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United Nations Convention on the Rights of the Child

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**American Bar Association
Young Lawyers Division
Section of Family Law
Section of Individual Rights
and Responsibilities
Section of International Law
and Practice
Report to the House of Delegates
United Nations Convention on the
Rights of the Child***

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association supports in principle the ratification by the United States of the provisions of the United Nations Convention on the Rights of the Child (Articles 1054).

BE IT FURTHER RESOLVED, That the American Bar Association should immediately convene a working group of representatives from interested Association entities and affiliated organizations to work with the Executive Branch and the Senate on the identification and clarification of issues related to possible reservations that might be considered as part of the ratification process.

REPORT

Background

On November 20, 1989, the United Nations General Assembly unanimously adopted an international Convention on the Rights of the Child. That adoption came after ten years of careful deliberation and a drafting process in which the United States played a key role, and in which each article of the Convention was

* This Recommendation and Report was adopted by the House of Delegates in February 1991. The Section was not heavily involved in the preparation of the Recommendation and Report, but was added as a co-sponsor.

written by international consensus. The United States voted in the General Assembly for adoption of the Convention.

On September 2, 1990 the Convention took effect as international law among the nations that had ratified it (ratification by twenty nations was required for the Convention to have binding effect). It is believed that this is the speediest period in which an international convention has received the requisite number of ratifications to become effective.

As of November 1, 1990, 55 nations had ratified the Convention, but the United States was not among them. An additional 78 nations had "signed" the Convention (evidencing a strong intent to ratify) but had not yet ratified it. The United States was not among these nations either. Both the U.S. Senate and the House of Representatives have, by large majorities, passed resolutions urging the President to forward the Convention to the Senate.

The Convention provides a new international standard—and a new body of international law—setting forth what each of the world's nations must do to improve the care and treatment of their most vulnerable citizens: our children. The Convention specifically addresses such critical topics as: the child's right to a national identity; duties of the state when children have to be separated from their parents; further protection of children from international abduction (in February 1981 the House of Delegates called for U.S. ratification of the Hague Convention on Civil Aspects of International Child Abduction); the child's right to be heard in any judicial proceeding affecting him or her; and the right to be protected by the State from abuse and neglect and to receive appropriate alternative care when necessary in order to be protected from such maltreatment.

Other Convention provisions address: the need to have safeguards for children in the adoption process; the right to special protection for refugee and handicapped children; the right to an adequate standard of health care and prenatal care; the right to an adequate education; the right to be protected from hazardous and exploitative child labor; the right to food and shelter; the right to protection from sexual exploitation and family violence; and the right, when detained by the state, to be kept separate from detained adults, and with parental access assured. The Convention calls for the nations of the world to provide a juvenile justice system that generally meets the standards that have been set in this country (and which have been greatly influenced by the ABA/IJA Juvenile Justice Standards approved by the House of Delegates in 1979).

The Convention also mirrors another important ABA juvenile justice policy, adopted by the House of Delegates in August 1983. It calls for an end to the use of the death penalty for those who commit crimes while under the age of eighteen.

Past Association Policy Actions

The American Bar Association has often taken a policy position in respect to U.S. ratification of international conventions and treaties, especially those deal-

ing with human rights. In addition to the aforementioned child abduction convention, the House of Delegates has, among its many approved policies dealing with international treaties and conventions, urged the U.S. to ratify the:

- a) Convention on the Prevention and Punishment of the Crime of Genocide (August 1948 and February 1976);
- b) Convention on the Protection of Victims of Non-International Armed Conflicts (August 1987);
- c) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (February 1986);
- d) International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights (February 1979);
- e) American Convention on Human Rights (August 1979); and
- f) International Convention on Elimination of All Forms of Racial Discrimination (August 1978).

Indeed, these Association-endorsed international accords contain a large number of guarantees and protective provisions relating to children which have been incorporated into the new Convention on the Rights of the Child.

The House of Delegates has also approved many policy resolutions addressing the need for improved treatment, under the law, of children here in the United States. In addition to the aforementioned international child abduction, "Juvenile Justice Standards" and "juvenile death penalty" policies, the ABA has officially endorsed:

- a) improved federal and state child abuse and foster care legislation (August 1980, 1981, and 1988);
- b) an improved federal child support system (February 1987);
- c) improved child care resources and regulatory policies (August 1983); and
- d) a set of guidelines for the fair treatment of child witnesses in cases where child abuse is alleged (July 1985).

In February 1984 the House of Delegates urged the legal profession as a whole to respond to the needs of children "by directing attention to issues affecting children." Several ABA Presidents have championed this topic, calling upon the organized bar to advocate, as the House urged, "for the needs of children who have no effective voice of their own in government." The 1984 resolution not only addressed the legal rights of children, but also the "implementation of statutory and programmatic resources to meet the health and welfare needs of children."

Former ABA President L. Stanley Chauvin, Jr., in the November 1989 *ABA Journal*, noted in his "Message From the President" that since social and legal problems are often inextricably linked, we as attorneys must address such issues as children growing up in poverty, teen pregnancy, youth unemployment, addicted newborns, and homeless children. "Small children," he wrote, "need big advocates." Mr. Chauvin has since become a member of a National Advisory Council on the Rights of the Child, a blue-ribbon group co-chaired by Senators

Bill Bradley (D—NJ) and Richard Lugar (R—IN) that is helping to increase public awareness about the Convention and its importance.

The Impact of the Convention

The U.N. Convention on the Rights of the Child is a natural extension of the Geneva Declaration on the Rights of the Child of 1924 and the U.N. Declaration of the Rights of the Child of 1959. The latter document noted that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. . .” The new Convention builds on these declarations and others that have been developed over the past two decades. Despite the existence of over 80 international instruments that have some provisions that address the special status of children, until now there was no comprehensive instrument specifying the full gamut of the rights of children. Importantly, as a comprehensive statement of children’s legal rights, the Convention constitutes a key addition to the body of international human rights law that is having an increasing influence in shaping the behavior of governments.

Two issues that have been raised concerning U.S. ratification need to be addressed. First, some who have reviewed the text of the Convention, without having knowledge of its drafting process or its legislative history, have expressed concern about its use of language in two places:

1) the child’s need for “appropriate legal protection, before as well as after birth” (a direct quote from the preamble to the 1959 United Nations Declaration of the Rights of the Child).

This is found in the Convention’s Preamble, which itself carries no binding force of law under recognized international legal principles. On the question of whether this part of the Preamble affects the Convention’s substantive provisions, the drafters of the Convention included in the legislative history a statement that, “In adopting this preamble or paragraph, the Working Group does not intend to prejudice the interpretation of article 1 [i.e., the definition of “child”] or any other provision of the Convention by States Parties.”

The second part of the Convention about which concern has been expressed is:

2) the use of the phrase “every child has the inherent right to life” (found in Article 6).

Some have wondered whether these words are meant to represent some “coded” provisions that are designed to impose on nations some position on the issue of abortion. Those who are most familiar with the history of the Convention’s development are unanimous in concluding that the drafters of the Convention on the Rights of the Child clearly and purposefully left it up to each State Party (ratifying nation) to determine whether the definition of a “child” is to include the gestation period.

For one thing, “child” is defined in Article 1 as “below the age of 18 years,” referring to the maximum age but giving no opinion on when the Convention’s

protections begin. Commentators who have studied the use of language and the meaning of terms in the new Convention, including two who observed and participated in the process of drafting the Convention, are convinced that the drafters only reached consensus on the need to protect children from the *time of birth* (the drafters were especially concerned with protection of children from such harms as infant mortality, malnutrition, and epidemics). The Convention has already been ratified by countries whose laws cover the entire spectrum of the abortion issue.

Independent analysis of the Convention, its legislative history and international law antecedents, by several legal scholars has reached the same conclusion: U.S. ratification of the Convention on the Rights of the Child would *not* impose any new requirement on this country to protect (or not to protect) any rights during the gestation period, and the U.S. would remain free to adopt policies on the abortion issue in the same manner as it is presently doing. Relevant articles addressing this issue by Boston College Law School Professor Sanford J. Fox (*Whittier Law Review* 1991, in press) and Australian law professor Philip Alston (*Human Rights Quarterly* 1990) and a memo by Attorney Markam Bell of the law firm of Morgan, Lewis & Bockius are on file at the ABA Center on Children and the Law.

It is also noteworthy that Senator Jesse Helms (R—NC) *failed* in an attempt to amend the Senate Resolution (urging President Bush to submit the Convention for the Senate's advice and consent) by adding his suggested language that would have extended the Convention's meaning for the U.S. as applying to "the unborn offspring of any human being at every stage of biological development" (Congressional Record, Sept. 11, 1990, p. S 12787).

Finally on this issue, it should be mentioned that two international conventions which have *already* been approved by the House of Delegates and which clearly apply to both children and adults (the International Covenant on Civil and Political Rights and the American Convention on Human Rights) have similar language to the ambiguous phrases that are quoted above.

The second issue of concern relates to possible "reservations" that could be made in connection with American ratification of the Convention on the Rights of the Child. As has been the case with earlier international treaties and conventions, the United States government may need to place some reservations on its ratification action. This is probably inevitable in a federal system of government such as our own, and is an accepted and frequently utilized mechanism for nations desirous of approving international human rights accords. As the Recommendation states, the ABA response to this inevitability will be the convening of a working group to help identify and clarify reservations that might be considered during the U.S. Senate's ratification deliberations.

One example of such a reservation (as has already accompanied the French ratification) might be an expression by the U.S. Senate that the Convention will not be applied in this country so as to affect in any way the issue of abortion. As

the text of the Convention itself points out, any reservations that might be adopted by the U.S. Senate should not compromise the spirit or principles of the Convention. This is especially important since the Convention represents a carefully developed international consensus on how children of the world should be treated.

Why the U.S. Should Quickly Ratify the Convention

Full and prompt U.S. support for this Convention is critical. For over a year the Executive Branch has been reviewing the Convention. Nonetheless, President Bush has yet to submit the Convention to the United States Senate for its advice and consent as to ratification. However, as previously mentioned, bipartisan "sense of the Congress" resolutions, calling upon the President to submit the Convention for Senate ratification have been passed by in [sic] both the Senate (S. Res. 231) and the House of Representatives (H. Res. 312).

Our nation should be a leader and strong advocate for ratification of the Convention in the international community. Following U.S. ratification, our government should also be actively involved in the U.N. monitoring efforts. The worldwide need for conformity to the Convention's standards is overwhelming. According to Congressman George Miller, Chair of the U.S. House of Representatives Select Committee on Children, Youth and Families, more than 38,000 of the world's children die every day due to a lack of food, shelter, or primary health care. More than one billion people, the majority of them children, either have no home or live in inadequate housing. Over 100 million children are forced to work under hazardous and often fatal conditions, many for almost no pay. (Congressional Record, November 2, 1989, p. E 3659).

Once the Convention is ratified by the United States, the ABA could effectively assist the nation's lawmakers to, in the words of Article 4, "undertake all appropriate legislative . . . measures, for the implementation of the rights" recognized in the Convention. Since 1978, the Young Lawyers Division's *ABA Center on Children and the Law* (formerly, the National Legal Resource Center for Child Advocacy and Protection) has been a focal point within the Association for organized activities in the child protection arena. The Center has recently published the book *Children's Rights in America* which compares the laws of this country to the provisions of the Convention. The scholarly essays in that book suggest that the U.S. already is, in large part, complying with the provisions of the Convention.

The Center on Children and the Law, together with the Criminal Justice Section's "Juvenile Justice Center," the Family Law Section's Task Force on the Needs of Children, the Individual Rights and Responsibilities Section's Committee on the Rights of Children, the involvement of those attorneys who are active in the international law field, and other bar leaders concerned with the plight of our nation's children, can help to assure that the Convention's provisions become a reality both throughout the United States and abroad.