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International Law and the Child, 100 Years Later: A Dichotomous History of Children’s Rights, Protections, and Freedoms

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ABSTRACT

A century after the 1924 Declaration on the Rights of the Child, the shape of international children’s rights has transformed from its “children as property” past to its right affirming and empowering present. From the Child Savers of the Twentieth Century to Eleanor Roosevelt’s championing of UNICEF, the United States has been instrumental in crafting and expanding the field of international children’s rights. Yet, the United States is the only country not to have ratified the Convention on the Rights of the Child (UNCRC). The United States has a longstanding preference for negative rights over positive rights, rooted in the deontological originalism of the Constitution. The UNCRC, however, necessarily includes both positive and negative rights to protect children from the state and, when needed, their legal guardians. It recognizes the indivisibility of rights and blurs the distinction between the public and the private, children’s autonomy and parental rights, and theories of natural rights and social justice. Where did the international child rights movement and the United States part ways, and why? At what point did support for positive rights for children gain international traction and dissuade the one country that so consistently supported greater protection of and for children from ratification? This Article aims to answer these questions through an exploration of how the international sociopolitical landscape changed to accommodate children as rights holders, how various human rights conventions, declarations, and covenants have impacted the field of international rights of and for children, and why the United States remains a ratification outlier.

INTRODUCTION

The international child rights movement turned one hundred years old in 2024. The drafters¹ of the 1924 Declaration on the Rights of the Child pictured widespread international protection² and a transformation of the treatment of destitute children.³ Anti-war activists hoped for increased global sympathy toward children through the work of this declaration, Save the Children, and the United Nations International Children's Emergency Fund (UNICEF). However, the 1924 Declaration's mere five articles and the internationalist era being in its infancy meant change was not as radical as anticipated. Fundamental international human rights treaties, including the International Covenants on Civil and Political Rights and the International Covenants on Economic, Social and Cultural Rights, offered children freedom from discrimination. However, children's international rights did not truly expand until the 1989 Convention on the Rights of the Child (UNCRC). The world's most ratified convention took a decade to create; drafters struggled with how best to frame, protect, and empower the child and battled between Western and Eastern concepts of childhood. Despite this conflict, the UNCRC is now widely celebrated for its utilization of the "best interests" principle, gender inclusivity, and global impact through UNCRC committee reports and domestic implementation.

Only one country has yet to ratify the UNCRC—the United States. This refusal to ratify is in keeping with the United States' pattern of signing but not ratifying U.N. human rights treaties; opponents cite threats to sovereignty and its potential to create a "culture of permissiveness" behind the United States' ratification rejection. The UNCRC's creation is remarkable for other reasons—it blurs legal dichotomies. The United States has a longstanding preference for negative rights—the UNCRC relies upon both positive and negative rights and utilizes them to reinforce one another. The UNCRC provides maturity-based freedoms and opportunities for empowerment of children—the United States fears ratification of the UNCRC would authorize children to become little adults, capable of full autonomy and removing the possibility for parental intervention. The UNCRC

¹ Dominique Marshall, *The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of League of Nations, 1900–1924*, 7 INT'L J. CHILD. RTS. 103, 132 (1999).

² *Id.* at 137.

³ Hugh Cunningham, *The Rights of the Child from the Mid-Eighteenth to the Early Twentieth Century*, 50 ASPECTS OF EDUC. 49, 50 (1994).

questions the need for a clear distinction between the private and public, noting children's inherent vulnerability requires greater protection even if this includes negative rights against a legal guardian. Naturally, the United States is also unwaveringly against this concept.

How did international children's rights reach this point? The United States has been a guiding force throughout the entire international children's rights movement—from its own child-saving movement and the world's first child protective agency being founded in New York, to President Hoover's ardent support of UNICEF and Eleanor Roosevelt's inseparability from the success of the Universal Declaration of Human Rights, and finally, extensive involvement throughout the entirety of the UNCRC's drafting process. Where did the international child's rights movement and the United States part ways, and why? At what point did the parental rights debate enter this field and dissuade the one country that so consistently supported greater protection of and for children? To understand this shift, we must first explore how the international sociopolitical landscape changed to accommodate children as rights holders rather than, as once was the case, chattel. In Part I, there will be a discussion of what precisely is meant by a "right" within the context of children, examining another dichotomy—the natural/human theory of rights. Following this, a chronological analysis of all international efforts to create and disseminate child-specific rights and protections will be divided into three core sections: (1) the internationalist lite era and global humanitarianism through a U.S. lens; (2) binding international collaborative efforts and introducing fundamental norms; and (3) the world's most ratified instrument, the UNCRC. In celebration of a century since the release of the 1924 Declaration, this Article aims to answer how the international child rights movements originated, and where and why the United States decided to disengage with the movement it created.

I

THE NINETEENTH CENTURY—PROTECTION AND NURTURANCE

The absence of children's protection and rights literature predating the nineteenth century stems from the fact that until this period, children were "largely consigned to the status of parental property or chattel."⁴ In fact, up until the Medieval Era, in some parts of the world,

⁴ *Children's Rights, Historical Roots of the Children's Rights Movement*, in JRANK, MARRIAGE AND FAM. ENCYCLOPEDIA 247 (2024) [hereinafter JRank].

parents had the legal power to decide whether their child lived or died.⁵ The gradual shift in Western attitudes toward children started to emerge in the late fifteenth and early sixteenth centuries, gaining greater traction in the eighteenth century. The Enlightenment’s emphasis upon individual freedoms, and an innate duty owed to children because of their immaturity, paved the way for support for a child protection system in the United States in an attempt to escape the unrestrained “tyranny of parents over children.”⁶ “One must aid them and supplement what is lacking to them, whether in intelligence or strength, in all that is connected with physical need.”⁷ Rousseau’s maxim, together with Locke’s belief that children “must be treated as rational creatures,”⁸ permeated through the West and aided in the shift toward greater governmental child protection. Despite America’s initial support, it was Great Britain, closely followed by Prussia⁹ and France,¹⁰ who became the first industrialized States to introduce legislation akin to child protection.

In 1802, Sir Robert Peel 1st Baronet, father of Prime Minister Sir Robert Peel 2nd Baronet, put forward the Health and Morals of Apprentices Act.¹¹ Peel and other social reformers relayed the concerns of medical professionals regarding children working in cotton mills. This act limited apprentices¹² to twelve hours of work per day, required room cleanings very occasionally with quick lime and water, and

⁵ *Histoire Des Droits De L’Enfant* [History of the Rights of the Child], BICE: BUREAU INTERNATIONAL CATHOLIQUE DE L’ENFANCE [INT’L CATH. CHILD BUREAU], <https://bice.org/fr/droits-de-lenfant/histoire-des-droits-de-l-enfant/> [https://perma.cc/53F6-TPRG] (last visited Mar. 29, 2021) (Fr.); see also *Patria Potestās*, OXFORD DICTIONARY OF THE CLASSICAL WORLD, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100310590> (last visited Nov. 24, 2024) (“Father’s consent . . . [meant they] had power of life and death over children. This was exercised soon after birth, when a father chose to acknowledge and rear a child or not to do so.”).

⁶ JRank, *supra* note 4.

⁷ JEAN-JAQUES ROUSSEAU, *EMILE: OR ON EDUCATION* 69 (Allan Bloom trans., 1979).

⁸ JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 142 (1693).

⁹ Elisabeth Anderson, *Ideas in Action: The Politics of Prussian Child Labor Reform, 1817-1839*, 42 *THEORY & SOC’Y* 81, 82 (2013).

¹⁰ Lee S. Weissbach, *Child Labor Legislation in Nineteenth-Century France*, 37 *J. ECON. HIST.* 268, 268 (1977).

¹¹ Health and Morals of Apprentices Act 1802, 42 Geo. 3, c. 73 (U.K.).

¹² Apprenticeships were for pauper children—their parish was tasked with training them for a trade or sourcing occupation. They were vulnerable to mistreatment, overworked, often injured, and the enclosed conditions of factories meant rapid spread of contagious disease. See also *Robert Peel Asks that Posters of the Apprentice Act Be Displayed in Mills and Factories*, JEREMY NORMAN’S HIST. INFO., <https://historyofinformation.com/detail.php?id=4533> [https://perma.cc/4HUB-3NBB] (last visited Nov. 24, 2024).

insisted upon access to a rudimentary education for at least four years.¹³ Its enforcement was nigh on impossible, and even when implemented, many child workers were non-indentured,¹⁴ thus outside the limitations of the 1802 Act.¹⁵ Regardless, it paved the way for more ambitious successors, including the Cotton Mills and Factories Act of 1819¹⁶ and the Labour in Cotton Mills Act of 1831.¹⁷

All these acts faced significant opposition. Banning night work for anyone under the age of twenty-one and reducing maximum hours proved incredibly unpopular among factory owners who only stood to benefit from having a large portion of their workforce as children. Of the owners surveyed, “84% asserted that workers from ‘infancy’ were preferable,”¹⁸ and by growing up working in the factories, it “improved the quality of the adult . . . workers and created a reserve pool of adults with factory experience.”¹⁹ What is more, the disavowal of factory acts (outside of the social reformers) came from all sides. One-third of working-class families were without a breadwinner as the result of death or abandonment²⁰—children’s work was a familial necessity. Further, empathy for the working class was hardly a popular sentiment—“God had put people in their place in life and this must not be interfered with.”²¹

The lack of support for increased safeguarding was echoed in France, where similar bills were met with resistance. Once again, government intervention restricting young people’s working hours faced opposition from virtually all parties. Nevertheless, an unlikely group of industrialists attempted to appeal to Paris several times in the

¹³ Health and Morals of Apprentices Act 1802, 42 Geo. 3, c. 73, §§ 2–6 (U.K.).

¹⁴ Indentured labor involves a contract between the laborer and an employer to work for an allotted period, until a debt has been paid, or to work for a certain number of years in exchange for a “passage across the Atlantic.” See also *Children at Work*, WOMEN & AM. STORY, <https://wams.nyhistory.org/settler-colonialism-and-revolution/settler-colonialism/children-at-work> [<https://perma.cc/X9J2-VHNV>] (last visited Nov. 24, 2024).

¹⁵ *Early Factory Legislation*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/earlyfactorylegislation/> [<https://perma.cc/8VJY-J9SK>] (last visited Nov. 24, 2024).

¹⁶ Cotton Mills and Factories Act 1819, 59 Geo. 3, c. 66 (U.K.).

¹⁷ Labour in Cotton Mills Act 1831, 1&2 Will. 4, c. 39 (U.K.).

¹⁸ Douglas A. Galbi, *Child Labor and the Division of Labor in the Early English Cotton Mills*, 10 J. POPULATION ECON. 357, 360 (1997).

¹⁹ *Id.* at 370.

²⁰ Barbara Daniels, *Poverty and Families in the Victorian Era*, HIDDEN LIVES REVEALED (Mar. 2003), <http://www.hiddenlives.org.uk/articles/poverty.html> [<https://perma.cc/RN5L-TVYH>] [hereinafter Hidden Lives].

²¹ *Id.*

1830s, calling for child labor reform.²² Their persistence and two comprehensive inquiries later saw France's first child labor law in 1841.²³ By this year, attitudes in Britain had shifted drastically—child labor legislation now enjoyed “very broad support.”²⁴ In France, however, its passing was met with such wide contempt that its provisions were ignored with little to no consequence. Government officials with a vested interest in *la législation restrictive du travail des enfants*²⁵ were “powerless in the face of the intransigence”²⁶ of factory owners and working-class families. Further attempts at child labor legislation in 1874²⁷ and 1892²⁸ finally found greater support, but by the turn of the century, the issue of child labor was superseded in import by education reform.²⁹ The Catholic Church in particular viewed school as an “incubator of unity”³⁰ for children. Through schools, they could build a “shared concept of Frenchness [within] . . . a colonial ideology,”³¹ a matter more important to the Church than protecting working children.³²

In the 1880s, Germany introduced “national health insurance, industrial accident insurance, and old-age pensions”³³ under the Bismarckian welfare state. However, the primary reasons Germans

²² Weissbach, *supra* note 10. (Such industrialists were high-ranking officials belonging to groups who “as a whole, were most consistently opposed to factory legislation of any kind.”).

²³ See generally JEAN BAPTISTE HENRI DUVERGIER, COLLECTION COMPLETE, DECRETS, ORDONNANCES, REGLEMENTS ET AVIS DU CONSEIL D'ÉTAT (2011).

²⁴ Weissbach, *supra* note 10, at 269.

²⁵ Colin Heywood, *The Market for Child Labour in Nineteenth-Century France*, 66 HIST. 34, 34 (1981).

²⁶ Weissbach, *supra* note 10, at 269.

²⁷ ERNEST NUSSE, COMMENTAIRE DE LA LOI DU 19 MAI 1874 SUR LE TRAVAIL DES ENFANTS ET DES FILLES MINEURES EMPLOYES DANS L'INDUSTRIE: SUIVI DES DOCUMENTS LEGISLATIFS ET A (2013).

²⁸ LOUIS BOUQUET, LA REGLEMENTATION DU TRAVAIL: LE TRAVAIL DES ENFANTS, DES FILLES MINEURES ET DES FEMMES DANS L'INDUSTRIE; COMMENTAIRE DE LA LOI DU 2 NOVEMBRE 1892 (2010).

²⁹ Weissbach, *supra* note 10, at 270.

³⁰ Leon Sachs, *L'École Républicaine*, in POSTCOLONIAL REALMS OF MEMORY: SITES AND SYMBOLS IN MODERN FRANCE 34, 35 (Etienne Achille, Charles Forsdick & Lydie Moudileno eds., 2020).

³¹ *Id.*

³² The French Catholic Church feared the Freemasons and Jews were gaining governmental control and power. In response, the Church focused on education as a tool to spread Catholicism and, therefore, increase support for the Church from an early age. See generally Robert F. Byrnes, *The French Christian Democrats in the 1890's: Their Appearance and Their Failure*, 36 CATH. HIST. REV. 286 (1950).

³³ Anderson, *supra* note 9, at 81.

sought increased state intervention were drastically different from those of the aforementioned French and British social reformers. While some Prussian bureaucrats were motivated to liberate the poor through education and worker protections, the overarching political desire was to “profligate [the] unruly and potentially revolutionary lower classes.”³⁴ Removing the working class’s reliance upon unions and vesting it in the state neutralized socialist political threats. Whether enacted proactively through a dedication to liberal ideals or reactively in fear of an uprising, Prussia became the first continental European State to pass a child labor law in 1839, the “beginning of social policy in Prussia.”³⁵

Child labor was not particularly widespread in Prussia, but the attention and dedication given to the 1839 bill proved fruitful for future legislation, both domestically and in wider Europe.³⁶ According to Marxist historian Jürgen Kuczynski, another motivation behind local child labor reform was Prussian militarism.³⁷ The value of a child was not in their ability to work in a factory but to grow in to strong men fit for war.³⁸ The well-documented negative health impacts upon children working physically demanding jobs yielded “sickly, deformed men unfit for military service.”³⁹ In actuality, military issues were used as a “framing device”⁴⁰ to make child labor reform appear more palatable to the King. Producing and maintaining social welfare policies—including a reduction of hours for child workers and access to education—for the working classes were ultimately enacted out of fear of political uprising.⁴¹

In the United States, the Progressive Era saw the birth of the “child-saving movement”—systems and supporters dedicated to “rescuing neglected youth, as early in their lives as possible, from circumstances

³⁴ *Id.* at 82.

³⁵ DIETER KASTNER, KINDERARBEIT IM RHEINLAND: ENTSTEHUNG UND WIRKUNG DES ERSTEN PREUBISCHEN GESETZES GEGEN DIE ARBEIT VON KINDERN IN FABRIKEN VON 1839 (2004).

³⁶ Anderson, *supra* note 9, at 82.

³⁷ *Id.* at 85.

³⁸ Girl children were not afforded the same attention; the focus was more upon preventing girls from entering prostitution and being prepared for life as a wife; a girl “who has worked in a mill from her ninth year is in no position to understand domestic work.” See also Katherine A. Lynch, *Marriage Age Among French Factory Workers: An Alsatian Example*, 16 J. INTERDISC. HIST. 405 (1986).

³⁹ JÜRGEN KUCZYNSKI, STUDIEN ZUR GESCHICHTE DER LAGE DES ARBEITENDEN KINDES IN DEUTSCHLAND VON 1700 BIS ZUR GEGENWART 92 (1968).

⁴⁰ Anderson, *supra* note 9, at 85.

⁴¹ *Id.*

which . . . render them pests instead of blessings to the community.”⁴² The New York Society for the Prevention of Cruelty to Children, believed to be the world’s first child protective agency, was founded in 1874, inspired by the case of 10-year-old Mary Ellen McCormack. Abused by her adoptive mother, McCormack had to rely on animal protection legislation to be removed from her home by the state because there were no laws for children’s protection.⁴³ The child-saving movement also founded children’s aid societies, designed to gather homeless children from major cities and send them to the country to “work and build character on clean, honest, Protestant farms.”⁴⁴ Activists dubbed the “Child Savers” that fought for delinquent and neglected children to receive criminal treatment reflective of their young age—with a chance at reformation afterward,⁴⁵ increased child labor laws, mandatory schooling, and the creation of bureaus of child health and hygiene.⁴⁶ Additionally, the Child Savers were the driving force behind the advent of child adoption laws, the first being Massachusetts’ Adoption of Children Act of 1851. Four years later, Pennsylvania enacted the first adoption statute to explicitly promote the welfare of children during the adoption procedure, making the child’s needs and wants of paramount importance.⁴⁷ The Child Savers’ most noteworthy success was the establishment of a juvenile justice system, ostensibly designed with the protection of the child at its heart.

During this period, child psychologist G. Stanley Hall became the first to describe the distinct stages of childhood, stating that “to treat the adolescent as a ten-year-old was to invite disaster.”⁴⁸ Under his purview, understanding the juvenile offender could not be achieved without youth-oriented individualized treatment. Progressives embraced Hall’s ideals and used them as the basis for a *parens patriae*—the state acting as the parent to the child—court system, the juvenile court system, which acted to restrict the existing, near-limitless

42 WILLIAM TALLACK, *PENOLOGICAL AND PREVENTIVE PRINCIPLES, WITH SPECIAL REFERENCE TO EUROPE AND AMERICA* 342 (2nd ed. 1896).

43 Howard Markel, M.D., *Case Shined First Light on Abuse of Children*, N.Y. TIMES (Dec. 14, 2009), <https://www.nytimes.com/2009/12/15/health/15abus.html> [<https://perma.cc/JF2S-R6EB>].

44 LAWRENCE M. FREIDMAN, *A HISTORY OF AMERICAN LAW* 433 (1973).

45 *Id.* at 343.

46 Melissa Moon et al., *Is Child Saving Dead? Public Support for Juvenile Rehabilitation*, 46 CRIME & DELINQ. 38 (2000).

47 Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1114 (2003).

48 DAVID ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 207 (2017).

parental rights over the child. The court was to “look . . . to the needs of the child, not his guilt or innocence”⁴⁹ and take on the parental role. While momentous at the time, this ruling was quickly viewed as a tool for social control.⁵⁰

Using child protection as an argument for a juvenile court is controversial at best; in his investigation into the child-saving movement, Anthony Platt concluded that “juvenile delinquency” was a term used by the middle and upper classes to group lower-class, primarily immigrant children together for social control.⁵¹ However, if one *were* to view it as protective, this mission to place a child’s wellbeing at the center of legal debates was quickly trumped by a conservative Supreme Court. A significant blockade in the progressive trajectory of child rights came in the form of precedent-setting judicial interpretation of the Fourteenth Amendment. In 1905, a father unsuccessfully argued that the Fourteenth Amendment extended to parental custody rights⁵²—“it is a strange perversion of the word ‘liberty’ to apply it to a right to control the conduct of others.”⁵³ However, by 1923, judicial opinion had shifted radically.⁵⁴ In *Meyer v. Nebraska*,⁵⁵ liberty within the meaning of the Fourteenth Amendment was found to extend to a parent’s right to bring up their child as they wish. To be deprived of this was a violation of the right to due process. Two years later, *Pierce v. Society of Sisters*⁵⁶ concretized this opinion. The court could not interfere with “the authority of parents to make basic choices directing the upbringing of their children.”⁵⁷ Then, in 1944, in *Prince v. Massachusetts*, the Supreme Court, with a 5–4 decision, narrowed this approach and ruled the government may

⁴⁹ *Id.* at 213.

⁵⁰ Moon, *supra* note 46, at 41.

⁵¹ ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 177 (1969).

⁵² *Wadleigh v. Newhall*, 136 F. 941 (9th Cir. 1905).

⁵³ Supplement to the Brief of the Appellant, the Governor of the State of Oregon at 8, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (No. 584).

⁵⁴ The debate of state authority versus parental authority over children in the United States extends beyond the scope of this piece. See also Shelley Burtt, *The Proper Scope of Parental Authority: Why We Don’t Owe Children an “Open Future,”* 44 *CHILD, FAM., & STATE* 243 (2003).

⁵⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923). See also Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 *WM. & MARY L. REV.* 995 (1992).

⁵⁶ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁵⁷ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 *HARV. L. REV.* 1893, 1934 (2004).

regulate decisions over children if failure to do so would cause the child harm.⁵⁸ Parents could still make choices for their children, but now, they would face consequences if the child was placed in a harmful or child-inappropriate situation. The United States was back on the progressive track, considering children as individuals capable of injury and separate from their parents.

As the world entered the internationalist era, the liberal approach to children's rights versus parents' rights adopted by the United States extended beyond that of domestic law. Viewing the parent-child relationship as an aspect of ownership and *property theory* would prove to be an "impediment to the acceptance of children's rights in general."⁵⁹ The United States feared any potential for international interference in domestic parental decisions, in part because interference may have challenged the United States' pattern of racially disproportionate state intervention.⁶⁰ Thus, as the League of Nations grew, the United States worked to ensure it became the key arbiter of intervention itself.

II

RIGHTS: POSITIVE, NEGATIVE, THEORETICAL?

Before dissecting the content of each right, it must be understood what the term *right* means. Historically, a right's meaning may be traced back to the "premodern natural law doctrines of Greek Stoicism"⁶¹ and the practicing of four virtues—wisdom, courage, temperance, and justice—to achieve the state of eudaimonia: a well-lived life. Maintaining these virtues was seen as living in accordance with nature.⁶² Nature is intrinsic to the understanding of human rights. From Aristotle's belief that citizens who are equal in nature are permitted to claim their natural right to political office,⁶³ to Locke's claim that rights (or entitlements) are held "simply by virtue of being a person,"⁶⁴ nature is at the core. Rights are natural because they

⁵⁸ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁵⁹ Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313 (1998).

⁶⁰ Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 102 (2021).

⁶¹ Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 258 (1984).

⁶² JOHN SELLARS, *STOICISM* 32 (2006).

⁶³ ARISTOTLE, *POLITICS BOOK III* 1287a (1944) ("[F]or necessarily persons alike in nature must in accordance with nature have the same principle of justice and the same value . . . therefore it is wrong for those who are equal to have inequality.")

⁶⁴ Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 391 (1982).

originate in human nature. Finnis identified “human rights as a contemporary idiom for natural rights,”⁶⁵ concluding the expansion of human rights through the inclusion of affirmative rights meant international doctrine had, unnecessarily, broken free from its naturalistic past.⁶⁶ The right to an economic good such as healthcare or social security is not based in natural rights and, therefore, should not constitute a human right. With this narrow interpretation, children’s human rights could only be, at their most basic, freedom from governmental interference but not an opportunity for remedying injustice or inequalities.

Charles Beitz proposed an alternative theory of human rights—the social justice model, which asserts that “[h]uman rights are entitlements to the satisfaction of various human interests that would be guaranteed to members of a group by principles of social justice [. . .] [here] society’s basic institutional structure distributes the benefits and burdens of social cooperation.”⁶⁷ Human rights are universal, indivisible, and interrelated⁶⁸—when looking at human rights as they “actually operate in the world today,”⁶⁹ core instruments protect, empower, and uphold. Natural rights feature, for example, the rights to life and liberty, but treaties do not end here. Political rights, economic rights, rights associated with the rule of law, and rights of communities are just some of the other human rights found in the Universal Declaration of Human Rights.⁷⁰ Human rights are more than the minimum, and this is essential for children’s human rights because their immaturity requires more than the most basic form of protection. Children are entitled to rights because they are human and, therefore, natural. However, for a full, enriched, and successful development into adulthood, affirmative rights and social protections are also required.

The protest school of thought argues that human rights “articulate rightful claims made by or on behalf of the poor, the unprivileged, and

⁶⁵ Charles Beitz, *What Human Rights Mean*, 132 DAEDALUS 36, 37 (2003).

⁶⁶ JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 210 (1980).

⁶⁷ Beitz, *supra* note 65, at 41.

⁶⁸ U.N. Vienna Declaration and Programme of Action at 5, U.N. Doc. A/CONF.157/23 (July 12, 1993).

⁶⁹ Beitz, *supra* note 65, at 38.

⁷⁰ G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948) (Article 21 “right to take part in the government,” Article 23 “the right to work, to free choice of employment,” Article 11 provides the right to a fair trial, and Article 15 “right to a nationality”).

the oppressed.”⁷¹ It questions the status quo and believes human rights should be aspirational. Fierce critics of children’s rights, often fearing increased child protection and empowerment as an attack on parental rights and freedoms,⁷² believe supporters of increased human rights for children view children as the oppressed and parents as the oppressors. This Article will dispel this myth and conflation; while historically, especially before and including the nineteenth century, children regularly experienced oppression, this piece will not subscribe to the protest school of thought without nuance. International law’s treatment of children’s human rights through progressive declarations, covenants, and conventions is aspirational. Children are steadily granted a greater number of rights, as influenced by ambitious diplomats, legislators, and scholars. Children have natural dignity through being human, so from a naturalist stance, they are owed a collection of rights and freedoms. International law necessarily expands upon this, as concretely seen through the changes between the 1924 Declaration on the Rights of the Child and the 1989 UN Convention on the Rights of the Child. Children’s immaturity is incompatible with a purist interpretation of natural law, and their internationally protected human rights reflect this.

Additionally, a matter that will be addressed throughout this piece is the nature of each right—whether they are positive, referring to “guarantees of affirmative support from the state,”⁷³ making it unlawful for the government to choose not to undertake an action,⁷⁴ or negative, and thus restraining the government or an individual from certain conduct—a negative right is freedom from government action. The 1924 Declaration on the Rights of the Child (see below) only contains positive rights: Mankind *owes* that children must be fed, be nursed, be helped, be sheltered, and receive relief. All verbs in the document’s language require State parties to do something for children, while not doing so would be a breach of their human rights.

⁷¹ Marie-Bénédicte Dembour, *What Are Human Rights? Four Schools of Thought*, 32 HUM. RTS. Q. 1, 3 (2010).

⁷² See Clare Huntingdon & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90(6) FORDHAM L. REV. 2529 (2022); see *infra* Section V(D) of this Article.

⁷³ Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO STATE L.J. 919, 929 (2016).

⁷⁴ Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 J. CONST. L. 750, 750 (2001).

There are philosophical arguments for positive rights not amounting to human rights—F. A. Hayek would remark they are not rights at all.⁷⁵ Often, positive rights may be conditionalized—rights only held if a condition is first satisfied—therefore, they are not universal, unlike negative rights or *freedoms*.⁷⁶ Rights are negative, and entitlements are positive. Additionally, the U.S. Supreme Court claims to reject positive rights as a matter of constitutional law and its deontological originalism, noting,⁷⁷ “only actions, not omissions, have moral worth.”⁷⁸ However, the first major human rights instrument, the Universal Declaration of Human Rights, quickly notes, “Everyone has the right to life, liberty and security of person.”⁷⁹ The most basic and pervasive of human rights exist and may be applied without condition, debunking the idea that only negative rights are true rights. Further, many positive human rights do exist with conditions: The condition of being a woman, a child, a refugee, or belonging to an Indigenous group are all necessary conditions for various treaties and legal instruments. The entire field of international human rights is predicated on positive rights being human rights. For these reasons, this Article firmly accepts both positive and negative rights as human rights, capable of being relied upon by children, even with conditions. What is more, the U.S. Constitution’s Due Process Clause, as interpreted by the Supreme Court, *does* offer positive right protections: The freedom to marry requires positive action from the state. While the negative right of freedom from state interference has been expanded, including through the decriminalization of interracial marriage through *Loving v. Virginia*⁸⁰ and the extension of the Fourteenth Amendment to same-sex couples in *Obergefell v. Hodges*,⁸¹ marriage ultimately requires “active participation of the state.”⁸²

⁷⁵ F. A. HAYEK, *THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION* 68–69 (2020).

⁷⁶ Andrew Melnyk, *Is There a Formal Argument Against Positive Rights?*, 55 *PHIL. STUD.* 205, 206 (1989).

⁷⁷ William S. Boyd, *Deontological Originalism: Moral Truth, Liberty, and Constitutional Due Process: Part II - Deontological Constitutionalism and the Ascendancy of Kantian Due Process*, 43 *T. MARSHALL L. REV.* 165 (2017).

⁷⁸ MacNaughton, *supra* note 74, at 754.

⁷⁹ G.A. Res. 217 (III) A, Universal Declaration on Human Rights, at Art. 3 (Dec. 10, 1948).

⁸⁰ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁸¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁸² Appleton, *supra* note 73, at 932.

Other matters to consider are Liberal Rights Theory and the feminist critique of *rights*. Dworkin's theory of liberalism distinguishes between arguments of principle, designed to establish an individual right, and arguments of policy, "intended to establish a collective goal."⁸³ He continues, concluding, "Rights are best understood as trumps over some background justification for political decisions that states a goal of the community as a whole."⁸⁴ Individual rights exist and persist in spite of contradictions with governmental or community will—they must be upheld and respected even if they "act as restricting conditions on the majoritarian goals of society"⁸⁵ because rights are inherent and fundamental. Dworkin also states the most basic right is to be treated with "equal concern and respect"⁸⁶ regardless of status. This idea will also feature throughout the discussion of children's rights conventions and declarations as evidence of the distancing from the child's status as chattel past—the crux of all these texts is that children must be treated with dignity and respect because their individual rights trump any oppressive majoritarian community goals.

Feminist legal scholar Lisa Schwartzman disagrees with Dworkin, arguing, "rights often function in ways that uphold the current structures of power in society."⁸⁷ Additionally, Catherine MacKinnon criticizes Dworkin's claim that it is "primarily the government . . . against which people can be said to have rights."⁸⁸ Other structures of social power exist in society: MacKinnon would call on male dominance as a significant source of power and rights deprivation.⁸⁹ Of course, there is a power dynamic and difference between adults and children, especially between parent and child. This is a mostly necessary, protective power imbalance but disagreements to the extent of this imbalance, with the United States at the helm of parental rights, will also feature throughout later discussion. Children will be capable of having rights against their parents, and parents' power over their

⁸³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 90 (1977).

⁸⁴ Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153 (Jeremy Waldron ed., 1984).

⁸⁵ Lisa Schwartzman, *Liberal Rights Theory and Social Inequality: A Feminist Critique*, 14 *HYPATIA* 26, 28 (1999).

⁸⁶ Richard Dworkin, *Liberalism*, in *LIBERALISM AND ITS CRITICS* 62 (Michael J. Sandel ed., 1984).

⁸⁷ Schwartzman, *supra* note 85, at 26.

⁸⁸ *Id.* at 32.

⁸⁹ See Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 81, 8787 (Katharine T. Bartlett & Rosanne Kennedy eds., 1984).

children will have limits, such as mandatory primary education as enforced by governments, corporal punishment restrictions, and children having the right to freedom of expression, thought, conscience, and religion. International law will offer children the protection of positive rights, the freedom of negative rights, and address societal power structures from the government and parents. A century after the release of the 1924 Declaration, children’s international rights and freedoms differ vastly from their basic, exclusively positive roots.

III THE INTERNATIONALIST LITE ERA—GLOBAL HUMANITARIANISM THROUGH A U.S. LENS (1919–1959)

A. The Child Welfare Committee

*The children of the world will be under the protection of the
League of Nations.*⁹⁰

– The New York Times, 1924

As child labor reform slowly swept through the Western States, the League of Nations sought to create a specific body centered on child rights. As previously mentioned, the wider pediatric community during the early twentieth century deemed children “a specific group of persons”⁹¹ and recognized childhood as a “developmentally distinct stage of life,”⁹²—thus worthy of specified legal and medical attention. In 1913, the decision to create an international child welfare organization was made by a grouping of experts on children⁹³ in Brussels;⁹⁴ as a formal way to bring together “various experts on

⁹⁰ BRUNO CABANES, *THE GREAT WAR AND THE ORIGINS OF HUMANITARIANISM 1918–1924* 242 (2014).

⁹¹ Joëlle Droux, *A League of Its Own? The League of Nations’ Child Welfare Committee (1919–1936) and International Monitoring of Child Welfare Policies*, in *THE LEAGUE OF NATIONS’ WORK ON SOCIAL ISSUES* 91 (Magaly Rodríguez García, Davide Rodogno & Liat Kozma eds., 2016).

⁹² Andrew L. Yarrow, *History of U.S. Children’s Policy, 1900–Present*, *FIRST FOCUS: PUB. AGENDA* (Apr. 2009), <https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf> [<https://perma.cc/LFN7-QMRX>].

⁹³ Experts from the educational, medical, legal, and social fields came together for these discussions. *See* Droux, *supra* note 91.

⁹⁴ HIGH COMMISSION OF PATRONAGE, *PREMIER CONGRES INTERNATIONAL DE LA PROTECTION DE L’ENFANCE* [FIRST INTERNATIONAL CONGRESS OF THE PROTECTION OF CHILDREN] (1913) (Brussels was already an international leader of children’s justice at the time, having their own Juvenile Court. Judge M. Paul Wets, a Juvenile Court Judge, played an important role in the creation of the Child Welfare Committee (CWC)); *see also* CHILD

children ([in] educational, social, legal and medical [fields]).”⁹⁵ Unsurprisingly, progress toward the formation of such an organization came to an abrupt halt after the start of World War I.

The end of the Great War, together with a “growing transnational trend,”⁹⁶ reignited the interest in child welfare on an international plane. Postwar societies riddled with “destitute children, war orphans [and] refugee families,”⁹⁷ and the League of Nations’ desire to leave a lasting positive impact on the next generation⁹⁸ led to the resumption of international collaboration for the betterment of children. Reconciliation between nations after the war’s destruction dominated early conversations; improving child welfare was a mostly universalizing topic and a springboard for international cohesion within the League. However, tension emerged between the two non-governmental organizations (NGOs) wishing to be the League’s go-to agency for the creation of its child welfare mandate. The International Save the Children Union and the International Association for the Promotion of Child Welfare competed at every turn⁹⁹ until 1924¹⁰⁰ with the creation of the Child Welfare Committee (hereinafter CWC). Members consisted of political delegates from party States and representatives of voluntary organizations.¹⁰¹

The CWC was loosely modeled on the Advisory Committee on the Traffic in Women and Children of 1922,¹⁰² and designed to be a consulting body tasked with drafting reports and resolutions. From the beginning, its scope was limited within the League—the CWC was accountable to the Assembly’s Fifth Commission, the League’s

WELFARE COMMITTEE, ADVISORY COMMISSION FOR THE PROTECTION AND WELFARE OF CHILDREN AND YOUNG PEOPLE: MINUTES OF THE SECOND SESSION (1926).

⁹⁵ Clara Mercier-Gavalet, *L'Intérêt Supérieur de L'Enfant Entre Indétermination Normative, Sémantique et Conceptuelle* [*The Best Interests of the Child Between Normative, Semantic and Conceptual Indetermination*] (Dec. 2022) (Ph.D. dissertation, University of Quebec in Montreal).

⁹⁶ Droux, *supra* note 91, at 23.

⁹⁷ *Id.*

⁹⁸ FIRST ASSEMBLY OF THE LEAGUE OF NATIONS, PROVISIONAL VERBATIM RECORD: 1ST MEETING I, 3–4 (1920) [hereinafter statement of G. Motta from Switzerland].

⁹⁹ See Marshall, *supra* note 1.

¹⁰⁰ Both Save the Children and the International Association for the Promotion of Child Welfare were the first organizations to obtain seats in the CWC. Their competition and fierce activism proved fruitful and now they are equals in the eyes of the League.

¹⁰¹ Geneva, 1924: *The Geneva Declaration of the Rights of the Child*, ONLINE ATLAS ON HIST. HUMANITARIANISM & HUM. RTS. (2015), <https://hr-atlas.ieg-mainz.de/articles/stornig-geneva> [<https://perma.cc/9WMQ-FHWA>].

¹⁰² Droux, *supra* note 91; see also Magaly Rodríguez García, *The League of Nations and the Moral Recruitment of Women*, 57 INT’L REV. SOC. HIST. 97 (2012).

Council, and the League Secretariat.¹⁰³ Its lack of independence and inability to encroach upon other States or League-related bodies hampered the CWC's early ambitions. Furthermore, even when decisions were made within the CWC's permitted remit, compromise became a regular feature of discussions as votes had to be unanimous.¹⁰⁴ Regardless, State parties¹⁰⁵ and organizations tasked with evaluation during the Committee's first session in 1925 put forward their aspirational agenda, including protecting early childhood, limiting the age of marriage, providing assistance for migrant children, and supplying family allowances.¹⁰⁶ The Committee's agenda is evidence of its pattern of compromise—aiming for rights, but settling for protection.

The CWC's manifesto was implemented through a twofold process. First, they created a set of definitions and standards for States to use as guidance when reforming their youth policies. Second, the Committee used its multi-State backing to put pressure upon States to initiate youth policy reform in order to bring them in line with said standards.¹⁰⁷ The Committee launched studies into child marriage, migrant children, and illegitimate children to discover which countries' policies had the most significant room for improvement. Once identified, the Committee gradually applied financial and political pressure on States to ensure their policies converged toward the Committee's Western *progressive* ideals. This was largely unnecessary; parties to the CWC already subscribed to the Western ideals the Committee endorsed, so this act was more self-congratulatory than active in inciting progressive change. However, its studies, conversations, and fostering of core principles *did* eventually result in a feat of note—the first international child convention.

B. Declaration on the Rights of the Child 1924

Preamble: By the present Declaration of the Rights of the Child, commonly known as the 'Declaration of Geneva,' men and women of all nations, recognizing that mankind owes to the Child the best that

¹⁰³ Droux, *supra* note 91, at 91.

¹⁰⁴ *Id.* at 96.

¹⁰⁵ Belgium, Denmark, the British Empire, Spain, the United States, France, Italy, Japan, Romania, and Uruguay were all represented in the first session; see *Advisory Committee on Traffic in Women and Protection of Children – Report of the Fourth Session*, League of Nations Doc. C.293 1925 IV (1925).

¹⁰⁶ *Id.*

¹⁰⁷ Droux, *supra* note 91, at 98.

it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

Article 1: *The child must be given the means requisite for its normal development, both materially and spiritually.*

Article 2: *The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored.*

Article 3: *The child must be the first to receive relief in times of distress.*

Article 4: *The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.*

Article 5: *The child must be brought up in the consciousness that its talented must be devoted to the service of fellow men.¹⁰⁸*

Eglantyne Jebb and her sister Dorothy Buxton¹⁰⁹ were the primary creators of the Save the Children Fund and played a vital part in the Declaration's creation. They belonged to Shropshire high society and were vocal anti-war activists; the combination of their aristocratic background and "criminal" history¹¹⁰ prevented the Committee and Fourth General Council from seriously considering the sisters' proposals. As a result, Jebb conceded that for an instrument to be created, it must be merely educational and simple enough to be broadcast by the "*mille voix de la presse*."¹¹¹ Jebb and Buxton's endeavors were well-intentioned, but their involvement may have hampered the initial ambitious intentions for the Declaration—ultimately, the British government deemed the document "still too insensitive."¹¹² The Declaration's condensed nature made it easily communicable but lacking in substance to its critics.

¹⁰⁸ *Geneva Declaration of the Rights of the Child*, League of Nations (1924) [hereinafter Geneva Declaration].

¹⁰⁹ Marshall, *supra* note 1, at 135.

¹¹⁰ Miss Jebb was charged with "unpatriotic behaviour" and fined £5 after distributing a leaflet showing a photo of two starving Austrian children. It was "unpatriotic to save the children of former enemies from death by hunger." See James Muckle, *Saving the Russian Children: Materials in the Archive of the Save The Children Fund Relating to Eastern Europe in 1920–23*, 68 *SLAVONIC & E. EUR. REV.* 507 (1990).

¹¹¹ Marshall, *supra* note 1, at 131 (Translation: thousand voices of the press).

¹¹² Georges Werner, *Remise de la «Déclaration de Genève» au Conseil d'État de Genève pour ses archives* [Submission of the "Geneva Declaration" to the Geneva State Council for Its Archives], *REVUE INTERNATIONALE DE LA CROIX-ROUGE* [INT'L REV. RED CROSS] 6, 63 (1924).

Unsurprisingly, the staunchly moderate Declaration received “welcoming publicity”¹¹³ from the States already party to the CWC, with hundreds of newspapers reproducing the text. However, commentators with domestic provisions still slightly differing from the Declaration—including Germany, Canada, Belgium, and Sweden¹¹⁴—used it as an opportunity to confront their national laws and bring them in line with the five published articles. Article 3 is of particular note, given the circumstances surrounding the Declaration’s publication. It aided in a global shift in attitudes toward children and increased sympathy, regardless of nationality.

This is where Jebb triumphed. She and Save the Children would not falter in their insistence on the abnegation of individual interest¹¹⁵ when a child’s livelihood was at stake. They believed a State’s political interests should not be deemed so important as to cause active harm to a child; nationality should be completely set aside because the child, regardless of State, was not the enemy.¹¹⁶ She wanted to tap into the goodwill of “ordinary persons,”¹¹⁷ find the shared base humanity of people—and the ostensibly neutral ground of childhood appeared to be the way to do so. Once overwhelmingly unpatriotic to assist a foreign child in distress, the Declaration and the work of Jebb transformed this belief into one now seen through an internationalist and borderless lens.

Children are an inherently vulnerable group, regardless of nationality or status. The Great War drew attention to this notion. For once, it was not solely delinquents or orphaned children who were in most need of State assistance. The consequences of armed conflict do not discriminate, so neither could the Geneva Declaration. Every child “above all considerations of race, nationality, or creed,”¹¹⁸ is owed a duty of care, perceived additional vulnerabilities aside.

Making all children in every State party to the Declaration equal in rights and protection was the most significant effect of the 1924 Declaration. Ultimately, it was emblematic of the CWC’s process—it provided the basic and necessary requirements for a healthy childhood, but nothing more. It speaks to the duties and responsibilities of adults toward the children in their lives, rather than children being “little adult

¹¹³ Marshall, *supra* note 1, at 133.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 136.

¹¹⁶ MAGGIE BLACK, *THE CHILDREN AND THE NATIONS: THE STORY OF UNICEF* 18 (1986).

¹¹⁷ Marshall, *supra* note 1, at 138.

¹¹⁸ Geneva Declaration, *supra* note 108.

agents deserving the same rights as all.”¹¹⁹ Considering the almost complete lack of international social and economic rights afforded to children outside the workplace before the Geneva Convention, it marked a step in the right direction but not the big leap required.

C. UNICEF

*“Who would vote against children’s welfare and health?”*¹²⁰

The widespread suffering experienced by combatants and civilians during World War I led to the creation of the Geneva Declaration, and from the continued, exacerbated brutality of World War II emerged a new, specialized child rights body: UNICEF. The move from the League of Nations to the United Nations also resulted in the shift from the CWC to the United Nations’ International Children’s Emergency Fund. Of the UN’s postwar efforts on behalf of children, UNICEF’s creation and mission was “likely the most prominent”¹²¹ and universalizing for Member States. As with the previous child rights movements, the humanitarian body first focused upon the poorest children and those most in need of urgent assistance, ideally without making them “the objects of pity or . . . trophies of international goodwill.”¹²²

President Herbert Hoover¹²³ was once deemed the founding father of UNICEF for being the architect of a climate of support for a UN children’s fund, but Ludwik Rajchman, Poland’s delegate to the UN’s Relief and Rehabilitation Administration (hereinafter UNRRA) and former health secretariat for the League of Nations, was the one who effectively lobbied for UNICEF’s adoption.¹²⁴ UNRRA’s and Rajchman’s performances were impressive, but the States primarily supported by UNRRA were Socialist, and the emerging Cold War

¹¹⁹ John Wall, *Childhood Studies, Hermeneutics, and Theological Ethics*, 86 J. RELIGION 523, 542 (2006).

¹²⁰ YVES BEIGBEDER, *NEW CHALLENGES FOR UNICEF: CHILDREN, WOMEN, AND HUMAN RIGHTS* 17 (2001).

¹²¹ Paula S. Fass, *A Historical Context for the United Nations Convention on the Rights of the Child*, 633 ANNALS AM. ACAD. POL. & SOC. SCIS. 17, 24 (2011).

¹²² BLACK, *supra* note 116, at 15.

¹²³ President Hoover was also instrumental in the success of the Commission for Relief in Belgium (CRB), a philanthropic group designed to provide food and necessary resources for starving Belgians through the German blockade. The CRB had distributed supplies worth one billion dollars by 1919. *See* GEORGE I. GAY & HAROLD H. FISHER, *PUBLIC RELATIONS OF THE COMMISSION FOR RELIEF IN BELGIUM* (1929).

¹²⁴ V. Tarzie Vittachi, *Introduction: UNICEF at 40*, UNICEF NEWS, 1986, at 1.

threatened their willing assistance of Eastern European countries.¹²⁵ After Winston Churchill's "Iron Curtain" speech, Western States could no longer be seen financially supporting potential enemies.

The largest contributor—the United States—stopped providing monetary assistance to UNRRA. Rajchman still pushed for food and medical assistance for children even if this meant liquidating whatever remained in UNRRA's pool and eradicating the body.¹²⁶ Amidst the aftermath of WWII, thanks to the success of the Committee on Social and Humanitarian Affairs' proposal and Rajchman's "persistent shepherding,"¹²⁷ on December 11, 1946,¹²⁸ the U.N. General Assembly (hereinafter UNGA) unanimously adopted a resolution to create UNICEF.

The UNGA insisted UNICEF remain nonpolitical, upholding the text of the Geneva Declaration, which specifies that assistance is to be given "on the basis of need, without discrimination because of race, creed, nationality, status, or political belief."¹²⁹ The object and purpose of the resolution are similarly and deliberately flexible—"the broader the better."¹³⁰ This flexibility extends to funding and spending; UNICEF is permitted to receive voluntary contributions from any source and spend on virtually any matter provided it is "properly utilized" and in line with paragraph 2(b)(ii).¹³¹ Critically, UNICEF was to continue the ambitions of UNRRA, but not its heavily criticized work or the vitriol found between European and American workers at

¹²⁵ BLACK, *supra* note 116, at 4.

¹²⁶ In its three and a half years of existence, UNRRA provided just under four billion dollars in aid to roughly twenty-five countries, helping several hundred million people. *See* MAGGIE BLACK, *THE CHILDREN AND THE NATIONS: THE STORY OF UNICEF* 24–32 (1986).

¹²⁷ Vittachi, *supra* note 124, at 4.

¹²⁸ G.A. Res. 57 (I), Establishment of an International Children's Emergency Fund (Dec. 11, 1946).

¹²⁹ G.A. Res. 57/1, ¶ 2(b)(ii) (Dec. 11, 1946).

¹³⁰ BLACK, *supra* note 116, at 33.

¹³¹ G.A. Res. 57/1, ¶ 2(b) (Dec. 11, 1946) ("The Fund, in agreement with the Governments concerned, shall take such measures as are deemed appropriate to ensure the proper utilization and distribution of supplies or other assistance which it provides. Supplies or other assistance shall be made available to Governments upon approval by the Future of the plans of operation drawn up by the Governments concerned. Provisions shall be made for:

....

- (ii) Equitable and efficient dispensation or distribution of all supplies or other assistance, on the basis of need, without discrimination because of race, creed, nationality status or political belief").

the heart of UNRRA's demise.¹³² (This vitriol was rooted in the belief that American relief workers could not accurately empathize with recipients without themselves feeling the consequences of war at home.)

The Children's Fund's policies were to be determined by its Executive Board, with members chosen by the U.N. Economic and Social Council. Rajchman was elected Chairman of the Board, and Maurice Pate—an American and associate of President Hoover's—was chosen to be the first executive director of UNICEF.¹³³ Superficially, Pate was a peculiar choice given his Republican background and the anti-internationalist stance of the party. However, he was held in high regard both within the party and by President Hoover and was therefore able to enlist and encourage trusted conservatives to engage in UNICEF's international humanitarian mission. Pate wrote to George C. Marshall, the U.S. Secretary of State and architect of the postwar Marshall Plan, requesting enough resources for “a glass of milk and some fat to spread on bread for six million children”¹³⁴ in early 1947. By May of the same year, Congress voted to donate forty million dollars to UNICEF, provided this contribution was “matched” by other States—including Australia, Canada, New Zealand, and Switzerland.¹³⁵

Party States' first collaborative mission focused upon the dire widespread malnutrition throughout Europe—by the summer of 1948, food shipments were sent to four million children in twelve countries, expanding to six million by 1950.¹³⁶ UNICEF's primary role was, and continues to be, to address emergencies and provide relief, with an attached hope of strengthening domestic child health and welfare programs in the process. With the European emergency mostly resolved by 1950, UNICEF's relief-providing powers could finally expand beyond its early eurocentricity, shifting to less-developed states in Asia, the Middle East, and Latin America.¹³⁷

This expansion faced significant opposition from the United States, who had anticipated UNICEF's work finishing within four years at

¹³² Silvia Salvatici, *‘Help the People to Help Themselves’: UNRRA Relief Workers and European Displaced Persons*, 25 J. REFUGEE STUD. 428, 432 (2012).

¹³³ BLACK, *supra* note 116, at 8 (Black called Pate's appointment an “inspired choice”).

¹³⁴ Vittachi, *supra* note 124, at 4.

¹³⁵ *Id.*

¹³⁶ *Id.* at 4–5.

¹³⁷ *Id.* at 5.

most.¹³⁸ The sheer number of underfed children outside Europe made it “impossible to carry out [the] large-scale feeding programmes”¹³⁹ previously conducted. Intent on remaining an international charitable success, UNICEF had to change tack. Its limited resources were then put to use by providing global fellowships and training opportunities in maternal health, child health, and disease control.¹⁴⁰ Just as this form of outreach was gaining traction, Maurice Pate testified in front of Congress in 1949 that UNICEF would be concluding its work shortly, with remaining funding passing to the World Health Organization. However, upon realizing how much support UNICEF had garnered internationally, by early 1950 he expressed an opinion completely to the contrary—that UNICEF was only just getting started.

The U.S. State Department fundamentally disagreed with Pate, which was a considerable worry for UNICEF, given both the proportion of Children’s Fund financial support flowing from the United States and the pattern of western donor states following in the United States’ footsteps.¹⁴¹ UNICEF’s future became the feature of a discussion headed by the U.N. Committee on Social, Humanitarian, and Cultural Affairs on October 6, 1950. Eleanor Roosevelt argued the purpose was in its name—the fund was for emergencies only, not to be used as a tool for long term economic development, and thus should consider winding down operations.¹⁴² Developing nations, including Venezuela, Brazil, and Pakistan,¹⁴³ disagreed with her stance. What is more, even if UNICEF’s purpose was purely for children in emergency situations, how could one consider its work done? Unless, of course, European children are the only ones considered worthy of assistance.

A consensus over the body’s future remained elusive. Instead, UNICEF sufficiently demonstrated its effectiveness—particularly in Asia—over the next three years, after which a concrete decision was made.¹⁴⁴ This resolution was not supported by the fund’s primary backers; fortunately, it was carried by the majority. In a triumphant effort to prove its worth, the global distribution of life-saving drugs, antibiotics, and insecticides saved the lives of millions of children.

¹³⁸ *Id.* at 8.

¹³⁹ *Id.* at 7.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (Britain, Canada, and South Africa all suggested they would follow suit if the United States pulled funding and support).

¹⁴² U.N. GAOR, 5th Sess., 279th mtg., U.N. Doc. A/C.3/SR.279 (Oct. 6, 1950).

¹⁴³ U.N. GAOR, 5th Sess., 278th mtg. at 47, 57, U.N. Doc. A/C.3/SR.278 (Oct. 6, 1950).

¹⁴⁴ G.A. Res. 417 (V) (Dec. 1, 1950).

Three years later, UNICEF received almost unanimous support¹⁴⁵—except from the United States. However, shortly before the organization ran out of funds, President Eisenhower himself backed the indefinite continuation of UNICEF, helped in no small part by Eleanor Roosevelt’s public persistence:

There are about 900 million children under fifteen on Earth today. More than half—about 500 million—live and die in want . . . they are familiar with hunger, cold and disease. The only organization that even begins to answer their needs is UNICEF. Yet its total expenditure has been less than half the cost of a single aircraft carrier My hope—and the only practical salvation for these 500 million children—is that UNICEF will be made permanent.¹⁴⁶

As the U.N. was still in its infancy, and the international political climate remained delicate at best, significant pressure rested upon UNICEF’s shoulders. From the outset, UNICEF wanted to feed the hungry child, care for the sick child, and teach the illiterate child. Every other subset or delegated body of the U.N. had, and has, focused on a particular niche of activity or area of underdevelopment, such as “health, agriculture, employment, [or] education.”¹⁴⁷ Children fall within every one of these categories, with the added vulnerability of their youth. Despite appearing neat in its mission—aid children in need, particularly those impacted by war—when coupled with the U.N.’s pressure to succeed, UNICEF’s work could not be more complex or demanding.

UNICEF has not had a period of reprieve since its creation. Postwar food shipments of the late 1940s were closely followed by the 1950s’ tuberculosis, syphilis, and malaria epidemics. The 1960s saw the U.N.’s first “Development Decade,” with a surge in state independence, but also a lack of adequate resources to successfully birth the hopeful visions of new communities. Internationalist disillusion naturally followed, with entire nations succumbing to global recession, debt, and political distress.¹⁴⁸ Thankfully, in the postwar era, international legislative and NGO efforts concerning child protection and assistance were not limited to UNICEF and the Geneva Declaration. The following two decades saw the introduction of three of the most instrumental human rights treaties of the twentieth century: the Universal Declaration of Human Rights; the International Covenant

¹⁴⁵ G.A. Res. 802 (VIII) (Oct. 6, 1953).

¹⁴⁶ *60 Million Children Need Assistance*, SINGLETON ARGUS, Dec. 24, 2015.

¹⁴⁷ BLACK, *supra* note 116, at 16.

¹⁴⁸ *Id.* at 17.

on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. Furthermore, the Geneva Declaration was superseded by the 1959 Declaration on the Rights of the Child.

D. Universal Declaration of Human Rights 1948

As with UNICEF's creation, WWII "provided the catalyst for the development in human rights law . . . and moved human rights to the forefront of international relations."¹⁴⁹ While creating an overarching international human rights document in and of itself appears to be an obvious move for the U.N., actually crafting it was a tremendous feat. The U.N. Human Rights Commission, chaired by Eleanor Roosevelt, created a draft bill, meeting eighty-one times in order to discuss the text.¹⁵⁰ Mrs. Roosevelt played a key role throughout the majority of the United Declaration of Human Rights (hereinafter 'UDHR') creation, unsurprisingly influencing the document heavily with U.S. legal standards.¹⁵¹ On December 10, 1948, the declaration was unanimously adopted with forty-eight votes in favor.¹⁵² In presenting this monumental text to the General Assembly, Roosevelt said the following:

We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This Declaration may well become the international Magna Carta for all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries.¹⁵³

The UDHR does not articulate any child-rights-specific provisions; instead, it errs on the side of protection again through Articles 25 and 26. Further, it only speaks to children in relation to their parents. Article 25(2) states, "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall

¹⁴⁹ Elizabeth F. Defeis, *Universal Declaration of Human Rights: A Standard for States*, 28 SETON HALL J. LEGIS. & PUB. POL'Y 259, 261 (2004).

¹⁵⁰ Matthew Lippman, *Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights*, 10 CAL. W. INT'L L.J. 450, 466 (1980).

¹⁵¹ Defeis, *supra* note 149, at 262.

¹⁵² Eight States abstained—Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukraine S.S.R., U.S.S.R., Union of South Africa, and Yugoslavia.

¹⁵³ Eleanor Roosevelt, Adoption of the Declaration of Human Rights (Dec. 9, 1948).

enjoy the same social protection.”¹⁵⁴ The special care required for children means the UDHR opted for positive rights with the condition here, but in Article 26—the right to an education—the right is universally applied. Everyone has the right to an education, at least at the elementary level. Article 26(3) calls upon the preference for parental say—parents have the “prior right to choose the kind of education that shall be given to their children.”¹⁵⁵ Ostensibly, this is so parents may protect their children from school curricula they disagree with or to ensure there will not be rebuttal for opting for private or religious education. Beyond this, children are excluded from the UDHR.

Former Secretary-General Kofi Annan called the UDHR “the yardstick by which we measure a society’s state of progress.”¹⁵⁶ Based upon this statement, society’s state of progress in relation to children’s autonomous rights—not protection—slowed down significantly after the creation of UNICEF.

E. Declaration on the Rights of the Child 1959

After facing pressure from the Soviet delegation in 1956, the U.N. Human Rights Commission decided to revisit and update the 1924 Declaration.¹⁵⁷ Three years later, during its March–April 1959 session, the Commission established a ten-provision text¹⁵⁸ focusing upon the social and legal principles of child protection and welfare. While heavily based upon the Geneva Declaration, little else is known about its secretive drafting process.¹⁵⁹ On the date of its publication, the General Assembly recommended all state parties disseminate the text as far as feasibly possible “in all languages possible.”¹⁶⁰

¹⁵⁴ G.A. Res. 217 (III), at 25 (Dec. 10, 1948).

¹⁵⁵ *Id.*

¹⁵⁶ Press Release, Secretary-General, Secretary-General Says Prevention of Human Rights Violations Must Mark Twenty-First Century, U.N. Press Release SG/6487 (Mar. 16, 1998).

¹⁵⁷ Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 53 AM. SOC’Y INT’L L. PROC. 217, 229 (1959).

¹⁵⁸ *Id.*; Comm. on Hum. Rts., Rep. of the Twelfth Session, U.N. Doc. E/2844 (1956); Comm. on Hum. Rts., Rep. of the Fifteenth Session, U.N. Doc. E/3229 (1959).

¹⁵⁹ Zoe Moody, *The United Nations Declaration of the Rights of the Child (1959): Genesis, Transformation and Dissemination of a Treaty (Re)constituting a Transnational Cause*, 45 Q. REV. COMPAR. EDUC. 15, 21 (2015).

¹⁶⁰ U.N. GAOR, 14th Sess., 841st plen. mtg. at 20, U.N. Doc. A/PV.841 (Nov. 20, 1959).

The second Declaration was a “fundamental text in the field”¹⁶¹ of children’s rights. Like its predecessor, the term “children” included the unborn¹⁶² and did not refer to the girl child. Unlike its predecessor, it was more explicit in its intentions to be all encompassing:

The child shall enjoy all rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.¹⁶³

Its overall themes and intentions were to provide children with a happy childhood, elaborating upon this within the document’s ten provisions to explain how this may be achieved by the state and by parents.¹⁶⁴ The second Declaration expanded protection within vital areas, from giving children the right to a nationality¹⁶⁵ to being entitled to the benefits of a social security system¹⁶⁶—including access to education¹⁶⁷—and being afforded tailored care if physically, mentally, or socially handicapped.¹⁶⁸ Like the 1924 Declaration, the rights described in the second Declaration are overwhelmingly positive in structure. The child shall enjoy special protection,¹⁶⁹ be entitled to a name,¹⁷⁰ be protected against all forms of neglect, cruelty and exploitation,¹⁷¹ all unequivocally positive. However, within certain rights, negative rights exist as stipulations. Within the right to harmonious development, “a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”¹⁷² Additionally, in protecting children from neglect, children “shall not be

¹⁶¹ Rinku Gangwani, *Child Protection and Laws*, INDIAN J.L. & JUST., Sept. 2015, at 100, 105 (2015).

¹⁶² G.A. Res. 1386 (XIV), at 19 (Nov. 20, 1959).

¹⁶³ *Id.*

¹⁶⁴ Elena A. Pevtsova & Victoria G. Annkova, *Conception and the New Ways of Protecting the Rights of Children and Young People: Theory, History and Present*, 7 REV. EUR. STUD. 274, 276 (2015).

¹⁶⁵ G.A. Res. 1386 (XIV), at 20 (Nov. 20, 1959).

¹⁶⁶ *Id.* at Principle 4.

¹⁶⁷ *Id.* at Principle 7.

¹⁶⁸ *Id.* at Principle 5.

¹⁶⁹ *Id.* at Principle 2.

¹⁷⁰ *Id.* at Principle 3.

¹⁷¹ *Id.* at Principle 9.

¹⁷² *Id.* at Principle 6.

the subject of traffic,” nor shall they “be admitted to employment before an appropriate minimum age.”¹⁷³

The choice to publish this as an unbinding declaration rather than a convention, and the text’s mixture of principles and clauses,¹⁷⁴ faced criticism. The New York Times noted “the document [was] an enunciation of general principles without the teeth of international law to enforce them.”¹⁷⁵ Its lukewarm reception did not appear to matter in practice as influential states relied upon the UDHR when in need of an alternative mechanism. In fact, after the mid-1960s, NGOs and states hardly made reference to the Declaration and decided to draw up their own charters. The second Declaration ultimately “fell into oblivion.”¹⁷⁶

One of the second Declaration’s few critical successes became a key feature of its 1989 successor, as first found within Principle 7: best interests of the child, a principle rooted in necessary indeterminacy.¹⁷⁷ It is only mentioned within the remit of being a “guiding principle” for those in charge of a child’s education. Nevertheless, it is an indication of what was to come: considering the child’s thoughts, feelings, and providing independence rather than international law merely being a protective force.

IV

BINDING INTERNATIONAL COLLABORATIVE EFFORTS— INTRODUCING FUNDAMENTAL NORMS (1966–1985)

A. International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 1966

The Human Rights Commission, wanting to prevent another source of legislative critique when creating the next two major sources of human rights law, opted for the binding covenant format with the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) and the International Covenant on Economic, Social and Culture Rights (hereinafter “ICESCR”). Together with the UDHR, they

¹⁷³ *Id.* at Principle 9.

¹⁷⁴ Jordi Cots, “*Le BICE de les Droits et les Droits de l’Enfant: le Message de la Convention et le Message du BICE*,” *BICE, l’Enfance dans le Monde* (1996) 4–7.

¹⁷⁵ Paul Hofmann, *U.N. Body Backs Child’s Charter*, N.Y. TIMES, Oct. 20, 1959, at 8.

¹⁷⁶ Moody, *supra* note 159, at 24.

¹⁷⁷ Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 229 (1975).

form the International Bill of Rights.¹⁷⁸ The ICCPR recognized the child as a subject in and of itself but is still connected to the rights of the family.¹⁷⁹

The main articles relevant for discussion are Articles 10(2)(b) and 10(3) of the ICCPR, which focus on juvenile justice,¹⁸⁰ Article 18(4),¹⁸¹ which dictates states must respect a parent’s wishes regarding their child’s “religious and moral education,” and the entirety of Article 24, which essentially formalizes the primary elements of the second Declaration:

A24(1): Every child shall have, without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State;

A24(2): Every child shall be registered immediately after birth and shall have a name;

A24(3): Every child has the right to acquire a nationality.¹⁸²

The ICESCR’s Article 10 offers complementary protection for children through Article 10(1)—ensuring the family is provided for, especially when children are involved—and Article 10(3) which indicates special measures of protection and assistance are to be given to children “without discrimination.”¹⁸³ It continues: “Children and young persons should be protected from economic and social exploitation,” which, whilst not explicit, functions alongside Article 8 of the ICCPR to prevent compulsory labor and servitude.¹⁸⁴ Article 10 exclusively awards positive rights.¹⁸⁵ Outside of the working environment, children’s health and general wellbeing are covered under Article 12(2)(a) of the ICESCR, requesting states take measures to “achieve the full realization of [the] right [to] . . . the healthy

¹⁷⁸ Uchenna Emelonye, *Theoretical and Normative Foundation of Child Rights*, 15 US-CHINA L. REV. 1, 11 (2018).

¹⁷⁹ Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. MIAMI L. REV. 867, 918 (2003).

¹⁸⁰ Juvenile justice is an incredibly vast topic and is beyond the scope of this Article; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 10(2)(b)–(c) (Dec. 16, 1966).

¹⁸¹ *Id.* art. 18(4).

¹⁸² *Id.* art. 24.

¹⁸³ *Id.* art. 10.

¹⁸⁴ Stuti Agarwal, *Interplay Between Child Rights and Refugee Law: An Analysis from the Perspective of UNCRC*, 2 LEXFORTI LEGAL J. 21, 33 (2021).

¹⁸⁵ *Id.* art. 10.

development of the child.”¹⁸⁶ As part of the right to the healthy development of the child, state parties must take affirmative steps toward reducing the rates of stillbirths and infant mortality,¹⁸⁷ and preventing the spread of diseases;¹⁸⁸ positive actions bringing about a reduction of detrimental outcomes. This article is one of the rare instances where we see a specific right bestowed to a child not through a protectionary or parental lens. Although the UNCRC later introduced their own right to health for children,¹⁸⁹ this move was revolutionary for the time.

***B. International Labour Organisation’s Adoption of C138—
Minimum Age Convention (1973)***

*A3(1): The minimum age for admission to any type of employment or work which by its nature or circumstances in which it is carries out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years.*¹⁹⁰

The International Labour Organisation (hereinafter “ILO”) is among the world’s oldest intergovernmental organizations,¹⁹¹ described by some as the “90-pound weakling of UN agencies,”¹⁹² and by others as an essential mechanism which “thrive[s] outside of the formal channels of authority.”¹⁹³ Regardless, its specialized delegated powers focus upon “promoting peace, fighting poverty, encouraging respect for human rights (especially in workplaces), economic development, . . . child labour and forced labour”¹⁹⁴ through binding conventions and nonbinding recommendations. Further, since its conception in 1919, the ILO has been one of the most “pivotal” organizations in the

¹⁸⁶ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 12(2)(a) (Dec. 16, 1966).

¹⁸⁷ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 12 (2)(a) (Dec. 16, 1966).

¹⁸⁸ *Id.* art. 12 (2)(c).

¹⁸⁹ G.A. Res. 44/25, Convention on the Rights of the Child, art. 6, 24 (Nov. 20, 1989) [hereinafter UNCRC].

¹⁹⁰ International Labour Organization Res. C138, art. 3(1) (1973) [hereinafter C138].

¹⁹¹ Laurence R. Helfer, *Compliance with Unratified Treaties: The ILO Experience*, 71(1) L. & CONTEMP. PROBS. 193, 193 (2008).

¹⁹² *Id.* at 194.

¹⁹³ *Id.* at 217.

¹⁹⁴ Marc Bélanger, *The ILO and Human-Trade Union Rights*, 15 INT’L UNION RTS. 8 (2008) (Human rights and labor rights: IUR speaks with trade unionists, lawyers and human rights groups in the 60th anniversary year of the Universal Declaration of Human Rights).

campaign against child labor.¹⁹⁵ After conducting research into child labor, the ILO found over 200 million children worked in hazardous conditions with little to no protection.¹⁹⁶ This information, and the organization's dedication to improving "the deteriorating economic conditions"¹⁹⁷ in developing countries that may result in a need for child labor, was used to create its 138th convention—the Minimum Age Convention.

The Minimum Age Convention set forth general minimum ages to enter employment, depending on the completion of mandatory schooling and the hazards involved with the labor in question. The Convention dictates that "light" labor may be conducted from the age of thirteen,¹⁹⁸ general labor from the age of fifteen,¹⁹⁹ hazardous work under strict conditions from the age of sixteen,²⁰⁰ and without strict conditions from the age of eighteen.²⁰¹ Limitations are added to ensure children do not enter work before they are mentally and physiologically ready. Once employed, positive rights come into play—sixteen-year-olds may only be employed provided the "health, safety and morals of the young persons concerned are fully protected,"²⁰² and "adequate specific instruction or vocational training"²⁰³ has been given. The state must have checks in place to ensure these protections are enforced. These governmental obligations, therefore, constitute positive rights.

The Convention's overall intention was to encourage domestic legislation to abolish child labor—without explicitly defining what child labor is. Leaving this definition to each member state was a big risk for an instrument attempting to provide universalizing terminology and principles, especially given the range of definitions given to both "child" and "labo(u)r."²⁰⁴ Considering the ILO's apparent dedication to protecting children from the detrimental impacts of labor—being more susceptible to injury, exploitation, and losing out on development

¹⁹⁵ R.A. Mavunga, *A Critical Assessment of the Minimum Age Convention 138 of 1973 and the Worse Forms of Child Labour Convention 192 of 1999*, 16 POTCHEFSTROOM ELEC. L.J. 121, 124 (2013).

¹⁹⁶ Bélanger, *supra* note 194, at 8.

¹⁹⁷ Bozena Maria Celek, *The International Response to Child Labor in the Developing World: Why Are We Ineffective*, 11 GEO. J. ON POVERTY L. & POL'Y 87, 93 (2004).

¹⁹⁸ C138 art. 7(1), *supra* note 190.

¹⁹⁹ *Id.* art. 2(3) and 7(2).

²⁰⁰ *Id.* art. 3(3).

²⁰¹ *Id.* art. 3(1).

²⁰² *Id.* art. 3(3).

²⁰³ *Id.*

²⁰⁴ Celek, *supra* note 197, at 93.

opportunities to name a few²⁰⁵—leaving this definition open-ended was particularly remarkable. Perhaps it was because successful legislation cannot apply to an entire economy if true enforcement is expected,²⁰⁶ or because the ILO simply did not have the resources required to attempt the biggest feat of child labor legislation effectively.

Critique of the instrument also comes at the most basic level, in that its policies are written. The majority of young children in working conditions most likely to benefit from this Convention cannot read or write; written policies “protect the hierarchies of power by relying on the laws formulated by the elite and by making it difficult for others to penetrate the system.”²⁰⁷ The ILO only addressed a select few of these criticisms through its Worst Forms of Child Labour Convention in 1999,²⁰⁸ but its issue with a lack of reach to illiterate children and parents should have been given significant attention at the time—through accessible visual and auditory awareness campaigns using television, radio, posters, and community meetings. Children’s rights do not exist if children cannot understand nor rely upon them. This is not a failure specific to the ILO, but it will appear as a consistent thread throughout other major intergovernmental organizations and their attempts to remedy child rights loopholes and abuses.

C. Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)

Children and women have been inextricably linked in law. This Declaration is one of the many instruments²⁰⁹ that highlights and concretizes this connection. The Declaration on the Protection of Women and Children in Emergency and Armed Conflict (hereinafter “PWCEAC”) was proposed by the U.N. Economic and Social Council; its primary purpose appearing to be to “remind the international

²⁰⁵ *Id.* at 94.

²⁰⁶ *Id.*

²⁰⁷ Mavunga, *supra* note 195, at 128 (referencing Emme Vida Estacio and David F. Marks, *Child Labour and the Organization’s Convention 182: A Critical Perspective*, 10 J. HEALTH PSYCH. 475, 483 (2005) (This matter is too large to thoroughly dissect here, but will be particularly relevant when ensuring that the UNCRC is interpreted in a way that as many children as is practicable may understand their rights)).

²⁰⁸ Mavunga, *supra* note 195, at 129.

²⁰⁹ *See, e.g.*, The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), The Convention on the Elimination of All Forms of Discrimination against Women 1979, The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994), The Beijing Declaration and Platform for Action (1995), and The Montevideo Strategy for Implementation of the Regional Gender Agenda within the Sustainable Development Framework 2030.

community of the innocent, often overlooked victims of armed conflict²¹⁰—namely women and children. Whilst women and children are not the only parties to suffer during war, the U.N. still felt the need to provide tailored legislative protection given the gender and age specific abuse dealt by the hands of perpetrators during armed conflict. They often experience “suppression, aggression, colonialism, racism, alien domination and foreign subjugation,” at far greater rates than male adults.²¹¹

The Declaration stresses the particularly vulnerable situation of women and children, prohibiting any acts of “incalculable suffering”²¹² against this demographic. The Declaration primarily utilizes negative rights through prevention and condemnation, prohibiting attacks and bombings,²¹³ requiring foreign military operations to “spare women and children from the ravages of war,”²¹⁴ and making criminal imprisonment and torture of women and children.²¹⁵ A 2012 report from the U.N. Office of the Special Representative of the Secretary-General for Children Affected by Conflict²¹⁶ published positive results stemming from this Declaration, both within the United Nations family and in civil society. Though eighteen action plans had been signed and “thousands of children . . . saved and reintegrated into society,”²¹⁷ progress overall was “still short of satisfactory.”²¹⁸

The Economic and Social Council evidently did not see the need to separate women and children into their own legal categories deserving of individualized protection. Though there are similarities between the two groups when it comes to their safeguarding from armed conflict, major differences exist as well—specifically “the quality and nature of their agency and right to participation.”²¹⁹ The intention does not

²¹⁰ W. Warren H. Binford, *School Lessons in War: Children at Tuol Sleng & the Rise of International Protection for Children in War*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 28, 42 (2008).

²¹¹ G.A. Res. 3318 (XXIX), Declaration on the Protection of Women and Children in Emergency and Armed Conflict, preamble ¶ 4 (Dec. 14, 1974).

²¹² *Id.* art. 1.

²¹³ *Id.*

²¹⁴ *Id.* art. 4.

²¹⁵ *Id.* art. 5.

²¹⁶ Jean-Marc de La Sablière (Former Permanent Representative of France to the United Nations), *Security Council Engagement on the Protection of Children in Armed Conflict: Progress Achieved and the Way Forward* (June 15, 2012).

²¹⁷ *Id.* at 20.

²¹⁸ *Id.* at 22.

²¹⁹ Radhika Coomaraswamy, *Women and Children: The Cutting Edge of International Law*, 30 AM. U. INT’L L. REV. 1, 4 (2015).

appear to be the infantilization of women by grouping them with children, but this Article will not operate under this connection for several reasons. Firstly, whether intentional or not, it is infantilizing to group women and children together. In “subverting the distinction”²²⁰ between adults and youths, women are robbed of their agency. This Article does not want to perpetuate the theme of agency reduction. Secondly, there is a loose Western-Southern divide in views of women rooted in conservatism and strong Catholic and Islamic traditions.²²¹ Resistance to the grouping of women and children is more prominent in the South, however, the impacts of armed conflict are far more pressing in the South. The onus of shifting the attitudes toward women in emergencies and armed conflict should be placed upon wealthier nations with existing liberal precedents. Third, as the focus here is child rights, addressing adult women’s rights is beyond the scope of this Article.

D. International Year of the Child (1979)

Two decades after the Declaration on the Rights of the Child, the United Nations proclaimed 1979 to be the Year of the Child.²²² Primarily sponsored by UNICEF, having a “Year of the Child” was designed with two objectives in mind: (1) to provide an advocacy framework for decision-makers in the field of children’s rights and protection, and (2) to promote children-inclusive programs as part of all economic and social development platforms moving forward.²²³ Despite being international in nature, the Assembly’s hope was that the majority of change would occur at a national level, whilst stressing the vital role NGOs should play in supporting these national missions.²²⁴ The Assembly further noted that “the child is the most delicate and sensitive barometer of the state of the social order and of the world.”²²⁵ Essentially, all international legislative and economic efforts would be in vain if basic services for children were not provided first. Having a year dedicated to putting children’s protection and rights was intended

²²⁰ Tamar Ezer et al., *Child Marriage and Guardianship in Tanzania: Robbing Girls of Their Childhood and Infantilizing Women*, 7 *GEO. J. GENDER & L.* 357, 363 (2006).

²²¹ Coomaraswamy, *supra* note 219, at 31.

²²² G.A. Res. 31/169, International Year of the Child (Dec. 21, 1976).

²²³ G. A. Res. 32/109, International Year of the Child. Resolutions adopted on the reports of the Second Committee 89 (Dec. 15, 1977).

²²⁴ *Id.*

²²⁵ U.N. GAOR, 34th Sess., 34th plen. Mtg. at 715, U.N. Doc. A/34/PV.34 (Oct. 15, 1979) [hereinafter Agenda Item 26].

to incite a global transition toward truly cementing Principle 8 of the (still mostly ignored) Declaration on the Rights of the Child: “The child shall in all circumstances be among the first to receive protection and relief.”

Year of the Child meetings spotlighted novel areas of global concern—“child abuse, sexual exploitation, street children and the status of children with disabilities,”²²⁶ spurred research studies focusing upon child labor and infant and maternal mortality,²²⁷ incited the creation of Defence for Children International,²²⁸ and seemingly acted as a prelude to the UNCRC. Lindkvist argues we should not look to the Year of the Child as the catalyst for the UNCRC, but instead as evidence of a clash of competing visions for the future of children²²⁹ within international legislative efforts.

In 1978, during that year’s U.N. Commission on Human Rights session, the Polish government announced they would create a new draft convention on children’s rights to remedy the toothless declaration with the aim of completing this convention during the Year of the Child.²³⁰ Polish judge and politician Adam Łopatka—chair of the working group for this convention—believed Poland was best suited to lead this effort because of the “sensitivity of Polish society to the suffering and misery of children,”²³¹ after its children were stripped of their basic rights amidst the two world wars. The convention would follow the same formula as the declaration, using it as its basis, but updating it to better reflect modern social, cultural, and economic developments.

However, Poland’s efforts were quickly dismissed. A collection of Northern European states argued relying on the 1959 declaration as a blueprint would be a mistake: “[I]n many countries, views on the

²²⁶ Linde Lindkvist, 1979: *A Year of the Child, but Not of Children’s Human Rights*, 1 DIPLOMATICA 202, 202 (2019).

²²⁷ *Id.* at 203.

²²⁸ Defence for Children International is a “leading child rights-focused and membership-based grassroots movement founded in 1979. [Their] mandate is to ensure effective implementation of the United Nations Convention on the Rights of the Child (UNCRC) at the local, national and international level.” *See also About Us*, DEFENCE FOR CHILD. INT’L, <https://defenceforchildren.org/about-us/> [<https://perma.cc/88V2-8YCN>] (last visited Nov. 25, 2024).

²²⁹ Lindkvist, *supra* note 226, at 220.

²³⁰ JOHN TOBIN ET AL., THE UN CONVENTION ON THE RIGHTS OF THE CHILD—A COMMENTARY 5 (John Tobin ed., 2019).

²³¹ Office of the U. N. High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of a Child*, 1 U.N. DIGITAL LIBRARY, U.N. Doc. HR/PUB/07/1 i, xxxvii (2007) [hereinafter *Legislative History*].

family, on marriage, on the relations between children and parents and on the child as an individual having its own needs and rights have undergone important changes [since 1959].”²³² Further, as noted by Sweden, a significant number of States have been admitted as members of the United Nations since 1959. Said states should be provided with the opportunity to influence the drafting of a new convention.²³³ Relying on the declaration rather than creating something novel and reflective of the “current realities of children and families,”²³⁴ would be out of touch at best, and akin to the U.N.’s pre-decolonization era of international human rights politics at worst.

This belief was not shared amongst all state parties. Her Excellency Mrs. Klang de Guzmán, former First Lady of the Dominican Republic, called the updating of the declaration a “beautiful objective,”²³⁵ provided the restructured text respected the inherent rights found in every human and safeguarded the “universal rights”²³⁶ of the child. Unsurprisingly, the Polish delegation believed the declaration had already fully “settled the meaning of children’s rights in international affairs.”²³⁷ However, Mrs. Komarova of the Union of Soviet Socialist Republics posited that, two decades after the creation of the declaration, international actors still did not observe respect for children’s fundamental rights.²³⁸ Mr. Samhan of the United Arab Emirates raised the issues of Palestinian children living under Israeli occupation deprived of “education, stability and security,”²³⁹ in violation of both the Universal Declaration of Human Rights and the Declaration of the Rights of the Child, and South African children living under apartheid rule facing ongoing racial discrimination.

Several state parties highlighted the importance of utilizing rights-based language if international efforts are to be successful in promoting and protecting the welfare of children. And yet, in practice, the 1959 declaration had failed to do this very thing. The declaration’s motto stated, “Mankind owes to the child the best it has to give.”²⁴⁰ How could

²³² U.N. Secretary-General, *Question of a Convention on the Rights of the Child*, U.N. Doc. E/CN.4/1324 ¶ w (Dec. 27, 1978).

²³³ *Id.* ¶ dd.

²³⁴ Lindkvist, *supra* note 226, at 217.

²³⁵ Agenda Item 26, *supra* note 225, at 717.

²³⁶ *Id.* at 719.

²³⁷ U.N., Econ & Soc. Council, Comm. on Human Rights, 34th Sess., 1471 mtg. ¶ 76, U.N. Doc. E/CN.4/SR.1471 (Mar. 13, 1978).

²³⁸ Agenda Item 26, *supra* note 225, at 724.

²³⁹ *Id.* at 731–32.

²⁴⁰ *Id.* at 727.

it be affording children with the “best” unless it formally and explicitly provided all children with rights and with remedies to enforce them? Why rely upon a declaration which conflated the best interests of a child with the “wisdom of a powerful bureaucratic parent”?²⁴¹ This discourse effectively neutralized Poland’s efforts. In response, the U.N. General Assembly established an open-ended working group²⁴² to continue crafting the next international child treaty, in the hopes of creating a text with universal appeal, far removed from the declaration.

E. United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (“The Beijing Rules”)

In 1980, during the meeting of the Sixth U.N. Congress Prevention of Crime and the Treatment of Offenders congregation, congregants felt specific rules should be developed to “protect the fundamental human rights of juveniles in trouble with the law.”²⁴³ Presented by the Economic and Social Council in August 1985, the Beijing Rules were approved a month later. (They were the last set of major guiding principles concerning children debated on an international level before the enactment of the UNCRC). These rules provide guidelines on how “best” to treat children while they are part of the criminal justice system.²⁴⁴ Swiftly adopted by a general assembly resolution in November 1985,²⁴⁵ they address issues including age of criminal responsibility,²⁴⁶ protection of privacy,²⁴⁷ and the use of detention as a method of last resort.²⁴⁸ Age of criminal responsibility is of particular importance here because the UNCRC later relies upon this; the UNCRC does not specify the minimum age of criminal responsibility, whereas the Beijing Rules state the age “shall not be fixed at too low an age, bearing in mind the facts of emotional, mental, and intellectual

²⁴¹ C. R. Margolin, *Salvation Versus Liberation: The Movement for Children’s Rights in a Historical Context*, 25 SOC. PROBS. 441, 443 (1978).

²⁴² Nigel Cantwell, “A Convention? What Convention?,” in *Children’s Rights Bulletin*, 1983, F1, fd1, RBI–NGO Committee on UNICEF, The Rädda Barnen Papers.

²⁴³ U.S. Department of Justice National Institute of Justice, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, U.N. Doc. 145271(Dec. 1986).

²⁴⁴ *Beijing Rules*, YOUTH JUST. LEGAL CTR., <https://sjlc.uk/resources/legal-terms-z/beijing-rules#:~:text=The%20UN%20Standard%20Minimum%20Rules,police%20and%20due%20process%20guarantees> [<https://perma.cc/U3ZE-NTHX>] (last visited Nov. 25, 2024).

²⁴⁵ G.A. Res. 40/33(Nov. 29, 1985).

²⁴⁶ *Id.* ¶ 4.1.

²⁴⁷ *Id.* ¶ 8.

²⁴⁸ *Id.* ¶ 19.

maturity.”²⁴⁹ Albeit profoundly vague, this definition was not more narrowly defined until 2007 under UNCRC General Comment 10: Children’s Rights and Juvenile Justice.

The rules will also work together with the UNCRC to stress the need for a distinctive approach to youth defendants.²⁵⁰ Analysis of the broader impact of the Beijing Rules upon international children’s rights has been limited, but it is worth briefly including within this section because the United States was instrumental in their creation and approval, something remarkably absent from the next, and most significant, international child rights instrument: the UNCRC.²⁵¹

V

THE WORLD’S MOST RATIFIED INSTRUMENT: THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The UNCRC is the world’s most ratified treaty, ratified by all eligible states, except the United States.²⁵² It comprises of three parts and fifty-four articles, encompassing the civil, political, economic, social, health, and cultural rights of children.²⁵³ When originally proposed, the response to the UNCRC “was hardly a unanimous wave of unbounded enthusiasm,”²⁵⁴ and faced reluctance from some major NGOs,²⁵⁵ including UNICEF, now arguably an organization inextricable from the operationalization of the UNCRC.²⁵⁶ This attitude shifted from skepticism to hopefulness as the then executive director of UNICEF, James Grant, began to see UNCRC’s potential and later committed to financially and physically drafting the convention²⁵⁷ alongside the Ad Hoc Committee. UNCRC expert John Tobin has

²⁴⁹ *Id.* ¶ 4.

²⁵⁰ *Beijing Rules*, supra note 244.

²⁵¹ See generally TOBIN, supra note 230, at 6.

²⁵² United Nations Human Rights Treaty Bodies, UN Treaty Body Database, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en [<https://perma.cc/RGA9-9QCS>].

²⁵³ United Nations Convention on the Rights of the Child 1989 GA/Res/44/25.

²⁵⁴ NIGEL CANTWELL ET AL., 18 CANDLES: THE CONVENTION ON THE RIGHTS OF THE CHILD REACHES MAJORITY, 21 (Jane Connors et al. eds., 2007).

²⁵⁵ *Id.*

²⁵⁶ UNICEF was so involved with the creation and ratification of the UNCRC, they have adopted it as their own “semiofficial statement of principles” and “taken steps to integrate the principles of the CRC into all aspects of its activities.” Because of this, when UNICEF proposed they be the monitoring and coordinating body for the UNCRC, state parties happily agreed. See Joel E. Oestreich, *UNICEF and the Implementation of the Convention on the Rights of the Child*, 4 GLOB. GOVERNANCE 183, 184 (1998).

²⁵⁷ TOBIN, supra note 230, at 6.

called the instrument “remarkable,” with “[i]ts ambitions . . . as vast as the scope of its provisions.”²⁵⁸ However, its drafting process was “uncoordinated and unproductive”²⁵⁹ and the final result was a significant compromise from its initial aspirations.

A. The Drafting Process

As previously discussed, the Polish government proposed a draft convention during the Year of the Child, anticipating the UNCRC’s swift adoption thanks to its text being largely based upon the already agreed upon 1959 Declaration.²⁶⁰ The Commission on Human Rights sent this draft to several U.N. member states for consideration, as well as to interested NGOs.²⁶¹ The commission created a working group to discuss this draft convention, but meetings were held at the same time as general commission meetings—therefore poorly attended—and the cold war between the West and the East created additional tension.²⁶² Certain delegates used “tactics of obstruction . . . they submitted controversial proposals and then withdrew them when a consensus was finally reached after a long and tedious discussion.”²⁶³ In an attempt to redirect discussions toward the effective alteration and improvement of the draft convention, international organizations became deeply involved.²⁶⁴ The International Labour Organization, the U.N. Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization, and the International Committee of the Red Cross²⁶⁵ became invaluable in the campaign to craft a new child rights convention.

From the outset, the working group agreed to abide by the principle of adopting all convention texts by consensus; each proposal had to be discussed and amended unless vetoed by any party to the discussion. Ultimately, the Polish proposal based upon the 1959 Declaration was not adjusted to the requirements of a “fully-fledged treaty”²⁶⁶ nor did it accurately reflect an updated understanding of childhood and

²⁵⁸ *Id.* at 19.

²⁵⁹ *Id.* at 6.

²⁶⁰ *The United Nations Convention on the Rights of the Child*, CONG. RSCH SERV. (July 27, 2015).

²⁶¹ Legislative History, *supra* note 231, at 324.

²⁶² *Id.* at xxxviii.

²⁶³ *Id.*

²⁶⁴ See Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUMAN RIGHTS Q. 137 (1990).

²⁶⁵ Legislative History, *supra* note 231, at xxxix.

²⁶⁶ CANTWELL, *supra* note 254, at 22.

children’s rights. Progress proved slow; the working group’s first meeting in 1979 concluded with only a title and three preambular paragraphs written.²⁶⁷ NGOs in particular were turbulent—with no automatic right to speak (unlike governmental delegates), when afforded the rare opportunity, proposals were often ill-prepared and active disagreements even occurred between NGOs on the floor.²⁶⁸ By 1983, the languidness of and building tension amidst the drafting process resulted in a USSR delegate observing that—by his calculation—“it would take twenty-two years to finalize the text.”²⁶⁹

As a way to diffuse this chaos, twenty NGOs came together and formed an NGO ad hoc group to the convention, an organization which would later be known as Child Rights Connect.²⁷⁰ Thankfully, this group was expeditious and proficient in its contributions, a welcome divergence from the previous disorderly conduct. The ad hoc group was vital in crafting and informing the finished convention;²⁷¹ after its publication, Swedish representative Anders Rönquist remarked: “I can assure the Commission that the non-governmental organisations always have reminded the governmental experts, when the discussion has tended to be too legalistic, that we were dealing with the realities of children of the world.”²⁷²

Unsurprisingly, it was still six more years before the convention was published. Beyond constructing the text and content of each article, another complex pillar to consider was the way to depict children: in need of adult protection or as “little adults” with capacity in their own right? As we have seen, the former was chosen consistently, however, the convention offered a chance to shift this narrative toward the latter. Western-led international legal child protective efforts were conclusively deemed “quite illusory and [the] solicitude

²⁶⁷ *Id.* at 23.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Formation of the Ad Hoc NGO Group for the Drafting of the UNCRC*, CHILD RTS. CONNECT, https://childrightsconnect.org/cool_timeline/ad-hoc-ngo-group-for-the-drafting-of-the-un-convention-on-the-rights-of-the-child-was-formed/ [https://perma.cc/V95P-PUGG] (last visited Nov. 25, 2024).

²⁷¹ It is estimated the UNCRC contains fifteen significant articles or paragraphs based upon ideas proposed by the Ad Hoc Group, with a similar number of articles and paragraphs edited as a result of the group’s interventions. *See also* PETER WILLETS ET AL., *THE CONSCIENCE OF THE WORLD: THE INFLUENCE OF NON-GOVERNMENTAL ORGANISATIONS IN THE U.N. SYSTEM* 214 (Peter Willets ed., 1996).

²⁷² U.N. GAOR, 51st Sess., 33rd mtg. ¶ 28, U.N. Doc. A/51/PV.82 (Dec. 12, 1996); *see also* Linde Lindkvist, *Rights for the World’s Children: Rätta Barnen and the Making of the UN Convention on the Rights of the Child*, 36 *NORDIC J. HUM. RTS.* 287, 287 (2018).

inadequate;”²⁷³ children needed to be “treated in their full humanity and not just as subordinate and dependent subjects.”²⁷⁴ It became evident the UNCRC in its final form needed to differ in its perception of children. Articles Five, Twelve through Seventeen, and Forty-two contain the starkest evidence of this change.²⁷⁵

Article Five discusses the balance of parental supervision with a child’s evolving capacities and maturity.²⁷⁶ A few members of the 1987 Convention Working Group were hesitant to include any phrasing which had the potential to remove determination of a child’s best interests from the parents or legal guardian(s).²⁷⁷ The U.S. representative requested the family be “explicitly protected,”²⁷⁸ but Canada’s delegation expressed support for a child’s best interests be seen as across a spectrum, with the children themselves having a better understanding of their own needs as they mature into independent adulthood.²⁷⁹ The Netherlands²⁸⁰ and Australia²⁸¹ supported this proposal. A year later, the United States agreed with the Canadian position,²⁸² but Germany was of the view that express language was required to ensure parental rights were not restricted, with the German representative requesting the addition of a sentence stating that “[n]othing in this convention shall affect the right and the duty of parents.”²⁸³ This suggestion did not progress, and Germany mentioned

²⁷³ Paula S. Fass, *A Historical Context for the United Nations Convention on the Rights of the Child*, 633 ANNALS AM. ACAD. POL. & SOC. SCI. 17, 18 (2011).

²⁷⁴ *Id.* at 23.

²⁷⁵ For more information on UNCRC art. 42, see United Nations Convention on the Rights of the Child, CHILDREN’S RTS. IN WALES, <https://childrensrightswales.org.uk/raising-awareness.aspx> [<https://perma.cc/5K3T-KREB>] (last visited Mar. 4, 2025).

²⁷⁶ UNCRC art. 5.

²⁷⁷ Legislative History, *supra* note 231, at 358; *see also* U.N. Comm’n on Human Rights, Rep. of the Working Group on a Draft Convention on the Rights of a Child on Its Forty-Third Session, U.N. Doc. E/CN.4.1987/25, ¶ 100 (1987).

²⁷⁸ *Id.* *See also* U.N. Comm’n on Human Rights, *supra* note 277, ¶ 101.

²⁷⁹ *Id.* *See also* U.N. Comm’n on Human Rights, *supra* note 277, ¶ 104, 106.

²⁸⁰ Legislative History, *supra* note 231, at 358–59; *see also* U.N. ESCOR Doc E/CN.4.1987/25 ¶ 105.

²⁸¹ Legislative History, *supra* note 231; *see also* U.N. ESCOR Doc E/CN.4/1987/25 ¶ 109.

²⁸² Legislative History, *supra* note 231, at 360; *see also* U.N. ESCOR Doc E/CN.4/1988/28 ¶ 27 (Also, as we know, while the United States may have backed down to points of contention, it still did not ratify the convention).

²⁸³ Legislative History, *supra* note 231, at 360; *see also* U.N. ESCOR Doc E/CN.4/1988/28 ¶ 29.

their lack of satisfaction²⁸⁴ with this article, but they agreed to abide by the consensus: children will, at times, have the capacity to know what is best for themselves.²⁸⁵ Article Five is an example of one of the few negative rights found within the convention. It protects the freedom of legal guardians to raise their children as they wish, with the one stipulation that this may be done in line with the child's evolving capacities. Opponents to ratification of the UNCRC, namely the United States, often cite parental restriction as the primary reason behind their refusal to ratify, believing Article Five together with the "best interests" principle in Article Three means "a judge or a bureaucrat gets to decide" how a child should be raised in every circumstance.²⁸⁶ Of course, this is not the UNCRC's intention, but this belief persists.²⁸⁷

Articles Twelve through Seventeen concern the right to freedom from something: of forming and expressing their own views and having them respected,²⁸⁸ of expression more broadly,²⁸⁹ of thought, belief, and religion,²⁹⁰ of association,²⁹¹ to privacy,²⁹² and of access to information from the media.²⁹³ As with Article Five above, the right to freedom of expression was initially worded restrictively, ironically giving specific examples of the contexts in which children were "particularly" permitted to have the freedom to form their own views.²⁹⁴ The Danish delegation proposed specifically stating that as children get older, "the parents or the guardians of the child should give him more and more responsibility for personal matters,"²⁹⁵ and, as discussions progressed, most delegations believed in removing the

²⁸⁴ Legislative History, *supra* note 231, at 361; *see also* U.N. ESCOR Doc E/CN.4/1988/28 ¶ 34.

²⁸⁵ *See* Samantha Gualtieri & Amy S. Finn, *The Sweet Spot: When Children's Developing Abilities, Brains, and Knowledge Make Them Better Learners Than Adults*, 17 (5) PERSP. ON PSYCH. SCI. 1322 (2022).

²⁸⁶ *The Convention on the Rights of the Child Is Back in Congress*, PARENTAL RTS. ORG. (Mar. 4, 2020), <https://parentalrights.org/convention-on-the-rights-back/> [<https://perma.cc/XQ6B-DLSA>].

²⁸⁷ *See* Brian Montopoli, *31 GOP Senators Oppose U.N. Children's Rights Convention*, CBS NEWS (Aug. 24, 2010, 6:22PM), <https://www.cbsnews.com/news/31-gop-senators-oppose-un-childrens-rights-convention/> [<https://perma.cc/KM9H-L4BN>].

²⁸⁸ G.A. Res. 44/25, Convention on the Rights of the Child art. 12 (Nov. 20, 1989).

²⁸⁹ *Id.* art. 13.

²⁹⁰ *Id.* art. 14.

²⁹¹ *Id.* art. 15.

²⁹² *Id.* art. 16.

²⁹³ *Id.* art. 17.

²⁹⁴ U.N. ESCOR Doc E/CN.4/1349, 3.

²⁹⁵ U.N. ESCOR Doc/E/CN.4/L.1575 ¶ 7.

limited list attached to freedom of expression.²⁹⁶ Finally, UNICEF and the NGO ad hoc group suggested making the language gender neutral²⁹⁷ and offered support for the Danish idea,²⁹⁸ concluding the views of children should be “given due weight in accordance with the age and maturity of the child.”²⁹⁹

During the first reading of what would become Article Thirteen—freedom of expression—the United States submitted an extensive list of instances where this right should be restricted in the balance of liberty versus security: “for the protection of national security, public safety and order, or public health and morals, freedom of association and expression; and the right of peaceful assembly.”³⁰⁰ While the U.S. representative noted adolescents were likely to acquire the skills to participate fully in society, they did not explicitly acknowledge the evolving responsibility of children nor did they propose a text reflecting this idea.³⁰¹ Norway and Australia shared concern over this absence,³⁰² somewhat unsurprisingly, China did not offer support for the U.S. proposal, submitting freedoms of association, peaceful assembly, and privacy could not be afforded to children “in the same way they are enjoyed by adults,”³⁰³ and should not be as closely protected.

As the drafting of this right progressed, the United States again reminded the committee that the right to freedom of expression should not affect the “legitimate rights of parents,” nor the broader rights of the family.³⁰⁴ The German Democratic Republic, when examining potential restrictions upon freedom of expression, requested amending the restriction to include instances where the state needs to protect the “spiritual and moral well-being of the child,”³⁰⁵ in line with the ICCPR.³⁰⁶ This was met with rebuttals from the United States,³⁰⁷

²⁹⁶ *Id.* ¶ 78.

²⁹⁷ U.N. ESCOR E/CN.4/1989/WG.1/CRP.1, 21–22.

²⁹⁸ U.N. ESCOR E/CN.4/1988/WG.1.WP.2, 10.

²⁹⁹ G.A. Res. 44/25, Convention on the Rights of the Child art. 21(1) (Nov. 20, 1989).

³⁰⁰ U.N. ESCOR E/CN.4/1985/64, Annex II p.3.

³⁰¹ U.N. ESCOR E/CN.4/1987/25 ¶ 112.

³⁰² *Id.* ¶ 114–15.

³⁰³ *Id.* ¶ 117.

³⁰⁴ *Id.*

³⁰⁵ U.N. ESCOR E/CN.4/1989/48 ¶ 269.

³⁰⁶ *Id.* ¶ 270.

³⁰⁷ *Id.* ¶ 272; The United States argued that because additional restrictions to the right of freedom of expression were previously prohibited, this attitude should not change even if new restrictions were for the protection of children, not the nuclear family.

Portugal,³⁰⁸ Australia,³⁰⁹ Sweden,³¹⁰ Canada,³¹¹ and Argentina,³¹² with support offered only by Poland³¹³ and China.³¹⁴ Ultimately, the Committee kept the restrictions brief: only when fundamentally necessary to protect the rights of reputations of others,³¹⁵ for the protection of national security or public order, or for public health or morals.³¹⁶

The Committee's general consensus was that if an article's primary aim was to protect the freedom of or the freedom to something, any restrictions of this right must be conclusively and unequivocally essential.³¹⁷ This belief pervades the remaining freedom of or to rights within the Convention and is ostensibly why the United States did not ratify the UNCRC despite its frequent remarks and consistent commentary throughout. The drafting of this convention demonstrates the clear shift away from both the US acting as the arbiter for international child law and the disaffection toward being exclusively paternalistic. Child protection necessarily features throughout the instrument—from the protection from violence and neglect³¹⁸ to the protection from abduction and trafficking³¹⁹—but is equally balanced by the rights of children. The UNCRC finally cemented children as capable of possessing autonomy, proudly declaring that children deserve to be taken seriously, respected, and heard.³²⁰

The balancing of positive and negative rights and examining of power structures may contextualize this debate. The rights to freedom of something are necessarily negative rights—children have the freedom of expression, of thought, conscience and religion, of association, and of peaceful assembly. However, these freedoms are limited—the freedom of expression is only a freedom so long as in exercising this right, the child respects the rights or reputations of

308 *Id.* ¶ 273.

309 *Id.* ¶ 274.

310 *Id.* ¶ 276.

311 *Id.* ¶ 277.

312 *Id.*

313 *Id.* ¶ 275.

314 *Id.* ¶ 271.

315 G.A. Res. 44/25, Convention on the Rights of the Child art. 13 2(a) (Nov. 20, 1989).

316 *Id.* art. 13 2(b).

317 *See, e.g.*, U.N. ESCOR E/CN.4/1989/48 ¶ 295.

318 *Id.* art. 19.

319 *Id.* art. 35.

320 *Id.* art. 12.

others and does not jeopardize their state's national security.³²¹ Children have freedom of thought, but states must respect the right of legal guardians to "provide direction to the child."³²² Further, as part of these negative rights, there are positive obligations of the state. To protect the child's freedoms, "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence."³²³ To ensure children have the freedom to form their own views, states encourage the mass media to produce, exchange, and disseminate child-appropriate media from a diversity of sources.³²⁴

Eric Posner, a fierce critic of the international human rights regime, believes international law mistakenly pays much greater attention to negative rights than positive rights³²⁵ and needs to take a "humbler approach."³²⁶ This may be the case for the UDHR and ICCPR, which aim to protect the most fundamental of freedoms and restrict cruel, inhuman, or degrading punishment. Perhaps it makes sense, as an unspoken rule of international law, to prefer negative rights because international law is designed to offer a baseline for states to develop, not provide complex and often unenforceable obligations at every turn. But this cannot be said for the UNCRC; "[c]hildren are an anomaly in the liberal legal order."³²⁷ If the UNCRC purely focused on freedoms and viewed children as autonomous individuals capable of exercising all decisions without interference from another power, be it legal guardian or government, the Convention would be a disaster. The text and children's immaturity necessitate the positive rights of protection.

For the sake of a child's full, enriched, and healthy development, both positive and negative rights are required—they are, after all, "universal, indivisible and interdependent and interrelated."³²⁸ Rights and needs are connected; a child cannot fully exercise their freedom of expression without an enforced right to education and the mandated

³²¹ *Id.* art. 13.

³²² *Id.* art. 14(2).

³²³ *Id.* art. 16(1).

³²⁴ *Id.* art. 17.

³²⁵ Beth A. Simmons & Anton Strezhnev, *Human Rights and Human Welfare: Looking for a 'Dark Side' to International Human Rights Law*, 3 CAMBRIDGE UNIV. PRESS 60, 67 (2017).

³²⁶ Eric Posner, *The Case Against Human Rights*, GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> [https://perma.cc/QY2F-5L3S].

³²⁷ Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. (2004).

³²⁸ HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, 256 (1996).

production of child-appropriate media resources. Children may only be free from physical or mental violence if positive measures are taken to remove the child from the violent setting, penalize the perpetrator, and establish social programs to provide the necessary support for the child.

The UNCRC, and most international child rights law, blurs the distinction between positive and negative rights. It also abandons the traditional public/private distinction—only governments could deprive someone of their liberty, not a private individual.³²⁹ However, the UNCRC extends this to one particular collection of private individuals: legal guardians.³³⁰ It widely recognizes the importance of keeping a child within the family home and safeguards the parent-child relationship, believing it to be in the child's best interests—the guiding principle of the entire text.³³¹ Yet, setting standards and requirements for legal guardians creates a new power dynamic. Children having freedoms, negative rights, against their legal guardians is essential for their dignity but remarkable for an international instrument. Including private figures—legal guardians—is simply necessary for a child-focused convention because children's inherent vulnerability requires greater protection from a legal guardian who may be much more likely than their government to directly restrict the children's freedoms.

One could argue there is no public/private distinction with children, because there is “a constant interplay between public and private actors in the life of the family”³³² including public education and health services. But there is a distinction with the UNCRC regarding who owes children the greatest standard of care in dignity and freedom—the nuclear family, followed by the government if intervention is required.³³³ Whether the UNCRC is framed within the positive/negative or public/private dichotomies, it is a considerable effort to both protect and empower children within all primary settings, including the home, school, foster placement, and other publicly managed facilities.

³²⁹ Ezer, *supra* note 327, at 23.

³³⁰ UNCRC art. 3(2).

³³¹ *Id.* art. 18.

³³² *Id.* at 33.

³³³ UNCRC art. 20–21.

B. The “Best Interests” Principle

Article 3(1): “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.”

The best interests principle is one of the four “general principles” of the Convention, alongside Article Two, freedom from discrimination; Article Six, the right to life; and Article Twelve, respect for the child’s views.³³⁴ Literature surrounding the best interests principle is unending, with praise and criticism for its indeterminacy and malleable nature. When considering the idea of best interests, Mnookin stated, “[D]eciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.”³³⁵ Further, it may “cloak prejudices,” reflect dominant ideologies, or force a decision between a child’s present best interests and their future-oriented interests.³³⁶ In England, two cases show the inconsistency in interpreting best interests over similar matters: An HIV-infected mother was not allowed to prevent her baby from being tested for HIV despite her insistence,³³⁷ but another family *was* able to refuse a liver transplant for their baby.³³⁸ The President of the Family Division in England said “to prolong life . . . is not the sole object of the court and to require it at the expense of other considerations may not be in a child’s best interests.”³³⁹ She believed the parents should determine the best interest of the child.³⁴⁰ Here, best interests was not synonymous with best rights.

The principle of best interests and its inclusion within the UNCRC is so open to various interpretations that it is seen as both an empowering tool for children and simply another parental rights success. The remaining text of Article Three presupposes parents will always have their child’s best interests at heart, bar the few exceptions of neglect or abuse.³⁴¹ In *Parham*, the Court explained the “natural bonds of affection lead parents to act in the best interests of their

³³⁴ MICHAEL FREEMAN, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD ARTICLE 3: THE BEST INTERESTS OF THE CHILD 1 (2007).

³³⁵ Mnookin, *supra* note 177, at 260.

³³⁶ FREEMAN, *supra* note 334, at 2–3.

³³⁷ Re C (A CHILD) (HIV TEST) [1999] FLR 1004, England and Wales.

³³⁸ Re T (WARDSHIP: MEDICAL TREATMENT) [1997] 1 FLR 502, England and Wales.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ UNCRC art. 19.

children.”³⁴² These sweeping statements and beliefs hinge upon hope and the idea that parents nearly always know best. The myriad of factors needing to be considered when determining a child’s best interests—genetic, financial, educational, environmental, and relational³⁴³ to name a few—are so great and unquantifiable that ever truly pinpointing the one choice in a child’s best interest is all but impossible. Regardless, parental rights advocates have called for a higher threshold for state intervention, to “respect . . . parental authority and prevent . . . illegitimate incursions into private and family life.”³⁴⁴

The UNCRC’s threshold for state intervention, especially in medical dispute cases, occurs when a child’s best interests are not being considered—when the welfare of the child is at risk.³⁴⁵ Parental rights advocates wish to install a new threshold—only when a decision carries a “significant risk of harm” may the state intervene.³⁴⁶ This would be more in line with the United States’ *parens patriae* doctrine, where the parents may make all decisions over the child unless, and except “where immediate action is necessary or where the potential for harm is rather serious.”³⁴⁷ They also propose this threshold because the higher the standard, the fewer opportunities for disruption by local authorities and, therefore, the greater stability for the child.³⁴⁸

Supporters of the UNCRC threshold argue relying on a “significant harm standard” makes the bar too high—why is the welfare of a child being at risk not enough?³⁴⁹ Especially as it is often an indicator of significant harm to come.³⁵⁰ How best to conceptualize best interests and balance the beliefs and interests of the child, legal guardians, and matters of public policy is such a vast topic it cannot be fully addressed here, but the work of John Eekelaar may provide some clarity. He situates children’s rights within dynamic self-determinism, the goal of

³⁴² *Param v. J.R.*, 422 U.S. 584, 602 (1979).

³⁴³ MICHAEL KING & CHRISTINE PIPER, *HOW THE LAW THINKS ABOUT CHILDREN* 50 (2d ed. 1995).

³⁴⁴ Cressida Auckland & Imogen Goold, *Parental Rights, Best Interests and Significant Harms*, 28 *CAMBRIDGE L.J.* 287, 288–89 (2019) [hereinafter Auckland & Goold].

³⁴⁵ UNCRC art. 19.

³⁴⁶ *Id.*

³⁴⁷ Douglas S. Diekema, *Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention*, 25 *THEORETICAL MED. & BIOETHICS* 243, 250–51 (2004).

³⁴⁸ Auckland & Goold, *supra* note 344, at 310.

³⁴⁹ *Id.* at 307.

³⁵⁰ See The Mayo Clinic Staff, *Child Abuse*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/child-abuse/symptoms-causes/syc-20370864> [https://perma.cc/8KQ9-ZCEB] (last visited Nov. 20, 2024).

which is “to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice.”³⁵¹ This Article also subscribes to Eekelaar’s conclusion. The UNCRC is a child-rights convention, not a convention concretizing parental rights with children’s thoughts and beliefs only permitted in extreme circumstances. The UNCRC offers protection, rights, and freedoms, all of which must be in line with the child’s best interests, to equip them for adulthood and ensure healthy development. Its indeterminacy and various interpretations show its flexibility, but this is not a failing of Article Three. It is evidence of the drafters’ concerted efforts to protect and empower as many children as possible, no matter their background or circumstance, with hopes that between parental figures and, if necessary, governmental intervention, the child’s best interests will be at the center of every decision.

C. Gender Neutrality or Inclusivity?

A matter of particular note regarding the UNCRC is its choice to use both “he” and “she” pronouns throughout the entire instrument.³⁵² It goes beyond merely relying upon including the principle of nondiscrimination;³⁵³ it partially remedies some of the problematic matters found in the primary predecessor for girl children, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (hereinafter “CEDAW”). Like the child rights movement, women’s rights had suffered from the same “protection/independence dichotomy.”³⁵⁴ CEDAW could be construed to include girl children³⁵⁵—and if accepted, was likely to be the best available source for international protection (with autonomy sparsely included) given what we have previously explored. Naturally, it relies upon female pronouns in its text. However, where an instrument

³⁵¹ John Eekelaar, *The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism*, 8 INT’L J.L., POL’Y & FAMILY 42, 53 (1994).

³⁵² Nonbinary, trans, and intersex children are not explicitly addressed by the UNCRC—this is a regular criticism of the instrument by gender scholars but beyond the scope of this chapter. See also Carrie Paechter, *The Rights and Interests of Trans and Intersex Children: Considerations, Conflicts and Implications in Relation to the UNCRC*, 30 J. GENDER STUD. 844, 849 (2021).

³⁵³ UNCRC art. 2.

³⁵⁴ Cynthia Price Cohen, *The United Nations Convention of the Rights of the Child: A Feminist Landmark*, 30 WM. & MARY J. WOMEN & LAW, 29, 37 (1997).

³⁵⁵ *Id.*

addresses more than one gender, it has been linguistically traditional³⁵⁶ only to use “he”. The UNCRC is a remarkable break from this tradition.

The UNCRC’s working group did not initially intend to make the text gender inclusive—it was not until Canadian delegate Coleen Swords protested the exclusive use of masculine pronouns that an alternative was considered. After her remarks gained traction, UNICEF and UNESCO pledged³⁵⁷ to use gender neutral language throughout the text of the UNCRC—omitting pronouns if possible and hoping to rely upon the neutral phrases “the child” or “children.”³⁵⁸ When it became apparent pronouns were required in places, UNICEF offered several options: use both the masculine and the feminine, use the plural, repetition of the noun, or using the impersonal “its.”³⁵⁹ After careful examination, during a following technical review the drafting committee concluded using both masculine and feminine pronouns to be “best suited”³⁶⁰ for the text. All major human rights treaties up until this point had included the principle of nondiscrimination,³⁶¹ but the UNCRC was the first time two genders were irrefutably afforded this right.

D. The United States: Ratification Outlier

To date, 196 member states have ratified the UNCRC³⁶²—all parties with one exception: the United States. The United States featured heavily throughout the drafting process and former U.S. Ambassador to the U.N. Madeleine Albright signed the convention in 1995,³⁶³ but President Clinton did not submit the convention to the Senate for a vote. Similarly, President Bush did not submit the convention for debate,

³⁵⁶ *Id.* at 47.

³⁵⁷ Comm’n on Hum. Rts., Rep. of the Working Grp. on a Draft on the Rts. of the Child, U.N. Doc E/CN.4/1984/48 (1989).

³⁵⁸ Price Cohen, *supra* note 354, at 47.

³⁵⁹ Comm’n on Hum. Rts., Rep. of the Working Grp. on a Draft on the Rts. of the Child, U.N. Doc E/CN.4/1984/48 (1989).

³⁶⁰ *Id.*

³⁶¹ See African Charter on Human and Peoples’ Rights art. 28; American Convention on Human Rights art. 24; ASEAN Human Rights Declaration art. 3, 9; European Convention on Human Rights art. 14.

³⁶² Committee on the Rights of the Child, *About the Committee*, U.N. HUM. RTS. OFF. HIGH COMM’R, <https://www.ohchr.org/en/treaty-bodies/crc> [<https://perma.cc/BBR5-F683>] (last visited Nov. 20, 2024).

³⁶³ *Ratify Movement*, UNITED NATIONS ASS’N UNITED STATES AMERICA, <https://www.una-sf.org/ratify-movement> [<https://perma.cc/C296-STGW>] (last visited Nov. 20, 2024).

and President Obama called the lack of ratification “embarrassing,”³⁶⁴ but still did not push for the convention to make it to the Senate. Unsurprisingly, President Trump did not request a Senate discussion of the UNCRC, though in early 2020, Representative Ilhan Omar introduced a resolution to the House for the United States to finally ratify the convention, but only received support from three other Representatives.³⁶⁵ President Biden has yet to submit the convention for deliberation. Being an outlier for the ratification of a widely agreed upon U.N. convention or declaration is nothing new for the United States. The United States has signed but not ratified the ICESCR, CEDAW, the Convention on the Rights of Persons with Disabilities. Additionally, the United States has ratified the International Convention on the Elimination of All Forms of Racial Discrimination, but not recognized the competence under Article Fourteen for an individual complaint’s mechanism.³⁶⁶ Fear of unnecessary international interference is often cited as the primary reason for remaining a mere signatory; ratification could “impose on this country all kinds of terrible obligations that may be harmful to America and its children and families.”³⁶⁷

Opponents to the UNCRC have argued ratification may result in a “compromise [to] the sovereignty of the United States . . . undermin[ing] its Constitution,” expressing broad concern for any system designed to hold the United States to account by a “higher” power.³⁶⁸ Concerning the content of the UNCRC, adversaries indicated empowering children through international law would create a “culture of permissiveness, including abortion on demand, and unrestricted access to pornography.”³⁶⁹ Some have even reasoned the United States does not *need* further child protection because the Constitution and domestic provisions are “already strong and often superior”³⁷⁰ to the

³⁶⁴ Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/>.

³⁶⁵ H.R. 854, 116th Cong. (2020) (expressing the sense of the House of Representatives that the United States should become a state party to the United Nations Convention on the Rights of the Child—116th Congress (2019–2020)).

³⁶⁶ *U.N. Treaty Body Database*, U.N. HUM. RTS. TREATY BODIES, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CERD (last visited Mar. 3, 2025).

³⁶⁷ Kul Chandra Gautam, *Time for USA to Ratify the Child Rights Convention*, 89 CHILD WELFARE, 221, 222 (2010).

³⁶⁸ *Id.* at 222.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 223.

UNCRC—despite the United States incarcerating more of its youth than any other country³⁷¹—12.4% of its youth living below the poverty line³⁷²—and being the only high-income country not to grant paid maternity leave.³⁷³ Arguably, this demonstrates an even greater need for positive rights for U.S. children and mothers, but the hesitancy of the United States to introduce new state guarantees of affirmative rights suggests this is highly unlikely to change in the near future.

A key feature of this Article is how international law perceives children—the UNCRC firmly cements children’s voices as vital, with participatory rights highlighted throughout the entire document. More vocal opponents to the Convention are against ratification for this very reason: What if children are awarded rights that triumph over the right to parent? Could including the right to be heard trigger a governmental review of “any decision a parent made that a child didn’t like?”³⁷⁴ Of course, these are oversimplified deductions stemming from almost exclusively right and far-right individuals and organizations.³⁷⁵ However, these assumptions are worth noting if UNCRC advocates wish to truly understand their opposition and offer an informed response. A deeper dive into the United States’ non-ratification of the UNCRC merits researching further but doing so is beyond the scope of this Article. For now, this author is hopeful the ratification stance will change, especially given the fact that the United States remains the only

³⁷¹ Children’s Defense Fund, *The State of America’s Children 2023*, YOUTH JUST. (2023), <https://www.childrensdefense.org/the-state-of-americas-children/soac-2023-youth-justice/> [https://perma.cc/9CLL-XDDJ] (last visited Nov. 25, 2024).

³⁷² Belinda Luscombe, *What’s Behind the Spike in Child Poverty in the U.S.*, TIME (Sept. 12, 2023, 5:40 PM), <https://time.com/6313242/child-poverty-rate-2022-census/> [https://perma.cc/2WKC-9LTS].

³⁷³ Miranda Bryant, *Maternity Leave: US Policy Is the Worst on List of the World’s Richest Countries*, GUARDIAN (Jan. 27, 2020, 3:00 PM), <https://www.theguardian.com/us-news/2020/jan/27/maternity-leave-us-policy-worst-worlds-richest-countries> [https://perma.cc/7MFH-H9MD].

³⁷⁴ Attiah, *supra* note 364.

³⁷⁵ See, e.g., publications by the Home Schooling Defense League, including Maggie McKneely, *Treaty Threatens U.S. Protection for Children*, HOME SCH. LEGAL DEF. FUND (Apr. 24, 2020), <https://hslsda.org/post/treaty-threatens-us-protection-for-children> [https://perma.cc/B7HN-3WUG]; see also Rick Santorum, *Children Belong to Parents, Not Government*, WORLD NET DAILY (Apr. 14, 2013), <https://www.wnd.com/2013/04/children-belong-to-parents-not-government/> [https://perma.cc/YUS2-EGAG]; see also Richard G. Wilkins et al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS UNIV. PUB. L. REV. 411, 418 (2003) (who argue the UNCRC was perhaps so widely ratified solely because “many members of the international community have simply not understood . . . the CRC’s language . . . [g]iven the complexities of language translation, . . . this is a believable interpretation.”).

country in the world to sentence children to life in prison without the possibility of parole³⁷⁶—contrary to Article 37³⁷⁷.

***E. Global Impact—
the UNCRC Committee and Domestic Implementation***

Since its adoption, the UNCRC has been deemed the “given norm for children’s human rights,”³⁷⁸ and the “principal driving force behind a global children’s rights culture”³⁷⁹ Quennerstedt and others would disagree, asserting the only true consensus reached during UNCRC negotiations was a recognition of the *idea* of children’s rights, but nothing more. State parties to the drafting committee did not achieve a consensus regarding the theoretical underpinnings of the convention nor the moral justification for children’s rights. Wider discussion of the contradictions in consensus is beyond this Article, but what can be agreed upon in this Article is the impact of the UNCRC upon domestic children’s rights. Two major studies have investigated the domestic legal implementation and/or broader impact of the UNCRC, one by Save the Children (Estonia, Nepal, Peru, Uganda, and Yemen)³⁸⁰ and another by UNICEF (Australia, Belgium, Canada, Denmark, Germany, Iceland, Ireland, New Zealand, Norway, South Africa, Spain, and Sweden).³⁸¹ Save the Children stated the Convention

. . . has had an undeniable impact at [the] national level shown by changes to legislation, the creation of new programs or policies that deal with specific concerns, the creation of national child rights institutions and coordinating mechanisms, changes in attitude of governments towards non-governmental organizations (NGOs), and societal changes in attitudes towards children.³⁸²

and UNICEF, focusing specifically on domestic implementation, noted in countries “where there had been incorporation (Belgium,

³⁷⁶ Steven M. Watt & Allison Frankel, *Only in America: 16-Year-Old Locked Up for the Rest of His Life*, ACLU (Mar. 26, 2014), <https://www.aclu.org/news/speakeasy/only-america-16-year-old-locked-rest-his-life> [<https://perma.cc/6XKA-F9NL>].

³⁷⁷ Naturally, UNCRC Article 37 does not apply to the United States.

³⁷⁸ Ann Quennerstedt et al., *The UNCRC: The Voice of Global Consensus on Children’s Rights?*, 36 NORDIC J. HUM. RTS. 38, 39 (2018).

³⁷⁹ *Id.*

³⁸⁰ Laura Theyatz-Bergman, *What Happened? A Study on the Impact of the Convention on the Rights of the Child in Five Countries: Estonia, Nepal, Peru, Uganda and Yemen*, SAVE THE CHILD. SWED. (2009), <https://resourcecentre.savethechildren.net/pdf/2910.pdf> [<https://perma.cc/5ADE-AHAT>] (last visited Nov. 23, 2024).

³⁸¹ Laura Lundy et al., *The U.N. Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, UNICEF (2012), [hereinafter Lundy].

³⁸² Theyatz-Bergman, *supra* note 380, at 5.

Norway, Spain), interviewees felt that children were more likely to be perceived as rights holders and that there was a culture of respect for children's rights."³⁸³

Upon ratification, parties to the UNCRC must submit an initial report within two years and subsequent reports every five years to demonstrate progress since the submission prior. Using these reports, the UNCRC Committee may make informed recommendations and highlight the positive aspects of the state's child rights-based actions. The ostensibly voluntary nature of submissions and the lack of a Child Rights Court means traditional enforceability is not an option but is the usual mechanism of choice for international conventions and covenants, so is a wider source of tension within international law rather than being UNCRC specific. Suggestions by the Committee are unenforceable, instead hoping national-level mechanisms will work with the Committee to implement needed changes³⁸⁴ in line with Article Four. State parties must take "legislative, administrative and other measures" to implement the rights within the Convention. Using Save the Children's study, Estonia is an example of a state ratifying the convention, abiding by the requirement for the initial report, but failing to submit regularly thereafter. Has this affected the realization of children's rights in line with the UNCRC?

Estonia ratified the UNCRC in 1991,³⁸⁵ submitted reports in 2003³⁸⁶ (due 1993) and 2017³⁸⁷ (due 2008), and is set to submit its next report in 2024.³⁸⁸ Legislatively, the UNCRC has had an obvious impact: Article Three of the Estonian Constitution states that generally recognized principles and rules of international law are "inseparable" from the Estonian legal system.³⁸⁹ Article 123 of the Estonian

³⁸³ Lundy, *supra* note 381, at 4.

³⁸⁴ Theyatz-Bergman, *supra* note 380, at 6.

³⁸⁵ *Ratification Status by Country or by Treaty, Estonia*, U.N. TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=58&Lang=EN [<https://perma.cc/WQ5L-DCRW>] (last visited Nov. 25, 2024).

³⁸⁶ Comm. on the Rts. of the Child, Consideration of Reps. Submitted by States Parties under Article 44 of the Convention—Estonia, U.N. Doc. CRC/C/8/Add.45 (2002) [hereinafter 2003 Report].

³⁸⁷ Comm. on the Rts. of the Child, Consideration of Reps. Submitted by States Parties under Article 44 of the Convention—Estonia, U.N. Doc. CRC/C/EST/2-4 (2015) [hereinafter 2017 Report].

³⁸⁸ See Comm. on the Rts. of the Child, List of Issues Prior to Submission of the Combined Fifth to Seventh Periodic Reports of Estonia, U.N. Doc. CRC/C/EST/QPR/5-7 (2021).

³⁸⁹ The Constitution of the Republic of Estonia June 28, 1992, Chapter I: General Provisions art. 3.

Constitution requires international treaty rules to supersede domestic provisions if in conflict,³⁹⁰ then the Child Protection Act 1992 was adopted, an act primarily based upon the UNCRC.³⁹¹ The Child Protection Act guarantees protection of children through State and local government bodies and institutions, as coordinated by the Ministry of Social Affairs.³⁹² The UNCRC, whilst international in nature, will always be best implemented and most successful when incorporated into national legislation and local authorities. It is assumed states are “better aware of the particular needs and interests of children and families,”³⁹³ and are handed the metaphorical reins.

Enacting legislation is one thing, but positively affecting the rights and freedoms of children through direct action is another. It is nigh impossible to measure direct correlation between ratification of the UNCRC and the everyday wellbeing of children within a state. However, what may be examined are the complaints by the Committee following state reports and the changes implemented following said complaints. Continuing to use Estonia as an example, the Committee expressed concern regarding corporal punishment in the home.³⁹⁴ In response, a campaign entitled “Don’t hit the child,”³⁹⁵ was publicized by the government. Estonia took part in a European Commission scheme designed to train child protection officials to better spot examples of close relationship violence and violence against children.³⁹⁶ In 2014, the Child Protection Act was passed which explicitly forbids physical punishment of a child.³⁹⁷

A significant point of discussion throughout this Article has been how the child has been framed in international instruments. The title of Estonia’s most recent example of child-centered legislation includes “protection,” rather than highlighting the rights of children as individuals with their own legal identities and desires. However, the 1992 and 2014 Acts, both informed by the UNCRC, move directly from general principles to “rights of the child”³⁹⁸ and “ensuring rights and

³⁹⁰ *Id.* at Chapter IX: Foreign Relations and International Treaties art. 123.

³⁹¹ Republic of Estonia Child Protection Act 1992, c. 1 § 1(1) (“The Republic of Estonia Child Protection Act provides for the internationally recognised rights, freedoms and duties of the child and protection thereof in the Republic of Estonia.”).

³⁹² *Id.* arts. 4–5.

³⁹³ 2003 Report, *supra* note 386, at 8.

³⁹⁴ Theyatz-Bergman, *supra* note 380, at 23.

³⁹⁵ 2003 Report, *supra* note 386, at 29.

³⁹⁶ 2017 Report, *supra* note 387, at 24.

³⁹⁷ Child Protection Act 2014, ch. 5, § 24(1) (Est.).

³⁹⁸ The Constitution of the Republic of Estonia June 28, 1992, Part II.

well-being of the child”³⁹⁹ respectively. The 2014 Act states the very purpose of the Act must make “the best interests of the child as [the] primary consideration,” continuing into Section 21 by explaining how exactly to ascertain the best interests of the child.⁴⁰⁰

Naturally, these acts include child protection measures, dictating how children are to be protected by the Government of the Republic, the Child Protection Council, and the Ministry of Social Affairs,⁴⁰¹ among others, and for persons working with children.⁴⁰² However, since ratifying the UNCRC, Estonian legislative language has shifted from purely protective to balancing protection and empowerment, using both positive and negative language. Also, after a Committee recommendation, human rights education is included at all levels of the Estonian school curriculum during mandatory civic education classes.⁴⁰³ Not only has legislation changed to empower children, children themselves are being afforded the knowledge to understand their rights and how to access remedies. The empowering effect of the UNCRC and its Committee is patently evident here. Hopefully, if submitted on time, the 2024 periodical report will offer quantitative data to support the ostensibly positive qualitative deductions.

Australia ratified the UNCRC in 1990 and submitted reports to the Committee in 1996 (due 1993),⁴⁰⁴ 2005,⁴⁰⁵ 2012,⁴⁰⁶ and 2018.⁴⁰⁷ Unlike Estonia, the UNCRC has not been incorporated into domestic law.⁴⁰⁸ In 2011, a review of the Victoria Charter on Human Rights and Responsibilities Act (derived from the ICCPR) considered incorporating the UNCRC, but this recommendation failed because no

³⁹⁹ Child Protection Act 2014, ch. 2 (Est.).

⁴⁰⁰ *Id.* at ch. 1 §§ 2, 21.

⁴⁰¹ *Id.* at ch. 3 § 11.

⁴⁰² *Id.* at ch. 4.

⁴⁰³ Theyatz-Bergman, *supra* note 380, at 25.

⁴⁰⁴ Comm. on the Rts. of the Child, Consideration of Reps. Submitted by States Parties under Article 44 of the Convention – Australia, U.N. Doc. CRC/C/8/Add.31 (1996).

⁴⁰⁵ Comm. on the Rts. of the Child, Consideration of Reps. Submitted by States Parties under Article 44 of the Convention – Australia, U.N. Doc. CRC/C/15/Add.268 (2005).

⁴⁰⁶ Comm. on the Rts. of the Child, Consideration of Reps. Submitted by States Parties under Article 44 of the Convention – Australia, U.N. Doc. CRC/C/AUS/CO/4 (2012).

⁴⁰⁷ Comm. on the Rts. of the Child, Consideration of Reps. Submitted by States Parties under Article 44 of the Convention – Australia, U.N. Doc. CRC/C/AUS/5-6 (2018).

⁴⁰⁸ *Information Concerning Australia and the Convention on the Rights of the Child*, AUSTL. HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/legal/information-concerning-australia-and-convention-rights-child> [https://perma.cc/FC8U-GLPB].

“problem in Victoria’s existing laws” had been identified.⁴⁰⁹ However, as of writing, Australia does not have a comprehensive national child rights act. Queensland has the Child Protection Act of 1999, Victoria has the Children, Youth and Families Act of 2005 (“CYFA”), and South Australia has the Children and Young People (Safety) Act of 2017, but no one document covers all six federated states. Victoria is the most populous of the three, so will be the focus here.⁴¹⁰

The CYFA includes the best interests principle—it must “always be paramount”—and for the purposes of this Act, must be determined both to protect the child from harm and to protect their human rights.⁴¹¹ Further, in determining the child’s best interests, the child’s “social, individual, cultural identity and religious faith (if any)” and the child’s “age, maturity, sex and sexual identity” must all be considered.⁴¹² Whilst the most fundamental element of the UNCRC has been incorporated here, much is missing. In UNICEF’s study, Australian children and child specialist interviewees noted that a “child rights-based approach was not always explicit and that the incorporation of CRC principles was not systematic across States.”⁴¹³ What is more, one interviewee suggested the UNCRC had “no penetration” in domestic cases, unless the specific judge happened to be interested in international law.⁴¹⁴ Australia is far from an example of the UNCRC successfully impacting domestic child rights, beyond the State merely saying it, in theory, agrees to abide by these international principles.

Australia does have “pockets” of international best practice,⁴¹⁵ to include the Melbourne City Plan which held dedicated children’s forums with child-led activities and collected children’s ideas on topics like “living well, being safe and reaching their full potential.”⁴¹⁶ However, UNICEF’s interviewees remarked that Australia does “not

⁴⁰⁹ PARLIAMENT OF VICT., REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 6 (2011).

⁴¹⁰ *National, State and Territory Population*, AUSTRALIAN BUREAU OF STATISTICS (2023), <https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release#states-and-territories> [https://perma.cc/NS3H-BM5C].

⁴¹¹ *Children, Youth and Families Act 2005* (Vict) s 10(1) (Austl.).

⁴¹² *Id.* at s 10(3)(1).

⁴¹³ Lundy, *supra* note 381, at 32.

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* at 35.

⁴¹⁶ *Big City – Small Child*, CITY OF MELBOURNE, <https://www.melbourne.vic.gov.au/community/health-support-services/for-my-family/Pages/big-city-small-child.aspx> (last visited Nov. 25, 2024).

yet [have] a culture of children’s rights.”⁴¹⁷ It must be noted that this study was published in 2012, and the first Melbourne Children’s Town Hall was hosted in 2019, but several recent examples highlight Australia’s lack of support for a child rights-based culture. In September 2023, Queensland suspended its Human Rights Act to indefinitely detain a greater number of under-18s, including children as young as 10⁴¹⁸—the UNCRC Committee recommends the age of criminal responsibility be no lower than 14.⁴¹⁹ Indigenous children are still twenty times more likely to be imprisoned than non-Indigenous children⁴²⁰ (contrary to UNCRC Article 40), and in May 2022, children in New South Wales had their right to privacy (contrary to UNCRC Article Sixteen) breached through education technology products approved by the State; eight products were found to have illegally surveilled children online and outside school hours.⁴²¹

There is a clear place for domestic implementation of the UNCRC—as the basis for the creation of Australia’s first child rights-based act. A much wider study would need to be conducted to effectively compare the impact of choosing to domestically implement the UNCRC against states who have chosen not to. However, based upon the Estonia-Australia comparison, it is certainly much easier for the Committee to make recommendations and suggestions when states have realized the content of the UNCRC within their own law. Including the best interests principle as a minimum is a start, and admittedly, Victoria’s definition is remarkably inclusive and child-focused. But when children discover that their freedoms and rights under the UNCRC have been breached, it is a mammoth task to relay these breaches all the way up to an international committee versus a domestic court. To ensure children are agents of change, a need exists to cement this agency through legislation. If the UNCRC really is the given norm for

⁴¹⁷ Lundy, *supra* note 381, at 35.

⁴¹⁸ Ali MC, *Australian State Suspends Human Rights Law to Lock Up More Children*, AL JAZEERA (Sept. 18, 2023), <https://www.aljazeera.com/news/2023/9/18/australian-state-suspends-human-rights-law-to-lock-up-more-children> [<https://perma.cc/G6HU-8FU2>].

⁴¹⁹ Comm. On the Rts. Of the Child, Gen. Comment No. 24 (2019), replacing Gen. Comment No. 10 (2007), Children’s rights in juvenile justice, ¶ 33, U.N. Doc. CRC/C/GC/24 (2019).

⁴²⁰ *Australia – Events of 2022*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2023/country-chapters/Australia> [<https://perma.cc/Q79M-W9KD>] (last visited Nov. 25, 2024).

⁴²¹ *How Dare They Peep into My Private Life? Children’s Rights Violations by Governments that Endorsed Online Learning During the Covid-19 Pandemic*, HUM. RTS. WATCH (May 25, 2022), <https://www.hrw.org/report/2022/05/25/how-dare-they-peep-my-private-life/childrens-rights-violations-governments> [<https://perma.cc/JNE4-GZ7N>].

children's human rights, its accessibility is a must. This direct and measurable change in Estonia's child laws appears purely positive but is another example of why the United States has not ratified the UNCRC and is divested from the international child rights regime. The United States is happy to lead global intervention but fears international interference in its own domestic policies. Ratification would require radical change from the local to the constitutional, a new belief in the paramount importance of positive and negative rights for children, and a willingness to treat foreign involvement as a strength, not a weakness. Until this point, it is deeply improbable we will see the United States ratify any further human rights treaties with positive right promises.

CONCLUSION

The one consistency throughout this chronological analysis of international child law is conflict. Conflicting beliefs behind the same ultimate purpose, such as the introduction of child labor laws with intentions ranging from quashing political upheaval to building stronger young adult soldiers; international conflict itself with both world wars setting the stage for the 1928 and 1959 Declarations; conflicts of interest with different conclusions hoped for behind the UNCRC, ultimately delaying the finished document years behind the drafters intended publication date; and the ongoing conflict between the natural/human, positive/negative, public/private, and children's autonomy/parental rights dichotomies. Its dichotomous nature makes for a fascinating treaty with articles open to domestic and cultural interpretation whilst still explicitly providing for the protection of children.

Its near universal acceptance could have been a remarkable opportunity for truly global discussions surrounding child rights. Perhaps if the opposition to broad positive rights for children by delegates from the United States had been more strongly considered, the UNCRC would have full ratification from every U.N. State Party. If the "best interests" principle was removed or more clearly delimited, or if freedoms of expression and religion included extensive caveats in favor of parents or legal guardians, the United States would be the 197th ratifier. These are not issues specific to the UNCRC. The issues are emblematic of the constant balance in international law and policy between the freedoms and rights of people and the restrictions required by each Member State. Regardless, U.S. children need the UNCRC more than most other Western State Parties. Thirty-five years after the UNCRC's release, rates of child poverty in the United States are at a

record high,⁴²² nearly 60,000 children under the age of eighteen are incarcerated,⁴²³ education enrollment is falling,⁴²⁴ and the demand for children's mental health services has increased exponentially.⁴²⁵ When will the United States make the best interests of its children more important than its sovereignty? A century after the Declaration of 1924, the American Child Savers of the twentieth century would be disheartened at the status of children's rights in the United States. After all, who would vote against children's welfare and health?

⁴²² Nanci Flores, *Record Rise in Poverty Highlights Importance of Child Tax Credit*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 12, 2023).

⁴²³ INST. OF EDUC. SCIS., REPORT ON THE CONDITION OF EDUCATION 2022 iii (2022).

⁴²⁴ *America's Addiction to Juvenile Incarceration: State by State*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/juvenile-justice/youth-incarceration/americas-addiction-juvenile-incarceration-state-state> (last visited Nov. 25, 2024).

⁴²⁵ Ashley Abramson, *Children's Mental Health Is in Crisis*, AM. PSYCH. ASS'N (Jan. 1, 2022).

