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Non-Discrimination and the Rights of the Child: Article 2

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NON-DISCRIMINATION AND THE
RIGHTS OF THE CHILD
ARTICLE 2*

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Article 4 of the February 24, 1988 Working Group Draft of the Convention on the Rights of the Child purported to extend all the rights set forth in the Convention to each individual child. The Article specifically provided these rights "[w]ithout distinction of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national or social origin, family status, ethnic origin, cultural beliefs or practices, property, educational attainment, birth, or any other basis whatever."¹

The Working Group of government representatives charged by the United Nations Commission on Human Rights with drafting the Convention on the Rights of the Child has since finished the second reading of this Convention. On December 20, 1988, the working group presented its final

* The Comments are made in the author's personal capacity. The views expressed herein are solely of the author.

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1. The entire text of draft Article 4 reads as follows:

1. The States Parties to the present Convention shall respect and extend all the rights set forth in this Convention to each child in their territories without distinction of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national or social origin, family status, ethnic origin, cultural beliefs or practices, property, educational attainment, birth or any other basis whatever.

2. States Parties to the present Convention shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or other family members.

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

draft which amended some of the wording in the previously published articles, as well as renumbering and, in some cases, reordering them. This version, which will be presented to the United Nations Commission on Human Rights for debate in February or March of 1989, somewhat changed the wording of Article 4 and renumbered it as Article 2.² This comment will discuss the earlier version of the Working Group Draft and comment on the effect, if any, of the new wording reflected in Article 2 of the December, 1988 version.

The principle of equality or non-discrimination codified in Article 2 is a recurring theme in international law and is contained in many international human rights instruments such as the Universal Declaration of Human Rights,³ the International Covenant on Civil and Political Rights⁴ and the International Covenant on Economic, Social and Cultural Rights.⁵ However, as one international judge has noted, "[a]lthough the existence of this principle is universally recognized . . . its precise content is not very clear."⁶ Historically, this clause exemplifies one of the most basic problems in the international law of human rights.

2. The new wording of Article 2 of the draft convention is as follows:

1. The States Parties shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or 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.
2. The States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Working Group Report, supra note 1, at 29. Since this paper was written, the Convention has been adopted by the United Nations General Assembly on November 20, 1989 (U.N. Doc. A/C.3/44/L.44) in the form of draft Article 2 above.

3. Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (1948) [hereinafter UDHR].

4. The International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

5. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

6. *South West Africa, Second Phase*, 1966 I.C.J. 6.

I. INTERNATIONAL NORMS AGAINST DISCRIMINATION

International human rights law developed as a limited exception to the doctrine of national sovereignty.⁷ This was in response to several historical situations "[w]here a State committed atrocities against its own subjects which 'shocked the conscience of mankind'.⁸

The outrage of the world community led to international law that would obviate the possibility of similar events ever occurring again. The first instrument effected toward this goal was the Universal Declaration of Human Rights,⁹ which cataloged many basic human rights and fundamental freedoms already accepted as the foundations of many national constitutions. This document, in effect, became the basis and standard for human rights law in the international sphere and was quickly followed by a number of other instruments such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief¹⁰ and the Proclamation of Teheran.¹¹ The result, as

7. See generally P. SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 13-17 (1983) (for an account of the development of international human rights law).

8. Shortly following the First World War, the first treaties were signed dealing with the new States created by the Treaties of Versailles and St. Germain. These treaties were intended to protect the rights of linguistic and ethnic minorities and, for the first time, specifically included such rights as the right to life, liberty, free exercise of religion, and equal treatment before the law.

At the same time, international agreements were beginning to address several other humanitarian concerns which started to infringe on matters previously considered within the exclusive right of the individual State under the doctrine of national sovereignty. These concerns included slavery, treatment of prisoners of war, and adequate working conditions. The Slavery Convention, often seen as the first true international human rights treaty, was adopted in 1926. Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253. However, the greatest motivation towards the development of international human rights law were the events leading up to and during the Second World War. During this time, many atrocities were carried out under the full authority of domestic law. *Id.*

9. UDHR, *supra* note 3.

10. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, 36 U.N. GOAR Supp. (No. 51) at 171, U.N. Doc. A/36/51 (1981) [hereinafter Declaration].

11. *Draft Proclamation of the Conference Proposed by the Delegation of Iran - Proclamation of Teheran, International Conference on Human Rights*, -- U.N. ESCOR at 2, U.N. Doc. A/Conf. 32/L.28 (1968) [hereinafter *Proclamation of Teheran*].

Paul Sieghart points out, is that:

To the extent of those obligations, the strict doctrine of national sovereignty has been cut down in two crucial respects. First, how a State treats its own subjects is now the legitimate concern of international law. Secondly, there is now a superior international standard, established by common consent, which may be used for judging the domestic laws and the actual conduct of sovereign States within their own territory and in the exercise of their internal jurisdictions . . .

. . .¹²

Within the context of the development of international human rights law, the principle of equality or non-discrimination is one of the norms most widely found in international human rights instruments. All of the major human rights treaties, and many of the declarations, contain a provision importing this principle. The Charter of the United Nations itself includes as two of its major goals the principle of equal rights of peoples and the promotion and encouragement of respect for human rights and fundamental freedoms.¹³ Several authors agree that this principle now constitutes a norm of customary international law at least with respect to the grounds of race and sex.¹⁴

12. SIEGHART, *supra* note 7, at 15.

13. The purposes of the United Nations are:

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of the peoples, and to take other appropriate measures to strengthen universal peace.

3. To achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

U.N. CHARTER art. 1, para. 2, 3.

14. See generally A. BAYEFSKY, *The Principle of Equality or Non-Discrimination In International Law: Implications For Equality Rights In The Charter*, in RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS 117, 123-25 (L. Smith ed. 1986); B.G.

The importance which has been given to this principle by the United Nations since its inception, and by the world community in general, can be seen both in the frequency with which the principle is included, and the prominence it is given, in each instrument. For example, in the Universal Declaration of Human Rights, Article 2 states: "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁵ Similarly, the International Covenant on Civil and Political Rights, Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.¹⁶

RAMCHARAN, EQUALITY AND NONDISCRIMINATION, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 246, 249 (L. Henkin ed. 1981) [hereinafter RAMCHARAN]; For a general history of the development of the principle of equality or non-discrimination see I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 578-80 (2d. ed. 1973); RAMCHARAN, *supra* at 247-50.

15. See UDHR, *supra*, note 3. See also UDHR, *supra* note 3, art. 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination.

Id. at 72, 73.

16. See ICCPR, *supra* note 4, at 53. The Covenant was adopted and ratified on Dec. 16, 1966. See also arts. 3 and 26:

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or

In addition, the International Covenant on Economic, Social and Cultural Rights, Article 2(2) states: "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in: the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."¹⁷ Similar provisions are contained in: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);¹⁸ The Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation;¹⁹ the Convention Against Discrimination in Education;²⁰ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDW);²¹ and so forth.²²

social origin, property, birth or other status.

Id.

17. See ICESCR, *supra* note 5, at 49-50. The Covenant was adopted and ratified on Dec. 16, 1966. See also arts. 2(3) and 3:

2. (3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

3. The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Id.

18. The International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (XX), 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc A/6014 (1966) adopted by the General Assembly on December 21, 1965. Entered into force on January 4, 1969 [hereinafter ICERD]. See also arts. 1 and 2.

19. International Labour Office, Official Bulletin. Vol. XLI (1958) No. 2 at 72. Adopted by the General Conference of the International Labour Organization at its forty-second session on June 25, 1958. Entered into force on June 15, 1960. See articles 1, 2, 4 and 5.

20. See *United Nations Educational, Scientific and Cultural Organization, General Conference*, Eleventh session (30th mtg.) at 119 (1960) (entered into force on May 22, 1962) [hereinafter *The Convention Against Discrimination in Education*]. See Articles 1, 2, 3, and 4.

21. G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc A/34/46 (1979) [hereinafter CEDW]. Adopted by the General Assembly on December 18, 1979 (Res. 34/180). Entered into force on September 3, 1981. See arts. 1, 2, 4, 7 and 8.

22. Declaration, *supra* note 10, at 171-72 (arts. 2, 3, 4, 5) and the *Proclamation of Teheran*, *supra* note 11, art. 1.

An examination of the individual provisions listed above will show that, although the wording of the February, 1988 Article 4 in the draft Convention on the Rights of the Child was similar to that in several other international human rights instruments, particularly, the ICCPR and the ICESCR, it was also unique in several ways. First, the list of grounds were, and remain in the new Article 2, different between the first and second subsections of the Article. This issue is discussed below in connection with the question of the sufficiency of the included grounds.²³

Second, both the old draft Article 4 and the new Article 2 are what one author has called a subordinate clause rather than an autonomous one.²⁴ Although all of the similar clauses in the major international human rights instruments position the clause so that it governs all of the rights contained in the instrument, Article 26 of the ICCPR is structured in such a way that it is an autonomous norm and stands on its own: "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law." The draft Convention here, like the majority of other instruments, contains a subordinate clause which, although it can have no independent existence, qualifies all of the other substantive provisions as if it were a part of each one.

Finally, both versions of the draft Article extend the prohibition of discrimination to include sources of possible discrimination due to attributes of the child's parents, legal guardians or family members, rather than the child himself. Thus, the Article recognizes both the special status and needs of children, due to their very dependency, and at the same time their right to many of the same basic human rights and fundamental freedoms already recognized for adults.

The question of whether children are included in the rights guaranteed in other international human rights instruments is not an easy one to solve. Although under some

23. See *infra* notes 26-38 and accompanying text.

24. BAYEFSKY, *supra* note 14, at 119.

circumstances, children require special protection due to their unique interests, there is not always sufficient justification to treat children differently from adults at all times. It is possible that a certain "ghettoization" of children's issues might result from a restriction of the rights of children to only one Convention.²⁵

II. DISTINCTION VS. DISCRIMINATION

Four particular concerns arose from an examination of the wording of the February, 1988 Article 4 of the draft Convention in the context of the existing international human rights law discussed above. First, the wording appeared in somewhat different form from many of the other international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights, the International Convention for the Elimination of All Forms of Racial Discrimination and the Convention for the Elimination of Discrimination Against Women. At the same time, it was similar to others, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, due to its use of the word "distinction" rather than the term "discrimination."

At first glance, the word "distinction" appears broader

25. One of the potential difficulties with the creation of such a separate convention on the Right of the Child is that this might, by implication, result in the exclusion of children from the purview of the already existing human rights instruments, although this concern is to some extent addressed by the inclusion of article 41. See Schweitzer, *A Children's Rights Convention --- What Is The United Nations Accomplishing?* in *THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS --- THIRD SOKOL COLLOQUIUM* 115, 126-33 (R. Lillich ed. 1981). What is perhaps more likely is a "fragmentation" of children's rights resulting in a lack of clarity and confusion within States as to the extent of their obligations. In this context, as an aside, since many Articles contained in the draft Convention are restatements and expansions of preexisting rights under other instruments, it might be useful to consider explicitly including a provision acknowledging the rights of children to share in the protection of other human rights instruments or perhaps to include a statement to this effect in Article 41. By the use of similar wording to that of several existing international human rights instruments, the draft Convention adopts much of the law that has already developed in this area particularly with regard to the non-discrimination clause which has received so much attention in the context of other similar instruments.

in its potential application then the word "discrimination." While an anti-discrimination clause such as that contained in the February draft appeared laudable in the extent of its reach, a close examination raises the concern that the actual choice of wording in this clause might well make it unworkable. Most law, both domestic and international, exists by the very fact of creating some distinctions between groups of people or between situations or individuals. In some cases, distinctions are justifiable²⁶ and may even be deliberately made in order to ameliorate certain disadvantages. As written, it appeared that this earlier clause could be taken to prohibit all distinctions of any sort, whereas obviously the intention of this clause was to permit some "positive" distinctions while disallowing other "negative" ones.

This concern has been raised before and, indeed, some discussion of the difference in the meanings of these two terms was entered into during the process leading up to the adoption of the two International Covenants. As B.G. Ramcharan points out in his report of the events, some delegates preferred the word "discrimination" because they felt this word reflected the fact that some distinctions were justifiable and, in cases of affirmative action, even desirable. Other delegates were concerned that the utilization of the word "discrimination" might allow States to justify distinctions on the basis that groups were not "similarly situated" as there was no generally accepted definition of the word in the international sphere. They preferred the word "distinction" as it was used in many other texts and constitutions, such as the French Constitution. Each word was felt by one group of delegates to give a higher degree of protection. In the final version of the Covenants, however, it appears that both terms were used interchangeably even within different articles of the same Covenant, although in the clause closest to that of the draft

26. See SIEGHART, *supra* note 7, at 17-18; RAMCHARAN, *supra* note 14, at 258; A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE 108 (2d ed. 1977); CHARLES ALEXANDRE KISS, *Le Concept d'égalité: définition et expérience*, 27 LES CAHIERS DE DROIT 145, 149 (1986).

Convention, the ICCPR used the word "distinction," while the ICESCR used the word "discrimination."²⁷

The term "distinction" is not affirmatively defined in any of the Conventions, although some explanation is given as to what does not constitute a distinction. Only four of the Conventions actually define the term "discrimination."²⁸ Most authors agree, however, that both terms are to be interpreted to exclude arbitrary or unjust distinctions or discrimination.²⁹ Therefore, it is possible that the terms distinction and discrimination are truly interchangeable in the field of international human rights law.

However, it is arguable that there is a subtle difference between the definitions of the two words in international law.

27. See generally RAMCHARAN, *supra* note 14, at 258-61.

28. The ICERD, *supra* note 18, states in Article 1:

In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id. The CEDW, *supra* note 21, states in Article 1:

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.

Id. The Convention Concerning Discrimination in Respect of Employment, *supra* note 19, states at Article 1(a):

For the purpose of this Convention the term 'discrimination' includes (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

The Convention against Discrimination in Education, *supra* note 20, at 119:

For the purpose of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular

Id.

29. See BROWNLIE, *supra* note 14, at 579; RAMCHARAN, *supra* note 14, at 259-61; BAYEFSKY, *supra* note 14, at 119.

First, the two are not synonymous either within the confines of the English language generally or within some domestic human rights law. Second, although all of the international instruments referred to above maintain consistency by using "sans distinction aucune" in the French document for the English "without distinction of any kind" and "sans discrimination aucune" for "without discrimination of any kind," a dichotomy of usage has previously been examined in the context of the European Court of Human Rights. Specifically, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁰ uses the term "without discrimination" in English and "sans distinction aucune" in French. In interpreting this article, the European Court of Human Rights found that:

In spite of the very general wording of the French version ("sans distinction aucune"), Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized. This version must be read in the light of the more restrictive text of the English version ("without discrimination").³¹

The Court also found that certain legal distinctions were indeed the only means to correct factual inequalities. This decision would suggest that there may well be some difference in meaning between the two terms.

Thus, the concern expressed in connection with the choice of the word "distinction" in the Covenants, that it was the word chosen in many constitutions, including the French Constitution, may in reality be a much stronger argument in relation to a more historical definition of the word "distinction"

30. EUROPEAN COMMISSION OF HUMAN RIGHTS DOCUMENTS AND DECISIONS 1955-1957 14-15, 36 (Martinus Nijhoff, The Hague, 1959).

31. Case, Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (merits), 6 EUR. CT. H.R. (ser. A) (1968).

in both French and English. It is interesting to compare the nondiscrimination provision in the recent Canadian Constitution, which uses the word "discrimination" in both the English and French versions.³²

In this regard, it appears a positive change that the December, 1988 version of this Article no longer uses the term "distinction" but rather prohibits "discrimination" under both subsections.³³

III. AFFIRMATIVE ACTION

Although there remains a concern that the use of the word "discrimination" may allow States to justify distinctions on the basis that groups are not "similarly situated," this danger does not seem as real as the concern that the use of the term "distinction," without further definition, might have actually discouraged States from creating short-term distinctions in order to remedy historical disadvantage, such as by affirmative action. Several authors have previously examined what

32. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act of 1982, was enacted by Schedule B of the Canada Act 1982 (U.K.), 1982, ch.11, § 155. Section 15 of the Charter, the equality rights section, took effect three years later on April 17, 1985. CONSTITUTION ACT part I, § 15(1)(2). The three year delay was planned to allow provincial and federal governments to review legislation and make any necessary changes to bring statutory law into compliance with the equality rights section. Section 15 of the Charter of Rights and Freedoms reads:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The French version substitutes the words "without discrimination" for:

15(1) La loi ne fait acception de personne et s'applique egalement a tous, et tous ont droit a la meme protection et au meme benefice de la loi, independamment de toute discrimination, notamment des discriminations fondees sur

Id.

33. *Working Group Report, supra* note 1.

constitutes a differentiation under international law.³⁴ Most agree that a differentiation must have an objective and reasonable justification, and that the means chosen must be proportionate to the justification.

It is generally recognized that the principle of equality or non-discrimination does not require strict equality of treatment for all persons, because the concept of human rights recognizes that human beings, although belonging to a common heritage, are inherently unique. It is basic to the principle of equality that equal treatment of persons who are not similarly situated, and therefore not in equal circumstances, can often perpetuate inequality rather than creating equality.

In order to achieve true equality in fact, and to ensure that there is no abuse, people must be treated differently within certain limitations. A blanket prohibition of distinctions could well result in a situation where a State is not allowed to make distinctions between citizens and aliens, although all States do, and this is basic to the concept of statehood.

Many international human rights instruments containing a prohibition of discrimination or distinction also contain a clause specifically allowing positive measures to be taken in favor of disadvantaged groups or so-called affirmative action provisions. Many such clauses also list specific examples of distinctions which do not constitute discrimination for the purposes of the document.³⁵ These special measures, or affirmative action, must be undertaken only to correct the demonstrable effects of historical discrimination or inequality and must be: temporary; cease when specific, stated objectives are attained; and not in their effect maintain unequal or

34. See generally, BROWNLIE, *supra* note 14, at 379; BAYEFSKY, *supra* note 14 at 121-25.

35. See, e.g., ICERD, *supra* note 18, art. 1(4):

1(4). Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination

separate standards.³⁶ A clause of this type included in the draft Convention on the Rights of the Child would offer added flexibility to measures taken by States to effect the Convention and would assist in the achievement of the long-term goal of equal opportunity for the world's children.

IV. THE DISABLED CHILD

A further concern raised by draft Article 4 was the extent of the list of grounds. A comparison of the list of grounds under the other international human rights instruments showed that it was fairly complete. However, it was noticeable that the only ground which appeared to be missing from Article 4(1) was physical and mental disability. Although the list of grounds contained in the draft Article 4 was open-ended and remains unchanged in the new Article 2, the specific protection for disabled children was included in the draft Convention at Article 12, now Article 23. An inclusion here in the list of prohibited grounds of discrimination which would serve to strengthen the rights of disabled children. It is interesting to note that this ground has now been added to the new Article 2, while three other grounds, namely family status, cultural beliefs or practices and educational attainment, have been removed from the earlier draft Article.

Again, perhaps the reason that disability had not hitherto been included here stemmed from the use of the word "distinction" instead of "discrimination" in Article 4, as the prohibition of discrimination on this ground would be more reasonable for a state, in that it would be better able to understand and meet its obligations. A prohibition of distinction on this ground might well discourage a state from developing specialized programs to meet the needs of disabled children.

36. ICERD, *supra* note 18, arts. 1(4) and 2(2) and the CEDW, *supra* note 21, art. 4(1).

V. CHILDREN VS. FAMILIES

The first section of both versions of this draft Article extend protection to attributes concerning the child's parents and/or legal guardians. The second section adds the words "or other family members." The addition of this further extension to the first subsection would not create major additional burdens and might, by its consistency, avoid situations where another family member is temporarily in charge of the child and the child is subject to discrimination.

Under the second part of the old Article 4 and the new Article 2, there appears to be less extensive protection for the rights of children than for their rights concerning their relatives. While it is understandable to some extent that children cannot always be protected from punishment due to their own activities, and that adults will have more extensive rights with regard to the holding of opinions and so on, the draft Convention by its terms also does apply to children up until the age of 18. All children, and certainly a 17 or 18-year-old, should have the same protection from punishment and discrimination based on their own status, expressed opinions and beliefs as they do from that based on those of their relatives. Perhaps this clause should be divided into two parts for greater clarity.

VI. CONCLUSION

Several changes could be made to the new draft of Article 2 in order to clarify and strengthen its effectiveness.³⁷

37. Recommendations suggested for changes to the earlier draft Article 4 (as published in C. COHEN, *Independent Commentary: United Nations Convention on the Rights of the Child* in DEFENSE FOR CHILDREN INTERNATIONAL (C. Cohen ed. 1988)) were accommodated in part by the new version of the draft article. The earlier recommendations, for the sake of comparison, were as follows:

1. The States Parties to the present Convention shall respect and extend all the rights set forth in this Convention to each child in their territories without *discrimination* of any kind, irrespective of the child's or his parent's or legal guardian's *or other family member's* race, colour, sex,

The recommendations made above can be summarized in the following version:

1. States Parties shall respect and ensure the rights set forth in this Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's *or family member's* race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members *and on the basis of the status, expressed opinions, or beliefs of the child.*

3. *This article shall not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged groups, including those disadvantaged due to one of the grounds listed in subsection 1, provided that these special measures are temporary, cease when specific, stated objectives are attained and do not in their effect maintain*

language, religion, political or other opinion, national or social origin, family status, ethnic origin, cultural beliefs or practices, property, educational attainment, birth, *mental or physical disability*, or any other basis whatever.

2. States Parties to the present Convention shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the Child's parents, legal guardians, or other family members *and on the basis of the status, expressed opinions, or beliefs of the child.*

Id.

unequal or separate standards.

Achieving the ideal balance is not an easy task. As one author has noted: "[i]n formulating a children's convention, the United Nations' most difficult task will be determining how to provide children with both the care and protection required by childhood and the broadest range of freedom and rights compatible with the physical, intellectual and social conditions of childhood."³⁸ The task is much more difficult when the goal is to embody this blueprint for the future within one document intended to last for all time. The document's message must apply over the wide variety of cultural, political and social backgrounds and the vast changes and challenges that each child faces during the first 18 years of life.

38. SCHWEITZER, *supra* note 25, at 122.