

AMERICAN BAR ASSOCIATION

Section of Individual Rights and Responsibilities
Criminal Justice Section
Law Student Division
Young Lawyers Division
National Association of Women Lawyers

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- RESOLVED, that the American Bar Association, in its efforts to
promote the United States' ratification of the United Nations
Convention on the Rights of the Child, and previously having
endorsed such ratification in principle, suggest that such
ratification be accompanied by Reservations, Understandings, and
Declarations as follows:
1. Addressing Article 30 of the Convention, a Reservation that
the United States may regulate the practice of religion to the
extent that such regulation is permitted by the United States
Constitution;
 2. Addressing Article 37 of the Convention, a Reservation that
United States Jurisdictions, pursuant to existing law, may continue
to confine within adult correctional facilities certain children
who have committed offenses, even when such confinement may not be
in the "best interests of the child" in a particular case;

3. Addressing Articles 9, 37, and 40 of the Convention, an Understanding that these Articles permit United States jurisdictions to separate a child from his or her parents against their will even if such separation may not be considered to be in the "best interests of the child," if such separation results from deprivations of liberty duly imposed for infringements of penal law; 16 22
4. Addressing Article 10 of the Convention, an Understanding that United States jurisdictions may determine the "exceptional circumstances" warranting restriction of a child's relations and contacts with parents in different states in accordance with the "best interests of the child" standard articulated in Article 9; 23 27
5. Addressing Article 28 and other provisions of the Convention, an Understanding that the Convention prohibits corporal punishment in the schools and that the United States government will take appropriate measures to bring relevant laws into conformance with this prohibition; 28 32
6. Addressing Article 29 of the Convention, an Understanding that the United States is not required to regulate private educational institutions in any way beyond that which is permitted by the First Amendment to the United States Constitution; 33 36
7. A Declaration that this Convention imposes no legal obligations on the United States regarding the voluntary interruption of pregnancy and that this Convention cannot be interpreted as affecting laws in the United States relating to such interruptions; 37 41
8. A Declaration that, for purposes of the Convention's Article 1 definition of "child," the age of majority in the United States is age 18. 42 44

REPORT

In February 1991, the House of Delegates of the American Bar Association adopted a Resolution that supported United States ratification of the United Nations Convention on the Rights of the Child. In addition, the Resolution called for the convening of a Working Group "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."

Pursuant to this directive, then-Association President Talbot D'Alemberte appointed in early 1992 a working group of 10 members (chaired by Daniel L. Skoler) from named designees of the following Association entities or affiliates:

Section of Individual Rights and Responsibilities
 Section of International Law and Practice
 Criminal Justice Section
 Section of Family Law
 Section of Litigation
 Young Lawyers Division
 Standing Committee on World Order Under Law
 Commission on Mental and Physical Disability Law

The Working Group has completed its review and has issued a report that, pursuant to the House of Delegates mandate, (i) reviews pertinent issues and recommends a set of possible Reservations (i.e., "Reservations, Understandings, and Declarations" (RUDs) in treaty law terminology) for consideration and adoption as part of the terms of United States ratification and, (ii) at the same time, reviews all articles of the Convention and major implementation questions and explains the need to focus RUDs on selected issues raised by the Convention. The recommendations of the Working Group's report constitute the basis for this proposed House of Delegates resolution. The proposed resolution is intended to augment and particularize the Association's 1991 endorsement in principle of the terms of the Convention and the desirability of ratification.

¹ "Reservations," generally speaking, refer to limitations imposed by a ratifying or adopting nation on the substantive terms or application of treaty provisions. "Understandings" and "Declarations" advise other states of how a ratifying state intends to interpret or implement treaty provisions whose substantive content is accepted as binding.

At the outset, it should be noted that the Convention was drafted over a 10-year period by a working group of the United Nations Human Rights Commission, in which the United States played a major role. Adopted by the General Assembly of the United Nations in 1989 and opened for signature in 1990, the Convention also came into force in 1990. Although the United States has neither signed nor ratified the Convention, more than 140 other countries, including all advanced industrial nations and natural allies of the United States in human rights matters, have done so. Indeed, in the short period of its existence as one of the major international human rights treaties, the Convention on the Rights of the Child has attracted more participating States Parties than any other UN human rights treaty, including the 17-year old International Covenant on Civil and Political Rights, which the United States ratified just last year and from which the Children's Convention draws a good deal of its content.

The Convention is composed of a Preamble and three Parts. Nearly all of the substantive rights and duties are articulated in the 41 Articles of Part I. Part II obligates Parties to the Convention to submit reports on the progress they are making in implementing the Convention to a Committee on the Rights of the Child, an independent body selected by the Parties. Part III contains "housekeeping" provisions relating to such matters as the effective date of the Convention and the deposit of instruments of ratification with the UN.

The Nature of the Rights and Duties Under the Convention

In some respects, provisions of the Convention on the Rights of the Child closely resemble United States Bill of Rights and Political Rights. For example, the Children's Convention protects children's freedom of expression and assembly, as well as freedom from arbitrary arrest. Although the Convention expresses these civil rights in terms slightly different from the way they appear in the United States Constitution, there is no risk that these differences would result in any restriction of rights that are otherwise available to American children under constitutional or statutory law. To preserve just such domestic rights, Article 41 of the Convention provides:

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child which may be contained in:

- (a) The law of a State Party; or
- (b) International law in force for that State.

In addition to the familiar civil rights, the Convention also includes provisions directed at the child's basic material needs,

such as food, clothing, and shelter. The Convention scheme is to set out the responsibilities of various sectors of society for assuring adequate access to such items, a scheme that closely resembles provisions of current American law. The parents, including those who are not present in the home, are primarily responsible for meeting children's basic needs. Children also are to be eligible to benefit from various forms of social insurance. When these sources of assistance are insufficient, a Party to the Convention is required to assist the parents in providing for the child.

Provisions relating to additional fundamental concerns, such as children's health and education, are similar to those relating to material needs. The Convention imposes a duty for States Parties to establish and support programs designed to assure progressive achievement of goals--in particular, healthy and educated children.

However, of prime importance is Convention language permitting progressive achievement of rights and requiring achievement only to the extent of available resources. Virtually all so-called "economic and social rights" are qualified in this manner. Article 4 is the key provision for these ideas:

States parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of rights recognized in this Convention. In regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources, and where needed, within the framework of international co-operation.

The principle of progressive achievement within the context of available resources establishes that these provisions of the Convention, upon ratification by our nation, would impose upon the United States obligations of conduct, not of result. There would be, for example, no international legal duty to assure that all American children actually enjoy good health. Rather, the Convention would require that there be a continual striving to that end. Furthermore, the Convention does not serve to create new entitlements or causes of action for benefits. Whether such provisions are to be created is a matter to be addressed by implementing legislation.

Reservations, Understandings and Declarations

Definition of Child and Protection of Life. Turning to specific substantive Convention provisions for which RUDs are identified and recommended, Article 1 defines a "child" as "every

human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." This language, as the legislative history of the Convention confirms, purposefully leaves to the discretion of each State Party the matter of what the lower age limit should be. In light of the varying ages at which children in the United States attain majority for different purposes, the proposed Declaration affirming the Convention's age 18 standard is intended to prevent these variations from affecting the availability of rights under the Convention.

However, the Convention's preamble refers to the child's need for "appropriate legal protection before as well as after birth," and Article 6 recognizes that every child has an "inherent right to life." Although this terminology has taken on special significance in the United States with respect to the issue of abortion choice, preamble declarations, as a matter of established international law, create no rights additional to a Convention's substantive provisions. The Convention's legislative history expressly confirms that the Article 6 "right to life" terminology was not intended to address the "choice" issue or to alter the Convention's essential neutrality on voluntary interruption of pregnancy. The Working Group recommends reinforcing the intended neutrality of this language with a Declaration out of the same abundance of caution that led France and the United Kingdom to qualify their ratifications. The recommended Declaration would leave no doubt that the Convention does not affect United States law on the abortion question.

Expansion of Civil Rights Under Convention. As noted above, the Convention explicitly preserves all provisions of United States law that might be construed as going beyond the Convention's protection. For this reason, there is no need for Reservations to the Convention to assure continued impact of the Constitution. (By contrast, the UN Civil and Political Rights Covenant contained no such explicit provision, thereby creating a need to clarify through RUDs the fact that the Covenant's requirements relating to prohibitions of certain kinds of advocacy do not override First Amendment freedom of speech guarantees.)

In some respects, however, the Covenant does provide for expansion of existing civil rights. Because the Convention, in Article 41, does not preserve the lesser protections of current United States law, decisions need to be made as a matter of policy whether the United States accepts the expansions or wishes to restrict them via specific Reservations, Understandings, or Declarations. The proposed ABA resolution does not propose many RUDs addressing these expansions. The exceptions are proposed RUDs that deal with certain expansions that might conflict with U. S. law (e.g., the scope and regulation of religious and educational practice under the First Amendment). They are explained elsewhere in this report. It is believed that, on the whole, the

Convention's provisions reflect movement toward a more child-centered society in which children have greater opportunities to participate, according to their capacity, in decisions affecting them. Because such decisions consequently would reflect the best interests of children more than they do currently, the expansive provisions may provide clarifications of and changes to American legal doctrine that are to be welcomed.

Detention of Children with Adult Prisoners. In the context of the administration of justice, the civil rights question is more difficult. For example, this country's practice of permitting children to be treated as adult criminals for certain offenses raises issues that do not square easily with Convention requirements, such as the specific requirement that children not be housed with adult prisoners. However, in the belief that the Convention ratification process is not the appropriate vehicle for deciding whether and how that part of the corrections system should be changed, a Reservation has been proposed that would leave this part of the justice system largely unaffected by the Convention.

Capital Punishment for Children. With regard to the harshest aspects of the prosecution of children as adults--the imposition of death sentences or prison terms for life without possibility of parole--no Reservation has been proposed. Such a Reservation not only would run counter to the Association's long-established policy opposing the death penalty for children, but also likely would be rendered invalid by the international rule barring reservations that defeat the object and purposes of a Convention.

A fundamental reason given by the Working Group for not supporting a Reservation in this area is that the preservation and support of children's lives is so central and ubiquitous a theme in the Convention that it would be an unacceptable contradiction to interpose a Reservation permitting continued application of capital punishment for offenses committed by children under age 18. (One member of the Working Group suggested adoption of an Understanding to the effect that the United States will seek to achieve progressively, rather than through immediate implementation, the Convention's ban on capital punishment for children below the age 18.)

For similar reasons, the Working Group report supports possible expansion of interpretation of the Eighth Amendment's prohibition against cruel and unusual punishment to encompass, in the Convention's terms, "inhuman and degrading treatment." The Group believes that the special vulnerability of children to abuse in the guise of "treatment" or "correction" makes it important that this Article 37(a) protection receive support under American law.

Religious Freedom and Authority of State. As noted above, Convention provisions relating to religious practices also need to be addressed. Regarding the Article 14 freedom of religion provision, the Supreme Court has held that it may be permissible to enforce child labor law policies even if enforcement entails some

interference with a child's religious practices. See Prince v. Massachusetts, 321 U.S. 158 (1944). The proposed Reservation regarding religious liberty restrictions addresses this concern.

The wall between church and state in the United States also requires an understanding to ensure that, by virtue of the education provisions of Article 29(2) of the Convention, the government does not acquire a power to control private religious schools beyond what the separation of church and state now permits.

School Discipline and Corporal Punishment. One other policy matter requires explanation--the question of corporal punishment in the schools and the requirement of Article 28(2) of the Convention that school discipline be consistent with a child's human dignity. Since 1985, the American Bar Association has been on record as opposed to corporal punishment in institutions where children are cared for or educated and has urged that state laws permitting such punishment be amended accordingly. Consistent with that policy, the recommended Understanding interprets Article 28(2) as supportive of abolition of corporal punishment. Because Article 28(2) would not be self-executing, however, it would not automatically change existing law; implementing legislation would be necessary to change those laws that permit corporal punishment.

Separation of Children from Parents. The remaining RUDs in the proposed resolution seek to harmonize criteria in articles of the Convention relating to (i) the right of a child to maintain contacts with a parent or parents from whom separated, either domestically or in another nation (Articles 9 and 10(2)) and (ii) the necessity of separating juvenile offenders from their parents in those serious cases where institutionalization is required (Articles 9, 37(c), and 40(2)). These proposals simply serve to clarify application of the "best interests of the child" standard that pervades the Convention's provisions concerning administration of civil and criminal justice to children and do not entail significant policy considerations.

In view of the foregoing, the Section of Individual Rights and Responsibilities and co-sponsoring entities urge the ABA House of Delegates to adopt the proposed resolution relating to ratification of the UN Convention on the Rights of the Child.

Respectfully submitted,

Ronald L. Plesser, Chair
Section of Individual Rights
and Responsibilities

February, 1994

GENERAL INFORMATION FORM

Submitting Entity:
Section of Individual Rights and Responsibilities
Criminal Justice Section
Law Student Division
Young Lawyers Division
National Association of Women Lawyers

Submitted By: Ronald L. Plesser, Chair
Section of Individual Rights and Responsibilities

1. Summary of Recommendation(s).

This recommendation calls for the American Bar Association, in supporting ratification of the United Nations Convention on the Rights of the Child, to suggest that such ratification occur subject to specific "Reservations, Understandings, and Declarations" concerning the way certain treaty provisions would apply in the United States. The recommendation proposes two Reservations, four Understandings, and two Declarations.

The Reservations to the treaty language are intended to preserve certain provisions of U. S. law that otherwise would be inconsistent with treaty obligations. One Reservation would permit the continuation of some U. S. jurisdictions' existing practice of confining in adult correctional facilities children who have committed certain offenses; the other would allow for regulation in the United States of religious practices that affect children to the extent permitted by the U. S. Constitution.

The Understandings are designed to clarify the way in which the United States intends to apply the treaty. The Understandings provide for limited exceptions, in specific circumstances, to treaty language requiring jurisdictions to act in "the best interest of the child" in dealing with children in their care; commit the United States to work to bring the nation's laws into compliance with treaty prohibitions against corporal punishment in the schools; and state that the convention will not be interpreted to require regulation of private institutions beyond that permitted by the U. S. Constitution.

The Declarations, which address the operation of the convention's provisions, make clear that the Convention has no legal effect on U. S. abortion laws and that the Convention applies to juveniles up to the age of 18.

2. Approval by Submitting Entity.

The recommendation was approved by the governing Council of the Section of Individual Rights and Responsibilities at its fall meeting on Oct. 8-9, 1993. The governing boards of the Section of Criminal Justice, the Young Lawyers Division, the Law Student Division, and the National Association of Women Lawyers also approved the recommendation at their fall 1993 meetings. The governing bodies of other entities represented on the working group that reviewed the Convention will consider the recommendation at upcoming meetings, to be held prior to or during the ABA's 1994 Mid-year Meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?

In February 1991 the House of Delegates adopted a resolution approving in principle the U. S. ratification of the UN Convention on the Rights of the Child and requiring the establishment of a working group to study the Convention to identify issues that might be the subject of Reservations (and, implicitly, Understandings and Declarations). This recommendation, a follow-up to that 1991 resolution and a product of the working group formed by then-ABA President Sandy D'Alemberte, clarifies the ABA's position regarding specific elements of the Convention. The proposed Reservations, Understandings, and Declarations are consistent with existing ABA policy.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

In addition to the policy cited in 3, above, that supports ratification of the Convention in principle, also relevant to this recommendation are existing ABA policies relating to confinement of juveniles in adult correctional facilities (8/83), the juvenile death penalty (8/83), use of corporal punishment in schools (7/85), and reproductive rights (8/93), as well as ABA policies generally supporting religious freedom and the exercise of other First Amendment rights. The proposed recommendation is not inconsistent with any of these policies.

5. What urgency exists which requires action at this meeting of the House?

The UN Convention on the Rights of Children is one of several treaties awaiting United States ratification. The Clinton Administration has pledged its support for ratification and has indicated that it would like to begin the process soon. Given that the current Congressional session is nearing its end, the treaties most likely will be taken up next year. Development of the ratification package that the Administration will send to the Senate on each treaty takes some time, however, and the U. S. Department of State already has begun preparations. It therefore is important to have the ABA policy on this treaty in place early in 1994, particularly given the fact that the United States is one of the few nations in the world--and the only

Western democracy--that has not ratified the Convention. Postponement of consideration of the recommendation until August 1994 or some later date would deny the ABA its opportunity to help shape the ratification package on which the Senate will vote.

6. Status of Legislation.

The Administration has yet to send its ratification package to the Senate. Its formulation of the package, however, depends in part upon information and recommendations it receives from other parties interested in ratification, including the ABA.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of the recommendation would result only in indirect costs to the Association, reflected primarily in Governmental Affairs and Section staff time devoted to ratification efforts as part of the staff members' overall substantive responsibilities.

8. Disclosure of Interest.

There are no known conflicts of interest among proponents of the recommendation regarding the subject matter of the recommendation.

9. Referrals.

On or before Nov. 15, 1993, this recommendation and its accompanying report were referred to the following ABA sections, committees, bar associations, or affiliated entities:

Sections and Divisions

Section of Administrative Law and Regulatory Practice
Criminal Justice Section
Section of Dispute Resolution
Section of Family Law
Section of General Practice
Section of International Law and Practice
Section of Labor and Employment Law
Section of Litigation
Section of Real Property, Probate and Trust Law
Section of Taxation
Section of Trust and Insurance Practice
Section of Urban, State and Local Government Law
Section of Government and Public Sector Lawyers Division
Judicial Administration Division
Law Student Division
Senior Lawyers Division
Young Lawyers Division

Standing Committees

Standing Committee on Law and National Security
Standing Committee on World Order Under Law

Special Committees and Commissions

Special Committee on the Drug Crisis
 Coordinating Committee on Immigration Law
 Special Advisory Committee on International Activities
 Steering Committee on the Unmet Legal Needs of Children and their families.
 Commission on Homelessness and Poverty
 Commission on Mental and Physical Disability Law
 Commission on Opportunities for Minorities in the Profession
 Commission on Public Understanding about the Law
 Commission on Women in the Profession

FORUMS

Affordable Housing and Community Development Law Forum
 Health Law Forum

Affiliated Organizations

American Immigration Lawyers Association
 Federal Bar Association
 Hispanic National Bar Association
 National Asian Pacific American Bar Association
 National Association of Attorneys General
 National Association of Women Judges
 National Association of Women Lawyers
 National Bar Association, Inc.
 National Conference of Commissioners on Uniform State Laws
 National Conference of Women's Bar Associations
 National District Attorneys Association
 National Legal Aid and Defender Association

As noted in 2, above, several entities already have approved the recommendation and have joined the Section of Individual Rights and Responsibilities as co-sponsors. The responses of other groups to whom the recommendation has been referred are not known at this time.

10. Contact Person. (Prior to the meeting.)

Daniel L. Skoler
 Council Member, IRR Section, and
 Chair, Working Group on the UN Convention on the Rights of
 the Child
 5107 Leesburg Pike, Suite 1600
 Falls Church, VA 22041
 Tel.: 703/305-0200

Penny Wakefield
 IRR Section Director
 American Bar Association
 1800 M Street, N. W. - South Lobby
 Washington, D. C. 20036
 Tel.: 202/331-2280

Rozann Stayden
 Legislative Counsel
 American Bar Association
 1800 M Street, N. W.
 Washington, D. C. 20036
 Tel.: 202/331-2205

11. Contact Person. (Who will present the report to the House.)

Robert F. Drinan, S. J.
 IRR Section Delegate
 Georgetown University Law Center
 600 New Jersey Avenue, N. W.
 Washington, D. C. 20001
 Tel.: 202/662-9073

12. Contact Person Regarding Amendments to This Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

There are no known amendments to be proposed at this time.