

**The United States' Compliance Decisions with
Regards to the U.N. Convention on the Rights of
the Child and the Two Optional Protocols:
Reflections on the Theories of International Law**

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United States' Compliance Decisions with Regards to the Convention on the Rights of the Child and the two Optional Protocols: Reflections on the Theories of International Law

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In 1989, the United Nations implemented the U.N. Convention on the Rights of the Child (CRC), the most innovative and comprehensive treaty on children's rights ever enacted. To date, only two nations have not ratified the CRC: United States and Somalia, the latter of which has no recognized government. Ironically, the United States played a prominent role in drafting the CRC even though it chooses not to ratify. The *rationalist* camp of international relations scholars would explain this disparity by advancing a state interest perspective on international law. The first part of my thesis will illustrate the rationalist argument- international law is simply a product of states perusing their own interests on the international stage- as well as discuss rationalist's reflections on the legitimacy of international law (Goldsmith Posner 1998). In the second part of my thesis, my attention turns away from the CRC and towards the Convention of the Rights of the Child Optional Protocols: the Optional Protocol on the Sale of Child, Child Prostitution, and Child Pornography and the Optional Protocol on the Involvement of Children in Armed Conflict. Both Protocols, separate treaties from the CRC, were enacted by the U.N. in 2000. In July of 2002, the United States ratified both Protocols with unanimous advice and consent from the Senate. The United States' significant break from its non-ratification stance on the CRC produces an interesting puzzle: why would ratification of the CRC be against United States' national interest but not the CRC's supplementary Protocols? This puzzle provides counter-evidence to the rationalists' approach of international law. I argue that the United States' decision to ratify the Optional Protocols demonstrates that international law is more than a states' pursuit of their national interests. Using the U.S. ratification decision as support, I advance *acculturation* as the mechanism responsible for influencing state behavior (Jinks and Goodman 2004). This positive, more normative view of international law is subsidiary development of *constructivism*, a scholarly camp contrary to rationalism. At the conclusion of my thesis is a brief discussion reflecting on the legitimacy of international law coinciding with a belief in acculturation.

PART ONE

The U.N. Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC), adopted by the U.N. General Assembly in 1989, is the first legally binding, universal treaty dedicated to protecting the rights of children. The CRC is widely acclaimed for its achievements in placing children's rights to the center of the global humanitarian agenda. The CRC is a comprehensive framework for the rights of children, including political, economic, social, cultural, and civic rights. The CRC's range of protections and standards for the most vulnerable population, children, deservingly earns it the epithet, the "Magna Carta for Children."¹

The CRC consists of 54 articles which address the substantive rights of children. Although the range of protections is vast, the CRC has an underpinning of five major themes:

- all rights in Convention the are to be given to the child free of discrimination (UN General Assembly 1989, Article 2);
- the best interests of the child are a primary consideration in all matters concerning the child (UN General Assembly 1989, Article 3);
- because of the evolving capacities of the child, children can be accorded greater autonomy and responsibility as they get older (UN General Assembly 1989, Article 5);
- the child has the right to life, survival, and development (UN General Assembly 1989, Article 6);
- states must ensure that due weight be given to the views of the child, and that all matters affecting him or her, the child has a right to be heard and to granted freedom of expression. (UN General Assembly 1989, Article 12)

In addition to the articles, the CRC's preamble states, "the child should be fully prepared to live an individual life in society and brought up in the spirit and ideals

¹ This comment was attributed to James P. Grant while he was executive director of UNICEF (see Fottrell 2000).

proclaimed in the charter of the United Nations” (UN General Assembly 1989). The preamble cites past documents which support children’s rights, including the Geneva Declaration of the Rights of the Child of 1924, the Declaration of the Rights of the Child of 1959, the Universal Declaration, the ICCPR, and the ICESCR (UN General Assembly 1989, preamble). Although the preamble’s paid homage to previous works serves as a reminder that the CRC was not the first document to address the children’s rights issue, it is the certainly the most innovative and comprehensive.

In addition to these positive attributes, the CRC is awarded the title of the most widely ratified United Nations treaty in history. Upon opening for signature in January of 1990, the CRC immediately received 61 state signatories. Within the first two year of adoption, the CRC was ratified by 100 state parties and an additional 91 states by the end of the 1900s (Rutkow and Lozman 2006). Most U.N. treaties take years or even decades to obtain the necessary ratification to be officially implemented;² however, the CRC was ratified within seven months. The norm that the CRC is critical to the development and safeguard of children is a sentiment shared by every self-governed nation in the world except one, the United States of America. The United States and Somalia, which has no recognized government, are the only two nations not to ratify the CRC.

The United States’ Role in Initiating and Drafting the CRC

The United States’ sole position as an outlier may be shocking enough on its own. However, more shocking irony can be identified with a brief examination of the United States’ historical views on children’s rights as well as United States’ participation in the

² The international Covenant on Civil and Political Rights (CCPR) took 10 years to obtain 35 signatures before it come into force (Fottrell 2000, 1).

creation of CRC. The central premise of the CRC, the child as an independent rights holder, is not a new phenomenon in international law. In fact, it was instrumental to the League of Nation's Declaration on the Rights of the Child (1924). This non-binding declaration, however, was highly symbolic and fostered low compliance. It was followed by an equally tokenistic 1959 Declaration of the Rights of the Child (Fottell 2000, 2). The failure for international cooperation to combat the autocracies against children spurred a robust United States movement for global children's rights in the 1970s. This movement was "hinged on a move away from the welfare-oriented paternalism of earlier campaigns towards a radical liberation-oriented approach, the cornerstone of which was recognition the child's autonomy" (Fottell 2000, 2). By the end of the 1970s, the United States movement succeeded in forming an international consensus calling for "better developments" in the area of children's rights. Influenced by this U.S. movement, the U.N. General Assembly designated 1979 as the "International Year of the Child." In congruence with the "International Year of the Child," the Polish government proposed a convention on the rights of the child to the United Nation's 34th session. The proposal was mainly created by Professor Adam Lopatka, who at the time served as the president of the *Polish Association of Jurist* and a delegate to the *U.N. Human Commission on Human Rights*. Poland's initiative later led to the drafting and debate of the fully-approved Convention on the Rights of the Child. The 1970s United States movement was the inspiring factor in Lopatka's, dubbed "father" of the CRC, decision to create the original draft (Todres in Todres, Wojcik, Revaz 2006, 13).

The United States' involvement is not limited to just initiating awareness. The United States indisputably played a major role in drafting the Convention on the Rights

of the Child. It had large influence over the *Open-Ended Working Group of the Commission on Human Rights*, the working group established to oversee drafting of the CRC. The United States was the most active participant revising the original convention submitted by Poland. For example, the United States expanded Poland's original Article 7 into the newly created Article 13 (freedom of expression), Article 14 (freedom of religion), Article 15 (freedom of association and assembly), and Article 16 (the right to privacy) (Cohen 2006, 1990). In total, the United States contributed seven articles to the convention (*Travaux Preparatoire*).³ Only five other states provided entirely new articles.⁴ Not only did the United States input several provisions, it also was influential in preventing certain language from entering the CRC. For example, the Swedish government proposed that Article 38, dealing with children in armed conflict, should be altered to increase minimum age for combat from 15 to 18. However, the CRC was drafted based on consensus and the continuous refusal of the United States to increase the age resulted in the ultimate adoption of 15 as the minimum age for combat (Cohen 2006, 190-91). Although the United States demonstrated the ability to influence the language of the CRC on its own, the U.S. still exhibited influential power over other participants in the *working group*. The United States was able to gain the unconditional support of Norway, the Netherlands, the United Kingdom, Finland, Portugal, Argentina, Canada, Australia, and Sweden. The United States' contribution was so unequivocal that many nations began to refer to the CRC as the "U.S. Child Rights Treaty" (Cohen 2006, 190-92).

Despite the United States' large participation in the initiation and drafting of the CRC, the U.S. refused to become a signatory when the convention entered into force in 1990. Since that time, however, several attempts have been made in support of U.S. ratification. The first attempt was made by Senator Bill Bradley from New Jersey, who proposed a resolution urging

³ Article 14,15,16, as well as Article 10 (family reunification) Article 19 (protection from abuse), and Article 25 (review of placement).

⁴ Denmark (Article 5, parental guidance), India (Article 6, survival and development), Argentina (Article 8, identity), Norway (Article 29, recovery and reintegration), and China (Article 33, narcotics).

the President to submit the CRC to the Senate for its “advice and consent” (Con. Res. 139). Although this resolution was supported by 89 co-sponsors, President George H.W. Bush refused to sign the CRC over to the Senate. Further attempts to move the CRC to the Senate were made by other congressmen such as Gus Yatron from Pennsylvania and Bernard Sanders from Vermont. However, President George H.W. Bush refused to sign any pro-CRC resolutions, arguing that CRC diminished American family values and was incompatible with Constitutional law (Rutkow and Lozman 2006, 170-172). One of the last attempts to pass the CRC through to the Senate was made in a resolution created by Congressman Patrick Leahy of Vermont. In a 1994 speech to the Senate, he explained that “the administration’s resistance to ratifying the CRC is due to misunderstandings about the Convention. Opponents claim that it is antifamily... or infringes upon states’ rights. The CRC does none of these things” (Rutkow and Lozman 2006, 170). However, despite the best efforts of the Congress, the CRC remains untouched by the United States Senate. The only success that the Convention on the Rights of the Child has demonstrated within the United States government occurred on February 10, 1995. On this date, President Clinton had Madeline Albright, acting at the time as the U.S. Delegate to the U.N., sign the CRC on behalf of the United States.⁵ No further action has been taken with the CRC since 1995 and, to date, the CRC has not been transmitted to the Senate for ratification (Rutkow and Lozman 2006, 170-172).

Theories of International Law

International law, which encompasses multilateral human rights treaties such as the CRC, is currently at the epicenter of debate and research in legal scholarship as well as the international relation subfield of political science. Most scholarship in

⁵ This action means that the United States will refrain from taking actions that would defeat the object and purpose of the treaty (see Vienna Convention on the Law of Treaties, May 23, 1969; Art. 18, 1155 U.N.T.S. 332, 336). However, this does not mean that the U.S. is obligated to ratify.

international law presents positive theories on the power of international law (Spiro 1994; Charnovitz 1997; Slaughter 1995; Alesina and Spolaore 1997; Falk 1985 Keohane and Nye 1972). These scholars argue that state authority structures are melting away in favor of international law and institutions. However, more relevant to my thesis, is debate pertaining to the *reasons* states comply with international law.

On one side of this debate are scholars who share the assumption that states comply with international law for normative reasons. This means, doctrinally, states observe the rule of *opinio juris*, the “sense of legal obligation” that makes customary international law binding, and *pacta sunt servanda*, the rule that treaties must be obeyed. Thomas Franck (1990) argues that international law pulls states towards compliance by exercising a normative influence on state behavior. Koh claims that international law becomes part of the “internal value set” of states (1997, 2603). Briairly (1963) asserts that states comply with international law because they have consented to it. International relation (IR) theorists, like the above legal scholars, have also made notable contributions to international law scholarship. IR theorists’ scholarship is more recent because political scientists previously did not study international law apart from the study of international institutions.⁶ This recent work of political scientists, studying international law in its own right, tends to produce more methodological literature by applying previous IR theories. A solidified camp was established in the early 1990s, labeled *constructivism*, which emphasizes norms and the global ideational structure in relation to the forces that shape state behavior.⁷ Constructivist scholars⁸ see norms, social structure, and values of

⁶ American realist scholars felt that international law was outside of their specific research agenda (see Mearsheimer 2001; Waltz 1979). Bull (1979) spoke on international cooperation but did distinguish international law. (The major exception would be Hans Morgenthau 1948).

⁷ See Alexander Wendt (1999), *Social Theory of International Politics*.

the international society as strong components in forming the identity of the actors who operate within it. Therefore, nations “obey international rules not just because of sophisticated calculations about how compliance or noncompliance will affect their interests, but because a repeated habit of obedience remakes their interests so that they come to value the rule of compliance” (Koh 1997, 263).

However, constructivist theories which advance a normative explanation to state behavior would not be able to provide an explanation for the United States’ decision not to ratify the CRC. The United States is historically one of the most avid supporters of children’s rights and, therefore, would predictably be in favor of a treaty codifying these rights. Furthermore, the United States has been an initiating and leading crusader in the evolution of international humanitarianism.⁹ The United States, an active participant in the drafting of the CRC, clearly views the norms of the Convention as legitimate and moral. Clearly, the United States is not choosing to ratify the CRC because it does not agree with CRC’s codified norms. Why then does the United States choose not to comply with a U.N. convention that 192 other nations have? The theory of state compliance through normative reasons may seem ill-equipped to explain this situation.

There is, however, another side of the international law compliance debate, opposite that of constructivism, which may presents answers to the puzzle of the United States’ decision not to ratify the CRC. This scholarly camp, labeled *rationalist*, argue

⁸ Leading constructivists include Friedrich Kratochwil, John Ruggie, Nicholas Onuf, Hayward Alker, Richard Ashley, Martha Finnemore, Ernst Haas, and Alex Wendt.

⁹ “The United States has been the world’s leading proponent of universal human rights protections based on international law. Franklin Roosevelt’s Four Freedoms Speech was a rallying cry for international human rights advocates. The United States played a dominant role in creating foundational international human rights instruments such as the Nuremberg Charter, the United Nations Charter, the Universal Declaration, and the Genocide treaty. Since World War II, and especially in the last twenty-five years, human rights has been a central preoccupation of United States foreign policy. The United States constantly urges nations of the world to embrace international human rights standards. And more than other nations, it uses military and economic leverage to force compliance with these standards.” (Goldsmith 1998).

that international law is not as normatively significant as the experts, governmental officials, and even the media allege (Goldsmith and Posner 2005; Oppenheim 1912). Rationalists, who apply rational choice theory to international law, feel that state behavior arises from its personal interest and therefore the role of international legal obligations is minimal at best. Goldsmith and Posner, in *The Limits of International Law*, present the argument that international law is simply the result of states pursuing their own national interest. States, therefore, would not comply with international law or submit to an international treaty that goes against their interests. This theory, directly conflicting with the constructivist argument of state compliance as a result of transnational norms, dilutes the power of international law. However, where the normative theory of international law falls short, Goldsmith and Posner's theory does not. Their theory would assert that the United States chooses not to ratify the CRC because it goes against its national interests. Part one of my thesis will expand upon this argument and provide evidence in support of this claim. I will do this first by providing a general discussion of the concept of national interest. I will then proceed by presenting the controversial argument as to why the Convention of the Rights of the Child does not coincide with the United States' national interest. Lastly, I explain how the United States' "exceptionalism" makes its noncompliance possible, which is the foundation of the state interest theory of international law.

United States' National Interests

Nye defines the national interest as the set of shared priorities regarding relations with the rest of the world. The importance of this term is exemplified in the Commission

on America's National Interest's statement, "national interests are the fundamental building blocks in any discussion on foreign policy... In fact, the concept is used regularly and widely by administration officials, members of Congress, and citizens at large" (Nye 1999, 23). An argument posed by these administration officials, congress, and even the citizens at large is that CRC threatens United States' *sovereignty*, *federalism*, and *established constitutional laws*. Although these claims are highly contested (Todres, Wokcik, and Revaz 2006; Cohen 1998), they have received significant media attention and are highly vocal. Therefore, I claim whether or not the threats posed by CRC are legitimate, they were seen as such, and thus shaped the United States' national interest towards non-ratification. I will further expand on these threats below in the order they are presented above.

Sovereignty Concerns

Sovereignty concerns have been addressed in the ratification debates of essentially all international treaties involving the United States. For example scholars and politicians have claimed that United States' entrance into North American Free Trade Agreement, the World Trade Organization, and the International Criminal Court have all threatened sovereignty. They claimed that in signing these permanent agreements, the United States had forsaken its sovereign status (Radon 2004). This similar concern of the erosion of sovereignty kept the United States from several human rights treaties such as the Convention on Economic, Social, and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women (Goldsmith 1998). Even when the United States does ratify a U.N. human rights convention, they attach conditions to the treaties which secure U.S. sovereignty generally by making the treaty

non-self executing.¹⁰ These fundamental sovereignty concerns are also in the debate surrounding the ratification of the CRC. The opposition fears that the CRC, by giving force to transnational rules of non-American decision makers, surrenders U.S. sovereignty. Although the threat of outside intervention is not as large in CRC as it is for other international treaties, the opposition still claims the CRC would subject the United States to international scrutiny. All parties of the CRC must submit a report within two years of ratification and every five years thereafter. The report must entail a detailed description of the level of compliance and the measures taken to ensure accordance with the CRC (UN General Assembly 1989). The report, and ultimately the state, is subject to inspection by *Committee on the Rights of the Child*.¹¹ Subjecting the United States to a decision-making body not elected or appointed by U.S. citizens is a common opposition held by CRC critics.

Federalism Concerns

The second threat that critics claim the CRC poses pertains to United States federalism. The purpose of federalism is to protect the rights and the sovereignty of the states (Yarbrough 1985). A federalism-based argument for refusal to engage in an

¹⁰ “When the President obtains the Senate’s advice and consent to ratification of a treaty, the treaty is binding on the United States under international law. A treaty, thus properly ratified, creates legal obligations upon the United States. However, when a treaty is said to be non-self executing, any rights that may arise under the treaty can only be enforceable in the United States if there is additional implementing legislation” (Malone in Todres, Wokcik, and Revaz 2006, 33-34). Declaring a treaty non-self executing because the separate international and domestic legal regimes, thus preserving state sovereignty. (see Henkin, U.S. *Ratification of Human Rights Conventions: The Ghost of Senator Bricker* for more information of the history of non-self executing reservations).

¹¹ The Committee on the Rights of the Child is the body of independent experts (who are selected from NGOs that the United Nations deem prominent) that monitors implementation of the Convention on the Rights of the Child by its State parties. The Committee examines States’ report and addresses its concerns and recommendations to the State party in the form of “concluding observations” (see Office for United Nations High Commissioner for Human Rights).

international treaty actually dates further back than the previous sovereignty argument. In 1916, the United States entered into a treaty with Great Britain to protect the rights of migratory birds. Within months of entry into the treaty the U.S. passed a domestic act which “prohibit[ed] the killing, capturing, or selling of any of the migratory birds included in the terms of the treaty” (Rutkow and Kizman 2006). The State of Missouri challenged that the treaty violated the Tenth Amendment¹² and took its case to the Supreme Court (see *Missouri v. Holland*). Ultimately, the Supreme Court decided against Missouri stating that “Congress has the power to enact legislation to implement a treaty, even if it would lack the power to enact the same legislation absent of the treaty” (*Missouri v. Holland*). This precedence, which established an international treaty as “supreme law of the land,” strikes fear in supporters of states’ rights such as Senator Bricker. In the 1950’s, Bricker lead a Congressional movement endorsing a proposed amendment which would make treaties effective only through legislation that would still be valid even in the treaties’ absence. The amendment was ultimately defeated, partially due to President Eisenhower’s promise that “the United States would not accede to international human rights covenants or conventions” (Rutkow and Lozman 2006). For the most part, Eisenhower’s promise has been generally kept. Concerns about the impact on federalism have been cited as a reason to stall ratification on all seven major U.N. human rights treaties (Resnik 2001; Spiro 1997).

The CRC is arguably the international human rights convention that would have the largest, negative affect on federalism. The CRC included many provisions on family law and juvenile justice that are traditionally regulated by the states as opposed to the

¹² “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” (U.S. Const. am. 10).

federal government. Some specific examples of these areas include family separation and reunification, education, labor, child placement, custody issues, protection of children from abuse and neglect, and most notably juvenile execution. (Nelson in Todres, Wojcik, Revaz 2006, 87). However, if the United States ratifies the CRC, the federal government would have the power to legislate in those areas. The reason is not only because of the precedence established in *Missouri v. Holland*, but also the “supremacy clause” of the U.S. Constitution,¹³ which gives Congress the power to ratify treaties that supersedes state law. The state rights’ opposition of the CRC resonates with the broad sentiment that citizens do not want the federal government deciding on issues that vary greatly in community standards from state to state. Critics argue that family issues have traditionally been left to the local government. Intimate issues of family law, inherently local concerns, should be addressed by the states and not the disconnected federal government. Critics of ratification advance the claim that CRC promotes anti-federalism, supports an over-encroaching federal bureaucracy, and therefore is outside arena of the United States’ national interest (Gregory 2002, 146).

U.S. Constitutional Law Concerns

The final example of a major threat that the CRC poses against United States’ national interest is its incompatibility with the U.S. Constitution (Levesque 1996). The “supremacy clause” of the Constitution would enable treaties to override United States’ Constitutional law. There are several prominent examples in which the CRC conflicts with already established United States law. For example, Article 28.2 states that school discipline must be administered “in a manner consistent with the child’s human dignity”

¹³ See U.S. Const. art. 2 which states that the President of the United States has the power to ratify a treaty with the advice and consent of two-thirds of the Senate present; and U.S. Const. art. 6, which states that, if ratified, a treaty supersedes state law and federal law if ratified later in time that act of Congress.

(UN General Assembly 1989). Although not specifically enumerated, this could outlaw all forms of corporal punishment, a law not established in United States.¹⁴ States can grant local schools the option of using corporal punishment. This type of speculation does not provide a solid argument of inconsistency; however the vague language of the CRC would subject the United States to the “whims” of the *Committee on the Rights of the Child* (Gregory 2002, 146).

Vague potential disconnects are vast, yet there is still a limited amount of blatant in-congruency examples. The most controversial and noted example is the strong divergence between the CRC and U.S. law in the realm of juvenile imprisonment. Article 37 of the CRC states that “[n]either capital neither punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below the age of 18” (UN General Assembly 1989). In the United States however, several state laws allow the possibility of juvenile life imprisonment without the possibility of parole. There are several other areas in which the CRC, as is, is incompatible with U.S. law. *The American Bar Association Working Group on the Convention on the Rights of the Child* (1993) gives an in-depth analysis of further inconsistencies. Article 37(c) of the CRC states, “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest” (UN General Assembly 1989). However, in the United States, upheld through *Kent v. U.S.* (1966), older juveniles can be imprisoned in adult facilities. There are also problematic divergences in educational standards, the most significant being the provisions located in Article 29 of CRC. This Article contends that non-public schools must abide by the same

¹⁴ In 1977, the U.S. Supreme Court ruled in *Ingraham v. Wright*, that schools may use corporal punishment despite parental objection.

curriculum of public schools (UN General Assembly, 1989). This is incompatible with United States' law which allows a more personalized curriculum for parents choosing to home school their child (Limber and Wilcox 1996, 1248-49). These and other examples of conflicting principles between those enshrined in the CRC and those of the U.S. Constitution and legislation fuel the opposition against ratification. The opposition argument (Home School Legal Defense Association, the Christian Right, etc.) is that the United States, "an epitome humanitarian righteousness," should not be obliged to alter its established law given the obvious strength and success. More-so, this opposition argues that the CRC would permit the United States laws to be influenced by non-U.S. decision makers. The general fear is that the CRC poses a threat to "time-honored, reputable" U.S. laws, and therefore ratification would be against the United States' national interest.

At the conclusion of the above examination of the threats that the CRC poses to national interest, a very pressing question should surface. Does not the threat of dissolving sovereignty and over-riding established laws go against most all state's national interests? If United States can cite the above threats as reasons for noncompliance, and this evidence supports Goldsmith and Posner's state interest theory, why are other states not doing the same? Why have 192 other nations ratified the Convention on the Rights of the Child if it is incompatible with their national interests? Goldsmith and Posner's theory of international law would explain this disparity by examining the special enforcement logic of humanitarian international law and United States' exceptionalism.

United States' Exceptionalism

The United States has a special ability to exhibit a “double standard” in international human rights law. This double standard is a result of the unusual enforcement logic and poor enforcement record of international human rights law. Traditional international law is self-enforcing because nations receive mutually positive gains from compliance.¹⁵ International human rights law is different in that it is not self-enforcing. As Goldsmith (1998) points out, “states would gain nothing from a mutual promise to provide greater protection to their citizens.” Therefore it is not within a states’ national interest to comply with international law because there are no incentives to do so. The only time compliance would occur is if sanctions were involved. However, many states are unwilling to sanction noncompliance with international human rights law because of the high cost of resources associated with sanctions. Therefore, international sanctions for human rights offenses are mostly limited to two situations in which nations have special enforcement incentives. The first situation...

occurs when one nation's human rights violations threaten significant adverse consequences for another nation. This explains the United States' intervention in the former Yugoslavia and Haiti. A second context for likely human rights enforcement is when a government receives domestic political benefits from unilateral enforcement, and the costs of such enforcement -- in economic or military terms -- are low. Examples of this phenomenon are U.S. economic sanctions against weak and unpopular countries like Cuba and Myanmar (Goldsmith 1998).

The reasons the United States is able to display a “double standard” in international human rights law is clear. Very few nations have the special enforcement power of that of the United States. States are unable to extend the military and economic resources

¹⁵ An example of this is diplomatic immunity. “This law persists because of the mutual advantage it brings. Nations forgo the relatively small benefit of enforcing local laws against foreign diplomats in order to realize the broader benefits that accrue from relations with foreign nations. But unless both nations provide immunity, neither will do so and both will be worse off” (Goldsmith 1998).

needed to sanction. The United States faces minimal threats of sanctions, and because international human rights law is not self-enforcing, the United States has no reasons to comply. Furthermore, the United States generally respects human rights domestically. Therefore, “because of the general satisfaction with the United States’ domestic human rights protections... NGO and foreign governments’ attempts to stigmatize the United States for noncompliance with human rights law fall flat” (Goldsmith 1998).

Implications of United States’ Noncompliance

At this point I would like to briefly discuss some broad implications of the situation expanded upon above. The first implication specifically pertains to the United States. The United States actions in forcing other nations to comply with international humanitarian law while it refuses to do so, is criticized as a display of hypocrisy. The charge is that the United States is exhibiting a double standard by professing policies it does not hold. The United States’ claim, that it is the “epitome of principled human rights law,” does not hold weight with many human rights activists. These activists claim that the United States’ immigration practices, police abuses, custodial treatment and conditions, and the death penalty are all in violation of human rights law. The United States’ noncompliance stance with respect to conventions such as the CRC is earning it a negative reputation on the world stage.

The second implication for U.S. noncompliance is its detrimental effects to the power of international law. The constructivists, who adhere the normative power of international law, are optimistic about international law’s governing ability. However, the rationalist theory, that states only comply with international law if it is consistent with its national interest, does not endorse this normative power. The rationalists believe that

the United States did not ratify the CRC because it was not within the frame of its national interests. If their theory is correct, then there is little or no power to international human rights law. However, significant counter-evidence to a rationalist theory of international law is the United States' 2002 decision to ratify two Optional Protocols to the Convention on the Rights of the Child. In part two of my thesis, I will briefly discuss the contents of the Optional Protocols and United States' ratification process associated with the Protocols. Then I will explain a possible rationalist argument for the United States compliance with these protocols. Lastly, I will present my argument for how this U.S. decision supports a constructivist-like, optimistic theory of the legitimacy of international law

PART TWO

The Optional Protocols of the Convention on the Rights of the Child

On May 25, 2000, the United Nations adopted two Optional Protocols to the Convention on the Rights of the Child. The first, the Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution, and Child Pornography (Protocol on the Sale of Children), prohibits the sale and trafficking of children for reasons of sexual exploitation. The Protocol on the Sale of Children outlaws child prostitution and child pornography. It requires these acts to be covered under a country's criminal or penal law, creates a basis for jurisdiction and extradition with respects to these crimes, and provides protection for children victimized by these practices. The Optional Protocol to the Convention of the Rights of the Child on the Involvement of

Children in Armed Conflict (Protocol on Child Soldiers) outlaws the practice of recruiting and using children in armed conflict. It bans the use of child soldiers under the age of 18. It also prohibits compulsory recruitment of children for the armed forces who are under the age of 18. These two Optional Protocols were created in response to critics who viewed that the CRC was not explicit enough on the above issues.¹⁶ The Optional Protocols can be signed by any signatory to the CRC, even if those signatories have not ratified the CRC. Therefore, this allows the United States to ratify the Optional Protocols, which it did on December 23, 2002.

On August 31, 2000, the Clinton Administration sent the Protocols to the Senate stating that the two treaties “urgently need Senate approval” (letter from Paul Kelly, Assistant Secretary of State for Legislative Affairs). The United State ratified both Protocols with unanimously granted advice and consent from Congress and favorable support from President Clinton. The government sentiment was that ratification is an example of the “commitment of the United States to the protection of children and to working with the international community to end abuses and recognize universal human rights norms” (US Department of State 2000).

Optional Protocol: Evidence in Support of Goldsmith and Posner’s National Interest Theory of International Law

As a brief refresher, Goldsmith and Posner’s (2005) theory is that “international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power” (Goldsmith

¹⁶ See *travaux préparatoires* of the Optional Protocol on Children in Armed Conflict and Optional Protocols on the Sale of Children.

and Posner 2005, 3). Therefore if a states' national interest is obstructed by a multilateral treaty, that state will not act in accordance with the treaty. For this reason, the United States chose not to ratify the Convention on the Rights of the Child. However, states weaker than the United States will choose to ratify a human rights treaty, even if they would accrue some costs. These states will comply because they fear sanctions from the military, diplomatic, and financial might of strong states, primarily the United States. Avoiding these sanctions is important to states; therefore, compliance with international treaties would be a part of those states' national interests. This pattern of behavior, "powerful states forcing weaker states to engage in acts that are contrary to their interest," Goldsmith and Posner label as *coercion*. The United States' compliance with the two Optional Protocols could not be an example of *coercion*. The United States is not being influenced, against its national interest, into compliance by a more powerful state. However, the United States is still exhibiting a pattern of behavior showing pursuit of U.S. national interest. This pattern of behavior, in which a state chooses to comply without regard to the force of compliance (the CRC), is called *coincidence of interest*. Below I will further elaborate on *coincidence of interest* and then I will explain how the United States' ratification of the Protocols demonstrates this.

Coincidence of Interest

International lawyers and some IR scholars view the fact that states very rarely commit genocides as evidence for compliance with international law. However, both before and after the development of international law, the number of genocides committed has remained constant. (Chalk and Johnson 1999). A better explanation of the

absence of genocides and crimes against humanity reflects a *coincidence of interest* (Goldsmith and Posner 2005, 111). States have good reasons, not related to international law, to refrain from committing genocides. Examples of good reasons include immorality of killing large groups of people, “insufficient animosities among citizens to provoke such crimes,” and genocides disruption of a states’ internal stability and economy” (Posner and Goldsmith 2005, 111).

Genocides, however, are not the only human rights crimes states have no interest in committing. There are a range of human rights protections embedded in most states’ domestic policies. Specifically for the United States, the rise of women’s rights, the movement to decline racial and religious discrimination, and advanced protection of political freedom were all phenomena unrelated to international law (Goldsmith and Posner 2005, 111). Therefore, by the time the major U.N. human rights treaties were drafted, the United States did not have to change their behavior to comply with them. States can comply with human rights conventions for reasons having to do with domestic law and culture independent of the terms of the treaty. Ratification of these conventions does not hinder most states’ national interests because the chance and cost of violating is so low. *Coincidence of interest*, for the reason enumerated above, explains the United States’ compliance with the Optional Protocols.

The United States chose not to ratify the Convention on the Rights of the Child because the CRC conflicted with its national interests.¹⁷ The CRC threatened the United States’ established laws, due to incompatibility with education, juvenile imprisonment, adoption law etc. The CRC also endangered U.S. federalism by granting the federal government jurisdiction over laws typically granted to the states. The CRC would also

¹⁷ See above section “Part One: United States’ National Interest.”

diminish U.S. sovereignty by subjecting the U.S. to constant monitoring from the international community. However, the provisions of the Optional Protocols to the CRC did not pose any of the threats which the CRC itself imposes. Below I will enumerate on the low costs of ratifying the Optional Protocols which Goldsmith and Posner would argue makes ratification possible.

Optional Protocols Consistency with U.S. Laws

Protocol on the Sale of Children

Within the last decade, the issue of child trafficking has been on the United States' domestic agenda. In recent years, the United States has taken several steps to combat trafficking and the sexual exploitation of children by introducing legislation and increasing its resources to prevent and treat those abuses. The United States, in 2000, passed the Victims of Trafficking and Violence Protection Act and, in 2003, the Tracking Victims Protection Reauthorization Act and the PROTECT Act. These acts serve to close existing loopholes, increase penalties for offenders, and provide victim assistance (Revaz and Todres in Todres, Wojcik, Revaz 2006, 301). These recently implemented congressional acts, as well as those already established in U.S. law¹⁸ concerning issues of child exploitation, are completely consistent with the provisions of the Protocol on the Sale on Children. An article-by-article analysis that accompanies this Protocol, prepared by the State Department, states that “[p]rior to U.S. ratification of the Protocol, U.S. federal and state law satisfied the substantive requirements of the Protocol. Accordingly, no new implementing legislation was required to bring the United States into compliance

¹⁸ See, e.g. 18 U.S.C. 1591, 2421, 2422 and 2423 (West Supp. 2005).

with the substantive obligations that it assumed under the Protocol....” (U.S. OP Initial Report, 2000). Since the United States’ law is already consistent with the Protocol, it poses no threats to established U.S. law.

There are no blatant inconsistencies between U.S. law and the Protocol on the Sale of Children. However, the vague language of this Optional Protocol poses the threat of interpretation unfavorable to the United States. Therefore, the Senate Committee on Foreign Affairs issued one reservation, six understandings, and one declaration, to the final ratification document of the Protocol on the Sale of Children. Attaching Reservations, Understandings, and Declarations (RUDs) to human rights treaties, a practice that began in the 1970’s, allows the United States to commit to treaties while not compromising its domestic concerns.¹⁹ RUDs apply a set of conditions to treaties which allow United States to be “non-self executing” and thus not enforceable in U.S. courts unless implemented by additional legislation; expresses an understanding that some provisions of the treaty may be implemented by state and local governments rather than by the federal government; and allows United States to decline commitment to certain substantive provisions of a treaty (Bradley and Goldsmith 2000). The one reservation that the United States attached deals explicitly with Article 4(1) of the Optional Protocol on the Sale of Children. Article 4(1) obligates state parties to “take such measures as may be necessary to establish jurisdiction over the criminal offenses set forth in Article 3²⁰ when the offenses are committed in its territory or ‘on board a ship or aircraft

¹⁹ For more information on RUDs see Nash (1995), *Contemporary Practice of the United States Relating to International Law*; Stewart (1993) *Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*.

²⁰ The Crimes outlined in Article 3 are: “Offering, delivering or accepting, by whatever means, a child for the purpose of: Sexual exploitation of the child; Transfer of organs of the child for profit; Engagement of

registered in that state” (Exec. Rpt. 107-4 2002, 3). However, US jurisdiction over Article 3 offenses is not always stated in terms of “registration” of a ship or aircraft but by ownership of a U.S. citizen or cooperation. Therefore, the Senate Committee implemented a reservation which stated that “the treaty obligation on this aspect of the Protocol will not apply to the United States” (Exec. Rpt. 107-4 2002, 4). The Senate Committee also introduced Understanding (2) which ensures that Article 2(a)’s broad definition of the sale of children does not include acts lawful in the U.S. For example, the lawful act of placing the child in temporary custody of family or friends while promising to provide compensation for that child’s living expenses is lawful. Implemented Reservations (3) and (4) ensures the Protocol’s definition of “child pornography” and “transfer of organs” confirms with U.S. law and Understanding (5) further guarantees compatibility with US law²¹ (Exec. Rpt. 107-4 2002, 4-5). Child protection laws long-established within the American legal system, new U.S. laws in implemented in 2000, and the RUDs attached the Optional Protocol of the Sale of

the child in forced labor; Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; Offering, obtaining, procuring or providing a child for child prostitution, as defined in Article 2; Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in Article 2.”

²¹ *Understanding (5)-Improper inducement in relinquishment of parental rights:* Article 3(1)(a)(ii) requires States Parties to ensure that, in the context of sale of children, the act of improperly inducing consent, as an intermediary, for adoption in violation of applicable international legal instruments on adoption is fully covered under its criminal law. The use of the term “applicable international legal instruments” is understood to mean the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption (the “Hague Convention”). Because the United States is not currently a party to the Hague Convention, the understanding states that the United States is not obligated to criminalize the conduct prohibited in Article 3(1)(a)(ii) or take action as required under Article 3(5). The understanding also elaborates on the meaning of the term “improperly inducing consent.” It should be noted that the Senate gave advice and consent to the ratification of the Hague Convention during the 106th Congress. The United States has not, however, deposited its instrument of ratification, because it is not yet in a position to fulfill the obligations of the Convention; that is because the regulatory structure for implementation of the Convention has not been finalized, though the necessary implementing legislation has been enacted (P.L. 106-279).

Children make the United States laws completely compatible with the Optional Protocol. This Optional Protocol does not threaten U.S. Constitutional laws, thus making ratification within the framework of U.S. national interest.

Protocol on Child Soldiers

The State Department conducted the same article-by-article analysis on the Protocol on Child Soldiers as it did for the Protocol on the Sale of Children. The State Department found once again that the U.S. laws were already adhering to the laws enumerated in the Protocol on Child Soldiers. For example, the U.S. already does not permit compulsory recruitment of any person under the age of 18 for military service. Also, “under U.S.C. 505(a), the United States does not accept voluntary recruits under the age of 17” (Exec.Rpt. 107-4 2002, 79).

The “United States is in compliance, by law and practice, with the obligations of Articles 2 through 4.” However, “the Department of Defense will need to issue appropriate internal directives to ensure implementation of the obligation of Article 1” (Exec. Rpt. 107-4 2002, 1). Article 1 obliges state parties to “take all feasible measures’ to ensure that members of the national armed forces, who are under the age of 18, do not take a ‘direct part’ in hostilities” (Exec. Rpt. 107-4 2002, 4). The Department of Defense conducted a comprehensive study to ensure its ability to comply with this Article. The Department concluded that it is already in compliance and that the Protocol “will not harm the military’s ability to accomplish its national security mission” (Exec. Rpt. 107-4 2002, 7). The Department gave three reasons for compliance to this provision even before the Protocol. First, 17-year-olds have never been a major part of U.S. military recruitment. Over the past few decades, the percentage of 17-year-olds has only been 5.7

percent on average. Second, most 17-year-olds turn 18 while still in training. Only about .25 percent of 17-year-olds reach the base before they turn 18. Third, the article requires states to take “all feasible measures” that persons under 18 do not take “direct part” in hostilities. This flexible language allows for over-sights in times of crises (Exec. Rpt. 107-4 2002). Furthermore, the United States Senate Committee implemented Understanding (2) which articulated all instances in which the United States could possibly sway from Article (1) (Exec. Rpt. 107-4 2002, 7). Other RUDs were also implemented by the Senate Committee assuring absolute compatibility. Understanding (3) clarified the requirements of the U.S. for minimum age of voluntary requirement and Understanding (4) ensured that the Protocol definition of “armed groups” coincided with U.S. law (Exec. Rpt. 107-4 2002, 7-8). The established U.S. law, in addition to the RUDs, lead to the State Department’s conclusion that “no implementing legislation is required with respect to U.S. ratification of the Protocol since current U.S. law meets the standards in the Protocol” (U.S. OP Initial Report, 2000). Ratification of the Protocol on Child Soldiers, just like the Protocol on the Sale of Children, poses no threat to U.S. national interest through inconsistency with U.S. law.

Optional Protocols Consistency with Federal System

Another threat that human rights treaties pose to U.S. national interest is the possibility of obstructing U.S. federalism. The danger is that ratifying treaties will allot law-making power, originally granted to the states, to the federal government. However, ratification of these Optional Protocols does not pose such threat. The Optional Protocol of Child Soldiers will not erode state power. All provisions in this Protocol are already

under the jurisdiction of the federal government. Since the Protocol on the Sale of Children does address a limited amount of issues that can be classified under state jurisdiction, the U.S. attached an understanding to the Protocol. It states:

The United States understands that the Protocol shall be implemented by the Federal Government to the extent that it exercising jurisdiction over the matters covered therein, and otherwise by the State and local governments. To the extent that State and local governments exercise jurisdiction in such matters, the Federal Government shall as necessary, take appropriate measures to ensure the fulfillment of the Protocol (Revaz and Todres, in Todres, Wojcik, and Revaz 2006, 300).

This understanding clarifies U.S. compliance with the Sale of Children Protocol. This clarification, in addition to the Protocol on Child Soldiers' nonexistent threat, supports the claim that neither Protocol will affect the U.S. federal system.

Optional Protocols Sustain United States' Sovereignty

The last major threat, the diminishment of sovereignty, is also not posed as a result of ratifying the Optional Protocols. U.S. sovereignty is not endangered because of the non-self executing declarations placed on both protocols.²² Since the treaty is non-self executing, Congress would need to adopt additional legislation for the treaty to take affect domestically. By declaring this treaty “non-self executing” the Protocols would not “give any international entity or other authority any power over U.S. actions nor

²² This declaration, which would not be included in the instrument of ratification, provides that the provisions of the Protocol are not self-executing, with one exception. The exception is Article 5, which permits parties to consider the offences covered by Article 3(1) as extraditable offenses in any existing extradition treaty between States Parties. That said, the United States will continue to undertake any extraditions pursuant to the provisions of Chapter 209 of Title 18, United States Code. The declaration also makes plain that the United States considers that current law, including the laws of the states, adequately fulfills the obligations of the Protocol, and therefore it does not intend to enact new legislation to fulfill its obligations. There is one exception to this statement as well: as noted in the reservation described above, a minor change to federal law will be required to satisfy the obligations of Article 4(1).

infringe on U.S. sovereignty” (Revaz and Todres, in Todres, Wojcik, and Revaz 2006, 29).

The United States’ sovereignty is also not threatened in relation to its obligation to report on its progress in fulfilling the requirements of the Optional Protocols. The Optional Protocols requires that “State Parties provide reports to the *Committee on the Rights of the Child* on their implementation under this Protocol, and guarantees the *Committee on the Rights of the Child* the right to request additional information from State Parties” (Exec. Rpt. 107-4 2002, 28). However, both protocols are independent of the CRC and therefore the United States does not assume any obligation to the CRC. Also, to solidify this as the case, in both treaties the United States implemented understandings which state, “the United States understands that the Protocol constitutes an independent multi-lateral treaty and that the United States does not assume any obligations under the Convention of the Rights of the Child by becoming a party to the Protocols” (Exec. Rpt. 107-4 2002, 28). Therefore, the United States cannot be monitored by, or required to report to the *Committee on the Rights of the Child*.

Article 8 of the Protocol on Child Soldiers and Article 12 of the Protocol on the Sale of Children, do have reporting practices of their own, unrelated to those of the CRC (Exec. Rpt. 107-4 2002, 28). Within two years of ratification, states are required to submit a report, detailing measures taken to implement the visions of the Protocols, to *the Committee on the Rights on the Child*. However, in the drafting of the Protocols, state participants rejected the proposal “that would have permitted the committee, inter alia, to hold hearings, initiate confidential inquiries, conduct country visits, and transmit findings to the concerned State Party” (Exec. Rpt. 107-4 2002, 28). The Committee has no

authority other than to receive reports and request additional information. The Committee's limited authority poses no threats US Sovereignty.

Furthermore, the United States took actions, besides declaring the treaty non-self executing, to make sure it was not subjected to *any* international body. For example, Understanding (5) of the Protocol on Children Solider states that, "...the United States understanding that nothing in the Protocol establishes a basis for jurisdiction by any international tribunal, including the International Criminal Court" (Exec. Rpt. 107-4 2002, 12). The Protocols' limited reporting requirements, in addition to the RUDs, ensure that the U.S. is not subjected to the jurisdiction of any international actor. Not placing the U.S. at the whims of any other nation secures United States' autonomy. Erosion of sovereignty is thus not a legitimate threat posed by U.S. ratification of the Optional Protocols.

Acculturation Mechanism for State Compliance

Providing a rationalist explanation for the United States decision to ratify the Optional Protocols does, however, present a pressing puzzle. If the United States only ratified the Optional Protocols because it was already compliant with the protocols terms, why bother to ratify at all? Why would the United States take the time and resources to ratify a treaty that would exhibit no change to its established behavior? These questions reveal a fundamental flaw in the rationalist theory of international human rights law. It is a theoretical imperfection of which both Goldsmith and Posner admit awareness.

Goldsmith and Posner also pose questions like:

If modern multilateral human rights treaties do not significantly influence human rights behavior, why do states spend the time, effort, and resources to negotiate

and create multilateral human rights treaties and related institutes? Why don't powerful liberal democracies simply announce a policy of using carrots and sticks to improve human rights in other countries and apply these incentives [only to] weak state whose human rights abuses are especially offensive to the world (Goldsmith and Posner 1998, 127)?

Goldsmith and Posner, as well as other rationalist scholars,²³ are unable to identify precise answers to these questions. This well documented, unexplainable inconsistency thus provides a glimmering hope for the legitimacy of international law. Obviously, the United States is not acting solely on behalf of its national interest. If the U.S. were to act on its interest alone, it would not waste resources in the lengthy ratification process of the Optional Protocols. Nor, would the United States suspend any of its sovereignty to *the Committee on the Rights of the Child*.²⁴

Although I feel that the United States decision to ratify the Optional Protocols confirms that international law really “does matter,” blind acceptance of a constructivist theory of international law does not explain the disconnect between the divergent U.S. ratification decision of the CRC and the Optional Protocols. An important aspect of the constructivist theory is the belief that persuaded actors have “internalized” new norms and rules of appropriate behavior which has caused a redefinition of their interest accordingly.²⁵ I do not believe the Optional Protocols present United States with any

²³ See Andrew T. Guzman (2002), *A Compliance-Based Theory of International Law*; Jack L. Goldsmith & Eric A. Posner (2002), *Symposium on Rational Choice and International Law, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*; Oona A. Hathaway (2002), *Do Human Rights Treaties Make A Difference?*

²⁴ Recall that the United States must abide by the provision of Optional Protocols that “Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment” (Optional Protocols).

²⁵ See Martha Finnemore (1996), *National Interest in International Society*; Alastair Iain Johnston (1996), *The Social Effects of International Institutions on Domestic and Foreign Policy Actors, in Locating the*

new norms, nor was United States influenced to internalize the merits of the Protocols. Therefore, a deeper analysis of social mechanisms that help make international law matter has provided me with an explanation for this puzzling situation. I believe that the international community's increasing negative reactions towards the United States' exhibition of a "double standard" has pressured the U.S. towards more compliance. Throughout the 1990s, the United States became progressively threaten by the growing hostilities from the international community. Scholarly and government critiques were made highlighting the United States' display of hypocrisy and "double standard."²⁶ Furthermore, the international community's disapproval of the United States began to manifest into terrorist acts and the loss of allies. The United States began to feel, absent of coercion, that the costs of nonconformity were increasing. This phenomenon is part of the social-psychological process and is highly related to the idea of "cognitive comfort."²⁷ The United States began to experience discomfort by its increasing status of alienation from the rest of the global community. This explanation for ratification is closely related the work of Goodman and Jinks (2004), "second generation" scholars in international legal study.

Proper Authorities; and Jeffrey T. Checkel (1999), *Norms, Institutions, and National Identity in Contemporary Europe*.

²⁶See David P. Forsythe (1985), *the United Nations and Human Rights, 1945-1985*.

²⁷ There are "social-psychological benefits of conforming to group norms and expectations (such as the "cognitive comfort" associated with both high social status and membership in a perceived "in-group") ... [D]iscomfort is caused by holding two or more inconsistent cognitions. This phenomenon is part of a family of cognitive processes related to the basic human need to justify one's actions to oneself and others. Substantial empirical evidence demonstrates that individuals experience discomfort -- including anxiety, regret, and guilt -- whenever they confront cognitions about some aspect of their behavior inconsistent with their self-concept (including any social roles central to their identity). Individuals are highly motivated to minimize this dissonance by either changing their behavior or finding ways to justify their past behavior. Therefore, there are internal pressures driving actors to act and think in ways consistent with the social roles and expectations internalized by such actors" (Goodman and Jinks 1999, 640).

Goodman and Jinks simplify the previous, “first generation” scholarly work into two mechanisms which influence state behavior: *coercion*,²⁸ in the rationalist approach, and *persuasion*,²⁹ in the constructivist approach (Goodman and Jinks 2004). These scholars feel that both of approaches fall short of completely grasping “the complexity of the social environment within which states act and the many ways for which the diffusion of social and legal norms occur” (Goodman and Jinks 2004, 625). Goodman and Jinks advance a theory of a third mechanism, *acculturation*, which persuades states to make behavioral changes through the pressure to assimilate. The touchstone of acculturation is “that identification with a reference group generates varying degrees of cognitive and social pressures, real or imagined, to conform” (Jinks and Goodman 2004, 626). Since Goodman and Jinks’ theory emphasizes the role of social interaction in identity formation, there are major similarities between acculturation and persuasion (the constructivist approach). However, it is the small, enumerated differences that attract me to the theory of acculturation over persuasion as way to explain the United States’ decision to ratify the Optional Protocols.

One major difference is that “persuasion requires acceptance of the validity or legitimacy of a belief, practice, or norm- acculturation requires only that an actor perceives that an import reference group harbors the belief, engages in the practice, or subscribes to the norm” (Goodman and Jinks 2004, 642-643). In the interest groups’ plight for ratification of the Optional Protocols, acculturation tactics were very visible.

²⁸ Whereby states and institutions influence the behavior of other states by escalating the benefits of conformity or the costs of nonconformity through material rewards and punishments (Goodman and Jinks 1999)

²⁹ The active, often strategic, inculcation of norms. Persuasion theory suggests that international law influences state behavior through processes of social "learning" and other forms of information conveyance (Goodman and Jinks 1999).

Congressional representatives stressed the importance of ratifying the treaty to promote cooperation within the global community. Representative John J. Lafalce of New York, warned the government of the costs of turning “its back on [widely excepted] international treaties” (Exec.Rpt. 107-4 2002). The panel of human rights activists, who spoke at the Senate Foreign Relations Committee hearing on these two Protocols, also warned the U.S. about international social “shunning” as a consequence of non-compliance (Exec.Rpt. 107-4 2002). Forms of influence that coincide with the theory of persuasion are mechanisms such as framing,³⁰ teaching, and cuing to think harder. These mechanisms result in a state’s *acceptance* of new norms, thus prompting compliance. No new norms are being accepted in the United States decision to ratify the Optional Protocols. The United States ratified because of the social influence from the larger “in-group” of the international community. The United States *conformed* to the Optional Protocols, the typical compliance result of the mechanism of acculturation, because it was pressured to do so. These acculturations methods that were used by pro-children’s rights interest groups during the ratification debates over the Optional Protocols were not used during the debates of the CRC. Interest groups in favor of ratifying the CRC focused their Congressional lobbying on correcting the misconceptions that U.S. governmental officials had about the CRC (Nelson in Todres, Wojcik, Revaz 2006). These interest groups rarely mentioned the ramifications of going against the grain of the international society. However, in the early 2000s interest groups in support of the Optional Protocols really focused portraying the detrimental effects to U.S. reputation that not ratifying the Protocols would cause. Basically, the United States governmental officials were made

³⁰ See Richard Price (1998), *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*.

more aware of the societal pressures to confirm when debating the Optional Protocols than when debating the CRC.

Another difference between persuasion and acculturation is that the former requires an assessment of the merits of a belief. In contrast, in the acculturation process, it is the very act of conforming that garners social approval and alleviates the cognitive discomfort. Persuasion involves assessing the content of a new norm; “acculturation occurs not as a result of the content of the relevant rule or norm but rather as function of social structure- the relations between individual actors and some reference group” (Goodman and Jinks 2004, 643). The ratification debate over the Optional Protocols was centered less on the properties of the treaty than on the United States relation to the actors in the international community. The United States, as analyzed above, needed minimal or no changes in its current practices to ratify the Optional Protocols. It is because the “acculturation process does not involve actually agreeing with the merits of a group’s position that it may result in outward conformity with a social convention without private acceptance or corresponding changes in private practices” (Goodman and Jinks 2004, 643). The United States is still in non-agreement with the merits of Convention of the Rights of the Child, the mothering document to the Optional Protocols, yet it ratified the two supplementary Protocols. Clearly, the United States’ decision to ratify was outside of merits and rested on the social pressures of the international community.

Implications

The in-depth analysis of the United States’ reasons for complying with the Optional Protocols is important because of its relation to the larger theme of the

legitimacy of international law. Goldsmith and Posner's theory, a rationalist approach, portrays international law compliance as an endogenous outgrowth of individual state interest. If the rationalist interpretation of international law is correct, than United States ratified the Optional Protocols because of a "coincidence of interest." Prescribing to this theory would associate international law with a non-influential and possible nonexistence force. Thus the implications for international law, under rationalism, are grave.

Agreeing with Goldsmith and Posner means international law is entitled to less respect and therefore would diminish the deference of key audiences, such as powerful states, for international law. Consequently, states might grow more reluctant to enter into international, mutually benefiting treaties. Furthermore, if state leaders come to regard international law as pretend politics, they might take it upon themselves to arbitrarily assess whether compliance, in a particular case, is in its state's *immediate* interest. If they decide on compliance through the basis of immediate interest, as opposed to calculations about the state's long term reputation, most international relationships would become hap-hazard and ineffective. Understanding the U.S. compliance with the Optional Protocols through a rationalist perspective would conclusively destroy the idea of a functioning global civil society because of the uselessness of the regulatory power of international law.

However, completely conceding to the more uplifting theory of international law, the constructivist approach, would produce a hole in explaining the United States' differing decisions involving CRC and Protocols. If the United States went through a process of internalizing the international norm consensus on children's rights, either through framing or learning, then the U.S. would be likely comply with the CRC. This,

not being the case, led me to believe that a different type of international influence was occurring. The United States is not being influenced by norms, but rather by its global status. The increasingly widespread, negative reputation of the United States is causing it cognitive discomfort. I believe the United States was influenced to conform to the Optional Protocols because of its growing status of an “outsider” in the international community. To alleviate cognitive discomfort and gain association with the “in-group,” the United States ratified the optional protocols. The ratification decision was not based on the merits of the Optional Protocols, nor did the protocols pressure the United States to accept new norms and reform its identity through a learning process. The United States ratification of the Protocols thus portrays acculturation, a mechanism that is a slight modification on the constructivist theory of international law. The societal pressure to assimilate with a higher normative standard provoked the United States’ decision to ratify the Optional Protocols.

The most significant outcome of accepting the idea of acculturation, as the mechanism which caused the United States to ratify the optional protocols, is how subscribing to this theory portrays international law. The theory of acculturation would thus promote the idea that international law is a legitimate force. The United States did feel pressure from an international community to conform to an international treaty. Although the United States may not accept the norms of the CRC, it does feel the need to cooperate with this international standard. Furthermore, there are still costs involved with ratifying the protocols. The United States is submitting reports to an international body as well as agreeing to comply with norms of the Protocols. This form of compliance increases the global visibility of the United States’ domestic actions.

Furthermore, international law gains more legitimacy through the United States' decision to ratify the Protocols. This action means the United States is opening itself up to further pressure by crediting the international community with a treaty worthy of ratification. Ratifying the Protocols means the United States will abide by the rules of this treaty despite the costs, an action that a rationalist theory to international law cannot account for.

Conclusion

Prescribing to different theories of international law to explain compliance portrays the legitimacy of international law in very divergent lights. Rationalists feel that compliance arises from a states' pursuit of its national interest, and therefore, the role of international legal obligations is minimal at best. Constructivists feel states comply with international law for normative reasons, thus granting international law with more legitimacy. The United States' decision to not ratify the Convention on the Rights of the Child seems to be supportive of rationalist theory. However, the United States decision to ratify the Optional Protocols to the CRC creates an interesting puzzle counterintuitive to rationalism. I assert that the United States felt pressure to conform to international community during its Optional Protocol ratification debates in 2000, that it did not feel it 1990s' ratification debates of the CRC. This assertion supports a theory of acculturation as the mechanism responsible for state behavior. Subscribing to an acculturation theory is conclusive of the idea that international law is both a powerful and legitimate force.

Sources

Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime. 17-28 July 2000. Official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime. Vienna, Tenth session.

Aleinikoff, Alexander. 2004. "Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution." *Texas Law Review* 82: 1990-2010.

Brierley, J. 1963. *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. New York: Oxford University Press.

Bull, Hedely. 1977. *The Anarchical Society: A study of Order in World Politics*. New York: Columbia University Press.

Chalk, Frank, and Kurt Johnson. 1990. *The History of Sociology of Genocide: Analyses and Case Studies*. New Haven: Yale University Press.

Charnovitz, Steve. 1997. "Two Centuries of Participation: NGOs and International Governance." *Michigan Journal of International Law* 18:183–286.

Checkel, Jeffery. 1997. "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide." *European Journal of International Relations* 3: 473-95.

Checkel, Jeffrey. 2001. "Why Comply? Social Learning and European Identity Change." *International Organization* 55 (Summer): 553–88.

Cohen, Cynthia Price. 1998. "The Role of the United States in Drafting the Convention on the Rights of the Child: Creating A New World For Children." *Loyola Poverty* 4 (9): 25-49.

Cohen, Cynthia Price Cohen. 2006. "The Role of the United States in the Drafting of the Convention on the Rights Of the Child." *Emory International Law Review* 20: 185-92.

Convention on the Rights of the Child art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3.

Finnemore, Martha. 1996. "Constructing Norms of Humanitarian Intervention.." *In The Culture of National Security: Norms and Identity in World Politics*, edited by Peter

Katzenstien, 153-85. New York: Columbia University Press.

Finnemore, Martha. 2003. *The Purpose of Intervention*. New York: Cornell University Press.

- Forsythe, David P. 1997. "The United Nations, Human Rights, and Development." *Human Rights Quarterly* 19 (2): 334-349.
- Fottrell, David. 2000. *Rivisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child*. The Hague, The Netherlands: Kluwer Law International.
- Frank, Thomas. 1990. *The Power of Legitimacy Among Nations*. New York: Oxford University Press.
- Goldsmith, Jack Landman. 1998. "International Human Rights Law and the United States Double Standard." *Green Bad 1 (2d)*: 365-78.
- Goldsmith, Jack Landman & Eric Posner. 1999. "A Theory of Customary International Law," *University of Chicago Law Review* 66: 1113.
- Goldsmith, Jack Landman & Curtis Bradley. 2002. "Treaties, Human Rights, and Conditional Consent." *Pennsylvania Law Review* 149: 399.
- Gregory, David L. 2002. "The United States' Concerns about the Convention on the Rights of the Child." *Education and the Law*. 14 (3): 141-152
- Goldsmith, Jack, and Eric A. Posner. 2005. *The Limits of International Law*. Oxford: Oxford University Press.
- Henkin, Louis. 1995. "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker." *The American Journal of International Law* 89 (2):341-350.
- Jean Yarbrough. 1985. "Rethinking 'The Federalist's View of Federalism.'" *Publius* 15 (1): 31-53.
- Jenik Radon. 2004. "Sovereignty: A Political Emotion, Not a Concept." *Stanford Interantional Law Journal*. 195 (4): 202–35.
- Krasner, Stephen, ed. 1983. *InternationalRegimes*. Ithaca,NewYork: Cornell University Press.
- Krasner, Stephen D. 2001. "Sovereignty." *Foreign Policy*. 122 (Jan): 1-7.
- Koh, Harald Hongju. 1977. "Why Do Nations Obey Interntional Law?" *Yale Law Journal* 106: 2599.
- Levesque, Roger J. R. 1996. "International Children's Rights: Can They Make a Differernce in American Family Policy?" *American Psychologist* 51 (12): 1251-1256.
- Limber, Susan P. and Brian L. Wilcox. 1996. "Application of the U.N. Convention on the Rights of the Child to the United States." *American Psychologist* 51 (12): 1246-1250.

- Mearshimer, John. 2001. *The Tragedy of Great Power Politics*. Princeton, N.J.: Princeton University Press.
- Morgenthau, Hans. 1948. *Politics among Nations: The Struggle for Power and Peace*. New York: Knopf.
- Nye, Joseph S., and Robert Keohane. 1972. *Transnational Relations and World Politics: An Introduction*. In *Transnational Relations and World Politics*. Cambridge: Harvard University Press.
- Nye, Joseph S. 1999. "Redefining the National Interests." *Foreign Affairs* 78 (4): 22-35.
- Office of the United Nations High Comm'r for Human Rights 2004. "Status of Ratifications of the Principal International Human Rights Treaties 10–11." *UNICEF, Frequently Asked Questions, Convention on the Rights of the Child*.
- Oppenheim, L.. 1912. *International Law. Volume 1*. London: Green.
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc A/54/49, Vol III (2000).
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/264, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000).
- Resnik, Judith. 2001. "Categorical Federalism: Jurisdiction, Gender, and the Globe." *Yale International Law Journal* (111): 619-66.
- Risse, Thomas. 2000. "'Let's Argue': Communicative Action in World Politics". *International Organization* 54 (Winter): 1-39.
- Ruggie, John G. 1998. "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge." *International Organization* 52 (Autumn): 855–86.
- Rutkow, Lainie, and Joshua T. Lozman. 2006. "Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child." *Harvard Human Rights Journal* 19 (Spring): 159-190.
- Slaughter, Anne-Marie. 1995. "International Law in a World of Liberal States." *European Journal of International Law* 6: 503-38.
- Spiro, Peter J. 1994. "New Global Communities: Nongovernmental Organizations in International Decision Making Institutions." *Washington Quarterly* 18: 45-57.

Spiro, Peter J. 1997. "The States and International Human Rights." *Fordham Law Review* 66: 567-585.

Todres, Jonathon, Mark E. Wojcik, and Chris R. Revaz, eds. 2006. *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification*. Ardsley, NY: Traditional Publishers.

Vienna Convention on the Law of "Treaties 1969. (May 23). Art. 56, 1155 U.N.T.S. 331, 345.

Waltz, Kenneth Neal. 1979. *Governing the Globe: What Is the Best We Can Do?* Springer: Netherlands.

Wendt, Alexander 1999. *Social Theory of International Politics*. New York: Cambridge University Press.