Judicial Tyranny Goes Global

International Mindset Usurps Parental Rights

by Michael P. Farris

The United Nations Convention on the Rights of the Child is a threat that longtime homeschoolers know well. If ratified by the United States Senate, it would ban spanking in our country. Homeschooling would no longer be governed by state law, but by a 10-member committee of child welfare "experts" in Geneva. Even our right to teach our children that Jesus is the only way to God would be in jeopardy.

Aware of this threat, homeschoolers and other parental rights advocates have been ready for battle for some time. In fact, the reason that this treaty was never sent from the State Department to the Senate for ratification, after being signed by then President Bill Clinton on February 16, 1995, is that it faced certain defeat. As a friend of traditional families, President George W. Bush has simply not moved it at all.

However, a new challenge to American families and our constitutional republic has been launched by the federal judiciary. Under a legal doctrine sanctioned by the United States Supreme Court, the federal courts have begun to treat unratified treaties as binding on the United States. Already one federal district court has employed this doctrine to declare that the UN Convention on the Rights of the Child (UNCRC or CRC) is binding on the United States even though it has never been ratified by the Senate.

The legal doctrine is called "customary international law." The advocates of this doctrine claim that it is derived from the "law of nations"—a legal concept that is specifically mentioned in the U.S. Constitution.

Historical origins of customary international law

Customary international law (CIL), purportedly, is part of what the Founders called the *law of nations.* Article I, section 8 of the Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

Noah Webster's seminal *American Dictionary of the English Language* (1828) gives this definition of the *law of nations*:

> The rules that regulate the mutual intercourse of nations or states. These rules depend on natural law, or the principles of justice which spring from the social state; or they are founded on customs, compacts, treaties, leagues and agreements between independent communities.

In the 1957 Supreme Court decision *Reid v. Covert*, 354 U.S. 1, 58, fn. 8, Justice Felix Frankfurter described the specific understanding that the early Republic had of the scope of the law of nations:

> This feeling about the "non-Christian" nations of the world was widely shared. In his "Jubilee of the Constitution," delivered on the 50th anniversary of the inauguration of George Washington, John Quincy Adams said:
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> "The Declaration of Independence recognised the European law of nations, as practised among Christian nations, to be that by which they considered themselves bound, and of which they claimed the rights. This system is founded upon the principle, that the state of nature between men and between nations, is a state of peace. But there was a Mahometan law of nations, which considered the state of nature as a state of war—an Asiatic law of nations, which excluded all foreigners from admission within the territories of the state. . . . With all these different communities, the relations of the United States were from the time when they had become an independent nation, variously modified according to the operation of those various laws. It was the purpose of the Constitution of the United States to establish justice over them all." Adams, Jubilee of the Constitution, 73.

There is little doubt that the Founders' view of the law of nations was different in two principal ways from the postmodern view that emerged after *Reid v. Covert*: (1) the law of nations was primarily based on a Christian perspective of natural law rather than a positivist understanding, and (2) it was limited to the conduct of affairs between nations, having no application to how a government could treat its own citizens within its own territory.

The postmodern view of CIL

A recent article in the *American Journal of International Law* tells this story:

> In the keynote address to the 2003 annual meeting of the American Society of International Law, Justice Stephen Breyer declared that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights." Justice Breyer concluded that nothing could be "more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us." In a room filled with international lawyers and academics, he received a home court standing ovation.[1]

The Supreme Court is using international sources to guide its decisions. In *Lawrence v. Texas*, the Court used international law to interpret the U.S. Constitution, "discovering" a new constitutional right to engage in homosexual conduct.[2] *Lawrence* was not the first time the Court had used international law to interpret our Constitution—it is just the most well-known example.

In March 2005, the Supreme Court took an even more dangerous step, using not only international law in general but the UN Convention on the Rights of the Child to guide their decision in *Roper v. Simmons.* In *Roper*, the Court ruled that it was unconstitutional to execute a

murderer who, about seven months before his 18th birthday, killed a total stranger in a brazen premeditated plan. He even told his companions that they would all get away with the crime because they were juveniles.

As a part of its ruling in this case on the changing views of cruel and unusual punishment, the Court used the UN Convention on the Rights of the Child as evidence of a shifting view on the subject. While stopping short of holding that this unratified treaty was binding on our country, the Court boldly proclaimed that its own views, guided by such international sources—not the views of the Founders—were the ultimate standard for determining what punishments are constitutionally impermissible.

Lower federal courts have gotten on the internationalist bandwagon, too. The most dangerous resulting trend is the application of nonratified treaties that have been adopted by a large number of other nations as binding on the United States.

Why is this so dangerous? Because there is a fundamental difference between the way the United States has historically applied international law and the way other nations do.

For example, in a recent British case involving the right of Christian schools to administer corporal punishment, the court decisions fully recognized the right of parents to use appropriate physical discipline at home. Even though Britain has adopted the UNCRC (which forbids corporal punishment), the case's intermediate appellate decision contained no reference to that treaty. The case was decided solely on British law.

The U.S. is perhaps the only nation in the world where a ratified treaty automatically becomes part of the highest law of the land. In virtually every other nation, a ratified treaty creates nothing more than a political responsibility that is unenforceable by the courts if the political branches of government take no action to implement the treaty's provisions.

Accordingly, other nations preserve their right of sovereignty and the people's right to self-government. The U.S. is unique in forfeiting the right of self-government to ratified treaties.

So why would we also allow *unratified* treaties to be binding on us?

The specter of CIL

The Founding Fathers never contemplated treaties that would purport to control the domestic policy of the states. As dangerous as it is to allow ratified treaties to govern our domestic agenda, it is unimaginable that unratified treaties would one day be deemed by the courts to be binding on our nation.

But this is the latest movement in the federal judiciary to advance the left's political agenda, which cannot be achieved through the legislative process.

In 2002, a federal district judge in the Eastern District of New York, Jack B. Weinstein, aggressively applied international law in cases dealing with parental autonomy. Judge Weinstein's first offering was the decision in *Beharry v. Reno*.[3]

Beharry was a deportation case in which an alien parent claimed international law protection arising from the fact that he had children who were American citizens. The conclusions of *Beharry* were not particularly alarming. Judge Weinstein simply held that the Immigration and Naturalization Service must grant the parent a hearing so he could contest his deportation.[4]

As is often the case, the significance of *Beharry* arose not so much from the judge's holding as from the reasoning used and the rulings of law issued as the judge reached his conclusion.

In the *Beharry* decision, Judge Weinstein relied heavily on a law review article penned by a professor with an openly internationalist agenda. Ultimately, Weinstein concluded that the UN Convention on the Rights of the Child was binding on the U.S.

In *Beharry*, Weinstein noted that Congress may override provisions of customary international law. However, he also said that to do so, Congress must positively enact specific legislation that postdates the "development of a customary international law norm."[5] Since Weinstein considered the CRC to be a "customary international law norm," he deemed it to be binding on the United States. To Weinstein, Congress' failure to ratify the treaty was insufficient to reject it as a binding part of CIL.

This decision was reversed by the Second Circuit on purely procedural grounds. The court noted that the decision's reversal on other grounds should not be construed as endorsing the international law conclusions of Judge Weinstein.

Any hope that the Second Circuit was actually repudiating these conclusions was undermined by a later decision from that same court. In another deportation case, the Second Circuit instructed a different federal district court to hold a "*Beharry*" hearing. The court indicated that the propriety of applying customary international law in this hearing was an open question.

Beharry was simply the warmup act. Judge Weinstein had another opportunity to advance his views of CIL in *Nicholson v. Williams*.[6] This case was a constitutional challenge to the New York social services practice of removing children from homes solely because their mothers were victims of domestic abuse. The lawsuit incorporated much good language about the fundamental right of parents to direct the upbringing of their children. However, Weinstein gratuitously relied on international law as an additional basis for reaching this conclusion. The judge cited a particular provision of the CRC and said, "These provisions of CRC have the force of customary international law."

Nicholson represents a significant shift from *Beharry*—a predictable shift, but significant nonetheless. In *Beharry*, Weinstein argued that immigration was a part of international law and thus the application of CIL was justified. In *Nicholson*, the context was entirely domestic, with no reference to international law at all. Yet Weinstein simply cited his prior conclusions from *Beharry* without noting the shift in context. Thus, the CRC has now been applied as customary international law in an entirely domestic case.

Nicholson is currently in the midst of a complicated appeal. It has been sent by the federal appeals court to the New York Court of Appeals—that state's highest court—for a determination of certain state law issues. It is difficult to determine at this point whether the internationalist component of Judge Weinstein's decision will be fully reviewed or not.

Many other federal courts have discussed the potential application of the CRC as binding customary international law. While few courts have categorically rejected this idea, most have simply found a way around the argument without fully endorsing or rejecting the concept.

One state judge has applied the CRC to a case in a manner that demonstrates not only judicial arrogance at its height, but utter ignorance of plain ordinary fact.

In the case *In re Julie Anne*, an Ohio trial court, on its own motion, raised the issue of whether parents and others should be restrained from smoking tobacco in the presence of a minor child.[7] As remarkable as this *sua sponte* motion may seem, even more astoundingly, the court held that the UN Convention on the Rights of the Child *had* been ratified and proceeded to use it as an additional

basis for ordering the parents not to smoke in front of the child. This case has no subsequent appellate history.

As much as I hate smoking, this decision suggests that the trial judge, based on the false premise that the UNCRC had been ratified, has effectively set fire to the U.S. Constitution and its protection of parental rights.

What will happen if the UNCRC becomes binding on the U.S.?

The UN Convention on the Rights of the Child is enforced by a 10-member board. The board determines whether nations that have adopted the treaty are in compliance with it. If the United States ratifies the CRC, the board's interpretation of the treaty will have binding authority on our courts. Accordingly, American courts would not be free to interpret the treaty in a manner different from this UN tribunal.

There is no need for internationalists to take parents to international court to enforce their "it takes a village to raise a child" mentality on all families. American courts will be bound to follow the decisions of the 10 UN experts, using the full weight of the American legal system to enforce such interpretations.

Here are some examples of what the UN board of "experts" considers to be violations of the treaty:

- The United Kingdom violates article 12, since "the right of the child to express his/her opinion" is not solicited in parental decisions to withdraw a child from sex education in public school or to choose an alternative to the public schools. (This means that the CRC prevents parental choices to select private schools and homeschools unless the government solicits and weighs the child's opinion in the matter.)[8]

- The UK violates articles 3, 19, and 37 by allowing parents to exercise "reasonable [physical] chastisement."[9]

- Any nation that permits spanking or fails to aggressively prosecute it is held to have violated the treaty—including Belize,[10] Canada,[11] Belgium,[12] Yemen,[13] Spain,[14] and Poland.[15]

- The UK violates articles 3, 37, 39, and 40 of the CRC by placing juvenile criminals into institutions which appear, to the UN, to have the goal of incarceration and punishment.[16]

- Belize was criticized because its "law does not allow children, particularly adolescents, to pursue medical or legal counseling without parental consent."[17]

- Canada, Belize, and a number of other nations were criticized for their failure to have a proper system for data collection on children.[18] Belize was specifically faulted for failing to ensure that all children would be registered with the national government.[19]

- Norway was told to "reconsider its policy on religious education for children in light of the general principle of non-discrimination and the right to privacy."[20]

- Pakistan was directed to expand its healthcare system with greater emphasis on "family education, including family planning. . . ."[21]

- Criticized for its balance of power between local and national governments on issues concerning children, Austria was directed to increase the use of national power to ensure compliance with the treaty.[22]

- Austria,[23] the UK,[24] Belize,[25] Sweden,[26] Indonesia,[27] and others were criticized for failing to spend enough tax dollars on social welfare for children. (Yes, Sweden.)

- Almost all nations were ordered to give their government workers better training in the content and principles of the CRC.

How can we fight this latest form of judicial tyranny?

Congress has the power to define customary international law. It also has the power to modify the jurisdiction of the federal courts. Congress needs to address this issue by enacting legislation that adopts the following kind of language:

> Customary international law that is enforceable by the courts of the United States is defined as legislation of Congress that has been enacted to enforce treaties that have been properly ratified by the Senate.
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> No other form of customary international law shall be recognized or applied by any court of the United States.
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> No court of the United States shall have the jurisdiction to entertain any question of customary international law based on any premise other than ratified treaties of the United States that have been properly implemented by appropriate legislation.

Home School Legal Defense Association will be working with members of the House and Senate to introduce such legislation in the weeks ahead. When that legislation is introduced, we will need the assistance of every member family and others who believe that American self-government should be preserved.

A more long-term project would address the general threat to American domestic sovereignty that is posed by all forms of international law, including ratified treaties. Simply put, it should require more than the signature of the President and a two-thirds vote of the Senate to change United States domestic law via the treaty process.

In 1953, the U.S. Senate fell one vote short of ratifying a constitutional amendment that would have prohibited UN human rights treaties from attaining self-executing status. The Bricker Amendment was a valiant attempt to stop these encroachments. This provision would have meant that a treaty was not binding until the body with appropriate legislative authority had actually passed implementing legislation.

While such an amendment would be welcome today, we would do well to add new protections in light of emerging threats—including a provision to stop the use of judicially imposed customary international law.

In *The Rights of Man*, Thomas Paine wrote:

> All power exercised over a nation, must have some beginning. It must either be delegated or assumed. There are no other sources. All delegated power is trust, and all assumed power is usurpation. Time does not alter the nature and quality of either.

Judicial imposition of international law upon the American public is tyrannical usurpation that strikes at the heart of self-government in the United States.

Endnotes

[1] Roger P. Alford, "Misusing International Sources to Interpret the Constitution," 98 *AMJIL* 57, 57 (2004).
[2] *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).
[3] *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).
[4] *Id.* at 604.
[5] *Id.* at 599.
[6] *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).
[7] *In re Julie Anne*, 121 Ohio Misc. 2d 20, 780 N.E.2d 635 (Com. Pleas Ohio 2002).
[8] *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, Committee on the Rights of the Child, 8th sess., U.N. Doc. CRC/C/15/Add.34 (1995).
[9] *Id.*
[10] *Concluding Observations of the Committee on the Rights of the Child: Belize*, Committee on the Rights of the Child, 20th sess., at 5, U.N. Doc. CRC/C/15/Add.99 (1999).
[11] *Concluding Observations of the Committee on the Rights of the Child: Canada*, Committee on the Rights of the Child, 9th sess., at 5, U.N. Doc. CRC/C/15/Add.37 (1995).
[12] *Concluding Observations of the Committee on the Rights of the Child: Belgium*, Committee on the Rights of the Child, 9th sess., at 3, U.N. Doc. CRC/C/15/Add.38 (1995).
[13] *Concluding Observations of the Committee on the Rights of the Child: Yemen*, Committee on the Rights of the Child, 20th sess., at 5, U.N. Doc. CRC/C/15/Add.102 (1999).
[14] *Concluding Observations of the Committee on the Rights of the Child: Spain*, Committee on the Rights of the Child, 7th sess., at 3, U.N. Doc. CRC/C/15/Add.28 (1994).
[15] *Concluding Observations of the Committee on the Rights of the Child: Poland*, Committee on the Rights of the Child, 8th sess., at 5, U.N. Doc. CRC/C/15/Add.31 (1995).
[16] *Concluding Observations: UK*, 1995, *supra* note 1.
[17] *Concluding Observations: Belize*, 1999, *supra* note 3, at 4.
[18] *Concluding Observations: Canada*, 1995, *supra* note 4, at 4; *Concluding Observations: Belize*, 1999, *supra* note 3, at 3.
[19] *Id.* at 5.
[20] *Concluding Observations of the Committee on the Rights of the Child: Norway*, Committee on the Rights of the Child, 6th sess., at 4, U.N. Doc. CRC/C/15/Add.23 (1994).
[21] *Concluding Observations of the Committee on the Rights of the Child: Pakistan*, Committee on the Rights of the Child, 6th sess., at 5, U.N. Doc. CRC/C/15/Add.18 (1994).
[22] *Concluding Observations of the Committee on the Rights of the Child: Austria*, Committee on the Rights of the Child, 20th sess., at 2, U.N. Doc. CRC/C/15/Add.98 (1999).
[23] *Id.*
[24] *Concluding Observations: UK*, 1995, *supra* note 1.
[25] *Concluding Observations: Belize*, 1999, *supra* note 3, at 4.
[26] *Concluding Observations of the Committee on the Rights of the Child: Sweden*, Committee on the Rights of the Child, 20th sess., at 4, U.N. Doc. CRC/C/15/Add.101 (1999).
[27] *Concluding Observations of the Committee on the Rights of the Child: Indonesia*, Committee on the Rights of the Child, 4th sess., at 3, U.N. Doc. CRC/C/15/Add.7 (1993).

About the author

Chairman of the Board and General Counsel Michael Farris cofounded HSLDA with Mike Smith in 1983 and served as president through 2000, when he became the president of Patrick Henry College. Farris is a constitutional lawyer, the published author of six non-fiction works and three novels, an ordained minister, and a leading pro-family activist on Capitol Hill. He and his wife Vickie have ten children and seven grandchildren, and have been homeschooling since 1982.

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HOME SCHOOL LEGAL DEFENSE ASSOCIATION
Advocates for Family & Freedom

ONE PATRICK HENRY CIRCLE, PURCELLVILLE, VA 20132
540-338-5600 ♦ INFO@HSLDA.ORG ♦ WWW.HSLDA.ORG