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## ***Legislative Update: Substance Over Form: How the United States Is Fulfilling the Precepts of the United Nations Convention on the Rights of the Child Without Having Ratified It***

*By Mitchell Paglia*

The United Nations Convention on the Rights of the Child (“CRC”), adopted by the United Nations General Assembly on November 20, 1989, was created in order to better protect children from abuse and exploitation and to set out the measures each signing country must take in order to protect and promote the civil, political, economic, social, and cultural rights of all children. There is only one country that has not ratified the CRC: the United States. Even South Sudan, still in its infancy as it was founded on July 9, 2011, has ratified the CRC. So what excuse does the United States have? It is not as if there have not been plenty of opportunities to ratify the treaty. Indeed, the United States was a major contributing factor in the formation of the treaty under Presidents Ronald Reagan and George H.W. Bush. The United States even signed the CRC in 1995. However, neither Presidents Bill Clinton nor George W. Bush pushed for the CRC’s ratification. Nor did Barack Obama, who, during his 2008 presidential campaign, said of the CRC, “it is embarrassing that the [United States] is in the company of Somalia, a lawless land. If I became president, I will review this and other human rights treaties.” Somalia has since ratified the treaty, yet the United States still has not, and likely will not under the current congressional layout of a Republican-controlled House and Senate. There is a staunch domestic opposition to ratifying the treaty for a variety of reasons: it impedes states’ rights, it diverts resources from more important federal concerns, and it limits how parents can raise their own children. Ratification does not even appear to be a feasible option until we have a new president and most likely a new congressional layout as well, if that will even work.

Notwithstanding the reasoning as to *why* the CRC has not been ratified by the United States, as the CRC pertains to promoting the empowerment of children to testify in court along with the requisite protection to do so, it is not necessary that the United States ratify the CRC. There are various areas of American law that deal with children and the rights and responsibilities associated with them; subjects ranging from juvenile justice and the school-to-prison pipeline, maternity and paternity leave, education, poverty, and health are just a few that the CRC covers. Yet when it comes to the promotion of a child’s rights to communicate on behalf of their own interests, and protecting those rights after they have been the victim of or witness of a crime against them, the United States’ ratification of the CRC is not necessary. This article will very briefly recap the theoretical objectives that Articles 3 and 12 of the CRC’s aim at fulfilling. Then, this article will provide a brief overlay of the United States’ legal framework for protecting the rights of children to testify on behalf of their interests after they have witnessed or been victimized by a crime. This article will then compare the CRC to U.S. law and show that the United States has done much to fulfill the CRC and

that ratifying the CRC is not necessary to protect children's rights to testify on their own behalf.

### **The Interests Preserved Through the CRC**

The CRC "recognized the general disregard for the needs of child victims and witnesses and sought to remedy these shortcomings [by] addressing a child's right to participation and the need for courts, administrative tribunals, and other . . . actors to take 'the best interests of the child' into consideration of their operations." The CRC operates on the presumption that children should testify, whenever at all possible, according to the child's individual capacities and ability to handle the situation, to the crimes they have experienced or witnessed. The CRC also recognizes the duty to protect the child from re-traumatization and other forms of physical or mental forms of harm.

Article 12 states that all countries who sign the CRC will allow a child who is capable of expressing their views freely on matters that affect the child to do so, and that the weight of the child's expressions will be weighted in accordance with age and maturity. The child has the opportunity to be heard either directly or indirectly through a representative and to have their opinions taken into consideration when decision-makers pass judgment. These testimonies should occur whether the crime directly or indirectly affects the child. The reasons and methods behind promoting a child's right to testify under the CRC are quite important. Permitting the child to testify recognizes the child's humanity and ability to participate within society. Children can also come to terms with the crimes that they faced, presuming that they understand that they have that opportunity to do so and freely choose to do so without undue pressure or manipulation. Children should, therefore, be permitted to speak on their own behalf whenever possible or have a representative do so if it can be ensured that the representative is fully expressing the views and wishes of the child.

Article 3 of the CRC expresses the duty that countries have in protecting and promoting the "best interests of the child" and their well-being, while preventing the physical, mental, and emotional harms and trauma that may come from testifying in both direct and cross-examinations, facing the defendant and having a general lack of knowledge about the legal system. A "higher duty of care" is owed to children to make sure that they are afforded the same rights to testify as adults but also to ensure that they are protected from exposure to situations that are likely to be traumatic or harmful, while not providing so much protection as to inhibit opportunities to meaningfully testify. Conforming to this higher duty of care can include actions such as not interviewing children more than is necessary; ensuring that the condition that the child is testifying in will be one that makes the child feel respected, at ease and secure in a child-friendly environment and non-intimidating atmosphere; informing the child about the procedures and setting in which they will testify, including who will be participating; making sure that the child knows about the different health, psychological, and social services that are available; and, when possible, permitting the child to not be heard in open court, but rather under conditions of anonymity and informing the child to the conditions they will be testifying under. These measures taken in the interests of the child are critical regarding the child being able to make clear and informed decisions as to how they wish

to testify. All of these rights of the child must also be balanced by the right of the accused to receive a fair trial.

<sup>1</sup> The United States, while not having ratified the CRC, has nonetheless adopted the responsibilities that Articles 12 and 3 dictate and has preserved the balance between providing a defendant a fair trial and protecting the child victims.

#### **The United States**

In the United States, children are not “among the principal victims of war . . . are [not] brutally targeted [in war, and are not] killed, tortured, raped and abducted into armed groups to fight in adult wars where they may be forced to commit atrocities against their own families and friends.” Nonetheless, children within the United States still face maltreatment in the form of neglect, threats, being victims of or witnessing physical or sexual abuse, or witness parental drug or alcohol abuse. 18 U.S.C. § 3509 establishes child victims’ and child witnesses’ rights within the United States. The United States defines a child as any person who is under the age of eighteen and provides for the protection of children who are either the victims of or witness of a crime involving physical or sexual abuse or exploitation or was a witness to a crime committed against another person.

A child is presumed to be competent to testify, and only upon overwhelming evidence, age alone not being sufficient, will questions pertaining to the child’s competency to testify be accepted. Only the judge can ask those questions unless the judge is satisfied that the child will not experience emotional trauma. The types of questions permitted “shall be appropriate to the age and developmental level of the child, shall not be related to the issues at trial, and shall focus on determining the child’s ability to understand and answer simple questions.” When the child does testify, the United States provides for a child to testify live by a two-way closed circuit television or videotaped deposition of the child, if it can be shown that the child is unable to testify because of fear; if there is a substantial likelihood, established through expert testimony, that the child would suffer emotional trauma; if the child suffers from some form of mental condition; or the defendant or his counsel causes the child to be unable to continue testifying. The judge of that child’s case also has the discretion to be able to question the child either within his chambers or “some other comfortable place other than the courtroom with the child’s attorney and other individuals who may help the child feel more comfortable in testifying. This video testimony will then be transmitted to the courtroom for the defendant and the jury to listen to along with an opportunity for the defendant to be able to communicate with his attorney throughout the taking of the testimony for Sixth Amendment purposes.

The United States has also provided means to ensure that the personnel present within the courtroom can help facilitate the testimony of the child. A court has discretion to exclude from the courtroom all people, including members of the press, who do not have a direct interest in the case. This order may be made if the court determines that testifying in open court would cause substantial psychological harm to the child or result in the child’s inability to communicate effectively. Such a finding must be made only after taking into account the victim’s age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.

Children are to have available to them multidisciplinary child abuse teams, members of a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to help coordinate the assistance needed to handle cases of child abuse. These teams will provide medical diagnoses and evaluations and related expert testimony, in-person and telephone consultations, psychological and psychiatric diagnoses, and training services for judges, litigators, court officers, and others who are involved in child victim and child witness cases so they may better handle these children. To represent the child's best interests, guardian ad litem may be appointed whose purpose is to attend depositions, hearings, and trial proceedings in which the child participates in order to best make recommendations to the court concerning the welfare of the child and is also responsible for marshaling and directing the services and resources that the child may need.

Finally, a child is permitted to have an adult attendant who may accompany the child to provide emotional support. As long as the child is not being directed to answer the questions by the attendant, the attendant may hold the child's hand or have the child sit in the attendant's lap. The child may also use "anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying."

#### **Conclusion**

The preceding comparisons between Articles 3 and 12 of the CRC and the United States' law, 18 U.S.C. § 3509, show striking similarities, and even the most dedicated and sincere proponents of the United States adopting the CRC must admit that for purposes of protecting child witnesses, the United States would not have many more legal remedies to provide in order to follow the obligations set forth within the CRC.

The presumed competency of a child to testify reflects the desirability of allowing in all relevant evidence within trials. Presuming that a child is competent to testify also reflects the recognition that the CRC makes that children are to be valued members of society and are sought after to contribute to the functioning of that society. Presuming competence also facilitates the child's coming to terms with what happened to him or her and allows them to feel a sense of control in the outcome of the trial that either directly affects them as victims or indirectly as witnesses to a crime, all things that the CRC strongly promotes within Article 12. When a child is deemed competent to testify, then the child's testimony as to what the child saw and experienced is deemed just as equal and as important as any adults. Furthermore, Article 12 encourages the use of representatives to speak on the behalf of the children and to articulate the child's interests. This role of dedicated advocacy is precisely what the guardian ad litem role outlined in 18 U.S.C. § 3509 is designed to do. It is the guardian ad litem who helps push for the court to make a judgment at trial that is within the best interests of the child, and the best interests of the child are determined by the guardian ad litem who has built a rapport with the child through ascertaining and understanding the child's needs and desires. The guardian ad litem helps the court understand what it was that the child either saw or experienced.

Permitting a child to testify against an individual who has hurt him or her and having that child feel comfortable in being able to do so are two separate, albeit related,

matters. The United States has demonstrated in § 3509 the type of protective measures that Article 3 promotes. Article 3 ensures that the child will feel physically, mentally, and emotionally safe and secure, and that he or she will feel enabled to testify against the defendant. The ability for children to be able to meet with the judge either within his or her chambers or elsewhere in an environment that is comfortable for a child echoes the encouragement from the CRC that a child feel respected, at ease, and secure in a non-intimidating atmosphere. This approach to the child feeling safe is also reflected in the widely-available use of two-way video testimony and video depositions. It is a well-recognized pattern within psychological literature that a child is often muted with fear and anxiety when presented with an abuser who has either personally hurt the child, or who is someone the child loves. Placing the child away from the defendant is another way in which the United States promotes the child victim's mental wellbeing. The CRC also encourages letting the child be aware of and able to utilize the resources of psychological and health services that may help the child testify, a sentiment that reverberates within § 3509. A child in abuse cases is provided with state-sponsored multidisciplinary child abuse teams that guide the child step by step through the entire process of the litigation and act on the child's behalf to navigate a world the child would be utterly helpless to navigate solo.

For purposes of empowering and protecting child witnesses, ratifying the CRC may be a symbolic statement, but one that is highly superficial, for if one goes beyond skimming the surface of the United States' rejection of ratifying the CRC, they will find that in essence, we already have.

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<sup>1</sup> The Sixth Amendment of the U.S. Constitution provides for all defendants to be able to face their accuser. The constitutional framework within the United States will not permit for a defendant's Sixth Amendment right of confrontation to be abbreviated or circumscribed per se solely because of the discomfort of a child

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victim. Congress's method of balancing the rights of the defendant and the sensitivities of the child is reflected in § 3509. Although there is some variation within the various jurisdictions of the fifty state legislatures, ninety-four federal judicial districts, and twelve federal judicial circuits within the United States, any nuances that are established within those respective jurisdictions are all based off of preceding rulings from the U.S. Supreme Court on the subject of children's testimony and a defendant's Sixth Amendment right to confrontation. The case that is the backbone for many of these discussions is *Maryland v. Craig*, 497 U.S. 836 (1990). For a more in-depth discussion of the interplay between these competing interests, the Gershman and Richard's articles are strongly recommended, along with the CJS and Kletter legal encyclopedia entries.