

REPRESENTING CHILDREN AND INTERNATIONAL NORMS

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From 2002 to 2004, I lived in Kinshasa, Congo, where I worked on issues of sexual violence against women, adolescent reproductive health, and abandoned children (and became friendly with the Congolese Government's Special Ambassador for Children). My experiences there inform this comment on the final report of the Conference's¹ Working Group on International Law, Norms, and Practice.

The Working Group developed a series of recommendations concerning children's representation and international norms based on the recognition of the transnational nature of much of our work on behalf of children in the United States. The first recommendation calls for the United States to ratify the UN Convention on the Rights of the Child ("CRC"), while other recommendations urge the United States to comply more fully with international norms regarding children, and suggest methods for children's advocates to use international norms in their work.² These are admirable recommendations and aspirations that I would like to examine more closely in this Comment.

There are three basic questions that this Comment addresses: 1) the difficulties and controversies over using international law in domestic court on behalf of children (or anyone else, for that matter), outside of the few cases, such as sex trafficking and Hague Treaty abductions, where Congress has explicitly condoned looking outside of our borders; 2) the issues of how much energy children's rights representatives should expend in advocating ratification of the CRC in the current political environment, rather than using resources to improve the representation process domestically; and 3) the possibility of using international norms for helping United States organizations advocating for children internationally, using the example of child witches from sub-Saharan Africa. This final question leads me to suggest another group recommendation, which would urge domestic child advocates to share best practices with local groups working in other countries.

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¹ *Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 571-1407 (2006).

² *Report of the Working Group on the Lessons of International Law, Norms, and Practice*, 6 NEV. L.J. 656 (2006). The group also recommends that U.S. advocates learn from comparative law approaches to family law, and that U.S. advocates integrate transnational legal issues into their practices.

First, I turn to the basic question concerning the controversies involved in using international law domestically.³ Where there are relevant domestic statutes, then claims concerning international human rights may be brought in United States courts⁴ (and there is some limited precedent for enforcing customary international law in domestic courts even without direct legislative authority⁵). Trafficking, international adoption, and child abduction are clearly areas where international law is relevant, if not determinative, to children's rights issues, based on statutes implementing international treaties and understandings.⁶ Claims that can be brought under the Alien Tort Claims Act,⁷ ("ATCA") which offers "a civil remedy to aliens who are victimized by tortious violations of international law," constitutes another set of promising avenues,⁸ and there is actually precedent for using the ATCA in cases involving children.⁹

On the other hand, there are many areas where appeals to the use of international norms may be problematic. The issues concerning reproductive rights/access to family planning/contraceptives for children are among the many examples where the U.S. is rigidly anti-international norms.¹⁰ For example, President Bush has reinstated the "global gag" rule, which prohibits U.S. funding to any organization that provides counseling or any other services relating to abortion,¹¹ notwithstanding that many other governments provide such fund-

³ This is a rather large topic. For a sampling of recent articles, see Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431 (2004); Harold Hongju Koh, *International Law as Part of our Law*, 98 AM. J. INT'L L. 43, 48 (2004); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2022 (2004); Laura Little, *Transnational Guidance in Terrorism Cases*, 38 GEO. WASH. INT'L L. REV. 1 (2006).

⁴ For recent discussion of this issue, see Sandra Coliver et al., *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169 (2005); Ralph G. Steinhardt, *International Humanitarian Law in the Courts of the United States: Yamashita, Filartiga, and 911*, 36 GEO. WASH. INT'L L. REV. 1 (2004).

⁵ *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983).

⁶ For example, the United States ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography in 2002. OFFICE OF THE SPOKESMAN, U.S. DEPT. OF STATE, FACTSHEET, available at <http://www.state.gov/r/pa/prs/ps/2002/16216.htm> (last visited May 17, 2006). For discussion of implementation, see Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Prevent Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 416-17 (2004).

⁷ 28 U.S.C. §1350 (2006).

⁸ See Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2269 (2004).

⁹ In *Adva v. Clift*, the court concluded that the mother had tortiously withheld custody from the father, but found that, nonetheless, the "best interests of the child" required that the daughter remain in the mother's custody. 195 F. Supp. 857, 866 (1961).

¹⁰ On reproductive rights, children, and the utility of international law, see Naomi Cahn & Anne T. Goldstein, *The Constitution, Reproductive Rights, and Feminism: Roe and Its Global Impact*, 6 U. PA. J. CONST. L. 695 (2004).

¹¹ E.g., *Global Gag Rule*, <http://www.plannedparenthood.org/pp2/portal/files/portal/international/globalsource/resource-global-gag-rule.xml>.

ing. While the Supreme Court cited transnational law sources concerning the death penalty for juveniles in *Roper v. Simmons*, these sources in the Court's opinion were explicitly advisory, not binding,¹² nor a representation that the Supreme Court adopted its position because of international norms. Moreover, broad appeals to international law and norms are quite difficult to enforce because of the rigorous test applied to lawsuits based on such norms.¹³ While children's rights advocate must know these norms, and while they are useful information as we advocate for our clients, enforcing compliance with them as international norms may be less promising than using domestic bases for such claims.¹⁴

Second, it is unclear whether children's advocates in the United States should spend additional time at this point in our political history in advocating for the Convention on the Rights of the Child ("CRC"). The CRC is certainly important aspirationally for children both domestically and internationally, it is meaningful now in the world community, and, in the long term, the United States should ratify the Convention. But, as a strategic matter, this is not the optimal political time to press for ratification given the composition of the national government. There has already been an enormous effort to ratify the CRC in the United States.¹⁵ Although ratification is certainly important as a symbol internationally, particularly because every other country in the world except for Somalia has ratified the Convention,¹⁶ it is unclear whether additional efforts toward ratification will change the currently bleak outlook until there is a change in national leadership.

¹² In *Roper v. Simmons*, 543 U.S. 551, 575 (2005), the Court stated:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

For criticism, see Daniel J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 128 (2005) ("the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand").

¹³ See, e.g., Steinhardt *supra* note 8.

¹⁴ See, e.g., Nicholson v. Scopetta, 344 F.3d 154, 168 (2d Cir. 2003); Carolyn Kubitschek, *Reforming the Child Welfare System*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 383 (2005).

¹⁵ See, e.g., Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and its Consistency with United States Law*, 5 GEO. J. FIGHTING POVERTY 185 (1998); Susan Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, HUMAN RIGHTS, Spring 1999, at 27, contents available at <http://www.abanet.org/irt/hr/hrsp99toc.html>. For a list of organizations within the United States supporting ratification, see http://www.abanet.org/intlaw/committees/public/human_rights/entitiesupporterc.pdf (last visited May 17, 2006). These organizations include the American Bar Association, The American Association of Retired Persons, the United Methodist Church, and the YMCA.

¹⁶ Path to the Convention on the Rights of the Child, http://www.unicef.org/crc/index_30197.html (last visited May 17, 2006).

Moreover, the practical implications that would result from ratification may be less significant than is hoped.¹⁷ For example, according to Professor Jean Koh Peters' useful survey of international practices, approximately one-half of the signatories apparently do not mandate that children's voices be heard in child protective proceedings in compliance with Article 12 of the CRC; although the U.S. has not ratified the Convention, almost eighty percent of states fully comply with Article 12's mandate.¹⁸

Additionally, ratification may not have much practical impact domestically because of the difficulties of enforcement. Like CEDAW, the CRC must be enforced either through a reporting mechanism (countries must make reports to the Committee on the Rights of the Child), and international pressure for compliance, or as claims in domestic courts, not through other enforcement mechanisms such as investigations or punishment.¹⁹ Other human rights treaties, such as the International Covenant on Civil and Political Rights, allow a claimant to proceed before an international tribunal. Moreover, it is unclear how ratification will help in specific cases, given contradictions with the Convention itself.²⁰ As one prominent children's rights advocate has explained, additional efforts to ratify the Convention at this point may not be as practically meaningful for children as working on other domestic problems facing children;²¹ these other problems (many of which are detailed in other contributions

¹⁷ On the other hand, opponents of ratification argue that the CRC would revolutionize the family. See, e.g., *The Many Assaults on U.S. Sovereignty*, THE PHYLLIS SCHLAFLY REP., June 2002, available at <http://www.eagleforum.org/psr/2002/june02/psrjune02.shtml> (arguing, among other points, that the UN would have a role in raising US children). For examples of how the CRC has positively changed some government's practices, see United States Fund for UNICEF, *Children's Rights*, http://www.unicefusa.org/site/c.duLRI800H/b.269280/k.2B41/Child_Rights_Advocate_Take_Action_US_Fund_for_UNICEF.htm (last visited May 17, 2006).

¹⁸ Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966 (2006).

¹⁹ For a discussion of the CRC's enforcement mechanisms, see Cynthia Price Cohen, *The Jurisprudence of the Committee on the Rights of the Child*, 5 GEO. J. FIGHTING POVERTY 201, 202-205 (1998); see also BARBARA STARK, *INTERNATIONAL FAMILY LAW* 260 (2005) (outlining the process). Based on the Committee's recommendation, the UN General Assembly has called for a study on violence against children, which is expected to be finalized in 2006. The United Nations Secretary General's Study on Violence Against Children, *The Study Report*, <http://www.violencestudy.org/a405>.

²⁰ The CRC obligates state parties to direct education toward

the development of the child's personality, talents and mental and physical abilities to their fullest potential, which, without religious and cultural changes, encourages girls to develop abilities for inaccessible jobs. Because the CRC also provides, in the same article, that children should develop respect for the national values of the country in which they live and their own cultural identity, the CRC ultimately affords girls the opportunity to live as highly educated second-class citizens.

L. Elizabeth Chamblee, *Rhetoric or Right? When Culture and Religion Bar Girls' Right to Education*, 44 VA. J. INT'L L. 1073, 1122-23 (2004); but see, e.g., Susan Kilbourne, *U.S. Failure to Ratify the Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437 (1996).

²¹ Conversation with George Washington University Law School Professor Catherine Ross, April 17, 2006. Among other activities, Professor Ross is the former Chair of the ABA Steering Committee on the Unmet Needs of Children.

to this Symposium) include improving foster care, providing educational opportunities, and increasing the inclusion of children's voices in issues affecting them, ranging from divorce to abuse and neglect to delinquency proceedings. While there are many problems relating to child welfare in the United States, ratifying the CRC will not necessarily improve conditions here, particularly because we are already performing better in many (clearly not all) aspects involving children than are many countries that have already ratified the CRC.²² It is, of course, important that ratification remain on the activist agenda of children's rights advocates, but it is important to remember that the act of ratification does not guarantee concrete results that children need.

Finally, many domestically based organizations and individuals work with indigenous non-governmental organizations ("NGOs") overseas to help them in representing children's interests. The needs of children in many developing countries are quite different from those of domestic children; poverty and family disruption in, for example, sub-Saharan Africa have resulted in many children being recruited, both voluntarily and involuntarily, as child soldiers or, in some cases, being cast out of their homes and accused of sorcery.²³ These are not problems that most American families confront. Yet, like these countries, we have children who live in poverty, who live in detention, and who are "throwaway" children.²⁴ Unlike these other countries, however, we have systems that are designed to protect these children, and our struggle is how to improve existing methods of representation and force revisions to the system so that it can better protect and respect children.²⁵

In many developing countries, there is no "system" to improve, to hold accountable; representing children means providing the concrete basics that they so desperately need, such as shelter and food, as well as advocating for legal and structural changes. For example, many of the problems faced by the street children/children accused of sorcery result from their parents' inability to provide for multiple children, so the children least in parental favor often suffer by being thrown out of their families. Because public welfare does not exist, because school fees are beyond the reach of many families, because foster care is not available, because there is no effective criminal sanctions that can be imposed, it is NGOs, like Save the Children and its local partners, who provide shelter for the children, who work with the parents to accept the child home,

²² For examples of problems in countries that have ratified, see Child Rights Information Network, *A Compilation of Extracts from NGO Reports to the Committee on the Rights of the Child Relating to Violence Against Children 103* (2006), http://www.crin.org/docs/NGO_Group_NGOs_and_VAC_Compilation_of_Extracts.doc [hereinafter *Compilation of Extracts*].

²³ See Naomi Cahn, *State Representation of Children's Interests*, ___ FAM. L.Q. (forthcoming 2006); "Poor Children: Child Soldiers, Child Sorcerers, and Abandoned Children," ___ OHIO J. CRIM. L. (forthcoming 2006).

²⁴ See Gregory Loken, "Throwaway" Children and Throwaway Parenthood, 68 TEMP. L. REV. 1715, 1756-57 (1995) (recommending changes in the law and funding to allow abandoned children to receive the support they need).

²⁵ See, e.g., Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

who work with any existing legal processes, and who advocate for legal change—with funding and other support from international actors.

The goal for us in the United States should be to support those organizations that are focused on addressing the needs of children. These organizations represent children's interests by developing realistic strategies with positive short-term results that can lead to improved conditions for children. The key issue is that indigenous actors are in desperate need of outside assistance to overcome the manifold obstacles in their way, obstacles that range from lack of funding to a corrupt justice system to insufficient attention to the problem.²⁶ Marshalling sophisticated strategies to link outside and inside actors is a critically needed intervention.

Thus, NGOs which work in these countries must connect with local organizations and work on reframing rights; for example, access to child protective services is both an internationally recognized legal right, but it is also a health care issue that is crucial to children's lives, and an educational issue that concerns knowledge within the community and the family about children's needs. Even if we are unsuccessful in enforcing civil rights, we can still focus on developing concrete strategies to deal with the health risks and the actual needs of children. NGOs are more likely to receive outside funding to operate orphanages and offer education to communities concerning children, than to receive funding to advocate children's rights. Both are important; children need recognition of their rights, and they need safe places to live.

But representing children internationally requires acknowledging their different needs in non-functioning systems. We in the United States have much to share with NGOs working in other countries, and, while we should not imperially trumpet our system as the best, we should also not be ashamed to share our efforts and accomplishments, to engage internationally with others who do not have access to the same basic guarantees of justice that we assume. A final recommendation for the Working Group, which builds on the Preamble to our recommendations²⁷, would encourage us to share our expertise and enable others to learn from us, just as we must learn from them. For example, we have developed both civil and criminal laws on abuse and neglect that could serve as models for other countries seeking to establish a child protection system. In the Congo, street children are rounded up for begging, and then confined with adults.²⁸ For example, the Inter-American Human Rights Commission concluded that in the country of Colombia, there is “no organized family welfare system.”²⁹ And, in the somewhat analogous context of domestic violence laws for women, I was assured, by a prominent advocate of a lead-

²⁶ For documentation of some of these problems, see HUMAN RIGHTS WATCH, *WHAT FUTURE? STREET CHILDREN IN THE DEMOCRATIC REPUBLIC OF CONGO* (2006), <http://hrw.org/reports/2006/drc0406/index.htm>.

²⁷ The Preamble notes “child advocates must share any successes and failures, so that all communities can learn about methods and programs which might benefit children around the globe.” *Report of the Working Group on the Lessons of International Law, Norms, and Practice*, *supra* note 2, at 658.

²⁸ See HUMAN RIGHTS WATCH, *supra* note 26, at § V.

²⁹ See *Compilation of Extracts*, *supra* note 22, at 103.

ing human rights organization in the Congo, that such issues were dealt with in the criminal code, and there was no need for any further efforts.

While the CRC and international norms remain important, I simply want to question where to put our energy concerning the application of international law and norms to domestic child representation issues. That energy can certainly help children in other countries, where international law plays a meaningful role and it can help children in other countries when we contribute our insights and skills, such as by helping to develop a family protection system in countries that do not yet have one. For example, while I was in the Congo, multilateral organizations, and NGOs were helping to develop new laws on child protection. They were also hoping to train governmental officials to respond appropriate to street children.

The responses to abandoned and homeless children in this country³⁰ and to children in need of protection within their families certainly present significant problems.³¹ The poverty and lack of opportunity for many domestic adolescents is unacceptable. But there are, nonetheless, organized attempts by the legislative, executive, and judicial branches of government in this country, albeit too often with ngo pressure, to take ameliorative actions after officially recognizing and investigating the issues involving protection of children from their families. This "rule of law," and expectations of governmental responsibility, are highly questionable in many other countries, which lack the basic institutions and laws that can help to protect children.

And we can learn much from the roles of children's representatives in other countries, where advocates have developed creative and practical approaches to a series of problems, such as street children. In its charge to our group, the conference organizers encouraged us to examine all aspects, both beneficial and detrimental, of using international norms.

The lesson is that advocating for children's representational rights must be grounded in the realities of their lives, not in enactment of a convention that will be difficult to translate into the daily needs of children in the delinquency or child protective systems. While constitutional/legal debates are useful and can result in changing the law, while pressuring for ratification of the CRC will send a worldwide message concerning U.S. respect for children, the primary focus should be on the consequences that result when children do not have access to the rights that they need here and the best means of advocating for them. For this reason, the focus should shift from theory and law to empiricism and documentation of the needs of children and the advocacy within existing frameworks of legal protection. The United States courts have an ambivalent

³⁰ For a critique of the dominance of United States visions of human rights, see Deborah Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 COLUM. HUM. RTS. L. REV. 259, 295-314 (2004).

³¹ See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS* (2002); Cahn, *supra* note 23; Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 32 (2005); Loken, *supra* note 24. Professor Loken notes that many adolescents who have been forced to leave their homes cannot access the long-term foster care system, but are instead placed in run-away shelters; that parents are not penalized for exiling their children; and that community members who help a thrown away child may face tort or criminal sanctions for doing so. *Id.* at 1751-56.

relationship to international law, while the courts in many other countries are significantly more likely to respond to appeals to international law as a way of guaranteeing children rights. Ultimately, the utility of international law norms for domestic practice in the short term is to help us support advocates in other countries with different attitudes towards international norms; and we can learn from best practices in other countries that have changed to comply with international norms.