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JUVENILE JUSTICE PROVISIONS OF THE DRAFT CONVENTION ON THE RIGHTS OF THE CHILD

*Cynthia Price Cohen**

The first draft of the Convention on the Rights of the Child was completed by the Working Group of the Commission on Human Rights in February of 1988.¹ This version of the Convention was the product of a drafting exercise which was begun in 1979 as the result of a Polish initiative and in celebration of the 1979 International Year of the Child (IYC).² The goal of the Working Group was to construct a treaty protecting children's rights, which would put into legally binding language the ideals articulated by the 1959 Declaration of the Rights of the Child³ which the IYC was commemorating. During the ensuing nine-year period, the Working Group took the original Polish text model of twenty substantive articles⁴ and expanded it into forty-one articles covering the full panoply of the child's human rights: civil-political, economic-social-cultural and humanitarian.⁵

Following completion of the first draft, known as a first reading, the Commission on Human Rights scheduled a second reading of the draft Convention for the fall of 1988.⁶

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1. See Draft Convention on the Rights of the Child, 44 U.N. ESCOR C.4 (28th mtg.), U.N. Doc. E/CN.4/1988/28 (1988); *Report of the Working Group*, U.N. Doc. E/CN.4/1989/WG.1/WP.2 (1988) [hereinafter *Working Group*].

2. See G.A. Res. 31/169, 31 U.N. GAOR Supp. (No. 39) at 74, U.N. Doc. A/3139 (1976).

3. G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4249 (1959).

4. See U.N. ESCOR (Agenda Item 13), U.N. Doc. E/CN.4/1349 (1980).

5. See *supra* note 1.

6. 45 U.N. ESCOR (Agenda Item 13), U.N. Doc. E/CN.4/1989/48 (1989).

In general, the purpose of the second reading was to correct any errors or omissions and to allow governments an opportunity to review the text of the draft Convention in light of their individual government's perspective. To increase the efficiency of this task, at the end of its January-February 1988 session, the Working Group requested that the United Nations Secretary-General conduct a "technical review" of the Convention and make all necessary or desirable recommendations for alterations in the text.⁷ A group of legal scholars, concerned that the "technical review" might omit or overlook important issues, compiled a collection of essays on these topics under the title, *Independent Commentary: United Nations Convention on the Rights of the Child*.⁸ The *Independent Commentary* was published by Defense for Children International-USA, a non-governmental organization, and was distributed to all government delegations. The arguments contained in the essays were given serious consideration by participating delegates and in some cases played a major role in the textual alterations which were undertaken during the second reading.⁹ While it is not possible to accurately measure the impact of the *Independent Commentary*, the differences between the text of the juvenile justice provisions (Article 19) of the first reading and that of the second reading would seem to indicate that, at the very least, the *Independent Commentary* made the weaknesses of the first draft clear enough that they could be adequately discussed at the second reading.

7. See *Working Group*, supra note 1, at Annex.

8. See C. Cohen, *Criminal Justice Weaknesses in The Convention: Article 19*, in *Independent Commentary: United Nations Convention on the Rights of the Child* (C. Cohen ed. 1988) at 34-44 [hereinafter *Criminal Justice Weaknesses*].

9. See *Question of a Convention on the Rights of the Child: Report of the Working Group on the Question of a Convention on the Rights of the Child*, 45 U.N. ESCOR (Agenda Item 13), U.N. Doc. E/CN.4/1989/48 (1989) [hereinafter *Report*].

I. BACKGROUND OF THE DRAFT CONVENTION'S JUVENILE JUSTICE PROVISIONS

A. *Original Proposal by Polish Delegation*

The Working Group, entrusted with the drafting of the Convention on the Rights of the Child, organized its deliberations around a model Convention presented by Poland to the Commission on Human Rights in 1979.¹⁰ This document consisted of twenty Articles protecting the rights of the child with an emphasis on economic, social and cultural rights, such as social security, education, and foster care, and included a skeleton implementation mechanism.¹¹ It also contained an Article protecting the rights of children in relation to the criminal justice system. Its three brief paragraphs guaranteed special treatment for the child, protection from capital punishment, entitlement to reeducation, socialization and separation from incarceration with adult prisoners.¹² After the end of the first reading, the Juvenile Justice Article, then known as Article 19, it was expanded from three short paragraphs to four extensive paragraphs as a result of prolonged Working Group discussion.¹³ Even with this augmentation, the rights guaranteed by Article 19 fell woefully short of the standards set by the criminal justice protection of the International Covenant on Civil and Political Rights.¹⁴ This presented a serious problem because one of the aims of the Working

10. *See supra* note 4. This was the second of two drafts by Poland. For the text of the first draft, *see* U.N. ESCOR Supp. (No. 4), U.N. Doc. E/CN.4/1292 (1978).

11. *See supra* note 4.

12. *Id.* at art. 20.

13. At some point between 1979 and 1989 the Juvenile Justice Article was renumbered from 20 to 19. For the final first reading text, *see supra* note 1. For debates on Article 19, *see* U.N. Doc. E/CN.4/1986/39 (1986).

14. The International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR (Supp. No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter Covenant].

protected by the Convention on the Rights of the Child should at least meet the standards set by existing international human rights instruments.¹⁵

B. First Reading Text

The Working Group's first debates on Article 19 took place in January of 1986.¹⁶ At that time the drafters had three models for the Article: a modified version of Poland's 1979 draft,¹⁷ a Canadian proposal originally tabled in 1985¹⁸ and a proposal from the NGO Ad Hoc Group on the Drafting of the Convention on the Rights of the Child (NGO Group).¹⁹

The new Polish proposal²⁰ contained many of the elements of the 1979 text except that the thrust of old paragraph 3 on resocialization was now part of paragraph 1. Paragraph 2, while continuing to protect against the death penalty, was expanded to include protection against arbitrary detention and cruel, inhuman or degrading treatment or punishment. Paragraph 3 retained the prohibition against incarceration with adults. These changes marked the beginning of a trend toward guaranteeing the child all of the criminal justice protections available to adults under the International Covenant on Civil and Political Rights.

The Canadian proposal²¹ took this trend even further. That delegation's proposal was restricted to two paragraphs, which included protection of human dignity, right to a speedy trial and a fair hearing, as well as the rights protected in the

15. The purpose behind the inclusion of Article 41 was to avoid any possibility that the Convention on the Rights of the Child could be interpreted in such a way as to diminish existing human rights standards. The language of Article 41 is intended to incorporate customary international law.

16. See U.N. Doc. E/CN.4/1986/39 (1986).

17. *Id.* at para. 88. See also *supra* note 4.

18. *Id.* See also U.N. Doc. E/CN.4/1985/64 (1985).

19. See U.N. Doc. E/CN.4/1986/WG.1/WP.1 (1986).

20. See *supra* note 17.

21. See *supra* note 18.

second Polish proposal. During the Working Group's debates these two paragraphs were further extended to include the right to an appeal, to a presumption of innocence, to legal assistance and to prompt notification of charges in an understandable language.²²

The NGO Group was an alliance of approximately thirty non-governmental organizations having consultative status with the United Nations Economic and Social Council which met twice yearly in Geneva for consultations regarding the text of the draft Convention.²³ Reports of these semi-annual consultations included drafting recommendations which were passed on to the Working Group.²⁴ In regard to Article 19, the NGO Group made a series of proposals each of which reflected the evolving nature of the Group's ideas in regard to juvenile justice protection. In reality, many of the NGO Group's recommendations were virtual replications of similar governmental proposals. However, it was the NGO Group that pressed for the prohibition of life sentences without possibility of parole and the child's right to maintain contact with his or her parents.²⁵ The NGO Group also urged that incarceration be discouraged as a method of punishment.²⁶

Because there was considerable discussion of the Article 19 proposals and no immediate consensus, the Chairman of the Working Group, Dr. Adam Lopatka, assigned Article 19 to a small drafting party for revision.²⁷ The drafting party, made up of Canada, Poland, Austria and interested non-governmental organizations produced a new version of Article

22. See *supra* note 16, at para. 90.

23. The NGO Group was given the general support and encouragement of UNICEF.

24. See Report of Informal Consultations Among International Non-Government Organizations (1983); Informal Consultations Among International Non-Government Organizations (1984) (copies may be obtained from Defence for Children International, Geneva, Switzerland).

25. *Id.*

26. *Id.*

27. See *supra* note 16, at para. 92.

19 that was divided into four paragraphs.²⁸ The first paragraph was substantially the same as to the one proposed by Canada. It called for special treatment for children "accused or found guilty of infringing the penal law" which would "promote their sense of dignity and worth" and was aimed at rehabilitation.²⁹ Paragraph 2 noted existing human rights instruments and guaranteed equal rights with adults, shortest possible detention, and legal assistance. It also protected against arbitrary detention, cruel and inhuman treatment and torture and made provisions for alternative rehabilitation programs. Paragraph 3 warned against using the penitentiary system as a substitute for child welfare facilities and paragraph 4 prohibited capital punishment and life imprisonment.³⁰

The first paragraph was adopted with only minor linguistic modifications.³¹ The other paragraphs were sent back to the drafting party. The Working Group then adopted the drafting party's revised versions of paragraphs 2 through 4 with only minimal changes.³²

C. *Second Reading*

The main criminal justice provisions of the International Covenant on Civil and Political Rights are to be found in Articles 6, 7, 9, 10, 14 and 15.³³ The *Independent Commentary* essay "Inadequacy of Criminal Justice Rights in the Convention"³⁴ pointed out that of the eighteen criminal rights protected by the Covenant, the first reading of the draft Convention on the Rights of the Child gave equivalent

28. *Id.* at para. 93.

29. *Id.*

30. *Id.*

31. *Id.* at para. 96.

32. *Id.* at para. 99.

33. See Covenant, *supra* note 14.

34. See *Criminal Justice Weaknesses*, *supra* note 8.

protection to only five of these. The thirteen remaining rights were either given weaker protection in the Convention or omitted altogether. The *Independent Commentary* compared the text of each line in the first reading draft of the Juvenile Justice Article of the Convention on the Rights of the Child with that of the criminal justice provisions of the Covenant. The Covenant's Article 10(1), a general prescription to respect human dignity, was almost identical to that of the Covenant.³⁵ The Convention's first reading Article 19 gave stronger or more elaborate protection from torture, separation of juveniles from adults and rehabilitation guarantees than did the Covenant.³⁶ It gave roughly equivalent protection against arbitrary arrest and guaranteed the presumption of innocence, right to an appeal and to a speedy trial.³⁷ The *Independent Commentary* noted that the Convention's protection against torture, the right to be informed of charges, to a fair hearing, to prepare a defense and to separation from adult prisoners was either weaker or were missing some of the elements of the Covenant's guarantees.³⁸ The rights totally omitted were protection from ex-post facto laws, from self-incrimination, from double jeopardy and the right to review of arrest, to call and examine witnesses and to compensation for false arrest.³⁹ The *Independent Commentary's* analysis included recommendations for improvements in the first reading text of the draft Convention which were aimed at correcting these errors and omissions.⁴⁰

The second reading of the Convention on the Rights of the Child took place over a two-week period late in 1988.⁴¹ After agreeing on some initial stylistic changes in the

35. *Id.* at 34. See also *supra* note 14 and *Report, supra* note 1.

36. *Id.* at 34-35.

37. *Id.* at 35-37.

38. *Id.* at 37-39.

39. *Id.* at 40-42.

40. *Id.* at 43.

41. See *Report, supra* note 9.

Convention, such as the change to gender-neutral language, the Working Group reviewed the wording of each paragraph of each article in detail.⁴² Few were adopted without at least some discussion. A number of Articles were sufficiently controversial so as to require the establishment of drafting parties to iron out differences and submit alternative texts. Article 19 was one of these Articles.⁴³

The drafting party was made up of delegates and observers from Argentina, Canada, China, Cuba, India, Mexico, Portugal, the United States of America, Venezuela and representatives from the NGO Group.⁴⁴ They had several model Articles for their consideration.⁴⁵ There was the first reading text of Article 19,⁴⁶ along with comments from "technical review"⁴⁷ and an entire revised version subsequently submitted by the Crime Prevention and Criminal Affairs Branch of the Center for Social Development and Humanitarian Affairs of the United Nations office in Vienna (Crime Prevention Branch).⁴⁸ There were the observations of the NGO Group from their consultations prepared for the 1986 Working Group⁴⁹ as well as those prepared for the second reading. Finally, there was the model juvenile justice proposal which had been put forward by Defence for Children International (DCI)⁵⁰ and the juvenile justice essay from the *Independent Commentary*.⁵¹

The content of the first reading of the text of Article 19 has been discussed above. Following the format of the

42. *Id.*

43. *Id.* at para. 533 ff.

44. *Id.* at para. 536.

45. *Id.* at paras. 533-536.

46. U.N. Doc. E/CN.4/1989/WG.1/WP.2 at 82, 84 (1988).

47. See U.N. Doc. E/CN.4/1989/WG.1/CRP.1 (1988).

48. See *Report, supra* note 9, at para. 534.

49. See *supra* note 19.

50. See U.N. Doc. E/CN.4/1989/WG.1/WP.67 (1988) for modified version of original DCI proposal.

51. See *Criminal Justice Weaknesses, supra* note 8.

other Articles analyzed in the "technical review," the text of article 19 was submitted to the various branches of the United Nations for comments. Only UNICEF and the Crime Prevention Branch sent responses regarding Article 19.⁵² UNICEF's comments pointed out that article 19 should apply to children detained but not yet charged, that there was no protection from status offenses (detention for violations which would not be crimes if committed by adults) and that it was important to include parental notification.⁵³

Comments in the "technical review" from the Crime Prevention Branch were largely aimed at bringing the first text more into line with the Beijing Rules for the Administration of Justice.⁵⁴ The "Beijing Rules" which set standards for the handling of juvenile offenders, were a product of the 1985 Crime Congress and the Crime Prevention Branch had been deeply involved in the drafting of these standards.

An underlying principle of the "Beijing Rules" is that juveniles should not be deprived of their liberty.⁵⁵ While the Crime Prevention Branch expanded its "technical review" comments into an extensive proposal for the second reading,⁵⁶ those comments emphasized that there should be a minimum age for criminal responsibility, that detention should be a last resort for the minimum period necessary, that there should be procedural safeguards and that should be rehabilitative standards set for detention facilities, including the separation of children from adults.⁵⁷ The model Article 19 from the Crime Prevention Branch reiterated all of the above points, while including many of the standard procedural safeguards such as presumptions of innocence, prompt notification of charges, legal assistance, right to a speedy trial and to an

52. See *supra* note 47. see also U.N. Doc. E/CN.4/1989/WG.1/WP.2 (1988) at 82-87.

53. See *supra* note 47.

54. See *supra* note 48. See also "Beijing Rules," G.A. Res. 40/33, 40 U.N. GAOR Supp. (No. 53), U.N. Doc. A/40/53 (1985).

55. *Id.*

56. See *Report, supra* note 9, at paras. 533-599.

57. *Id.*

appeal. The model contained prohibitions against torture, capital punishment and military detention, and also called for parental notice, along with the minimum age of criminal responsibility.⁵⁸

Proposals from the NGO Group and DCI focused on the need to separate the broader general protection against detention, torture and capital punishment from the strictly juvenile justice aspects of Article 19.⁵⁹ The model distributed by DCI split article 19 into two parts with the new Article 19 only addressing the arbitrary detention-torture issues and a new Article 19 *bis* detailing the criteria for juvenile justice considerations.⁶⁰ DCI and the NGO Group also supported the inclusion of a prohibition against status offenses and of additional procedural safeguards similar to those listed by the Crime Prevention Branch.⁶¹

The exact number of small drafting parties established during the second reading is not easily ascertained. Some, which were formed to address wording of a single paragraph, met briefly and submitted a draft which was quickly adopted. Others deliberated for a week or more. Drafting parties ranged in size from two or three members to as many as fifteen or more. There were at least ten of the large drafting parties.⁶²

The drafting party assigned to work on Article 19 was faced with the demanding job of making major changes in its text, instead of merely stylistically rearranging a few words to make them more accurately reflect the drafter's intent. Their job was made more difficult by the fact that in addition to the list of models and recommendations mentioned above, the party also had to give consideration to the rather complicated Article 19 proposals tabled by three drafting party members:

58. *Id.*

59. *See supra* note 50.

60. *Id.*

61. *Id.* *See also supra* notes 47 and 48.

62. *See Report, supra* note 9.

India,⁶³ Mexico⁶⁴ and Venezuela.⁶⁵ In addition, at least one Spanish speaking member of the party refused to draft solely in English. This necessitated constant translation and retranslation and slowed up the process considerably. That there was ever any agreement on a new text was close to miraculous. The completion and adoption of the radically changed text by the Working Group was even more amazing.⁶⁶

The drafting party minimized intra-group conflict by adopting the Article 19-19*bis* format put forward by DCI. This extended the applicability of the prohibition against torture to situations outside that of the first reading draft in which it was confined to penal settings.⁶⁷ In the process of rewriting Article 19 the drafting party took into consideration some of the recommendations found in the many models before them and added a number of the protections previously omitted.⁶⁸

The drafting party's method for choosing to protect some recommended rights and omitting others is not entirely clear.⁶⁹ There does not seem to be any link between the number of times that protection of a particular right was advocated by the various models and commentaries and the drafting party's decision to include that protection in the new Article 19. For example, protection against ex-post facto laws and quarantees ensuring the right to defense witnesses, and to cross-examine were recommended only in the *Independent Commentary* essay.⁷⁰ These were added to the new Article 19.

63. See U.N. Doc. E/CN.4/1989/WG.1/WP.15 (1988).

64. U.N. Doc. E/CN.4/1989/WG.1/WP.32 (1988).

65. See U.N. Doc. E/CN.4/1988/WG.1/WP.11 and E/CR.4/1988/WG.1/WP.49 (1988).

66. The Canadian delegation played a major role in ensuring the last minute adoption of the drafting party's text by the Working Group. See *Report*, *supra* note 9. See also paras. 546-598.

67. Compare Draft Convention, *supra* note 1 and Working Group, *supra* note 1 with U.N. Report, *supra* note 9.

68. *Id.* See also *Criminal Justice Weaknesses*, *supra* note 8.

69. See *Report*, *supra* note 9.

70. See *supra* note 8.

On the other hand, UNICEF the Crime Prevention Branch, the NGO Group and the *Independent Commentary* all stressed the need for protection against status offenses.⁷¹ This recommendation was ultimately ignored by the drafting party. In all, eight new protections were added to either Article 19 or 19 *bis*: guarantees of a minimum age of criminal responsibility, parental notification, charges in an understandable language, witnesses, privacy, review of arrest, self-incrimination, and against *ex post facto* laws.⁷² Besides the proscription against status offenses, the drafting party unfortunately also omitted the protection against double jeopardy.⁷³

II. CONCLUSION

After the second reading text was adopted by the Working Group it was discussed before the plenaries of the Commission on Human Rights and of the Economic and Social Council. The text received the blanket approval of both of these bodies.⁷⁴ In mid-November of 1989, the Convention on the Rights of the Child will come before the Third Committee of the General Assembly for a final examination by that Committee, after which it will be sent to the General Assembly for adoption. This is anticipated to be on November 20, the thirtieth anniversary of the Declaration of the Rights of the Child.⁷⁵

There are many parts of the Convention on the Rights of the Child which could benefit from re-drafting. Some of these omissions and inadequacies are the result of the drafting process which required the nations of the world to meet for

71. See, e.g., *Criminal Justice Weaknesses*, *supra* note 8 at 42 and *supra* note 47.

72. See *supra* note 68.

73. *Id.*

74. See U.N. Doc. E/CN.4/1989/54 (1989) and U.N. Doc. E/CN.4/1989/79 (1989).

75. The General Assembly adopted the Convention on the Rights of the Child, by consensus, on the morning of November 20, 1989. The only changes in the second reading text concerned the financial implications of Article 43.

one week each year and attempt to outline and define all of the rights to which children are entitled. Other omissions and inadequacies are the outcome of a delicately created consensus, which if seriously questioned might well bring about the collapse of the entire Convention.⁷⁶

Technically, it is still possible for revisions to be made in the text of the Convention on the Rights of the Child up until the moment it is adopted by the General Assembly. Ideally, the wording of Articles 19 and 19 *bis*, now renumbered as Article 37 and Article 40, should be altered to include, at the very least, protection against double jeopardy and status offenses. However, given the push to have the Convention adopted on November 20 and the corresponding fear that reopening the Convention's text for debate of any kind might jeopardize its adoption by the General Assembly this year, it is highly unlikely that this will happen.⁷⁷ Certainly this is unfortunate, but there was only so much that the Article 19 drafting party could effectively contemplate during the stressful weeks of the second reading. Given the time pressure under which they were working, the drafting party is to be commended for eliminating almost all of the weaknesses found in the first reading text.

What has been truly remarkable about the drafting of the Convention on the Rights of the Child and its second reading is the extent to which NGOs were able to influence the drafting process and to have their concerns protected in the final text. In the case of Article 19, arguments put forward in DCI's *Independent Commentary* influenced the drafters to guarantee that juveniles have the right to witnesses, to an interpreter and to protection against *ex-post facto* laws.

76. The most contentious issues, which threatened the entire Convention, should they have been reopened after the second reading were the rights of the unborn child, the rights to freedom of religion, to adoption and foster care and the minimum age for participation in armed combat. For a detailed discussion of these issues, see C.P. Cohen, Introductory Note, United Nations Convention on The Rights of the Child, American Society of International Law/International Legal Materials, 28 I.L.M. 1448.

77. *Id.*

Added to this is the fact that protection against torture is no longer limited to the penal setting. Other new rights can also be traced to combined, cooperative NGO efforts.

The drafting of the Convention on the Rights of the Child provides a model of the type of cooperation between governments and non-governmental organizations which was envisioned by the drafters of the United Nations Charter.⁷⁸ Article 71 of the United Nations Charter states:

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations.⁷⁹

78. See generally U.N. CHARTER.

79. In ECOSOC Res. 1296 (XLIV), the Economic and Social Council fulfilled its Article 71 mandate by outlining the criteria which must be met by participating non-governmental organizations.

To be granted consultative status with the Economic and Social Council [ECOSOC] non-governmental organizations [NGO's] must fulfill requirements regarding their internal structure and international scope. Once approved by ECOSOC, the NGO's status is subject to regular review both for appropriateness of the designated category and for the organization's continuing adherence to the statutory requirements.

ECOSOC has devised three levels of consultative status. NGO's having a basic interest in most ECOSOC activities (e.g., International Council of Women) are classified as Category I. Those with expertise in specific areas, such as human rights, telecommunications, environment, etc. are placed in Category II. All other NGO's which have met the general criteria for consultative status with ECOSOC, but whose areas of specialization would be appropriate for only occasional consultation by ECOSOC are awarded Roster status. See, UNITED NATIONS AND HUMAN RIGHTS 19 (1978).

All NGO's with consultative status may send observers to any public meetings of ECOSOC or to those of its subsidiary bodies. NGO's in Categories I and II are permitted to submit written statements for circulation at such meetings. Those in Category I may also make oral interventions.

In addition to ECOSOC, NGO's can obtain consultative status with UNESCO, UNICEF, WHO, ILO and other intergovernmental bodies of the United Nations.

It would appear that members of the NGO Group have exercised their mandate well.⁸⁰

80. For a detailed discussion of NGO participation in the drafting of the Convention on the Rights of the Child see C. Cohen, *Role of Non-Governmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUMAN RIGHTS Q. 137 (1990).