

AN INTRODUCTION TO THE DEVELOPING JURISPRUDENCE OF THE RIGHTS OF THE CHILD

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The Convention on the Rights of the Child was adopted by the United Nations General Assembly on November 20, 1989.¹ At the time of the International Law Association's 1996 International Law Weekend, 187 countries had ratified the Convention. As of February 1, 1997 the number of States Parties had increased to 189.² Because of the Convention's worldwide popularity, it is having a major effect on both national and international law applicable to children. As a consequence, there is a new and growing body of international law on the rights of the child. The purpose of the International Law Weekend panel, *The Developing Jurisprudence of the Rights of the Child*, was to inform International Law Association members about this new body of international law, the general direction that its development has taken thus far and its effects on United Nations child rights activities, private international law and nongovernmental bodies, such as academic institutions.

Drafting of the Convention on the Rights of the Child was originally undertaken as a part of the celebration of the 1979 International Year of the Child. It was drafted over a ten year period by a Working Group established by the United Nations Commission on Human Rights.

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1. *Convention on the Rights of the Child*, adopted Nov. 20, 1989, G.A. Res. 44/25, 1 U.N. GAOR Supp. (No. 4a), U.N. Doc. A/144/149 (1989), 28 I.L.M. 1448 (1989), corrected at 29 I.L.M. 1340 (1990) (entered into force Sept. 2, 1990) [hereinafter *Convention*].

2. Nations that ratify treaties and are thus legally bound by them are known as "States Parties." The only countries in the world that had not yet become States Parties to the Convention were: the Cook islands, Somalia, Switzerland and the United States.

The final text of the Convention was an elaboration and an extension of a model convention presented to the Commission in 1979 by the Polish government, which was its sponsor. Participants in the Working Group included delegates from nations that were members of the Commission on Human Rights, delegates from nations that participated as observers³ and representatives from other bodies, such as international governmental organizations⁴ and nongovernmental organizations.⁵

During the drafting process, the original Polish model, which had twenty substantive articles, was expanded to such an extent that the substantive portion of the Convention's final text contains forty-two articles.⁶ The Convention on the Rights of the Child is the only international human rights treaty that incorporates the full range of human rights envisioned in the Universal Declaration of Human Rights.⁷ In fact, it also includes rights that are not covered by the Universal Declaration. Not only does it protect the child's civil-political rights (i.e., freedom of speech, religion and the right to privacy)⁸ and economic-social-cultural rights (i.e., the right to education, a standard of living and health care),⁹ it also protects the child who has no family,¹⁰ the child in time of war¹¹ and

3. The difference between nations that were members of the Commission on Human Rights and those that were not had to do with voting powers. However, this distinction was essentially irrelevant because all decisions of the Working Group were made on the basis of consensus and no vote was ever taken.

4. Represented were such bodies as UNICEF, the U.N. High Commissioner for Refugees, the World Health Organization and the International Labour Organisation.

5. Especially active were members of the Informal NGO Ad Hoc Group for the Drafting of the Convention on the Rights of the Child which included such organizations as Amnesty International, International Catholic Child Bureau, Defense for Children International, Redda Barnen International, Human Rights Internet and the International Commission of Jurists.

For a full record of the Convention's drafting process, including a list of governmental and nongovernmental participants see THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES," (Sharon Detrick, ed. 1992).

6. For details of this expansion and its effects on the international law of children's rights see *infra* note 21, *Developing Jurisprudence*.

7. *Universal Declaration of Human Rights*, G.A. Res. 217A (III) U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]. The Universal Declaration was drafted to clarify the meaning of the words "human rights" in the United Nations Charter.

8. See *supra* note 1, *Convention* at e. g. arts. 2, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 25, 30, 37, and 40.

9. See *supra* note 1, *Convention* at e.g. arts. 23, 24, 26, 27, 28, 29, 30, and 32.

10. In particular see *supra* note 1, *Convention* at arts. 20 and 21. Article 7 is also relevant because it speaks of the child's right to "know and be cared for by his or her parents."

11. See *supra* note 1, *Convention* at arts. 22 and 38.

provides for physical recovery and social reintegration of children who have been traumatized by a variety of causes.¹²

The Convention on the Rights of the Child is distinguished by four overriding principles that apply to all of the Convention's articles: 1) protection from discrimination;¹³ 2) the right to survival;¹⁴ 3) the "best interests of the child;"¹⁵ and 4) respect for the child's views.¹⁶ The Convention on the Rights of the Child strongly protects the family-child relationship,¹⁷ but not to the detriment of the child's well-being. For example, article 5 gives the family a guiding role in the child's exercise of his or her rights, but makes allowances for the maturity of the child. The Convention calls on States Parties to

respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.¹⁸

Although the Convention on the Rights of the Child supports the child's right to a nurturing family, it does not assume that the family-child relationship is perfect. Article 19 protects the child from "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."¹⁹

The Convention on the Rights of the Child is also notable for the fact that it is the only international human rights treaty that has been written in language that is equally respectful of both genders. Wherever a

12. See *supra* note 1, *Convention*, at art. 39.

13. See *supra* note 1, *Convention* at art. 2.

14. See *supra* note 1, *Convention* at art. 6.

15. See *supra* note 1, *Convention* at art. 3.

16. See *supra* note 1, *Convention* at art. 12.

17. The Convention on the Rights of the Child is decidedly pro-family. Recognition of the parent-child relationship can be found in articles 2, 3, 5, 7, 8, 9, 10, 11, 14, 16, 18, 20, 21, 22, 23, 24, 27, 37 and 40.

18. See *supra* note 1, *Convention* at art. 5. Emphasis supplied.

19. See *supra* note 1, *Convention* at art. 19 (1).

singular possessive pronoun has been used in the Convention, it appears as both masculine and feminine forms. Thus, for example, article 2 speaks of the principle of non-discrimination not only in relation to the child, but also in relation to "his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national ethnic or social origin, property, disability, birth or other status."²⁰

The overall effect of the Convention on the Rights of the Child is that of radically altering the way the world looks at children. Its impact has not been limited to the national legislation of States Parties, it has also been an inspiration to the drafters of the numerous international legal instruments that have been adopted since the Convention on the Rights of the Child went into force.²¹

Like other United Nations human rights treaties, the Convention on the Rights of the Child calls for States Parties to submit periodic reports to a committee of "experts of high moral standing and competence in the field"²² who are to examine the reports to ascertain the extent to which each State Party has fulfilled its obligations under the treaty.²³ Since September 2, 1990, when the Convention on the Rights of the Child went into force, countries that have ratified the Convention have been involved in conforming their national law to meet the Convention's standards and in preparing their initial reports to the Committee on the Rights of the Child, which is the Convention's monitoring body. While in some respects the Convention's monitoring process replicates that of other United Nations human rights treaties, it is unique in that article 45 provides a special role for nongovernmental organizations.²⁴ As a result of article 45, the Committee on the Rights of the Child has access to a broad range of information with which to evaluate the accuracy of States Parties' reports. The reporting process has already enabled many countries to discover and remedy flaws in their national children's policies.

The impact of the Convention on the Rights of the Child has reached far beyond the State Party reporting process. It has brought about

20. See *supra* note 1, *Convention* at art. 2 (1). Emphasis supplied.

21. For an overview of the way in which the Convention on the Rights of the Child is changing the international law of children's rights see Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1 (1993). [hereinafter *Developing Jurisprudence*].

22. See *supra* note 1, *Convention* at art. 43 (2).

23. See *supra* note 1, *Convention* at art. 44.

24. See *supra* note 1, *Convention* at art. 45. The words "other competent bodies" in paragraphs (a) and (b) were particularly intended to mean "nongovernmental organizations."

the drafting and adoption of two regional children's rights treaties.²⁵ It has influenced the language used in the text of Hague Conference treaties on private international law.²⁶ It has brought about a restructuring of the work of both the United Nations High Commissioner for Refugees and the United Nations Children's Fund to reflect internationally recognized rights of the child.²⁷ It has given new impetus to the activities of nongovernmental organizations and has inspired a new basis for research by the academic community.²⁸ Most importantly, it has assured that children's rights have a regular place on the international human rights agenda.²⁹

Unfortunately, it was not possible at the International Law Weekend panel, *The Developing Jurisprudence of the Rights of the Child*, to present the full picture of what is happening in the international law of children's rights. Instead, the panel touched on some of the high points of this development. Anders Rönquist, Counselor for the Swedish Mission to the United Nations, spoke about the place of children's rights within the Third Committee of the General Assembly and the Commission on Human Rights and the child rights' resolutions annually adopted by those bodies.³⁰ Professor Gertrud Lenzer, The City University of New York, outlined a future role for academic institutions in: 1) interpreting the rights enumerated by the Convention on the Rights of the Child; 2) supplying reliable information to the Committee on the Rights of the Child, and 3) developing new academic child rights projects', such as the Children's

25. See Charter on the Rights and Welfare of the African Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 [hereinafter Charter on the African Child], reprinted in AFRICAN NETWORK FOR THE PREVENTION AND PROTECTION AGAINST CHILD ABUSE AND NEGLECT, CHARTER ON THE RIGHTS AND WELFARE OF THE AFRICAN CHILD 12 (Peter O. Ebigbo, ed., 1991); European Convention on the Exercise of Children's Rights, published in RIGHTS OF THE CHILD, Maria Rita Saulle (ed.).

26. For a detailed description of the evolution of the text of the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption see *supra* note 21 *Developing Jurisprudence*.

27. Since U.N. adoption of the Convention on the Rights of the Child, the United Nations High Commissioner for Refugees has issued guidelines for field officers to assure that the rights of refugee children are adequately protected. UNICEF, on the other hand, is making child rights the organizational basis for all of its activities.

28. For example, the University of Gent has instituted an annual summer study course on children's rights and St. Xavier University in Chicago is exploring the possibility of establishing an interdisciplinary research center for children's rights.

29. The rights of the child is now formally on the agenda of both the Commission on Human Rights and the Third Committee of the General Assembly. Each of these bodies adopts a resolution each year focusing on the most important issues affecting children.

30. Anders Rönquist, address at International Law Association, International Law Weekend, Oct. 31 - Nov. 2, 1996.

Studies Program which she heads at Brooklyn College.³¹ Unfortunately, because of their busy schedules, neither of these speakers were able to provide publishable papers for the proceedings.

The other two speakers, both of whom have submitted essays for the International Law Association International Law Weekend Proceedings, provided distinctly different approaches to the Convention on the Rights of the Child. Peter Pfund, Legal Advisor's Office of United States Department of State, explained the way in which the Convention on the Rights of the Child had been recognized in recent treaty drafting processes of the Hague Conference on Private International Law.³² William D. Angel, Youth Division of the United Nations, described United Nations youth policies and pointed out the often ironic overlaps between *youth policy* and the *rights of the child* and speculated about possible future methods of relating the two areas of international law.³³

The panel topic was particularly well received. The "standing room" audience stayed to the very end, despite the cramped quarters.³⁴ Naturally, during the question and answer period, the audience wanted to know why the United States has not ratified the Convention on the Rights of the Child and what can be done about it. The consensus was that biggest problem comes from the fact that those who oppose the Convention are active and in continuously contact with their Senators and Congresspersons.³⁵ While those who support the Convention's ratification are essentially silent. To overcome the already mobilized anti-Convention campaign, what will be needed is a state by state drive for ratification that will counterbalance the activities of those in opposition. Only by obtaining the support of individual states will it be possible to counter federalism arguments that will undoubtedly be raised against the Convention at future Senate hearings. Unless a grassroots movement begins to build, there is a strong likelihood that the United States will enter the 21st Century as the world's only country that has not taken a stand for children.

31. Professor Gertrud Lenzer, address at International Law Association, International Law Weekend, Oct. 31 - Nov. 2, 1996.

32. See *infra* Peter Pfund, The Developing Jurisprudence of Rights of the Child, this volume.

33. See *infra* William D. Angel, Developing Jurisprudence on the Rights of Youth: Review of Problems and Prospects: North-South, this volume.

34. To some extent this may have been influenced by the fact that the 1996-97 Jessup Moot Court problem contains a children's rights issue.

35. Senator Jesse Helms has said that he gets one thousand letters against the Convention for every one in favor.