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Member of the Class of 1992

I. INTRODUCTION

The one hundred and forty-two countries that have signed or acceded to the United Nations Convention on the Rights of the Child (UNCRC) hope it will improve the plight of the world's children. Adopted by the United Nations General Assembly in November 1989, the UNCRC provides a comprehensive list of children's rights. These rights include economic rights to an adequate standard of living and health care, social and cultural rights which include appropriate care and education, political and civil rights, juvenile justice rights, and humanitarian rights during armed conflicts.1

The UNCRC went into force on September 2, 1990 after ratification by far more than the twenty required nations.2 "Not even the [UNCRC's] most enthusiastic supporters could have predicted the extent to which it has been embraced by the international community or the speed with which it has become a legally binding treaty," wrote Cynthia Price Cohen, the United Nations Representative for Human Rights Internet.4 By December 16, 1991 more than 142 countries, well over three-quarters of the Member States of the United Nations, had signed or ac-

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2. Id.
4. Children's Rights in America, supra note 3, at iii.
ceded to the UNCRC. Ninety-six of these countries had ratified it.\(^5\)

While over 139 countries have signed the UNCRC, signalling their intent to ratify, the United States has not yet signed the UNCRC.\(^6\) Both the Senate and the House of Representatives have passed resolutions urging the President to seek promptly the advice and consent of the Senate to the ratification of the UNCRC.\(^7\) The process, however, has stalled.

The broad question of whether the U.S. should ratify the UNCRC will not be discussed in this Note. Instead, the Note asks whether children whose rights are litigated in U.S. courts would be helped by ratification of the UNCRC. First, the plight of children in the U.S. is explored. The Note then discusses existing human rights agreements which affect children's rights around the world and in the U.S. A brief description of the UNCRC follows. The Note then explores how the UNCRC can be used on behalf of children in U.S. courts. The Note discusses the UNCRC's use as a ratified treaty, as customary international law, and as "guiding" authority. Finally, the author concludes that ratification of the UNCRC will be beneficial to children whose rights are litigated in U.S. courts.

II. CHILDREN IN THE U.S.

Many children in the U.S. endure painful lives. In 1989 the House of Representatives Select Committee on Children, Youth, and Families investigated the plight of children and families and reported on current


\(^{6}\) Cynthia Price Cohen & Per Miljeteig-Olssen, Status Report: United Nations Convention of the Rights of the Child, 8 J. Hum. RTS. 367, 378 (1991). Ratification of a United Nations treaty in the United States includes many steps. First, a treaty adopted by the U.N. General Assembly goes to the State Department where a report is prepared in conjunction with other administrative agencies. Defense for Children Int'l-USA, Path of a Treaty from U.N. Adoption to U.S. Ratification. The report includes recommendations for reservations, declarations, and understandings. Id. The treaty goes to the President who adds whatever reservations, declarations, and understandings he or she wants. Id. The President sends it to the Senate for its advice and consent. Id. In the Senate the treaty first goes to the Senate Foreign Relations Committee, where hearings are held. Id. More reservations can be added here, and the Committee makes a recommendation (by majority vote) on whether the full Senate should approve it. Id. The full Senate may also add reservations, declarations, and understandings and must approve the Convention by a 2/3 vote for it to become ratified. Id. Finally, the President may sign the instrument of ratification affixed to the treaty (or the President may withdraw the treaty at this point or add reservations, declarations, and understandings and send it back through the Senate ratification process). Id.

Congressman George Miller, Chairman of the Select Committee, described the report’s results: "What this report says is that we’re basically launching our children on courses of failure." The percentage of children in poverty increased in the 1980s. Twenty percent of all children, over twenty-two percent of all children under six, more than forty-five percent of black children, and nearly forty percent of Latino children lived below the poverty line in 1987. Homelessness among children has increased in recent years. The U.S. Department of Education estimated that 220,000 school-aged children were homeless in 1988. Twenty percent of all children have no health insurance. One in four children is born to a mother who does not receive timely prenatal care. In 1987 there were 1,781,000 arrests of juveniles and 53,503 juveniles held in custody in public facilities. Many U.S. children never get a chance to become functioning adults. The government, which could potentially save many children from bitter lives, has failed them.

Children traditionally have had narrower legal rights than adults. Until the nineteenth century European children were considered to be property; “children could be sold, abandoned, abused, and mutilated with impunity,” according to Dr. Kelly Weisberg, currently a Professor of Law at the University of California, Hastings College of the Law. Even today, governments, including democratic governments, do not have enough laws to protect children. The lack of laws is partly due to the fact that children cannot represent themselves in the political process: children are inexperienced, dependent, uneducated, and not allowed to vote. Moreover, the children that are suffering usually have parents

10. Id.
11. U.S. CHILDREN, supra note 8, at 109. In 1980, 18.3% of children were below the poverty line. The average poverty level for a family of four was $11,611 in 1987. Id.
12. Id. at 30.
13. Id. at 31.
14. Id. at 213.
15. Kay A. Johnson & Molly McNulty, Assuring Adequate Health and Rehabilitative Care for the Child, in CHILDREN’S RIGHTS IN AMERICA, supra note 3, at 220 (citing CHILDREN’S DEFENSE FUND, MATERNAL AND INFANT HEALTH: KEY DATA, SPECIAL REPORT ONE (1990)).
16. Id. at 237.
17. Id. at 239.
19. Id.
who are poor and who do not have any significant political power. Because children have no power of their own, they have generally become the poorest and least legally protected age group in the U.S. as well as in other countries. 20

Since children cannot help themselves, governments should vigorously represent their interests. The UN CRC and other international agreements attempt to focus government attention on the needs of children.

III. MAJOR INTERNATIONAL AGREEMENTS AFFECTING CHILDREN

The first major international agreement providing protection of children’s rights was the Geneva Declaration of the Rights of the Child in 1924. 21 The Declaration, adopted by the League of Nations, was the first significant international instrument directly devoted to the protection of children. 22 The Geneva Declaration, however, according to Walter Bennett, Jr., a lecturer at the University of North Carolina School of Law, "was substantively unfocused and essentially an aspirational document." 23

After World War II, increased international interest in human rights prompted concern for the rights of children. 24 Five major international instruments written after World War II affect children’s rights today. First, although the United Nations Charter (U.N. Charter) does not specifically mention children’s rights, it contains human rights provisions which apply to children as well as to adults. 25 The U.N. Charter is the "supreme international document providing for the protection and

20. See U.S. CHILDREN, supra note 8, at x.
22. Id. at 17 (reprinting the full text of the Declaration of Geneva, at n.94).
23. Id.
24. Id.
25. U.N. CHARTER arts. 55 ("the United Nations shall promote... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"), 56 ("[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."); Kathryn Burke et al., Application of International Human Rights Law in State and Federal Courts, 18 TEX. INT'L L.J. 291, 297 (1983). See discussion in Bennett, supra note 21, at 26-29, wherein he argues convincingly that the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights (ICCPR) and the International Covenant of Economics, Social and Cultural Rights (ICESCR), and other human rights documents apply in general to children. His argument would apply to the U.N. Charter as well.
promotion of human rights."26 Since the U.N. Charter is one of the few treaties containing human rights provisions that the U.S. has ratified, it is important to human rights law in the U.S.27

Second, in 1948 the United Nations unanimously adopted, by resolution, the Universal Declaration of Human Rights (UDHR).28 The UDHR is a broad statement of human rights, and it specifically mentions the rights of children in two of its articles.29

Third, the United Nations adopted the Declaration of the Rights of the Child in 1959.30 This declaration was the first international agreement to attempt to establish a comprehensive list of children's rights.31 Although the declaration did not succeed, it is the symbolic parent of the UNCRC.32

The United Nations adopted the fourth and fifth major agreements in 1967: the International Covenant on Civil and Political Rights (ICCPR)33 and the International Covenant of Economics, Social and Cultural Rights (ICESCR).34 Both covenants include articles which explicitly and implicitly provide protections for children.35 For instance, the ICCPR includes provisions calling for nondiscrimination,36 freedom

27. U.N. CHARTER arts. 55(c), 56. See Burke, supra note 25, at 297-311 for a discussion of the importance of these articles in United States human rights law.
29. UDHR, supra note 28 (article 25 provides special protection for children and article 26 provides a right to education).
31. See Bennett, supra note 21, at 17.
32. Id.
35. See Bennett, supra note 21, at 27.
36. ICCPR, supra note 33, art. 24.
from the death penalty, and due process and rehabilitation in juvenile court proceedings and dispositions. Similarly, the ICESCR includes provisions addressing education, health care, and economic and social exploitation. The U.S. has signed, but not ratified, the ICCPR and the ICESCR.

In addition, to these five principal instruments, there are many other international agreements which affect children. These agreements are under the auspices of both the United Nations and regional international organizations.

For numerous, interwoven reasons, the U.S. has been hesitant to ratify treaties, such as the UNCRC, which concern human rights. As of early 1990, the U.S. had ratified only thirteen multilateral human rights treaties. The traditional reluctance to ratify human rights treaties began, and can be understood, in the context of American politics after World War II. One commentator noted that the 1951 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was not ratified, in part because of growing isolationism and xenophobia flowing from the Korean War, rampant McCarthyism, anxieties of segregationists from the Deep South, and resistance by the American Bar Association. Some Senators believed that ratifying the Genocide Convention would mean surrendering U.S. sovereignty to a world government—perceived to be dominated by Communists—who themselves were engaging in genocide.

Federalism also spawned opposition to international human rights

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37. *Id.* art 6, § 5.
38. *Id.* art. 14.
40. *Id.* art. 12.
41. *Id.* art. 10.
43. *See* Bennett, *supra* note 21, at 18-29 for a comprehensive listing of these instruments.
44. *See* LILICH, *supra* note 42, at ix-x. On October 27, 1990, the United States Senate ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17,486 (daily ed. Oct. 27, 1990).
47. *Id.* at 256.
agreements because some states saw these agreements as a surreptitious way for the federal government to bypass the states and directly legislate civil rights.\textsuperscript{48} In 1953 Senator John W. Bricker of Ohio proposed an amendment to the U.S. Constitution to restrict the government from entering into international agreements that might infringe on the power of the states or be litigated domestically.\textsuperscript{49} To defeat the Bricker Amendment in the Senate, Secretary of State John Foster Dulles was forced to pledge that the U.S. did “not intend to become a party to any [human rights] covenant or present [one] as a treaty for consideration by the Senate.”\textsuperscript{50} Changes in U.S. politics and law have relaxed the so-called Dulles Doctrine. David Weissbrodt, Professor of Law at the University of Minnesota, noted that the “enactment of domestic civil rights legislation, the announcement of court decisions to eradicate some of the worst injustices of racial discrimination, the related decrease in concern for states’ rights, and the increasing interest in international human rights have considerably improved the climate for ratification of these multilateral treaties.”\textsuperscript{51}

The ratification of two human rights treaties in the past decade may pave the way for ratification of the UNCRC and other human rights treaties.\textsuperscript{52} In 1986 the U.S. ratified the Genocide Convention.\textsuperscript{53} In 1990 the Senate adopted a resolution to ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention).\textsuperscript{54} As an indication of the interest in the ratification of human rights treaties, it was rumored that the Reagan Administration withheld submission of the Torture Convention to the Senate until the Genocide Convention passed the Senate.\textsuperscript{55} Since, as with the principles against genocide and torture, U.S. Senators agree with the general principles of children’s rights, the UNCRC may be considered soon. Nonetheless, many Senators are hesitant to consent to ratification of the UNCRC. The concerns range from general concerns, such as federalism and the UNCRC’s possible threat to U.S. sovereignty,\textsuperscript{56} to specific concerns, such as the problem posed by the UNCRC’s prohibition of the

\textsuperscript{49} See Weissbrodt, supra note 42, at 38-39 n.45.
\textsuperscript{50} See Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong., 1st Sess. 825 (1953).
\textsuperscript{51} See Weissbrodt, supra note 42, at 39 n.45.
\textsuperscript{52} See Klitzman, supra note 46, at 260.
\textsuperscript{53} 132 CONG. REC. S1377 (daily ed. Feb. 19, 1986).
\textsuperscript{54} 136 CONG. REC. S17,486, S17,491 (daily ed. Oct. 27, 1990).
\textsuperscript{55} Id. at S17,487-490
death penalty for children under eighteen while many states still allow this practice.\textsuperscript{57}

\section*{IV. THE CONVENTION ON THE RIGHTS OF THE CHILD}

In 1979 the International Year of the Child, a United Nations delegation began drafting a treaty on the rights of the child\textsuperscript{58} in response to a proposal by the Polish government. "The purpose of the Convention [on the Rights of the Child] was to put into treaty form the values contained in the 1959 United Nations Declaration of the Rights of the Child . . . ."\textsuperscript{59} The UNCRC represents the strengthening of international customary law regarding children. The fact that the UNCRC was embraced so quickly by many countries increases its credibility.\textsuperscript{60}

The UNCRC adds to international children's rights law in three principal ways.\textsuperscript{61} First, the UNCRC includes rights omitted from previous international agreements. For example, it sets "minimum standards for treatment of disabled and emotionally disturbed children, standards for alternative placement of all children, and mandatory measures for detecting and reporting incidents of neglect and abuse."\textsuperscript{62}

Second, the UNCRC covers some areas of children's rights more comprehensively than previous international agreements. The UNCRC leaves no room for ambiguity on the protection of child refugees and the protection of children from exploitation.\textsuperscript{63}

Third, the UNCRC facilitates the development and establishment of international children's rights law. Disorganized and unclear international children's rights law has made the use of children's rights in court difficult.\textsuperscript{64} It also has hindered the establishment of an international consensus and understanding of children's rights law.\textsuperscript{65} The UNCRC provides a single and authoritative source which U.S. courts and the legal

\textsuperscript{57} See Klitzman, \textit{supra} note 46, at 256. Cohen & Miljeteig-Olssen, \textit{supra} note 6, at 379-81.

\textsuperscript{58} The UNCRC defines a child as "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier." UNCRC, \textit{supra} note 1, art. 1, 28 I.L.M. at 1459.

\textsuperscript{59} \textit{CHILDREN'S RIGHTS IN AMERICA}, \textit{supra} note 3, at iii.


\textsuperscript{61} See Bennett, \textit{supra} note 21, at 30.

\textsuperscript{62} \textit{Id}.

\textsuperscript{63} \textit{Id} at n.191.

\textsuperscript{64} \textit{Id} at 30.

\textsuperscript{65} \textit{Id} at 30-31.
community can cite for almost any issue involving children's rights. The UNCRC provides a foundation on which U.S. courts can build.

A. The Text of the UNCRC

The text of the UNCRC includes some general rights of children. Under the UNCRC, for instance, every child has the inherent right to life. In addition, nations which ratify the UNCRC must act with the best interests of the child in mind.

The more specific and substantive rights in the UNCRC may be placed into five categories: (1) economic rights (including adequate standard of living, social security, and health care); (2) social and cultural rights (including appropriate care and education); (3) political and civil rights (including freedom of expression and prohibition of state discrimination); (4) juvenile justice rights (criminal procedural rights and prohibition of certain punishments); and (5) humanitarian rights (protections during armed conflict). Because the forcefulness of the language which the drafters used to describe these rights varies, the strength of the rights varies accordingly. For instance, in certain provisions the UNCRC requires parties to the convention to "ensure" a certain right, while in others the UNCRC merely requires parties to "recognize" a right.

The UNCRC also contains many procedural provisions. Articles 4 and 42-45 address the implementation of the UNCRC. Cynthia Price Cohen, the United States Representative for Human Rights Internet, suggests that the most significant aspect of the UNCRC's implementation mechanism is that it recognizes the varying national constraints on implementation. She writes:

66. UNCRC, supra note 1, art. 6, 28 I.L.M. at 1460.
67. Id. art. 3, 28 I.L.M. at 1460.
68. Id. arts. 23, 24, 26, 27, 28 I.L.M. at 1465-67.
69. Id. arts. 7(1), 8-11, 16-21, 28-35, 28 I.L.M. at 1460-61, 1462-64, 1467-69.
70. Id. arts. 2, 7, 12, 13, 14, 15, 28 I.L.M. at 1459-62.
71. Id. arts. 37, 40, 28 I.L.M. at 1469-71.
72. Id. arts. 22, 38, §§ 1, 2, 28 I.L.M. at 1464, 1470.
73. See James Weill, Assuring an Adequate Standard of Living for the Child, in CHILDREN'S RIGHTS IN AMERICA, supra note 3, at 217 n.29 for discussion ("[t]he U.S. was a primary proponent of amendments seeking to soften the duty to implement economic rights. It succeeded in amending the social insurance article [26] to make it more of 'a goal or objective whose realization would be sought progressively rather than a legal right requiring immediate implementation' . . ., [b]ut a similar effort to weaken the basic guarantee in article 27(1) was rebuffed." (citation omitted) (citing RADDAA BARNEN INTERNATIONAL, COMPILATION OF THE ON-GOING WORK OF THE DRAFTING OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1978-87, First Draft, 166/87 (1987))).
74. UNCRC, supra note 1, arts. 2, 6, 28 I.L.M. at 1459-60.
Unlike other human rights treaties, where the implementation is somewhat accusatory or punitive, the theme of the implementation mechanism of the [UNCRC] is based on the premise that all States Parties intend to honor the rights of children, but that in some cases they may have difficulty in doing so . . . . [I]ts emphasis is on facilitation.75

Thus, the UNCRC provides mechanisms to make governments focus on their children. The UNCRC also includes a "savings clause" which prevents domestic or international law in force in a given state from being weakened by any UNCRC standards which are lower than presently accepted law.76 Thus, any treaty law or customary international law which provides better protection for children than the UNCRC is still binding.

B. U.S. Law and the UNCRC

There are many similarities and some differences between U.S. law and the UNCRC provisions.77 The authors of Children's Rights in America conclude that "for the most part United States law, both state and federal, is already in compliance with the [UNCRC's] standards."78 This is not surprising since the UNCRC was intended as a list of minimum rights that all nations should guarantee to children.79

There are, however, areas where the U.S. standards fall below the minimum standards of the UNCRC80 — most notably in the area of economic rights.81 In addition, the U.S. is not in compliance with the UNCRC's prohibition of the death penalty for persons under eighteen since several states allow that sentence for minors.82

In the UNCRC articles pertaining to economic rights, the UNCRC calls for all children to have an adequate standard of health care, an

76. UNCRC, supra note 1, art. 41, 28 I.L.M. at 1472.
77. A comprehensive discussion is beyond the scope of this Note, but CHILDREN'S RIGHTS IN AMERICA, supra note 3, was written on this subject in 1990.
78. Cohen & Miljeteig-Olssen, supra note 6, at 380. Cohen and Miljeteig-Olssen note that the majority of the authors of Children's Rights in America agree that U.S. law is in compliance with the UNCRC.
79. CHILDREN'S RIGHTS IN AMERICA, supra note 3, at iii.
80. Again, a comprehensive discussion of these differences is beyond the scope of this Note. See generally CHILDREN'S RIGHTS IN AMERICA, supra note 3.
81. See generally Weill, supra note 73, at 197-217; Kay A. Johnson & Molly McNulty, Assuring Adequate Health and Rehabilitative Care for the Child, in CHILDREN'S RIGHTS IN AMERICA, supra note 3, at 219-37.
82. Cohen & Miljeteig-Olssen, supra note 6, at 380.
adequate standard of living, and social security. U.S. statistics show that the U.S. is not complying with the standards in these areas.\textsuperscript{83} For example, today twenty percent of U.S. children have no health insurance coverage.\textsuperscript{84} Thus, the UNCRC provision requiring that all children have access to health care\textsuperscript{85} requires a major change in the U.S. health care delivery system.

Furthermore, article 4 states that parties to the treaty shall undertake measures to improve economic, social and cultural rights to the "maximum extent of their available resources..."\textsuperscript{86} Since the U.S. is one of the wealthiest countries in the world, article 4 seems to require that the U.S. greatly improve the economic circumstances of many U.S. children.\textsuperscript{87} The U.S. possesses approximately the same resources as the other industrialized countries, so the U.S. poverty rate and infant mortality rate should at least be within the same range as theirs. But they are not. For example, the number of children living in poverty is higher in the U.S. than in other major industrialized countries, often by a gap greater than seven percent.\textsuperscript{88} The U.S. also leads the other major industrialized countries with the highest infant mortality rate.\textsuperscript{89} Children's rights advocates in the U.S. may consider using article 4 and others in the UNCRC to augment the rights of U.S. children.

\section{V. USE OF THE UNCRC IN THE U.S.}

There are three ways advocates can use international law in U.S. courts.\textsuperscript{90} International law can be directly enforced pursuant to a treaty ratified by the U.S.; it can be enforced as customary law; and it can be used as a guiding standard to bolster a case.\textsuperscript{91} This section discusses how the UNCRC may be employed in each of these ways.

\begin{itemize}
\item \textsuperscript{83} See supra notes 8-20 and accompanying text.
\item \textsuperscript{84} See U.S. CHILDREN, supra note 8, at 213.
\item \textsuperscript{85} UNCRC, supra note 1, art. 24, 28 I.L.M. at 1465.
\item \textsuperscript{86} UNCRC, supra note 1, art. 4, 28 I.L.M. at 1459 (emphasis added).
\item \textsuperscript{88} HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S WELL-BEING: AN INTERNATIONAL COMPARISON, 101ST CONG., 2D SESS. 40 (Comm. Print 1990). The report compared the United States to Australia, Canada, West Germany, Sweden, and the United Kingdom based on statistics from 1979 to 1981.
\item \textsuperscript{89} Id. at 47 (based on statistics from 1986).
\item \textsuperscript{90} See Burke, supra note 25, at 295.
\item \textsuperscript{91} Id.
\end{itemize}
A. Enforcement of the UNCRC as a Treaty

A treaty is an international agreement which is ratified pursuant to each party's own constitutional or statutory provisions. The U.S. ratifies a treaty by signature of the President with the advice and consent of the Senate. A ratified treaty becomes part of the supreme law of the land. The U.S. Supreme Court has held that a treaty must not conflict with the U.S. Constitution. When construing a treaty and a federal statute which addresses the same subject, courts should attempt to give effect to both. If, however, a treaty conflicts with a federal statute, then the more recent takes precedence. If a treaty and a state law conflict, then the treaty prevails. Thus, treaties are a powerful source of law in the U.S.

The power of treaties in U.S. law, however, is tempered by the judicially-created doctrine of self-execution. A treaty may be enforced in U.S. courts by individuals only if it is self-executing. The U.S. Supreme Court has held that a treaty is self-executing when no implementing legislation is needed to give it effect. To determine whether a treaty is self-executing, courts usually focus on whether the parties intended for the treaty to be self-executing, first looking at the words of the treaty and then, if the words are unclear, at the circumstances surrounding its execution.
1. UNCRC: Ratified Without Reservations

The UNCRC will be most helpful to children litigating their rights if the Convention is signed and ratified with no reservations, understandings, or declarations. Under the U.S. Constitution, article VI, clause 2, the ratified UNCRC would become part of the supreme law of the land. Attorneys litigating on behalf of children could cite to a UNCRC provision, provided it is self-executing, as controlling. Whenever a self-executing UNCRC provision contains a higher standard than the previous federal or state law, the UNCRC provision would control.

The UNCRC may not greatly impact U.S. law, however, because the requirement that the provision be self-executing is a major limitation. This hindrance bars direct enforcement of the major provisions in the area where the U.S. is most deficient—economic rights. Even though ratification of the UNCRC will require the U.S. to provide economic rights, it will not allow children to walk into court and demand these rights because the articles of the UNCRC which contain these rights are not self-executing.

All of the economic rights provisions in the UNCRC indicate by their wording that legislation is anticipated for implementation of the right. Thus, they are not self-executing. For example, article 24 states that parties to the UNCRC "shall strive to ensure that no child is deprived of his or her right of access to [necessary] health care services." The words "strive to ensure" indicate that the parties intended legislation to be enacted to ensure this right. In addition, while section 1 of article 27 states that parties to the UNCRC shall recognize the right of every child to an adequate standard of living, section 3 of that article defines the parties' duty: "to take appropriate measures to assist parents and others responsible for the child to implement this right and shall, in case of need, provide material assistance...." The words "appropriate measures" again indicate that the parties are expected to enact legislation to ensure this right as well. Thus, attorneys litigating on behalf of children will not be able to directly enforce in U.S. courts the UNCRC provisions to pass legislation (not self-executing) or creates specific obligations to perform or refrain from certain acts (self-executing).

103. A reservation is a "formal declaration by a [nation], when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving [nation] and other [nations] party to the treaty...." MAJORIE WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW § 17, at 137-38 (1970). See id. for basic definitions of "declaration," "understanding," and "statement." This Note will focus on reservations, since they have the greatest impact.

104. See discussion under treaty power supra notes 42-57 and accompanying text.

105. UNCRC, supra note 1, arts. 23, 24, 26, 27, 28 I.L.M. at 1465-67.
ensuring economic rights, even if the UNCRC is ratified without reservations.106

The UNCRC, if ratified without reservations, could preempt some state laws. For example, the UNCRC provision prohibiting the death penalty for persons under the age of eighteen is self-executing. Therefore, an unreserved, ratified UNCRC would prohibit U.S. courts from sentencing children to death.107

2. UNCRC: Ratified With Reservations

If the U.S. ratifies the UNCRC, it will almost certainly do so with reservations.108 In ratifying both the Torture Convention and the Genocide Convention, the Senate included reservations in the resolution of ratification.109 Moreover, there are a number of proposed reservations to the ICCPR and ICESR which will probably be attached if they are ever ratified.110 Thus, it is likely that the UNCRC will have similar reservations attached if it is ratified by the Senate.111

Currently, it appears that the UNCRC will have at least four types of reservations. First, to counter federalism concerns and make the treaty politically palatable to the states, the UNCRC will probably have a federal-state reservation.112 The federal-state reservation to the UNCRC will most likely resemble the one attached to the recently ratified Torture Convention.113 The federal-state reservation to the Torture Convention states that the U.S. will be required to implement the Convention only "to the extent that [the federal government] exercises legislative and judicial jurisdiction over the matters covered [therein]" and

106. This does not mean that lawyers cannot otherwise use these provisions when litigating in U.S. courts. See sections below on customary law, infra text accompanying notes 122-33 and guiding international law, infra text accompanying notes 134-43.
107. As discussed below, however, the United States will almost surely take a reservation on this issue. Cohen & Miljeteig-Olssen, supra note 6, at 380.
110. Weissbrodt, supra note 42, at 48-54.
111. The UNCRC probably will have declarations and understandings (see WHITEMAN, supra note 103, § 17, at 137-38, for definitions) attached in the ratification process as did the Genocide Convention and Torture Convention. This Note discusses only the possible major reservations.
112. See discussion of federalism concerns, supra text accompanying notes 48-57.
113. See generally Lawrence L. Stentzel, II, Federal-State Implications of the Convention, in CHILDREN’S RIGHTS IN AMERICA, supra note 3, at 57-83. Stentzel analyzes the issue of the federal-state reservation and recommends a reservation which would be less broad than the usual U.S. reservation.
will merely take "appropriate measures" to encourage the states to do so as well.\footnote{114} A federal-state reservation will affect the UNCRC provisions that address areas that are controlled by the states. For example, the UNCRC provisions on education\footnote{115} will generally be unenforceable since public education is largely the responsibility of state government.

Second, the U.S. will probably also include a reservation making the treaty as a whole non-self-executing. This will make all provisions of the UNCRC non-actionable in U.S. courts unless there is implementing legislation. One justification for this type of reservation is that many countries, such as Great Britain, require implementation legislation for treaties to take effect.\footnote{116} Therefore, this reservation would merely place the U.S. in the same position as these other countries. The reservation will render the UNCRC unenforceable by individuals in U.S. courts unless implementing legislation allows otherwise.

Third, the U.S. will also likely attach specific reservations with regard to the economic rights contained in the UNCRC.\footnote{117} These reservations probably will state that such rights merely express aspirations for the party to the treaty, not obligations. They will ensure that no child will be able to enforce economic rights in U.S. courts.

Fourth, there likely will be miscellaneous specific reservations. For example, the U.S. probably will reserve the right to execute children under the age of eighteen for criminal offenses.\footnote{118}

To counteract possible reservations, the UNCRC provides that "[a] reservation incompatible with the object and purpose of the present Convention [on the Rights of the Child] shall not be permitted."\footnote{119} Arguably some of the proposed U.S. reservations are incompatible with the purpose of the UNCRC.\footnote{120} Practically, however, the provision against incompatible reservations may not make a difference. It has been noted that if other countries want the U.S. to ratify the treaty, and they believe the U.S. will not do so without the reservations, then they probably will not object.\footnote{121}

\begin{footnotes}
\footnotetext{114}{136 CONG. REC. S17,491-92 (daily ed. Oct. 27, 1990).}
\footnotetext{115}{UNCRC, supra note 1, arts. 28, 29, 28 I.L.M. at 1467-68.}
\footnotetext{116}{Telephone Interview with David Baltan, supra note 108.}
\footnotetext{117}{Id.}
\footnotetext{118}{Cohen & Miljeteig-Olssen, supra note 6, at 380.}
\footnotetext{119}{UNCRC, supra note 1, art. 51, § 2, 28 I.L.M. at 1476.}
\footnotetext{120}{See Weissbrodt, supra note 42, at 64 (questioning whether the federal-state reservations to the ICESCR and ICCPR were incompatible with the treaties).}
\footnotetext{121}{See Michael D. Craig, The International Covenant on Civil and Political Rights and United States Law: Department of State Proposals for Preserving the Status Quo, 19 HARV. INT'L L.J. 845, 871 (1978).}
\end{footnotes}
In sum, assuming the U.S. ratifies the UNCRC with all of the reservations listed above, the UNCRC is not likely to be beneficial to litigation on behalf of children in U.S. courts as a directly enforceable treaty.

B. Enforcement of the UNCRC As Customary International Law

Direct enforcement of treaties is not the only use for an international human rights convention in U.S. courts. Customary international law is also a “part of our law” according to the U.S. Supreme Court. Customary international law consists of international norms of behavior that have developed over time and have become international custom.

Thus, when a U.S. court enforces customary international law, it does not directly enforce a treaty. The court decides that a certain practice is customary law by looking at a number of factors: whether many nations have signed a treaty agreeing to a certain practice, whether those countries have followed that practice, and whether the U.S. has acquiesced by following that practice. Courts “interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”

U.S. courts did not protect individual rights by using customary international law until 1980, when the Court of Appeals for the Second Circuit held that official torture violates customary international law. In Filartiga v. Peña-Irala, two Paraguayan citizens brought a wrongful death action in New York district court against a U.S. resident who was a former police official from Paraguay. They accused him of wrongfully causing the death by torture of their son, Joelito Filartiga, in Paraguay.

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123. The traditional test in the U.S. for determining international customary law was first laid down in United States v. Smith, 18 U.S. (5 Wheat.) at 160-61 (“[T]he law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”).

The Inter-American Commission on Human Rights suggests that the elements of customary international law are:

a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; b) a continuation or repetition of the practice over a considerable period of time; c) a conception that the practice is required by or consistent with prevailing international law; and d) general acquiescence in the practice by other states.


125. Id. at 880.
Plaintiffs claimed jurisdiction under the Alien Tort Claims Act,126 which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."127 The district court dismissed the suit for lack of jurisdiction,128 but the Second Circuit reversed. It held that official torture violates the law of nations, and thus granted jurisdiction under the Alien Tort Statute. The court reasoned that courts should not "prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good. . . . Here, the nations have made it their business, both through international accords and unilateral action, [footnote omitted], to be concerned with domestic human rights violations of this magnitude."129 Thus, the Second Circuit recognized that customary international law can include individual rights. Nonetheless, not all courts have followed the holding in *Filartiga*. 130 Whether individual human rights will be enforced as customary international law in U.S. courts is uncertain.

The reluctance of U.S. courts to recognize international customary law, and individual rights in particular, means that many of the rights set forth in the UNCRC will not rise to the level of customary international law. In some areas, where the courts can discern a significant consensus, as the Second Circuit did in *Filartiga* with the right to be free from torture, the combination of the UNCRC and other evidence of customary international law may tip the balance. Ratification of the UNCRC by the U.S. may further sway courts toward establishing rights. Ratification of the treaty with contrary reservations may, however, undermine the UNCRC's power as customary international law.

Practical considerations may make a lawyer litigating on behalf of children less likely to spend the time and energy to brief an argument based on customary international law. Connie de la Vega, a professor at the University of San Francisco, notes that "it is difficult to establish that a particular right is protected by customary law."131 Citing *Filartiga* as an example, she explains that

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127. Id.
128. *Filartiga*, 630 F.2d at 880.
129. Id. at 888-89.
130. See Burke, supra note 25, at 315-22 for a discussion of the law following *Filartiga* on this issue.
the Second Circuit found that the prohibition of the use of torture is part of customary international law. However, [in order to reach this conclusion] the court engaged in an exhaustive analysis of the works of jurists, the general usage and practices of nations, and the judicial decisions recognizing and enforcing that law.\textsuperscript{132}

Thus, Professor de la Vega suggests that lawyers use international human rights law as a "guiding" principle rather than as proof of customary international law in the majority of cases.\textsuperscript{133}

C. Use of the UNCRC As "Guiding" the Definition of Children's Rights Under Federal and State Law

Federal and state courts may use "internationally recognized standards to [guide their interpretations of] the protections afforded by domestic constitutions, statutes, and other laws."\textsuperscript{134} International law which is guiding is different from customary international law in that the law is only persuasive, not binding, authority. The UNCRC may guide U.S. courts because, arguably, the U.S. should not lag behind the rest of the world in the protection of children.\textsuperscript{135}

Courts have used international norms to guide their decisions in a number of cases which affect the rights of children.\textsuperscript{136} The most notable case is a recent decision from the U.S. Supreme Court, Thompson v. Oklahoma.\textsuperscript{137} In Thompson, the Court prohibited, as cruel and unusual punishment under the Eighth Amendment, the execution of a person who was under the age of sixteen at the time of his offense. The Court looked to international law and the laws of other nations for guidance in defining the evolving standard of cruel and unusual punishment.\textsuperscript{138}

In the area of economic rights, Boehm v. Superior Court\textsuperscript{139} and California Federal Savings & Loan Association v. Guerra\textsuperscript{140} illustrate the use of international law as guiding in California courts. In Boehm, the California court of appeal referred to Article 25 of the Universal Declaration

\textsuperscript{132.} Id.
\textsuperscript{133.} Id.
\textsuperscript{134.} Burke, supra note 25, at 322.
\textsuperscript{135.} Id.
\textsuperscript{136.} For a partial listing and analysis of U.S. cases which quoted international human rights law, see de la Vega, supra note 131, and Burke, supra note 25, at 322-28. See LILlich, supra note 42, at vi-xi for a list of the major human rights treaties of special interest to the United States.
\textsuperscript{137.} 487 U.S. 815 (1988).
\textsuperscript{138.} Id. at 831, 831 n.34.
\textsuperscript{139.} 178 Cal. App. 3d 494 (1986).
\textsuperscript{140.} 479 U.S. 272 (1987).
of Human Rights to help define a minimum standard of living and denied one county's reduction of public assistance grants. In *California Federal Savings & Loan Association*, the California Supreme Court upheld a statute providing relief for working women who become pregnant. The Court's opinion cited testimony on the international standards relating to discrimination against pregnant women.

In sum, the UNCRC may be enforced directly, if it is ratified, used as customary international law, or cited as guiding.

VI. RATIFICATION OF THE UNCRC WILL HELP U.S. CHILDREN

Some children's rights lawyers in the U.S. may be reluctant to encourage the Senate to ratify the UNCRC because the large number of reservations actually may erode the international norms that have been accepted over time. For example, it would be difficult for a court to use the international minimum standard of living, either as customary law or as a guiding principle, when the court must ignore a U.S. reservation on this issue. Courts may face a similar problem in the face of a U.S. reservation concerning the UNCRC's prohibition of the death penalty.

Despite this concern, U.S. ratification of the treaty will strengthen customary international law and guiding law in many ways. Since the U.S. has ratified few human rights treaties in the past, ratification of the UNCRC will demonstrate that the U.S. government is more willing to be held to international norms with regard to children. U.S. courts will be more willing to consider the UNCRC in their decision-making. In sum, children whose rights are litigated in U.S. courts will benefit from U.S. ratification of the UNCRC even if it can only be done with many reservations.

VII. CONCLUSION

As international law continues to progress, the UNCRC likely will have a greater effect on U.S. law. More countries will ratify the UNCRC and work to improve the human rights of children as time passes. When President Carter signed the ICCPR and the ICESCR, he expressed his hope that the covenants would advance human rights:

Our Declaration of Independence and the Bill of Rights expressed a

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lofty standard of liberty and equality. But in practice, these rights were enjoyed only by a very small segment of our people.

In the years and decades that followed, those who struggled for universal suffrage, those who struggled for the abolition of slavery, those who struggled for women's rights, those who struggled for racial equality, in spite of discouragement and personal danger, drew their own inspiration from these two [sic] great documents—the Declaration of Independence, the Bill of Rights and our own Constitution. Because the beliefs expressed in these documents were at the heart of what we Americans most valued about ourselves, they created a momentum toward the realization of the hopes that they offered. . . . My hope and my belief is that the international covenants that I sign today can play a similar role in the advancement and the ultimate realization of human rights in the world at large.145

Similarly, the UNCRC holds great promise as a vehicle for the advancement of children's rights.

The U.S. should be one of the countries which ratifies the UNCRC. Even if ratified with reservations, the reservations may lose meaning out of the context of the time when they were made. Perhaps the U.S. may ultimately drop the reservations, as it is permitted to do under Article 51, section 3 of the UNCRC. Over time, the UNCRC will improve the rights of children in the U.S., and its ratification will signal to the world the U.S. commitment to children.