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Nannies in Blue Berets: Understanding the U.N. Convention on the Rights of the Child

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Ten things you need to know about the structure of the CRC:

1. It is a treaty which creates binding rules of law. It is no mere statement of altruism.¹
2. Its effect would be binding on American families, courts, and policy-makers.²
3. Children of other nations would not be impacted or helped in any direct way by our ratification.³
4. The CRC would automatically override almost all American laws on children and families because of the U.S. Constitution's Supremacy Clause in Article VI.⁴
5. The CRC has some elements that are self-executing, others would require implementing legislation. Federal courts would have the power to determine which provisions were self-executing.⁵
6. The courts would have the power to directly enforce the provisions that are self-executing.⁶

¹ Page 3, paragraph 1 of this document and pages 17 – 19.

² Pages 4 – 5 of this document, and pages 17 – 19.

³ Page 5, paragraph 5 of this document, and footnote 22.

⁴ Pages 4 – 5 and pages 18 – 21 of this document.

⁵ Page 21, paragraphs 3 – 4 of this document.

⁶ Page 8, paragraphs 2 – 3 and page 10, paragraph 3 of this document.

7. Congress would have the power to directly legislate on all subjects necessary to comply with the treaty. This would be the most massive shift of power from the states to the federal government in American history.⁷
8. A committee of 18 experts from other nations sitting in Geneva has the authority to issue official interpretations of the treaty which are entitled to binding weight in American courts and legislatures. This effectively transfers ultimate policy authority for all policies in this area to this foreign committee.⁸
9. Under international law, the treaty overrides even our Constitution.⁹
10. Reservations, declarations, or understandings intended to modify our duty to comply with this treaty will be void if they are determined to be inconsistent with the object and purpose of the treaty.¹⁰

Ten things you need to know about the substance of the CRC:

1. Parents would no longer be able to administer reasonable spankings to their children.¹¹
2. A murderer aged 17 years and 11 months and 29 days at the time of his crime could no longer be sentenced to life in prison.¹²
3. Children would have the ability to choose their own religion while parents would only have the authority to give their children advice about religion.¹³
4. The best interest of the child principle would give the government the ability to override every decision made by every parent if a government worker disagreed with the parent's decision.¹⁴
5. A child's "right to be heard" would allow them to seek governmental review of every parental decision with which the child disagreed.¹⁵
6. This treaty has been interpreted to make it illegal for a nation to spend more on national defense than it does on children's welfare.¹⁶

⁷ Pages 5 – 6 of this document.

⁸ Pages 9 – 10 of this document.

⁹ Page 4, paragraph 3 of this document.

¹⁰ Pages 20 – 21 of this document.

¹¹ Page 6 of this document.

¹² Page 15, paragraph 4 of this document.

¹³ Page 28 of this document.

¹⁴ Pages 11 – 15 of this document.

¹⁵ Pages 26 – 27 of this document.

¹⁶ Page 10, paragraph 1 of this document.

7. Children would acquire a legally enforceable right to leisure.¹⁷
8. Teaching children about Christianity in schools has been held to be out of compliance with the CRC.¹⁸
9. Allowing parents to opt their children out of sex education has been held to be out of compliance with the CRC.¹⁹
10. Children would have the right to reproductive health information and services without parental knowledge or consent.²⁰

Discussion

On November 20, 1989, an historic treaty proclaiming a world-wide regime of human rights for children was adopted and opened for ratification. By September 2nd of the following year, the Convention on the Rights of the Child (CRC) had been ratified by twenty nations, the number required for it to enter into force. This means it became effective and binding on those nations which had ratified.

Subsequently, the CRC has been ratified by a total of 193 nations.²¹ This makes it the most widely-adopted human rights treaty of any kind. Only two nations have not ratified or acceded to the CRC: the United States and Somalia. Both the U.S. and Somalia have signed the CRC, but neither has received the necessary approval required by the internal law of the nation to become an official party to the treaty.

¹⁷ Page 15, paragraph 4 of this document.

¹⁸ The American Bar Association, which supports the CRC, said that a Christian school's refusal to teach "alternate worldviews" would "fly in the face of article 29" of the treaty. *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law*, Cynthia Price Cohen and Howard Davidson, ed., (1990) p. 182. Ms. Cohen was a member of the Ad Hoc NGO Group on the Drafting of the Convention on the Rights of the Child. Mr. Davidson is the Director of the American Bar Association's Center on Children and the Law. The book was published by the ABA in 1990 and is available from that organization. It is cited throughout as (ABA).

¹⁹ Pages 13 – 14 of this document.

²⁰ *Supra*, and pages 27 – 28.

²¹ There may be some dispute as to the exact number of states which are parties due to some uncertainty of the treaty status of the various states which have emerged from the breakup of Yugoslavia.

On February 16, 1995, Madeline Albright, then the U.S. Ambassador to the United Nations, signed the CRC on behalf of the United States. Although the signing of the treaty was proclaimed a great victory by the then-First Lady Hillary Clinton, President Clinton never sent the treaty to the Senate for ratification.

I have tried to carefully employ the correct legal terminology of both American constitutional law and international law in the foregoing description of the status of this treaty. There are some key differences between domestic and international law—even in terminology. If the U.S. Senate would vote to approve the treaty by the requisite two-thirds majority, under our constitutional law we call that ratification, but in international law it is called accession. The reason I point this out is not to try to expound on the rather dry differences between ratification and accession, but to point out that the CRC is not a mere statement of altruism or political philosophy but is a legal instrument with binding legal consequences.

Under the most basic rule of international law, every nation that becomes a party to a treaty is obligated to perform the duties that it assumes under the terms of the treaty. Moreover, under the Vienna Convention on the Law of Treaties, every treaty is superior to all internal law—including the nation's constitution—with one important exception, which we will discuss later.

Our own Constitution reflects a variant of this same theme. Article VI of our Constitution contains this section:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This section clearly proclaims that treaties are superior to all state laws and state constitutions to the extent that the provisions of state law are in conflict with the rules contained in the treaty.

It is especially important to note the supremacy of a treaty over all forms of state law when the subject is the rights of the child. Virtually all law governing the parent-child relationship is state law, not federal law. Thus, the Constitution itself contains the language to prove that the CRC trumps the vast majority of American law on the subject of children.

Let us now turn briefly to the question of whether the treaty would be superior to our federal Constitution and federal laws made by Congress. The Supreme Court has ruled that the Constitution itself is superior to a treaty for the purposes of our domestic law. Again, international law contains the opposite rule—treaties trump national constitutions.

There is some debate over the issue of whether a treaty would prevail over an inconsistent act of Congress. It would be fair to conclude that treaties and federal statutes would likely be viewed of equal rank and, therefore, whichever enactment was more recent would prevail. New treaties trump old federal laws under this view involving our domestic law. However, under international law, there is no doubt that a treaty trumps a conflicting federal statute.

If the United States becomes a party to this treaty, then we have both a legal and moral duty to implement and obey its provisions.²² The duty to comply with the treaty rests

²² The Vienna Convention on the Law of Treaties makes it plain that a nation is bound to a treaty by its own consent and by no other factor. If a nation adopts a treaty, it must perform. Every nation that is a party to this treaty (and all are except the United States and Somalia) must perform their obligations under the treaty. The addition of the United States to the list of parties has absolutely no bearing on the duty of any other nation to perform its obligations.

See the following provisions of the Vienna Convention on the Law of Treaties:

Article 2 (g) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force;

with the national government. Thus, Congress, not the states, has the duty under international law to implement all areas of the treaty. This includes education, health care, family discipline, the child's role in family decision-making, and a host of other subjects.

By virtue of the ratification of this treaty, Congress would not only acquire the duty to implement the treaty, Congress would also acquire the jurisdiction necessary to directly legislate on education, health care, and regulation of family life. Today, Congress cannot enact laws which directly govern these subjects. Generally speaking, if Congress wants to regulate something in this area, it enacts some federal funding for the states but conditions the receipt of the funds on the state's duty to enact new laws implementing the federal guidelines.

But this would change if the CRC is ratified. For example, the treaty clearly bans all corporal punishment, including spanking by parents. Congress would have both the duty as well as the power to implement legislation which directly imposes legal sanctions against parents to spank their children. Spanking could be a federal crime if the CRC is ratified.

Today, Congress has no power on this question. State law governs corporal punishment. If the CRC is adopted, Congress would control corporal punishment—but it would not have discretion to permit it. By ratifying the treaty, Congress would have a duty to ban corporal punishment even in the home. The only discretion that Congress would retain would be to specify the punishment to be meted out against parents who violate this rule of international law against spanking.

With this general introduction to the interplay of treaty law with our domestic law, I hope that it is readily apparent that this nation ought to exercise the utmost caution in adopting

Article 26 "Pacta sunt servanda" Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

any treaty. We ought to carefully understand its meaning and application. We ought not to promise to obey a treaty, if it is our intent to not obey or to only partially obey its provisions.

International law imposes a duty upon nations to keep their promises contained in treaties. Moral law requires the same duty. Thus, we ought not to make foolish promises to obey treaties but instead should carefully consider the content and determine not only whether the substantive rules contained in the treaty are wise and appropriate, but also decide whether the policies in question are best made by international law instead of by our elected representatives.

Before we turn to the details of the CRC we need to consider one other piece of background instruction. The CRC is an international human rights treaty. Accordingly, it is necessary to obtain a basic understanding of the scope of human rights treaties.

An Overview of the Scope of Human Rights Law

Like most human rights treaties, the Convention on the Rights of the Child contains a codification of interdependent rights in five areas: political, civil, social, cultural, and economic rights. Note the term “interdependent.” The theory of human rights law is that if a child does not have enough to eat, of what value is education (a social right) or due process in a juvenile delinquency hearing (a civil right)? Thus, economic rights, like the right to food (from the government if necessary), are guaranteed to children every bit as much as civil rights.

The traditional American theory of rights—as represented by documents like our Bill of Rights—are guarantees of liberty that act as limitations on the power of government. The government may not invade my speech, press, or religion. Human rights theory embraces most of these kinds of rights but contains an entirely different sector of rights as well. In short, human rights theory contains the right to complete care from a socialistic state—not just for children, but for all persons.

One law professor who embraces this approach to human rights law gives us a revealing description of the meaning of a related treaty:

In essence, [the articles of the treaty] deal with the rights to food, clothing, and housing, the right of access to physical and mental health care, and the right to education. In terms of the “ratifiability” of the Covenants by the United States, the issues raised by that cluster of rights are twofold. Is the United States prepared to commit itself to the general proposition that there is indeed a human right to each of these social goods or, to put differently, to the satisfaction of each of these basic human needs? And, even if it is, is it prepared to accept the specific level of obligation in that regard provided for by the Covenant?²³

Geraldine Van Bueren, a human rights professor at the University of London and one of the participants in the drafting of the CRC, describes human rights law and children’s rights in terms that are clearly socialistic:²⁴

International human rights law is a peaceful but powerful instrument of change. In essence, human rights is about peacefully redistributing unequal power.

The essence of economic and social, and to an extent, cultural rights, is that they involve redistribution, a task with which, despite the vision of human rights, most constitutional courts and regional and international tribunals are distinctively uncomfortable.²⁵

However, Van Bueren praises those courts willing to boldly implement social and economic provisions of human rights treaties:

²³ Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, *The American Journal of International Law*, Vol. 84. No. 2, 365, 369 (Apr. 1990).

²⁴ Professor Van Bueren’s legal treatise on international rights of the child that is cited throughout this presentation is also cited by the Library of Congress on its website page which explains international law concerning the rights of the child. <http://www.loc.gov/law/help/child-rights/international-law.html>

²⁵ Geraldine Van Bueren, *Combating Child Poverty—Human Rights Approaches*, *Human Rights Quarterly*, Vol. 21, p. 680, 680-681 (1999).

The combating of child poverty is a good place to begin, not only because of the near universal ratification of the United Nations Convention on the Rights of the Child (CRC) of 1989, which symbolizes an international commitment to tackle child poverty, but also because of the way international law has been utilized by some national courts to support judicial activism in protecting children's rights."²⁶

Treaty obligations are traditionally categorized in terms of their priority in relation to implementation. The highest treaty obligations are those which may not be derogated even in times of national emergency. Listen again to Van Bueren:

Yet in terms of treaty law, children's economic, social, and cultural rights are so fundamental that no derogations from the implementation of these rights are allowed, even in times of emergency which threaten the life of the nation.²⁷

Van Bueren comments on the acceptability of the CRC in the United States. She describes the duty of the government to provide for the economic needs of children "to the maximum extent of available resources" "regardless of the economic model followed by the State party."

This is one of the reasons that the United States will find it difficult to become a party to the CRC; political philosophies that undermine social welfare on the basis of privacy are not acceptable. The CRC has shifted the focus from the historical benefits approach...to a child's right to an equitable share in the resources of the country. The CRC provides an ideology for state intervention.²⁸

The Committee on the Rights of the Child provides official interpretations of the treaty in reports that it issues concerning compliance by each state party. If the Committee criticizes a nation's failure to comply with the CRC, this is a finding that the nation has violated international law. Despite the fact that the Committee has no true enforcement power, it is an important source for learning what the treaty requires of a state party.

²⁶ *Id.* at 681.

²⁷ *Id.* at 684.

²⁸ *Id.* at 692.

Van Bueren says:

[T]he United Nations Committee on the Rights of the Child, criticized Egypt and Indonesia on the proportion of their budget spent on defence, as compared to the proportion spent on children's social expenditure.²⁹

The Committee also criticized Austria,³⁰ Australia,³¹ Denmark,³² the U.K.,³³ and others failing to spend enough tax dollars on social welfare for children.

Remember that Van Bueren commends those activist courts in various nations which have decided to directly order compliance with the CRC. We could reasonably anticipate that children's rights activists would bring lawsuits in American federal courts in hopes of finding sympathetic judges who would hold that America spends too much on military defense and order a redistribution of funds toward children's social programs. Today, such a lawsuit would not likely prevail. No one could guarantee that the same result would be achieved in a decade or two.

So far, we have established four basic principles:

1. The CRC is a treaty that creates binding legal obligations.
2. The CRC is supreme over all state law for all purposes.
3. There is a difference between domestic and international law on whether the CRC overrides even the U.S. Constitution.
4. The CRC is a human rights treaty which mandates a socialistic duty of the government to furnish a child's needs in economic, social, and cultural areas.

²⁹ Geraldine Van Bueren, *International Rights of the Child, Section D*, University of London, 36 (2006).

³⁰ Paragraph 46, *Concluding Observations of the Committee on the Rights of the Child: Austria*, Committee on the Rights of the Child, 38th sess., U.N. Doc. CRC/C/15/Add.251 (2005).

³¹ Paragraph 17 and 18, *Concluding Observations of the Committee on the Rights of the Child: Australia*, Committee on the Rights of the Child, 40th sess., U.N. Doc. CRC/C/15/Add.268 (2005).

³² Paragraphs 18 and 19, *Concluding Observations of the Committee on the Rights of the Child: Denmark*, Committee on the Rights of the Child, 40th sess., U.N. Doc. CRC/C/DNK/CO/3 (2005).

³³ Paragraph 10, *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, 31st sess., U.N. Doc. CRC/C/15/Add.188 (2002).

For many of us, this is more than enough to decide that the CRC is a bad idea. But there is a lot more when we dig into the specific principles and rules contained in the CRC.

Two Central Principles of the CRC

The two most important principles of the CRC are the “best interest of the child” principle and “the child’s right of participation” in all relevant matters. Let us look at the two key articles of the CRC.

Article 3(1) provides:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 12(1) provides:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

One way to understand these principles and their implementation is to consider a case that I litigated in Island County, Washington, in the early 1980s. At the time, Washington State had a law on the books which allowed its juvenile courts to assume jurisdiction over a child on the sole grounds of conflict between a parent and child.

A 13 year-old boy in that county complained to the counselors in his public school that his parents took him to church more often than he desired. This, of course, constituted a conflict between parent and child. Therefore, the school counselors turned the matter over to the Department of Social Services who immediately removed custody of the boy and scheduled a hearing approximately three days later. The parents obtained me as their lawyer to contest this removal and to get their son back.

There was no suggestion of abuse or neglect of any kind. The sole issue was whether the child's wishes regarding the amount of church attendance would be honored rather than the direction of the parents.

By the way, the parents attended church Sunday morning, Sunday evening, and Wednesday night. The boy was willing to attend church only on Sunday morning.

Under traditional American law, this case would have never been filed or would have been immediately dismissed. Absent proof of abuse or neglect, courts and social workers simply do not have the authority to intervene in parental decisions of this nature.

Specifically, this means that under traditional standards the government may not substitute its judgment for that of the parent until there is proof of abuse, neglect, or some other form of harm to the child.

But under this new Washington law, the standards were changed. Without any finding of abuse or neglect, the trial judge ruled that the wishes of the child should be taken into account, and it was his view that the best interests of the child would be served if the boy was allowed to limit his attendance at church to once a week. Accordingly, he ordered the parents to follow the boy's wishes or else the state would retain custody of the child.

I wanted to appeal the case for the parents but I could not guarantee them that they would retain custody of their son during the appeal. Accordingly, they decided to not appeal and obey the court's order to regain custody of their son.

This case is an absolutely perfect example of what would happen if the United States were to adopt the UN Convention on the Rights of the Child.

In two very important areas of parental choice—religion and education—it is absolutely clear that the CRC interferes with parental choice and elevates a child’s wishes over that of the parent, at least as the child gets older.

The Committee on the Rights of the Child issued an official report on September 29, 2006, regarding Ireland that contains a number of relevant and troubling items:

“The Committee ...notes that a high number of the complaints received by the Ombudsman for Children relate to a lack of respect for the views of the child. In light of article 12 of the Convention, the Committee recommends that the State party...[s]trengthen its efforts to ensure through Constitutional provisions that children have the right to express their views in all matters affecting them and to have those views given due weight, in particular in families, schools and other educational institutions, the health sector and in communities.”³⁴

While noting that social, personal and health education is incorporated into the curricula of secondary schools, the Committee is concerned that adolescents have insufficient access to necessary information on reproductive health. The education is optional and parents can exempt their children.”³⁵

In the 1995 report on the United Kingdom’s compliance with the CRC, the nation was criticized for allowing parents to make decisions to remove their child from participation in sex education classes in government schools without adequate measures to ensure that the child’s viewpoints were considered and weighed appropriately.³⁶

It is noteworthy that no criticism was leveled against either Ireland or the UK for failing to consider the child’s viewpoint in those cases where the parents left the child in the sex

³⁴ Paragraph 24 and 25, *Concluding Observations of the Committee on the Rights of the Child: Ireland*, Committee on the Rights of the Child, 43rd sess., U.N. Doc. CRC/C/IRL/CO/2 (2006).

³⁵ Paragraph 52, *Concluding Observations of the Committee on the Rights of the Child: Ireland*, Committee on the Rights of the Child, 43rd sess., U.N. Doc. CRC/C/IRL/CO/2 (2006).

³⁶ Paragraph 14, *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).

education classes. Nor was there any criticism for failure to consider the child's views in the decision to enroll the child in the government schools in the first place.

The child's wishes seem to get special attention only when the parents want something different from the wishes of the government.

Professor Van Bueren explains the general approach of the CRC:

“Unlike earlier treaties, the Convention on the Rights of the Child does not include a provision providing for parents to have their children educated in conformity with their parents' beliefs.

In addition, the child's right to freedom of expression and the right of the parents to initially give direction and **later only guidance**, strengthens the argument that children are entitled to participate in decisions so that their education *conforms to their own convictions*. The second question is whether a child has the right to choose a religion.

Under the Convention on the Rights of the Child, parents do have the right to provide direction to the child. Such parental power, however, is subject to two restraints:

- First, such direction should take into account the evolving capacities of the child, as expressly required by the Convention.
- Second, the direction should not be so unyielding that it equals coercion.

It can also be argued that the right to freedom of religion in the Convention on the Rights of the Child ought to be read together with article 12 which gives the child the right to express his own views in the matter of choice of religion.³⁷

³⁷ Geraldine Van Bueren, *International Rights of the Child, Section B*, University of London, 29-30 (2006).

Insofar as Professor Van Bueren (who is acknowledged as one of the world's leading authorities on the CRC) has an accurate understanding of this Convention, the result in Island County, Washington falls squarely in line with the requirements of this treaty.

Social workers and courts will decide whether they think a parent's decision about education or church is truly in the child's best interest, after giving the child's views whatever weight the government believes is appropriate.

When one looks at the regime of the CRC realistically, it is neither parents nor children who make the final decision in the case of conflict—it is the state which has the power and duty under the CRC to make ultimate choices.

How could the CRC ever be ratified?

We could spend considerable time picking apart the details of the other provisions of the CRC.

- Spanking is banned in the home and everywhere.
- Children have a legally binding right to leisure.
- Children have a right to reproductive health information without regard to parental involvement or permission.
- It is illegal to sentence juvenile murderers to death.
- It is also illegal to sentence juvenile murderers to life in prison.

But, all of these details are not as important to understand as the two overarching principles we have just studied:

- Government can override parental decisions on the best interest of the child without proof of abuse, neglect, or harm.
- Children have legally enforceable rights to complain about parental decision-making in every area of their life, including religious and educational decisions.

When the government can override parents on everything, there is no further need to plumb the depths of the various provisions of this treaty—at least in the time-frame we have here.

It is fair to ask, though: How in the world can the proponents of this treaty hope to secure its passage in light of what we have learned?

The short answer is that the proponents are relying on deception and arrogance. They make wild claims about the meaning and application of this treaty—claims that any honest legal scholar knows to be false. And they have the arrogance to believe that people on our side will not be sophisticated enough in international law to call their bluff and get the reliable information out to the public and our elected officials.

The website of the core group (childrightscampaign.org) pushing for ratification of this treaty has a page dedicated to answering criticisms of the CRC. Here is their introduction:

Over 300 organizations representing the interests of the religious, education, health care, humanitarian, labor, legal, and social service communities have lent their support for ratification of the CRC. However, a small number of political organizations have spearheaded efforts to oppose U.S. ratification. These groups have sought to minimize the Convention's value by employing "scare tactics" to fallaciously portray the CRC as a threat to American families. In general, opponents largely base their arguments on unsubstantiated claims regarding national sovereignty and interference in the parent-child relationship.

They allege that ratification of the CRC:

- would endanger national and state sovereignty;
- would undermine parental authority by allowing the UN to dictate how parents raise and teach their children; and
- would enable children the right to do as they please, including taking legal action against their parents, having abortions, joining gangs, etc.

These false claims are the result of misconceptions, erroneous information, and a lack of understanding about how international human rights treaties are implemented in the United States.

Notice their clever portrayal of those that support the treaty as religious, education, health care, and humanitarian organizations whereas those who oppose the treaty are political organizations. The National Education Association—together with its highly effective political action committee—is an educational organization. Home School Legal Defense Association is a political organization.

From simple clues like this it is obvious that what you are about to read is propaganda and not fair analysis.

Following this introduction, the Children's Rights Campaign proceeds to announce that opponents have attempted to defeat the CRC using nine "myths." Without citing a single source other than one Supreme Court decision from 1957, the Children's Rights Campaign has the arrogance to suggest that what it says is the truth, while everything their critics say are myths.

Since there is so much evidence to show that this website is utterly deceptive, the difficulty in answering it is limiting oneself to a reasonable number of examples. But, I will try to be reasonable.

The Children's Rights Campaign website says the following regarding their opponents:

They allege that ratification of the CRC:

- would endanger national and state sovereignty

Vienna Convention on the Law of Treaties, Article 27:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

We have previously quoted the text of Article VI of the Constitution to demonstrate that treaties prevail over state constitutions and state laws. So the claim that it is a “myth” that treaties will not affect state sovereignty is an unsophisticated lie.

Children’s Rights Campaign Website:

Myth #1: The Convention would become “Supreme Law” of the land.

Article VI of the U.S. Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land

Vienna Convention on the Law of Treaties, Article 27:

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The UN Committee on the Rights of the Child, June 8, 2006:

The Committee welcomes the incorporation of numerous articles on child rights into the Constitution, **which affirms that international instruments ratified by Colombia prevail over domestic legislation.**³⁸

In their introduction, the Children’s Rights Committee asserted that it was a “myth” that state sovereignty would be affected by the treaty. To refute this, we only need to re-read the balance of the Supremacy Clause of Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, **any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.**

³⁸ Paragraph 8, *Concluding Observations of the Committee on the Rights of the Child: Columbia*, Committee on the Rights of the Child, 42nd sess., U.N. Doc. CRC/C/COL/CO/3 (2006).

Children’s Rights Campaign Website (Myth #1 continued):

Myth #1 (Continued)

As with any treaty, each U.S. state would be responsible for developing and executing its own legislation.

The Inter-Agency Standing Committee Reference Group on Humanitarian Action and Human Rights:

Human rights law also contains provisions obliging states to implement its rules, whether immediately or progressively. States must adopt a variety of legislative, administrative, judicial and other measures that may be necessary to give effect to the rights provided for in the various treaties. This includes providing for a remedy before domestic courts for violations of specific rights and ensuring that the remedy is effective. The fact that a state has a federal or devolved system of government does not affect a state's obligation to implement human rights law.”³⁹

Children’s Rights Campaign Website (Myth #1 “answered”):

Truth: The Convention contains no language or directives with regard to how it should be implemented. Each country is responsible for determining how to implement this.

Professor Van Bueren at the University of London argues as treaty advocate:

Underpinning this approach are the legal consequences of states becoming party to the Convention on the Rights of the Child. The United Nations Convention on the Rights of the Child moves the borders for the state of what is political and what can be subject to a legal challenge in courts, particularly in resource allocation and budgetary matters. The Convention and other international laws in effect narrows what were previously unfettered discretionary powers of governments. Before governments become party to human rights treaty they are

³⁹ Inter-Agency Standing Committee Reference Group on Humanitarian Action and Human Rights, *Frequently Asked Questions on International Humanitarian, Human Rights, and Refugee Law*, (2002), available at <http://www.icva.ch/doc00001023.html#24>.

obliged to ensure that there are the resources, either to implement the Convention on becoming party or shortly thereafter, in accordance with international law.

Hence, there is no interference with national sovereignty, the nationally sovereign decisions on how resources on children’s rights to be expended have already been taken. In essence, the government has exercised its political powers, and it has to live with the legal consequences.⁴⁰

Children’s Rights Campaign Website:

Truth: The U.S. can ratify the CRC with reservations, understandings and declarations (RUDs). RUDs address specific conflicts between the U.S. Constitution and a particular Convention. Reservations modify a treaty’s provisions (e.g. if a provision of the CRC is in conflict with the U.S. Constitution, the U.S. can file a "reservation" to the provision, so that the provision does not apply). Understandings and Declarations help to clarify how the U.S. believes a particular provision should be interpreted. RUDs do not legally exempt the U.S. from adhering to a provision.

This is a curious “truth”. On the one hand the website claims that “reservations modify a treaty’s provisions.” On the other hand they say that “RUDs do not legally exempt the U.S. from adhering to a provision.” According to the last sentence, we still have to obey the treaty regardless of the Reservations, Understandings, or Declarations. One wonders if these people have any idea of what they are talking about.

In any event, both the text of the CRC and the Vienna Convention on the Law of Treaties are very clear about permissible and impermissible reservations.

United Nations Convention of the Rights of the Child, Article 51(2):

A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

⁴⁰ Geraldine Van Bueren, *International Rights of the Child, Section D*, University of London, 36 (2006).

Vienna Convention on the Law of Treaties, Article 19

Formulation of reservations:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless. . . the reservation is incompatible with the object and purpose of the treaty.⁴¹

Professor Louis Henkin writes in the American Journal of International Law:

Reservations designed to reject any obligation to rise above existing law and practice are of dubious propriety: if states generally entered such reservations, the convention would be futile. The object and purpose of the human rights conventions, it would seem, are to promote respect for human rights by having countries—mutually—assume legal obligations to respect and ensure recognized rights in accordance with international standards. Even friends of the United States have objected that its reservations are incompatible with that object and purpose and are therefore invalid.

...By adhering to human rights conventions subject to these reservations, the United States, it is charged, is pretending to assume international obligations but in fact is undertaking nothing.⁴²

Children's Rights Campaign website:

In addition, the CRC is not a “self-executing treaty”- it cannot be automatically implemented without legislative action.

Professor Arlene Andrews, Director of the Division of Family Policy at the University of South Carolina, writes:

The *Convention* is generally regarded as having two classes of rights for the purposes of self-execution, one class that is self-executing and one that is not self-executing (American Bar Association [ABA], 1993).⁴³

⁴¹ Vienna Convention on the Law of Treaties, Art 19 (1969), available at <http://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/19.html>

⁴² Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, The American Journal of International Law, Vol 89 No 2, 343-344 (Apr. 1995).

Myth #2: The CRC undermines the primacy of the parent-child relationship.

Professor Van Bueren:

Best interests provides decision and policy makers with the authority to substitute their own decisions for either the child's or the parents', providing it is based on considerations of the best interests of the child. Thus, the Convention challenges the concept that family life is always in the best interests of children and that parents are always capable of deciding what is best for children.⁴⁴

State parties are obliged to 'assure' to children who are capable of forming views the rights to express those views 'in all matter affecting the child' and to give those views' due weight in accordance with the age and maturity of the child'. By incorporating a reference to 'all matters affecting the child' there is no longer a traditional area of exclusive parental or family decision making.⁴⁵

International law is therefore establishing boundaries within which states are under a duty to ensure that parental power is properly exercised and within limits. ...The international protection of children's civil rights now touches the core of family life.⁴⁶

United Nations Committee on the Rights of the Child, Official Report on **Jordan** (2006):

The Committee continues to be concerned that respect for the views of the child remains limited owing to traditional societal attitudes towards children within the family and the community at large.

In the light of article 12 of the Convention, the Committee recommends that the State party continue to promote and facilitate, within the family, schools and other

⁴³ Arlene Bowers Andrews, *Implementing the U.N. Convention on the Rights of the Child*, 171 (Greenwood Publishing Group 1999).

⁴⁴ Geraldine Van Bueren, *International Rights of the Child, Section D*, University of London, 46 (2006).

⁴⁵ *Id.* at 137.

⁴⁶ *Id.* at 73.

institutions, in courts and communities, respect for the views of children and their participation in all matters affecting them.”⁴⁷

United Nations Committee on the Rights of the Child, Official Report on **Ireland** (2006):

[T]he Committee is deeply concerned that corporal punishment within the family is still not prohibited by law.

The Committee...urges the State party to:

- (a) Explicitly prohibit all forms of corporal punishment in the family;
- (b) Sensitize and educate parents and the general public about the unacceptability of corporal punishment.⁴⁸

Children’s Rights Campaign website:

Myth #3: Ratification would allow the UN to dictate how parents should raise their children.

Professor Van Bueren:

Unlike earlier treaties, the Convention on the Rights of the Child does not include a provision providing for parents to have their children educated in conformity with their parents’ beliefs. In addition, the child’s right to freedom of expression and the right of the parents to initially give direction and **later only guidance**, strengthens the argument that children are entitled to participate in decisions so that their education *conforms to their own convictions*.⁴⁹

International law is therefore establishing boundaries within which states are under a duty to ensure that parental power is properly exercised and within limits. ...The international protection of children’s civil rights now touches the core of family life.⁵⁰

⁴⁷ Paragraph 40 and 41, *Concluding Observations of the Committee on the Rights of the Child: Jordan*, Committee on the Rights of the Child, 43rd sess., U.N. Doc. CRC/C/JOR/CO/3 (2006).

⁴⁸ Paragraph 39 and 40, *Concluding Observations of the Committee on the Rights of the Child: Ireland*, Committee on the Rights of the Child, 43rd sess., U.N. Doc. CRC/C/IRL/CO/2 (2006).

⁴⁹ Geraldine Van Bueren, *International Rights of the Child, Section B*, University of London, 29-30 (2006).

⁵⁰ *Id.* at 73.

Children's Rights Campaign website:

Truth: Under the Convention, parental responsibility is protected from government interference.

Professor Van Bueren:

Under the Convention on the Rights of the Child, parents do have the right to provide direction to the child. Such parental power, however, is subject to two restraints:

- First, such direction should take into account the evolving capacities of the child, as expressly required by the Convention.
- Second, the direction should not be so unyielding that it equals coercion.

It can also be argued that the right to freedom of religion in the Convention on the Rights of the Child ought to be read together with article 12 which gives the child the right to express his own views in the matter of choice of religion.⁵¹

Children's Rights Campaign website:

Truth: There is no language in the CRC that dictates the manner in which parents are to raise and instruct their children. Ratification of the Convention would not prevent parents from homeschooling their children.

Professor Van Bueren:

Thus, the Children's Convention potentially protects the rights of the child who philosophically disagrees with the parents' educational goals.⁵²

Children's Rights Campaign website:

⁵¹ Geraldine Van Bueren, *International Rights of the Child, Section B*, University of London, 29-30 (2006).

⁵² Geraldine Van Bueren, *Combating Child Poverty—Human Rights Approaches*, Human Rights Quarterly, Vol. 21, 745 (1999).

Myth #4: The CRC embraces the view that children are autonomous agents who are capable, in all areas, of making adult decisions and dealing with adult situations.

Truth: The Convention does not extend to children all of the same rights accorded to adults, such as the right to vote and unrestricted freedom to make independent decisions.

Truth: The framers of the CRC understood that children's ability to exercise certain rights is dependent upon their age and maturity and influenced by their culture, environment, and life experiences. The Convention encourages parents to deal with rights issues with their children "...in a manner consistent with the evolving capacities of the child." (Articles 5 and 14)

Professor Van Bueren:

[S]tates should take account of the evolving capacities of each individual child. This is underlined by the duty in the Convention on the Rights of the Child...under which States Parties are **obliged** to assure to all children capable of expressing views **the right to express views** in all matters affecting the child, **the child's views being given due weight in accordance with the child's age and maturity.**⁵³

One aspect of the right to freedom of expression which, on the whole has been untested before international and regional human rights fora is whether the right to freedom of expression includes the right to sexual expression. If children have the right to freedom of expression and their right to freedom of expression is similar to adults the next question must be whether the right incorporates physical acts.

⁵³ Geraldine Van Bueren, *International Rights of the Child, Section B*, University of London, 75 (2006).

Sexual acts as forms of expression are comparable in many respects to the case of symbolic speech.

It is, however, difficult to sustain the argument that the right of children to express themselves to either heterosexual or homosexual relations is of little interest to the public. Certainly some forms of public sexual activities are arguably included within freedom of expression.⁵⁴

Children's Rights Campaign website:

Myth #5: The Convention gives children the right to sue their parents.

Professor Van Bueren:

International law grants an individual rights and duties which are capable of being enforced directly in the national courts but both the extent and manner of the implementation is generally determined by the national law of each country. A state, however, cannot plead provisions of its national law as authority for committing a violation of international law.⁵⁵

Published in Pace Law Review, Linda Elrod, Washburn University School of Law

Professor, Past Chair of ABA Family Law Section:

Ratification of the Convention itself would be a major step forward in improving the laws that protect and secure rights for children. The CRC obligates its parties to draft legislation and programs to protect children, to create procedures assuring fairness in removing children from their homes, and to assure that the child's voice is heard. Article 12 makes the ability of a child to express his or her views an internationally recognized human right which could be regarded as customary international law. It is time to move beyond the political and economic arguments that have kept Congress from ratifying the CRC and give children full rights of citizenship.

⁵⁴ *Id.* at 139-140.

⁵⁵ *Id.* at 381.

The interests of the child should be at the center of any decision-making. If the child is capable of articulating a perspective, the child should have client-directed counsel to get that voice before the court and the court should seriously consider it. Even if the child is unable to articulate a view, the child's attorney can offer a child-focused assessment of the child's needs. Because the child's best interests may be different than one or both of the parent's interests, the child should have a voice. Giving the child a voice, however, does not necessarily "conflict."

Listening to the child does not mean not listening to the parents or others involved in the dispute. The key is to add the child's voice to the voice of others being presented."⁵⁶

Children's Rights Campaign website:

Myth #6: Ratification will encourage children to have abortions.

Texas Journal of Women and the Law, Summer 2007:

The unmistakable trend in the United States is to consistently increase anti-choice legislation, particularly with respect to minors. Ratification of the U.N. Convention on the Rights of the Child by the United States holds a strong possibility of assisting minors who seek abortions without parental interference.

[*203] The Convention may offer the best hope for securing adolescent reproductive freedoms on a global level. If enough diplomatic pressure were exerted on the United States to compel it to ratify the treaty, the CRC could provide significant improvements in the outlook for reproductive freedom for minors.⁵⁷ 16 Tex. J. Women & L. 185, 202-203.

United Nations Committee on the Rights of the Child, Official Report on Columbia (2006):

⁵⁶ Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 Pace L. Rev. 869, 882-883 (Summer 2007).

⁵⁷ Katie Hatzivramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Conventions on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?*, 16 Tex. J. Women & L. 185, 202-203 (Spring 2007).

The Committee notes with appreciation...decisions of the Constitutional Court on...the partial decriminalization of abortion.⁵⁸

United Nations Committee on the Rights of the Child, Official Report on Chile (2006):

The Committee...is concerned over the high rate of teenage pregnancies, the criminalization of the termination of pregnancies in all circumstances....⁵⁹

Children's Rights Campaign website:

Myth #7: "The CRC allows children to participate in any religion of their choosing."

The government of Scotland published the following to help youth understand their rights under the CRC:

You have the right to choose your own religion and beliefs. Your parents should help you think about this."⁶⁰

Children's Rights Campaign website:

Myth #8: "Ratification will allow children to join gangs and racist organizations. Parents will not be able to oversee children's interactions with others."

United Nations Committee on the Rights of the Child, Official Report on Honduras (2007):

The Committee recommends that the State party ensure that no restrictions are placed on the right of the child to freedom of association other than those imposed in conformity with article 15 of the Convention.⁶¹

⁵⁸ Paragraph 3, *Concluding Observations of the Committee on the Rights of the Child: Columbia*, Committee on the Rights of the Child, 42nd sess., U.N. Doc. CRC/C/COL/CO/3 (2006).

⁵⁹ Paragraph 55, *Concluding Observations of the Committee on the Rights of the Child: Chile*, Committee on the Rights of the Child, 44th sess., U.N. Doc. CRC/C/CHL/CO/3 (2007).

⁶⁰ The UN Convention on the Rights of the Child: A Guide for Children and Young People (April 2008), available at <http://www.scotland.gov.uk/Publications/2008/04/01081649/1>

⁶¹ Paragraph 42, *Concluding Observations of the Committee on the Rights of the Child: Honduras*, Committee on the Rights of the Child, 44th sess., U.N. Doc. CRC/C/HND/CO/3 (2007).

UNCRC Article 15 (2):

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

It is contrary to the CRC to impose any restriction on a child's association other than those authorized by article 15. Article 15 says that as a pre-condition of any limitation on the child's right of association would have to be in conformity with the law and necessary for national security or public safety, etc. Accordingly, parents have no recognition of their right to impose restrictions on association beyond those authorized by law. Moreover, in the United States it is not illegal to join racist organizations or cults.

Children's Rights Campaign website:

Myth #9: The Convention provides children with an "unrestricted" right to access any information they want, including pornography.

World Library and Information Congress 69th IFLA General Conference and Council:

Yet the school library's collection and services should support gay, lesbian and bisexual students; it should also support the children of gay or lesbian parents or children with other gay/lesbian relatives.

In addition, the provision of titles with gay, lesbian or bisexual content and/or characters is important in helping straight students to develop a view of the world that includes families and lifestyles that are different from their own.

In relation to meeting the needs of gay, lesbian and bisexual users of school libraries, or in relation to meeting the needs of school library users for realistic representations of homosexuality in our society, it is clear that school libraries generally have a long way to go, despite some outstanding examples of good service. Freedom of access to information and literature for young people,

freedom of expression, access to information and books reflecting a diversity of views and lifestyles, censorship—these rights, enshrined in the Universal Declaration of Human Rights and the Convention on the Rights of the Child, and in important professional documents, are beyond the experience of many (perhaps most) users of school libraries.

In Summary

The Children’s Rights Campaign did not quote any critic of the CRC in formulating its various myths. Thus, they have created a series of classic straw men—easy targets that they attempt to knock down.

As formulated by the Campaign, some of the “myths” were not precisely accurate. But, in every case, there was at least some valid criticism of the Convention related to the “myth” statement. And in some cases, the so-called “myth” is clearly true. In short, it is very clear that the proponents of the CRC are not concerned with an accurate statement of international law or its interaction with domestic law.

The CRC is legally binding upon the State Parties. It has meaning. It can be enforced in domestic courts. Nations that ratify it are obligated under international law to comply with its terms.

We dare not ratify this treaty under the guise that we may do as we wish afterwards. Our national respect for the rule of law, as well as our Constitution’s Supremacy Clause, requires us to view the treaty as a material part of the supreme law of the land.