .....	1
<i>II. Historical Development and Overview of the Convention on the Rights of the Child</i> .....	2
<i>A. Development to the Convention</i> .....	2
<i>B. Drafting and Ratification of the Convention on the Rights of the Child</i> .....	4
<i>C. Overview of the Convention</i> .....	8
<i>D. Implementation of the Convention</i> .....	11
<i>III. United States Failure to Ratify the Convention on the Rights of the Child</i> .....	12
<i>A. Opposition to the Convention</i> .....	12
<i>B. Proponents to the Convention</i> .....	15
1. <i>General Support for the Convention</i> .....	15
2. <i>Current Domestic Compliance with the Convention on the Rights of the Child</i> .....	16
<i>C. Current United States Position</i> .....	22
<i>IV. Future Challenges of the Convention on the Rights of the Child</i> .....	23
<i>V. Conclusion</i> .....	25

### *I. Introduction*

November 20, 2009 marked the twentieth anniversary of the unanimous adoption of the Convention on the Rights of the Child (Convention) by the United Nations General Assembly.<sup>1</sup> As with any milestone, this event was cause to look at the past, present, and future of the quintessential document. The Convention was the culmination of years of consideration of the special needs of children. The final document has influenced States Parties by

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<sup>1</sup> Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 165, U.N. Doc A/44 736 (1989), reprinted in 28 I.L.M. 1448 (1989) [hereinafter *Convention*].

effectuating changes in laws and policies directed towards children. However, many of these changes are only recognized in theory and not in practice, causing some concern for implementation of the Convention.

The past, present, and future of the Convention will be examined throughout this article. Part II of this paper looks at the Convention's past, reviewing the predecessors to the Convention and its own conception and ratification. An overview of the themes included in the document as well as implementation of those themes will also be discussed. Part III discusses United States failure to ratify the Convention and the arguments on either side of the issue. The Convention will then be compared with current United States law and the possible future influence of international opinion on domestic juvenile law. The article will then conclude in Part IV by addressing some of the challenges the Convention currently faces and may come across in the future.

## *II. Historical Development and Overview of the Convention on the Rights of the Child*

### *A. Development to the Convention*

On November 20, 1989 the United Nations General Assembly unanimously adopted the Convention on the Rights of the Child<sup>2</sup>. Less than ten months later, the Convention was entered into force on September 2, 1990, thirty days after the twentieth deposit of ratification or accession.<sup>3</sup> However, the spirit and ideas behind the Convention contributing to its success has

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<sup>2</sup> *Id.*

<sup>3</sup> Article 49 states:

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

a history beyond that of the drafting of the Convention. Children were recognized as needing special care and protection sixty-five years prior to the adoption of the Convention. The first document to recognize children's rights on the international level was the Geneva Declaration of the Rights of the Child adopted by the League of Nations in 1924.<sup>4</sup> The Declaration was drafted by the non-governmental organization Save the Children International Union in response to the needs of children after World War I.<sup>5</sup> The Declaration was the first step towards protecting children's rights in a broad sense; however it was not legally binding.

The next step towards children's rights came in 1959 when the United Nations adopted the U.N. Declaration of the Rights of the Child. Inspired by the 1924 Declaration, this document officially recognized the human rights of children and expanded on the rights set forth in the earlier declaration.<sup>6</sup> In expanding the rights of children, many ideas were introduced in the 1959 Declaration. Included in these was "the idea that children are entitled to special protection, and that "the best interest of the child shall be the paramount consideration."<sup>7</sup> The Declaration further included a non-discrimination clause and first used the language of entitlement, recognizing children as subject of international law.<sup>8</sup> In achieving its end, the Declaration received contributions from a variety of nations representing a broad spectrum of cultures and levels of economic development.<sup>9</sup>

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2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Convention, *id.*, art. 49, 28 I.L.M. at 1475.

<sup>4</sup> Cynthia Price Cohen, *Introductory Note, United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</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, 163 (1998).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 162.

To celebrate the twentieth anniversary of the adoption of the Declaration of the Rights of the Child, the United Nations designated 1979 as the International Year of the Child (IYC).<sup>10</sup> The year prior, Poland submitted its proposal for a convention to the United Nations Secretary-General.<sup>11</sup> The draft text presented by Poland closely mirrored the 1959 Declaration with the hope that the convention would be adopted in 1979.<sup>12</sup> However, the draft did not meet the requirements of a treaty or take into consideration the developments in children's issues over the past twenty years.<sup>13</sup> Also, many state representatives objected based on the text of the draft, human rights applicable to children that were not addressed, and the silence to the implementation of the Convention.<sup>14</sup> Therefore, the process of developing the convention was postponed at the behest of numerous state representatives and over twenty international non-governmental organizations so lessons learned from the IYC could be taken into account.<sup>15</sup> In 1979, the Human Rights Commission established a Working Group to draft the convention.<sup>16</sup>

### *B. Drafting and Ratification of the Convention on the Rights of the Child*

The Working Group established by the Human Rights Commission took an open-ended approach to drafting the Convention, allowing a variety of parties to contribute to the process including states, international organizations, and non-governmental organizations.<sup>17</sup> These groups worked together with the ultimate goal of consensus. To achieve this end, the Working

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<sup>10</sup> *Supra* note 4 at 1448.

<sup>11</sup> Nigel Cantwell, *Words that Speak Volumes, in 18 Candles: The Convention on the Rights of the Child Reaches Majority* 21, 21 (2006).

<sup>12</sup> *Id.* at 22.

<sup>13</sup> *Id.*

<sup>14</sup> *Supra* note 7 at 165.

<sup>15</sup> *Supra* note 11 at 22.

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* note 7 at 165.

Group held meetings each year from 1979 to 1987 for one week prior to the annual session of the Commission.<sup>18</sup>

Initial progress for the working group was slow. This was a result of the current international political climate and competition with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Working Group that was meeting simultaneously.<sup>19</sup> The first two meetings of the working group created only title, preambular paragraphs and two substantive sentences.<sup>20</sup> However, in the mid-eighties, NGOs with a vested interest in the Convention who actively participated in the Working Group sessions became more organized by creating coherent proposals and designating spokespersons on specific themes.<sup>21</sup> This push by NGOs to have the Convention completed in time for the thirtieth anniversary of the Declaration and the tenth anniversary of IYC came to be known as “Target 1989”.<sup>22</sup> The NGOs also played an important role in facilitating discussion and much needed informal contacts between delegates as well as securing UNICEF’s full participation in the drafting.<sup>23</sup>

Increased interest and more organized participation led to an increased rate of provisions adopted, ultimately leading to the final draft unanimously adopted by the U.N. General assembly on November 20, 1989, achieving the goal of “Target 1989”. However, controversial issues led to compromises during the drafting process and states making

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<sup>18</sup> *Supra* note 4 at 1448.

<sup>19</sup> The Convention Against Torture was completed in 1984 which, combined with improved relations between East and West, contributed to a more cooperative environment for further work on the Convention to proceed.

<sup>20</sup> *Supra* note 11 at 23.

<sup>21</sup> *Id.*

<sup>22</sup> *Supra* note 4 at 1448.

<sup>23</sup> *Supra* note 11 at 24.

reservations, understandings or declarations when ratifying or acceding to the Convention.<sup>24</sup>

Four areas of controversy emerged during the second reading of the Convention: rights of the unborn child, the right to foster care and adoption, freedom of religion and the minimum age for participation in armed combat.<sup>25</sup>

Article 1 of the Convention provides the definition of a child.<sup>26</sup> Although the specific issue of abortion was not addressed by the Working Group, the debate centered on the rights of the unborn. The final language of the text was the result of a suggestion by Morocco to only make reference to the termination of the status of child and leave it to the states to define when life begins.<sup>27</sup> Another compromise was reached in referring to children in the Preamble to the Convention. The final draft quotes the 1959 Declaration, referring to “appropriate legal protection, before as well as after birth.”<sup>28</sup> Some states went farther to make reservations defining a child with domestic abortion policies in mind.<sup>29</sup> Three types of reservations emerged: (1) an affirmative assertion that the Convention does not cover the unborn child, only the live-born, (2) the claim that life begins at conception, and (3) a statement that Article 1 conflicts with national law with no further explanation.<sup>30</sup>

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<sup>24</sup> A reservation modifies the provision of the treaty to which the reservation relates. Reservations are permitted unless they are prohibited by the treaty, the treaty permits only specific reservations, or the reservation is incompatible with the object and purpose of the treaty. Understandings are interpretive statements that clarify or elaborate on, rather than change, the provisions of the treaty. Declarations are statements of policy relating to the treaty that do not alter or limit its substantive provisions.

<sup>25</sup> *Supra* note 4 at 1450.

<sup>26</sup> Article 1 states, “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” Convention, *supra* note 1, art. 1, 28 I.L.M. at 1459.

<sup>27</sup> Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 *Brook. J. Int'l. L.* 1, 15 (2008).

<sup>28</sup> *Supra* note 1 at 1458.

<sup>29</sup> *Supra* note 27 at 16.

<sup>30</sup> *Id.*

Islamic delegations objected to freedom of religion and to adoption and foster care, which are argued to conflict with the Koran and national legislation.<sup>31</sup> Under the teachings of the Koran, children are not allowed to choose a religion or change their religious belief.<sup>32</sup> Although the final text of the articles in question was the result of difficult negotiations, many states made reservations in regards to these controversial areas. Some states refer to Shariah law as the basis for their reservations in both areas while other states maintain parental authority over a child's religion and proclaim adoption as a secular matter.<sup>33</sup>

The final area of contention is found in Article 38, which addresses the minimum age of children in armed conflict.<sup>34</sup> During the drafting process, a majority of states wished to increase the minimum age from fifteen set forth in the 1977 Geneva Protocols to eighteen.<sup>35</sup> A compromise was reached by stipulating the age of fifteen in the Convention, but offering an Optional Protocol with the increased age of eighteen as the minimum for recruitment to armed forces and direct participation in armed conflict.<sup>36</sup> Many states went a step further by making reservations in response to Article 38 and set the age of military recruitment to age eighteen.

States made reservations to other provisions of the Convention as well. Some states made reservations to two rights guaranteed in Article 40(2)(ii) and 40(2)(v), the right to legal representation and the right to appeal. Second, many states made reservations to the demand that juveniles "deprived of liberty...be separated from adults unless it is considered in the child's best not to do so" as defined in Article 37. These reservations are justified by a state's

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<sup>31</sup> *Supra* note 4 at 1451.

<sup>32</sup> *Id.*

<sup>33</sup> *Supra* note 27 at 18, 21.

<sup>34</sup> *Supra* note 1, art. 38, 28 I.L.M. at 1470 (requiring States Parties to refrain from allowing children who have not attained the age of fifteen to engage in direct part in hostilities and refraining States Parties from recruiting children who have not attained the age of fifteen into their armed forces).

<sup>35</sup> *Supra* note 4 at 1451.

<sup>36</sup> *Supra* note 27 at 14.

lack of resources. Next some states made reservations in regards to minority rights by making a distinction between legal in illegal immigrants. Other states distinctly separated Article 30 reserving one's right to exercise his or her culture from the nondiscrimination provision stated in Article 2 while others made reservations connecting the two. Finally, some states made general reservations concerning religious and moral constraints or secular justifications.<sup>37</sup>

The final document gave legal force to the principles outlined in the 1959 Declaration, and contained over forty rights, covering all human rights protections.<sup>38</sup> Within ten months, a sufficient number of states ratified the Convention for it to enter into force.<sup>39</sup> Such rapid acceptance can be attributed to many factors, including the topic of the Convention and the support by various U.N. organizations, most notably UNICEF.<sup>40</sup> Furthermore, theories on state behavior for ratification and certain features of the ratification campaign may also assist in explaining the wide acceptance of the Convention.<sup>41</sup> To date, the Convention has achieved nearly universal ratification with only the United States and Somalia failing to ratify.<sup>42</sup>

### *C. Overview of the Convention*

The adoption of the Convention affirmed the pronouncement first recognized in the 1959 Declaration that “the child by reason of his or her physical and mental immaturity needs special safeguards and care, including appropriate legal protection both before as well as after

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<sup>37</sup> *Supra* note 27 at 20-24.

<sup>38</sup> *Supra* note 4 at 1450.

<sup>39</sup> Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 *Transnat'l L. & Contemp. Probs.* 251, 259 (1996).

<sup>40</sup> *Supra* note 7 at 167.

<sup>41</sup> For a detailed analysis of the theoretical explanations of state behavior and features of successful ratification campaigns, see Uta Oberdorster, *Why Ratify? Lessons from Treaty Ratification Campaigns*, 61 *Vand. L. Rev.* 681 (2008).

<sup>42</sup> The United States signed the Convention in 1995 and Somalia signed the Convention in 2002. However, on the twentieth anniversary of the Convention, Somalia's transitional government announced its intention to ratify the Convention.

birth.”<sup>43</sup> With the welfare of children the moral and legal basis of the Convention, four guiding principles emerged: non-discrimination, devotion to “the best interest of the child”, right of the child to be heard in all matters concerning him or her, and the right to life, survival and development.<sup>44</sup> These principles were first introduced in October 1996, but with no explanation. However, it can be concluded that the guiding principles are to be “taken into account when implementing the (other) articles of the CRC.”<sup>45</sup>

The right to non-discrimination is articulated in Article 2 of the Convention.<sup>46</sup> The article protects the rights of each child in a state’s jurisdiction, regardless of the child’s national status. States are required to not only “respect” but, also, “ensure” this right, thus making it a positive right.<sup>47</sup> It can also be concluded from the Committee’s observations that states have a duty to implement “legislative measures to prohibit all forms of discrimination together with effective remedies in case of violations of the prohibition” and take “social and other appropriate measures to prevent and combat de-facto discrimination.”<sup>48</sup> However, socio-economic disparities often lead to incidental de-facto discrimination and denial of certain rights some groups of children.<sup>49</sup>

The second guiding principle, “the best interest of the child”, is found in Article 3(1) of the Convention.<sup>50</sup> This interest must be considered in “all actions concerning children”. This wording can be broadly interpreted to include actions concerning a group of children, an

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<sup>43</sup> Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14<sup>th</sup> Sess., Supp. No. 16, at 19, pmbl. para. 3, U.N. Doc. A/4354 (1959).

<sup>44</sup> See Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child has not Supported Children*, 22 N.Y. Int’l L. Rev. 57, 59 (2009) and *supra* note 27 at 6-8.

<sup>45</sup> Jaap Doek, *The CRC General Principles, in 18 Candles: The Convention on the Rights of the Child Reaches Majority* 31, 31 (2007).

<sup>46</sup> *Supra* note 4 at 1459.

<sup>47</sup> *Supra* note 27 at 7.

<sup>48</sup> *Supra* note 45 at 33.

<sup>49</sup> *Id.*

<sup>50</sup> *Supra* note 4 at 1459.

individual child, and those actions that may affect children. Additionally, the best interest of the child is to be a basic concern of parents in the upbringing of their children as stated in Article 18(1).<sup>51</sup> However, neither the Convention or the Committee have specified the practical meaning of the best interest of the child, leading states and parents to determine what is a child's best interest, potentially to their own demise.<sup>52</sup>

Third is the child's right to life, survival and development as stated in Article 6. This is also viewed as a positive, rather than negative, right. The right to development is not the right to mere existence, but goes beyond this by including the right to education, healthcare, and adequate living.<sup>53</sup> This provision must be considered by a state when implementing all other articles of the Convention.<sup>54</sup> In addition, States Parties are prohibited from subjecting children to capital punishment or life imprisonment without the possibility of parole.<sup>55</sup>

Finally, Article 12 provides the child's right to be heard in all matters regarding the child.<sup>56</sup> Under this provision, states are required to allow children to express their views and be heard while considering the age and maturity of the child. Empowered by the right to be heard, children become a bearer of rights, rather than an object of rights.<sup>57</sup>

Although only formally introduced in 1996, these principles have provided guidance to nations when implementing the Convention. They have also been accepted as the standards for reporting and monitoring by the Committee of state's parties to the Convention. However, the

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<sup>51</sup> Article 18(1) states, "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern." *Supra* note 1 at 1463.

<sup>52</sup> *Supra* note 45 at 35.

<sup>53</sup> *Supra* note 45 at 36 and note 27 at 7.

<sup>54</sup> *Supra* note 45 at 36.

<sup>55</sup> *Supra* note 1, art. 37(a), 28 I.L.M. 1470.

<sup>56</sup> *Supra* note 1, art 12, 28 I.L.M. 1461.

<sup>57</sup> *Supra* note 27 at 7.

role of guiding principles in the implementation and interpretation of the other CRC provisions has not been clearly defined.

#### *D. Implementation of the Convention*

To effectuate the goals of the Convention, provisions were included in the text to transform what were aspirations on the part of drafting parties into laws, policies and practices in both the national and international communities. The procedures by which States Parties are to effectuate the articles of the Convention and put them into practice are outlined in Part II of the Convention. Part II also names the parties to be involved in the process of implementing the Convention, which are 1) the States Parties to the Convention, 2) the Secretary-General of the United Nations, 3) the U.N. Committee on the Rights of the Child, 4) “specialized agencies, UNICEF, and other United Nations organs,” and 5) “other competent bodies.”<sup>58</sup> These entities are charged with certain tasks to bring to realization the articles of the Convention and putting them into practice. The design of the implementation procedures are considered unique in that they facilitate dialogue between the Committee and States Parties rather than holding an accusatory hearing.

First, States Parties are required to submit reports on the status of the effect of the Convention on the state’s policies towards children.<sup>59</sup> The first report must be completed within two years of the entry into force for the state party and every five years after.<sup>60</sup> States Parties are also required to make the provisions of the Convention and their reports to the Secretary-General widely known to the public.<sup>61</sup> The Committee is to review the reports

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<sup>58</sup> See *supra* note 1, art. 43, 28 I.L.M. 1472 and art. 45(a), 28 I.L.M. 1474.

<sup>59</sup> *Id.* art. 44 § 1, 28 I.L.M. 1473.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* art. 42, 28 I.L.M. 1472 and 44 § 6, 28 I.L.M. 1474.

submitted and examine the progress made by states in regards to the Convention.<sup>62</sup> In response to the reports submitted, the Committee may make suggestions and general recommendations or “recommend to the General Assembly to request the Secretary-General to undertake...studies on specific issues relating to rights of the child.”<sup>63</sup> Finally, the specialized agencies, UNICEF, and other United Nations agencies may prepare “expert advice,” “reports,” and “technical advice or assistance” at the invitation of the Committee.<sup>64</sup>

### *III. United States Failure to Ratify the Convention on the Rights of the Child*

Although the United States has not ratified the Convention, it was an active participant in its drafting. U.S. delegations participated in the drafting of all but 2 articles to the Convention. Additionally, U.S. delegations proposed the inclusion of Articles 13, 14, 15 and 16. Furthermore, the delegations were instrumental in the drafting and development of Articles 17 and 18. Surprisingly, these articles, in which the U.S. played a key role, create some of the greatest opposition.

#### *A. Opposition to the Convention*

Arguments against ratification of the Convention range from opposition generally to opposition of specific articles. The strong opposition to the Convention has been successful thus far in preventing U.S. ratification. Politically conservative organizations<sup>65</sup> spearhead the

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<sup>62</sup> *Id.* art. 43 § 1 at 1472.

<sup>63</sup> *Id.* art 45(c) & (d) at 1474.

<sup>64</sup> *Id.* art 45(a).

<sup>65</sup> Organizations in opposition to ratification include the Christian Coalition, Concerned Women for American, Eagle Forum, Family Research Council, Focus on the Family, Home School Legal Defense Association, John Birch Society, and the National Center for Home Education.

movement through a grassroots campaign designed to gain popular support for opposition and influence Senate action.<sup>66</sup>

An initial concern of many opponents is the federalization of family law, an area of law traditionally controlled on the state level.<sup>67</sup> This fear is not completely unfounded. Article VI of the U.S. Constitution states “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” Judges on the state level would subsequently be bound by the provisions of the Convention through the Supremacy Clause. Some organizations additionally argue the language of the Vienna Convention on the Law of Treaties further supports the notion that the Convention would become the rule of law pertaining to juveniles.<sup>68</sup> However, this argument is without merit given the United States has not become a party to the Vienna Convention on the Law of Treaties.<sup>69</sup>

Further opposition arises from the argument that through the Convention, the government would usurp the rights of parents to raise their children as they see fit and allow children to rebel against their parents. In support of this contention, critics cite the requirement of States Parties to grant children freedom of expression,<sup>70</sup> of conscience,<sup>71</sup> of association,<sup>72</sup> right of privacy,<sup>73</sup> right to access information<sup>74</sup> and the responsibility of both parents for care

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<sup>66</sup> *Supra* note 39 at 439.

<sup>67</sup> John Quigley, *U.S. Ratification of the Convention on the Rights of the Child*, 22 St. Louis U. Pub. L. Rev. 401, 405 (2003).

<sup>68</sup> Michael P. Farris, *Nannies in Blue Berets: Understanding the U.N. Convention on the Rights of the Child*, 18 (January 2009).

<sup>69</sup> United Nations Treaty Collection, available at [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en#EndDec)

<sup>70</sup> *Supra* note 1, art. 13, 28 I.L.M. 1462.

<sup>71</sup> *Id.* art. 14.

<sup>72</sup> *Id.* art. 15.

<sup>73</sup> *Id.* art. 16.

<sup>74</sup> *Id.* art. 17.

of the child and the duty of States Parties to provide appropriate assistance to parents<sup>75</sup>. Opponents contend that granting children such rights would eliminate the traditional role of parents<sup>76</sup> by threatening a parent's involvement in their child's development, education, discipline, and religious training.<sup>77</sup> However, this view fails to consider the provision in Article 5 of the Convention which provides "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community..."<sup>78</sup> Furthermore, these rights are also guaranteed to everyone through the International Covenant on Civil and Political Rights, which the United States became a party to in 1992.

An additional argument to resist ratification is that the Convention, because of its rights framework, is ineffective. Conditions for children around the world have not improved in spite of nearly universal ratification.<sup>79</sup> Many examples demonstrate that the Convention is in fact not protecting children. Children across the globe remain susceptible to sex trafficking and tourism, child marriage, female genital mutilation, child soldiering, and force labor and servitude.<sup>80</sup> These violations are in direct conflict with provisions in the Convention itself and its two optional protocols. This will be discussed in greater detail when addressing the future concerns for the Convention.

Controversial issues such as abortion, education, and discipline are also susceptible to critics of the Convention. While abortion is not specifically addressed by the Convention, some

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<sup>75</sup> *Id.* art. 18.

<sup>76</sup> *Supra* note 67 at 404.

<sup>77</sup> Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 *Transnat'l L. & Contemp. Probs.* 437, 453 (1996).

<sup>78</sup> *Supra* note 4 at 1459.

<sup>79</sup> Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child has not Supported Children*, 22 *N.Y. Int'l L. Rev.* 57, 61 (2009).

<sup>80</sup> *Id.* generally.

organizations fear that the text could be interpreted as pro-choice. In support of this interpretation, opponents cite Article 24(2)(f)<sup>81</sup> which provides the right to family planning education and services and the right to privacy under Article 16<sup>82</sup>. Critics further sustain this argument on the basis that the right to family planning education and services is language generally used as a legal rationale for abortion services. Meanwhile, the right to privacy led the U.S. Supreme Court to rule that women reserve a right to abortion.<sup>83</sup> Next, curricular goals of education as described in Article 29 also come under attack as being statist, secularist, and devoted to humanist values.<sup>84</sup> Finally, critics object to the language of Articles 28 and 19 regarding school discipline and protection against abuse respectively.<sup>85</sup> It is argued that these articles could be interpreted to prohibit corporal punishment, including spanking by parents.

### *B. Proponents to the Convention*

Support for the Convention is equally strong as the opposition and the groups that rally in support are just as diverse. To promote support for the Convention, an informal working group has been created to develop a political strategy.<sup>86</sup> A part of this strategy has been to educate Senators and their staff about the basics of the Convention, including its provisions and implementation, as well as possible impact on U.S. law and policy.<sup>87</sup>

#### *1. General Support for the Convention*

Three reasons are provided by proponents in support of the Convention. First, the Convention would provide guidance for evaluating inconsistent existing policies. Current U.S.

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<sup>81</sup> *Supra* note 1, art. 24(2)(f), 28 I.L.M. 1466.

<sup>82</sup> *Id.* art. 16, 28 I.L.M. 1462.

<sup>83</sup> *Supra* note 77 at 448.

<sup>84</sup> *Id.* at 449.

<sup>85</sup> *Id.* at 450.

<sup>86</sup> *Id.* at 458.

<sup>87</sup> *Id.* at 459.

policies regarding children's issues are administered by numerous different entities. Coordination between them has been difficult and consistency is rare. Next, by fulfilling the reporting requirements of the Convention, the United States would be performing an assessment of its implementation of the Convention's provisions. Through the reporting process, violation of children's rights and issues would be brought to the attention of the government and it would be held accountable. Finally, the United States would be given the opportunity to be represented on the Committee on the Rights of the Child. The United States played an important role in the drafting of the Convention. Ratification would allow the U.S. to continue to participate when issues are brought to the Committee's attention.<sup>88</sup>

## *2. Current Domestic Compliance with the Convention on the Rights of the Child*

Additionally, many of the provisions of the Convention are currently a part of United States' policies concerning children's issues either through the United States Constitution or case law. Domestic policy recognizes the conflicting interests of the rights of the parents, the rights of the child, and the rights of the state. In the U.S., a balance has been reached between these conflicting interests as they apply to the provisions of the Convention. As stated earlier, the articles that grant civil rights to children are considered some of the most controversial. Focusing on these articles and the articles from which the Guiding Principles derive shall refute opposition in this area.

Article 13 grants children the right to freedom of expression. However, Article 13 goes beyond the bounds of the Constitutional First Amendment right to include art and other forms of media as modes of expression and the rights to impart and seek and receive information and

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<sup>88</sup> *Id.* at 459.

ideas. Case history beginning with *Tinker*<sup>89</sup> which affirms a student's freedom of expression. Although later decisions limit the right, Article 13(2) puts the right of freedom of expression in line with the *Tinker* decision. That this right is limited to protect national security or of public order or of public health or morals should quell concerns that children would have a right to access indecent materials.<sup>90</sup>

Next, Article 14 provides children with the freedom of thought, conscience and religion. Again, the U.S. Constitution and additional case law provide protect children from having this right infringed upon by the state. A balance was met between the rights of the parents, child and the state through Supreme Court decisions weighing religious rights against child labor laws and compulsory school attendance. The principles in section 2 of Article 14 were considered by Justice Douglas in his dissent in *Yoder*<sup>91</sup>, indicating the concept of parents providing guidance but in a manner consistent with the child is not recent perception.<sup>92</sup>

The rights to freedom of association and peaceful assembly are articulated in Article 15 of the Convention. The former is implicitly recognized by the Constitution while the latter is explicitly recognized. Cases applying these rights to children are few, thus the Constitution provides the majority of the guidance. Association rights have been defined by the Court for adults and it can be presumed that the protection of this right is even greater for children given their need for supportive peer groups.<sup>93</sup>

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<sup>89</sup> *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)

<sup>90</sup> Robert E. Shepherd, Jr., *Civil Rights of the Child, in Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* 135, 136-138 (Cynthia Price Cohen & Howard A. Davidson ed., 1990).

<sup>91</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>92</sup> *Id.* at 140.

<sup>93</sup> *Id.* at 142.

The freedom from arbitrary or unlawful interference with privacy, family, home or correspondence and from unlawful attacks on honor and reputation is provided in Article 16.<sup>94</sup> The right to privacy is not expressly stated in the U.S. Constitution, but this right has been brought before the Supreme Court in numerous contexts. As stated, the right to privacy debate in the Supreme Court led to a woman's protection of choice in matters relating to procreation and abortion. In response to minors, the Supreme Court established the mature minor doctrine, which allows a mature female under the age of eighteen to choose abortion without parental consent. The right against interference with the family seems to create family privacy or family autonomy. Finally, the right against "unlawful attacks on a child's honor and reputation" is related to the privacy interest already granted.<sup>95</sup>

Article 17 outlines the role mass media should play in a child's life. Through a child's right to free speech he is also granted access to information in numerous forms. Although this right is limited when compared to that of adults, that limitation is permitted by section (e) of the Article that encourages the development of appropriate guidelines for the protections of children.

As previously mentioned, the Guiding Principles of the Convention derive from articles of the Convention itself: the right to non-discrimination in Article 2; the best interest of the child in Article 3(1); the right to life, survival and development in Article 6; and the right to be heard in all matters concerning the child in Article 12. Again, the provisions found in these articles and the principles derived from them are already a part of juvenile jurisprudence in the United States.

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<sup>94</sup> *Supra* note 1, art. 16, 28 I.L.M. 1462.

<sup>95</sup> *Supra* note 89 at 143.

The broad non-discrimination guarantees of the Convention are given both constitutional and legislative protection in the United States. Although the language of the equal protection clause of the Fourteenth Amendment differs from that of the Convention, the breadth of non-discrimination coverage is similar.<sup>96</sup> Many cases involving the discrimination of children because of religious belief, political persuasion, skin color, or similar characteristics have been decided in accordance with the equal protection clause of the Fourteenth Amendment.<sup>97</sup> Furthermore, general and specific legislative action has guaranteed non-discrimination or equal protection among juveniles. Generally, the protections guaranteed by the Civil Rights Act safeguard an individual from discrimination; although, the provisions of the Civil Rights Act have been focused more on adults than on children. However, the federal legislature has enacted laws that specifically protect rights of children.<sup>98</sup>

Given the broad terminology of the equal protection clause of the Fourteenth Amendment, ratification of the Convention would have an impact on current U.S. policies. The Convention requires that ratifying states “ensure the rights” defined by the Articles, this requires more than just enacting legislation.<sup>99</sup> Furthermore, some of the provisions of the Convention may impose stricter requirements on the United States. For example Article 24 requires States Parties to “ensure that no child is deprived of his or her right of access to such

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<sup>96</sup> Daniel L. Skoler, *Anti-Discrimination and Identity Rights of the Child, in Children’s Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* 109, 111 (Cynthia Price Cohen & Howard A. Davidson ed., 1990).

<sup>97</sup> *Brown v. Board of Education* (segregation by race in access to public school education impermissible); *Levy v. Louisiana* (denial of child’s recovery of damages for wrongful death of parent because of illegitimacy unconstitutional); *Pyle v. Doe* (local government exclusion of alien children from public school attendance or from educational assistance benefits unconstitutional).

<sup>98</sup> Fair Housing Amendment Acts that prohibits discrimination against children; McKinney Homeless Assistance Act which prohibits states and their local school districts from discriminating homeless children in school enrollment; Rehabilitation Act of 1973 which protects children with disabilities; and Social Security Amendments which eliminates discrimination between adopted and natural children in eligibility criteria for child’s insurance benefits.

<sup>99</sup> *Supra* note 94 at 114.

health care services.” Many children in the United States are without medical insurance, most of which are of minority status. This is due in part to the current health care system implemented in the United States.<sup>100</sup>

The “best interest of the child” is not a foreign concept to the United States. This Guiding Principle of the Convention has been a basis for many of the legal standards governing children in the United States. The areas where this standard must be considered include matters involving and effecting the child and include adoption, dependency proceedings, foster care, termination of parental rights, child support obligations of divorced, separated, and never-married parents, aid to families with dependent children, divorce custody, other custody proceedings, non-parental visitation, jurisdiction, juvenile delinquency, education, labor, evidence, and surrogate parenthood.<sup>101</sup> The breadth of the phrase has led to controversy in how it should be interpreted. The Convention does not provide a specific definition of “the best interest of the child”, allowing States Parties to determine how extensive of a role it will play in juvenile jurisprudence. Given the recognition of the best interest of the child in the United States, this principle of the Convention does not conflict with domestic policy.

Article 6 of the Convention states “every child has the inherent right to life” and requires States Parties to ensure the “survival and development of the child.” This positive right is interpreted to include rights to education, healthcare, and adequate living. Many federal programs have been created to ensure that these rights are guaranteed for all children. For example, low-income families and children are serviced by the Head Start Program which

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<sup>100</sup> *Id.*

<sup>101</sup> Jane Ellis, *The Best Interest of the Child, in Children’s Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* 3, 4 (Cynthia Price Cohen & Howard A. Davidson ed., 1990).

provides quality pre-school education, Medicaid which assists in medical care, and the Food Stamp and National School Lunch Programs to satisfy nutritional needs.<sup>102</sup>

This principle may be further understood to include the child's right against capital punishment and life imprisonment without parole. In 2001, the Supreme Court decided *Roper v. Simmons*<sup>103</sup> declaring that the execution of individuals who were between the age of fifteen and eighteen in violation of the cruel and unusual punishment clause of the Eighth Amendment. The majority based this decision on (1) national consensus, (2) the independent judgment of the Supreme Court Justices, and (3) international law and practice. By including international law and practice in its analysis, the majority reaffirmed its relevance in United States constitutional jurisprudence.<sup>104</sup>

Juvenile life imprisonment without parole is an issue that has just recently been brought to the attention of the Supreme Court. On November 9, 2009, the Supreme Court heard arguments of two separate cases from Florida involving juveniles sentenced to life imprisonment without parole.<sup>105</sup> In the wake of *Roper v. Simmons*<sup>106</sup>, attorneys for the individuals sentenced hope to extend the application of the Eighth Amendment's ban on cruel and unusual punishment to life imprisonment without parole for juveniles.<sup>107</sup> The attorneys argued moral responsibility and possibility of rehabilitation in support of their conclusion and

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<sup>102</sup> John E. B. Myers, *The Child, Parents and the State, in Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* 87, 94-95 (Cynthia Price Cohen & Howard A. Davidson ed., 1990).

<sup>103</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>104</sup> Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 Alb. L. Rev. 909, 920 (2005).

<sup>105</sup> *Sullivan v. Florida* and *Graham v. Florida* both involve individuals who were sentenced to life imprisonment without parole for crimes less than murder.

<sup>106</sup> *Supra* 101.

<sup>107</sup> Ben Conery, *Justices Weigh Juveniles' Life Without Parole*, The Washington Times, Nov. 10, 2009, at 1, available at <http://www.washingtontimes.com/news/2009/nov/10/justices-weigh-juveniles-life-without-parole/>.

further stated that life imprisonment with the possibility of parole would not be in violation of the Constitution.<sup>108</sup> Again, international law and practice and the child's right against life imprisonment without parole articulated in the Convention may play a role in the outcome of these cases. Although conservatives on the court favor a case by case analysis, a blanket ruling would bring the United States in further compliance with the Convention.

The final Guiding Principle, the right of the child to be heard in all matters regarding the child, is articulated in Article 12. "Matters regarding the child" involve a variety of proceedings including (1) children in need of supervision, (2) custody or parental visitation, (3) paternity or support obligations, (4) adoption, (5) commitment to psychiatric facilities, and (6) public school actions affecting the child.<sup>109</sup> Generally, in cases where the child is a party to the action, representation in state courts is modeled after Rule 17(c) of the Federal Rules of Civil Procedure. In most proceedings, parents may serve in the capacity as representative for the child, however, in situations where the interests of the parents and the child conflict, the court may appoint a guardian ad litem to act on behalf of the minor. The court may also appoint a guardian ad litem to protect the interests of the child in cases where there child is not a party to the litigation but has an interest in the outcome.

### *C. Current United States Position*

Senator Jesse Helms, as Chairman of the Senate Committee on Foreign Relations, declared in 1995 that the Senate would not pursue the Convention on the Rights of the Child. As reasoning behind this contention, Senator Helms stated: 1) the Convention is incompatible with the God-given right and responsibility of parents to raise their children; 2) The CRC has

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<sup>108</sup> *Id.*

<sup>109</sup> Howard A. Davidson, *The Child's Right to be Heard and Represented*, in *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law 151* (Cynthia Price Cohen & Howard A. Davidson ed., 1990).

the potential to severely restrict States and the Federal Government in their efforts to protect children and to enhance family life; and 3) The United States Constitution is the ultimate guarantor of rights and privileges to every American, including children.<sup>110</sup> Despite such strong opposition, U.S. Delegate to the U.N. Madeline Albright signed the Convention on February 16, 1995.<sup>111</sup> Perhaps in part to such strong arguments on both sides of the controversy, the issue has not been addressed for fourteen years. However, currently the Obama administration is seeking to revive efforts to have the U.S. ratify the Convention.<sup>112</sup>

#### *IV. Future Challenges of the Convention on the Rights of the Child*

Over the past twenty years, limitations and shortcomings of the Convention have become evident. Limitations concern the lack of attention and guidance given to domestic courts in implementing the Convention. The shortcomings stated earlier also relate to implementation and how children's rights have not been protected in certain areas. These are areas that must be addressed in the future to ensure the continued success of the Convention.

Lack of attention and guidance to domestic courts has led to some states curtailing the requirements of the Convention through the court system.<sup>113</sup> Domestic courts play an important role in the implementation of the Convention since no device for handling individual or state-

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<sup>110</sup> The Campaign for U.S. Ratification of the CRC, Chronology: The Path to Promoting Universal Child Welfare,

[http://childrightscampaign.org/crcindex.php?sNav=getinformed\\_snav.php&sDat=chronology\\_dat.php](http://childrightscampaign.org/crcindex.php?sNav=getinformed_snav.php&sDat=chronology_dat.php).

<sup>111</sup> By signing the Convention subject to ratification, the U.S., through Madeline Albright, expressed its willingness to continue in the treaty-making process. The signature qualifies the U.S. to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and purpose of the treaty.

<sup>112</sup> John Heilprin, *Obama Administration Seeks to Join U.N. Rights of the Child Convention*, Huffington Post, June 22, 2009, available at [http://www.huffingtonpost.com/2009/06/23/obama-administration-seek\\_n\\_219511.html](http://www.huffingtonpost.com/2009/06/23/obama-administration-seek_n_219511.html)

<sup>113</sup> *Supra* note 7 at 160.

to-state complaints was built into the Convention.<sup>114</sup> Early cases involving children showed promise with the frequent use of the Convention by States Parties; where it was used in a broad range of cases in numerous countries.<sup>115</sup> However, some case law soon gave cause for concern, mainly in the areas of immigration cases and custody, parental access, and abduction cases.<sup>116</sup>

The failure of the implementation of the Convention is evident in at least five areas: child sex trafficking and tourism, child marriage, female genital mutilation, child soldiering, and forced labor and servitude of children.<sup>117</sup> Articles 19 and 34 generally prohibit child sex trafficking and tourism; however, this form of organized crime remains lucrative.<sup>118</sup> Additional efforts were taken by the Committee to prevent such behavior in the form of the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography, however, this has not curtailed the activity.<sup>119</sup> Child marriage, the next area not sufficiently protected is related to child trafficking. Although child marriage is not directly mentioned in the Convention, many provisions apply indirectly. However, states allow cultural rules and practices, including child marriage, to dominate, thus not allowing the Convention to protect against such practices.<sup>120</sup>

A third example of the failure of the Convention is the prevalence of female genital mutilation (FGM) practiced in the Middle East and Africa. Considered a cultural rite of passage, FGM is considered a violation of international law. In nations where FGM is practiced, a conflict is recognized between international law and cultural sovereignty. This conflict may direct the analysis on why the Convention has failed in this respect.<sup>121</sup>

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<sup>114</sup> *Id.* at 193.

<sup>115</sup> *Id.* at 193-194.

<sup>116</sup> *Id.* at 194 and 197.

<sup>117</sup> See generally *supra* note 79.

<sup>118</sup> *Supra* note 79 at 63.

<sup>119</sup> *Id.* at 64.

<sup>120</sup> *Id.* at 75.

<sup>121</sup> *Id.* at 80.

Child soldiers are another example of the Conventions shortcomings. Political conflicts within nations remain the primary justification states use to recruit children as soldiers. The Convention itself did not sufficiently address the issue; therefore, concerns for the issue were addressed in the Optional Protocol on the Involvement of Children in Armed Conflict.<sup>122</sup> Yet, despite this effort, child soldiering continues in many signatory nations.

Forced labor and servitude are the final example. Two conventions predate the Convention on the Rights of the Child concerning forced labor and servitude; however children continue to be forced into servitude. This issue is connected with child trafficking in general since most children forced into servitude are typically relocated.<sup>123</sup> Therefore, this is also governed by the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography.

## *V. Conclusion*

Given the Convention's shortcomings, ratification by the United States should be strongly considered. Ratification would nurture the rights required by the Convention already afforded to children in the United States through the Constitution and case law. Additionally, the by becoming a State Party to the Convention, the United States would have the chance of becoming a part of the Committee on the Rights of the Child, thus influencing the improvement of child welfare worldwide. Domestic criticism should be acknowledged through the use of reservations, understandings, and declarations; however, blind labeling by opposition to the Convention should not improperly influence decision makers.

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<sup>122</sup> *Id.* at 85.

<sup>123</sup> *Id.* at 88.

The Convention on the Rights of the Child has cause to celebrate its anniversary. Its predecessors provided a strong foundation for the Convention to build on. The nearly universal ratification has led to many states providing greater protections for children through new laws and policies. However, there remains room for the Convention to grow from its present state. Shortcomings on implementation and limitations on the rights ensured are evident. Yet it is necessary to also look to the future and how the Convention may overcome these challenges in its next twenty years.