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THE CONVENTION ON THE RIGHTS OF THE CHILD: A RE-ASSESSMENT OF THE FINAL TEXT

*Russel Lawrence Barsh**

On 8 March 1989, the United Nations Commission on Human Rights (Commission) adopted the final text of the Draft Convention on the Rights of the Child (CRC) and transmitted it, through the Economic and Social Council, to the General Assembly.¹ This concludes a decade of drafting by an open-ended working group of the Commission, dominated by Poland, the Nordic countries, and an "ad hoc" coalition of interested Non-Governmental Organizations (NGO's).

The text is noteworthy not only for its length, fifty-four Articles, but for the lack of satisfaction or enthusiasm with which it has thus far been greeted by most governments. When the Working Group met in February 1989 to adopt its final report to the Commission, most governments insisted on inserting clarifications of their views on the text of the Convention as adopted, resulting in an unprecedented 737 paragraph explanatory document which reveals, above all, an absence of general consensus.

In resolution 41/120 of December 8, 1986, the General Assembly proposed guidelines for the further elaboration of international human rights law.² New instruments should be consistent with existing ones, elaborating rights which are of a fundamental nature arising from human dignity, and, above

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1. *Convention on the Rights of the Child: Text of the Draft Convention as Adopted by the Working Group at Second Reading*, 45 U.N. ESCOR (54th-55th mtg.) at 6-7, 137, U.N. Doc. E/CN.4/1989/29 corr. 1 (1989) [hereinafter *Second Reading*].

2. G.A. Res. 41/120, 41 U.N. GAOR Supp. (No. 53) at 178, U.N. Doc. A/41/53 (1986).

all, they should be implementable.

This article reviews the final text of the CRC in the light of the comments made by governments of the Working Group and Commission on Human Rights, following the second reading of the draft Convention in December 1988. First, a consideration must be given to the overall aims and scope of the Convention. Then three areas of concern will be highlighted: universality, consistency with existing norms, and the practicability of implementation.

I. PRIORITIZATION OF THE CHILD

The most obvious aim of a Convention on children would be to give children a *priority* in the adoption of State measures, and allocation of State resources, especially for the realization of human rights in the field of economic and social rights. This issue was not raised in the Working Group until its first meeting in 1988, when the government of India successfully pressed for recognition of States' duty to ensure the "survival" of children.³ Other proposals, such as UNICEF's suggestion that the child's standard of living be ensured to "the maximum of [States'] available resources"⁴ and Senegal's to add a reference in Article 5 to "the protection necessary to the family" were rejected.⁵

The protections offered by the Convention as a whole are further weakened by the use of the "best interests" standard,⁶ and definition of the "child."⁷ After considerable debate, the Working Group's second reading of the text

3. See *Second Reading*, *supra* note 1, art 6.

4. *Report of the Working Group on the Question of a Convention on the Rights of the Child*, 45 U.N. ESCOR (Agenda Item 13) at 78, U.N. Doc. E/CN.4/1989/48 (1989) [hereinafter *Report*].

5. *Id.* at 137-38.

6. *Id.* at 22. See also *Adoption of a Convention on the Rights of the Child*, G.A. Res. --, 44 U.N. GAOR Supp. (No. --) art. 3, U.N. Doc. A/44/616 (1989) [hereinafter *Adoption of a Convention*].

7. *Report*, *supra* note 4, at 15. See also *Adoption of a Convention*, *supra* note 6, art. 1.

reconfirmed an earlier agreement to refer to the best interests of the child as "a primary consideration," rather than "the primary consideration" to be respected in State actions.⁸ Several States argued successfully that there may be "competing interests" at stake in the disposition of children, including those of "society at large."⁹ The second reading also reconfirmed an earlier decision to define the "child" as any person below the age of eighteen, "unless, under the law applicable to the child, majority is attained earlier."¹⁰ Naturally, this has the effect of permitting States to terminate the child's right to the Convention's protection at any age.

II. BEARERS OF RIGHTS AND DUTIES

The Convention describes not only the rights of children and the duties of States, but also the rights and duties of private persons in relation to the child. It is inconsistent, however, in identifying the bearers of these private rights and duties. Some Articles refer to "parents," others include "legal guardians," and still others the "family."¹¹ No logical pattern can be discerned for relating the scope of each specific duty to its nature. Indeed, there are some obvious logical inconsistencies.

For example, Article 5 recognizes the right of members of the "extended family or community" to provide the child with "appropriate direction and guidance"¹² while Article 14, dealing with the child's right to freedom of thought, conscience and religion, limits the scope of guidance to parents or legal

8. *Id.* at 22-23 (emphasis added). See also *Adoption of a Convention, supra* note 6, at 5, art. 3(1).

9. *Id.* at 22-23.

10. *Second Reading, supra* note 1, art. 1. The text remained unchanged through the submission of the CRC to the General Assembly. See *Adoption of a Convention, supra* note 6, art. 1.

11. See, e.g., *Second Reading, supra* note 1, arts. 2, 3(2), 5 and 7.

12. *Id.* art. 5.

guardians.¹³ Similarly, according to Article 27, "parents or others responsible for the child" are primarily accountable for the child's welfare,¹⁴ but a States' duty to provide assistance for the care of the child is limited to parents or legal guardians.¹⁵

Articles 7, 9 and 10 limit the child's right to be cared for, not separated from, maintain contacts with, and be reunified across State frontiers with his or her "parents."¹⁶ This is also inconsistent because the child who is a refugee or who is incarcerated has the right to be reunified with "other members of the family."¹⁷ "Relatives" may have a right to oppose an adoption under Article 21,¹⁸ but they have no right to oppose any *other* kind of separation of the child from its family.¹⁹ Taken together, these problematic Articles accord the child few rights in relation to grandparents, siblings, or any other family members.

At the second reading, there were only minor efforts to correct these problems. The U.S.S.R. unsuccessfully suggested widening the scope of Article 18 (responsibility for upbringing)

13. *Id.* art. 14.

14. *Id.* art. 27.

15. Except, curiously, in the case of the disabled child. *Second Reading, supra* note 1, art. 23. There are also apparently translation problems with the term "legal guardians" which has no exact equivalent in Venezuela, Colombia, Portugal, U.S.S.R., and China. *Id.* See *Report, supra* note 4, at 28.

16. *Id.* at 18, 32, and 37. See also *Second Reading, supra* note 1, arts. 7, 9, and 10.

17. *Report, supra* note 4, at 63. Article 22(2) states:

For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set for in the present Convention.

Second Reading, supra note 1, art. 22(2).

18. *Second Reading, supra* note 1, art. 21(a).

19. *Id.* See also *Report, supra* note 4, at 65-66.

to include "and others responsible for the child,"²⁰ and the Federal Republic of Germany felt it useful to change the phrase "close relatives" to "other members of the family" in Article 22.²¹ No other proposals for harmonization were considered. Who, then, will advocate for the child? Young children are unable to assert their own rights under the Convention and must rely on adults, whether kinsmen or, in the language of English law, some *prochain ami*. Since the CRC generally does not recognize legal standing except for "parents or legal guardians,"²² it has the practical effect of limiting the right to advocacy, which will hinder its implementation at the national as well as international levels.

III. UNIVERSALITY

The foregoing problems are symptomatic of a deeper, Eurocentric social orientation.²³ The CRC restricts the concept of the family to the European nuclear household, or, as one government contended, "the traditional triangular responsibility" for the child.²⁴ This weakens the rights of the child by weakening existing legal norms for the protection of families which form the principal learning and caring

20. *Report, supra* note 4, at 52.

21. *Id.* at 52, 64.

22. The term "parents" or "parents or legal guardians" appear in Articles 7, 9, 10, 14 and 18 of the Convention. Family members other than parents are mentioned in Articles 5, 22, 27, and 37.

23. See, e.g., R. Barsh, *The Draft Convention on the Rights of the Child: A Case of Eurocentricism in Standard-Setting*, NORDIC J. OF INT'L L. (1989); *Comparative Analysis of the Draft Convention*, U.N. Doc. E/CN.4/1989/NGO/21 (1989).

24. *Report, supra* note 4, at 31. Following the second reading, Article 5 stated: States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Second Reading, supra note 1, art. 5. This version remained unchanged through the submission of the CRC to the General Assembly. See *Adoption of a Convention, supra* note 6, art. 5.

environments for most children and, which are, in most parts of the world, "extended" rather than nuclear.

As Bangladesh observed in the Commission's debate on the final text, these were among the concerns which, until the second reading, presented serious difficulties for a large number of countries. These were countries mostly in the developing world whose socio-cultural realities and legal systems, particularly those relating to matters like inheritance, foster care, and adoption, were at odds with the proposed provisions of the draft Convention. As a result of vocal Senegalese and Venezuelan criticism at the 44th session of the Commission and 43rd session of the Assembly, the Working Group was advised, by General Assembly Resolution 43/112 of 8 December 1988, to: "[t]ak[e] due account of the cultural values and needs of developing countries in the second reading of the draft convention on the rights of the child in order to achieve the universal recognition of those rights in the future convention."²⁵ The Working Group responded chiefly by inserting in the preamble of the convention: "[t]aking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child."²⁶ In effect, the Working Group simply declared that it had adequately "taken account" of cultural differences. Nonetheless, Senegal argued in the Commission, this preambular reference must be given legal effect if developing countries are to take the CRC seriously. "This requirement must not be disregarded by any legal system, for it is the foundation of [the convention's] applicability; from it flows the receptivity of the addressees and rests the *source* of its legitimacy."²⁷

Moreover, cultural differences were acknowledged in some of the operative provisions of the Convention. Islamic

25. G.A. Res. 43/112, 43 U.N. GAOR Supp. (No. 49) at 188, U.N. Doc. A/43/49 (1988).

26. See *Second Reading*, *supra* note 1, preamble.

27. A verbatim transcript of the Commission debate on March 8, 1989 is available from Radda Barnen International, or see U.N. Doc. E/CN.4/1989/SR.54 at 5 (1989).

countries obtained explicit recognition of *shari'a*,²⁸ but broader cultural concerns were also addressed. Respect for the child's own culture, religion, and language is included among the aims of education listed in Article 29.²⁹ Indigenous Non-Governmental Organizations (NGOs) successfully proposed that the Convention's provisions for alternative care require respect for the child's right to grow up, wherever possible, in his or her own culture. Article 20(3), as adopted, provides: [w]hen considering [placements], due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background."³⁰

The government of Sri Lanka applauded this provision, believing it achieved the delicate balance between protection of the child, and not isolating a child from his ethnic, religious, cultural, and linguistic background. Portugal also stressed this provision.³¹

Although Article 30 of the CRC parallels Article 27 of the International Covenant on Civil and Political Rights³² (ICCPR), the new Convention lacks any provision for the promotion or development of a multicultural society. Indeed, the Working Group rejected proposals to secure the right of minority and indigenous children to be educated in their own languages. During the second reading, some delegations even

28. *Report, supra* note 4, at 18, 57. Specific reference to Islamic legal concepts of child-custody were also included in Article 20, but Islamic delegations were unsuccessful in eliminating a provision for automatic acquisition of nationality by birth from Article 2. *Id.*

29. *Id.* at 85. Article 29(1)(d) encourages educational institutions to promote "[f]riendship among all peoples, ethnic, national and religious groups and persons of indigenous origin." *Id.* See also *Second Reading, supra* note 1, art. 29 (1)(d). On the usual terminology, "persons of indigenous origin," a Canadian proposal aimed at avoiding the use of "peoples." *Id.* at 86.

30. *Id.* at 57. Article 20(3), as adopted after the second reading, provides that "[w]hen considering *solutions*, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." *Second Reading, supra* note 1, art. 20(3) (emphasis added). Canada and Brazil expressed the view that this should also clearly apply to Article 21 which addresses adoption. *Id.* at 61.

31. 45 U.N. ESCOR (54th mtg.) at 18, U.N. Doc. E/CN.4/SR.54 (1989).

32. 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 *Covenant*].

tried to have Article 30 deleted altogether.³³ On this point Yugoslavia, which has long chaired the Commission's working group on the rights of minorities, was particularly explicit in its "dissatisfaction." "My delegation regrets that we have all failed to establish in this important instrument *positive formulations* of the rights of the children of minorities to enjoy their culture, profess and practice their religion and to be educated in their own languages."³⁴

IV. CONSISTENCY WITH EXISTING LAW

At least sixteen of the CRC's thirty-nine substantive Articles parallel provisions of the ICCPR³⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁶ Some are quotations, while others are paraphrases. Do the differences reflect intelligible policy choices? It might be argued that some rights are not really applicable to children, or that special considerations might apply to their effective exercise by children. However, this does not seem to explain the deviation and omissions in the CRC.

For example, what rationale is there for omitting the phrase "this right shall be protected by law," from the right-to-life provision of the CRC which parallels Article 6 of the ICCPR, or omitting any reference to compensation for unlawful imprisonment in Article 37 of the CRC, which parallels Article 9 of the ICCPR? There appears at first to

33. *Report, supra*, note 4, at 87-88. A verbatim transcript of the Commission debate on March 8, 1989 is available from Radda Barnen International, or see U.N. Doc. E/CN.4/1989/SR.55 at 5 (1989).

34. *Id.* at 5.

35. See Covenant, *supra* note 31, at 52. Articles 2, 6, 7, 10, 13, 14, 15, 16, 30, 37, 40 of the CRC correspond to Articles 26, 6, 24, 12, 19, 18, 21-22, 17, 27, 6-7, 9, 10 and 14-15 of the ICCPR, respectively.

36. 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]. Articles 18, 24, 26, 27-28 of the CRC correspond with Articles 10, 12, 9, 11, 13 of the ICESCR, respectively.

be some logic behind omitting any reference in Article 15 of the CRC,³⁷ which deals with freedom of association, to the right to join trade unions. However, the CRC defines a child as anyone below the age of 18 years,³⁸ which clearly applies to millions of workers in all parts of the world. This may be another example of Eurocentrism, because youth employment is more routine (and necessary) in developing countries.

Numerous examples can be found. Under Article 13 of ICESCR, all education should be free.³⁹ Article 28 of the CRC limits free education to the primary and secondary levels.⁴⁰ Article 14 of the CRC,⁴¹ which parallels Article 18 of the ICCPR,⁴² omits the child's right to manifest his or her beliefs, or to *change* them.⁴³ The working group barely averted a proposal to restrict the child's freedom to acquire information from any source, on grounds of protecting the child's "spiritual and moral well-being."⁴⁴

37. *Report, supra* note 4, at 49.

38. *See Second Reading, supra* note 1, art. 1.

39. *See ICESCR, supra* note 35, at 51.

40. *Report, supra* note 4, at 79. Article 28(1)(a)(b) provides:

States Parties recognize the right of the child to education and, with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all; (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.

Second Reading, supra note 1, art. 28(1)(a)(b). Efforts to render the CRC consistent with the ICESCR on this point were resisted by the United States, United Kingdom, the Netherlands, Japan and Ireland. *Id.* at 82. Article 28 of the CRC also omits the ICESCR's provision for the right of parents to choose the child's school. *Id.* at 79.

41. *Id.* at 46.

42. *See Covenant, supra* note 31, at 55.

43. *Report, supra* note 4, at 46. Some countries "[c]ould not accept any provision giving the child a freedom to choose and change his or her religion or belief." *Id.* at 48. This problem was stressed in the Commission debate by Belgium, the Netherlands and Switzerland. U.N. Doc. E/CN.4/1989/SR.54 at 11 and U.N. Doc. E/CN.4/1989/SR.55 at 6, 9.

44. *Id.* at 45. The German Democratic Republic proposed the restriction and the representative of China declared her support for the amendment. *Id.*

The most serious paraphrase is in Article 18 of the CRC, which refers to "appropriate assistance" to families,⁴⁵ compared to the "widest possible protection and assistance" to which they are entitled by Article 10 of the ICESCR.⁴⁶ Moreover, Article 27 of the CRC⁴⁷ shifts the primary legal responsibility for providing an adequate standard of living for the child from the State, as it stands in Article 11 of ICESCR,⁴⁸ to the child's "parents or legal guardians."⁴⁹

It is true, of course, that the Convention contains a savings clause which defers to higher standards of protection. This being true, however, what was the point of including independent Articles on such matters as freedom of speech or the right to health in the draft Convention?⁵⁰ The argument often made at sessions of the Working Group was that not all States are parties to the two Covenants, and for those States the incorporation-by-reference and higher-standards clauses would have no effect, hence the need to smuggle the Covenants into the CRC.⁵¹ It would seem logical that States genuinely opposed to ratifying the Covenants would also refuse to ratify an instrument that contained essentially the same obligations, however, or was the idea to use children as a pretext for extending the Covenants to a larger number of States?

V. IMPLEMENTABILITY

45. *Id.* at 51.

46. *See* ICESCR, *supra* note 35, at 50.

47. *Report*, *supra* note 4, at 78.

48. *See* ICESCR, *supra* note 35, at 50.

49. *Report*, *supra* note 4, at 78. The United States delegation felt that this attempt "[t]o create responsibilities for private individuals was rather strange for an international covenant." *Id.* at 51.

50. In the course of the plenary debate in the Commission Senegal and Portugal, among others, stressed the importance of the saving clause. U.N. Doc. E/CN.4/1989/SR.54 at 5, 9.

51. The proposal simply to incorporate the entire ICCPR by reference was rejected by the Working Group, and the United States, among others, believed it was "[m]ore important for the Convention to enforce existing standards rather than to create new ones which would not be observed." *Report*, *supra* note 4, at 112, 136.

If the CRC is approved by the General Assembly and enters into force, it will establish the United Nations' seventh treaty body and periodic-reporting system in the field of human rights.⁵² It is disappointing that the CRC did not envisage any innovative implementation mechanisms. The chief role of the new committee would be the review of States' periodic reports, an approach which tends to be as ineffective as it is tedious and costly.⁵³ The Convention does not provide for individual communications. The committee may request approval from the General Assembly for studies to be conducted by the Secretary-General, but Secretariat studies as a rule are mere compilations of governments' replies to a *note verbale*, unlike the reports prepared by individually-appointed "special rapporteurs."

The role of NGOs is ambiguous, but crucial. Article 45 empowers the committee to invite "other competent bodies" to participate in its meetings, and this phrase was understood at the time it was adopted in 1987 to include appropriate NGOs.⁵⁴ The United States' proposal, on second reading, to include NGOs explicitly was rejected.⁵⁵ On the other hand Sweden, speaking on the adoption of the Convention in the Commission, referred to the future role of NGOs in the work of the committee. As master of its own procedure, the committee could conceivably include NGOs in any role it chooses. This ultimately depends on the willingness of State Parties to cooperate.

Even with effective monitoring of State compliance, the CRC will have little concrete effect on the lives of children

52. Existing bodies are the Human Rights Committee, Committee on the Elimination of Racial Discrimination (CERD), Committee on Economic, Social and Cultural Rights, Committee Against Torture, Committee on Apartheid, and Committee on the Elimination of Discrimination Against Women (CEDAW). A committee on migrant workers was established by the 44th session of the General Assembly.

53. R. Barsh, *Making the United Nations' Human Rights Machinery Cost-Effective*, 56 *NORDIC J. OF INTL L.* 183-97 (1987).

54. *Report, supra* note 4, at 125-27.

55. *Id.* at 126-27.

unless it can be used as a basis for mobilizing resources and programs, at the national as well as international levels. Unfortunately, the strongest statement in the Convention on the question of international aid is in the preamble. Senegal proposed the words: "[r]ecognizing the importance of international co-operation and assistance for the developing countries in order to improve the living conditions of children in those countries confronted with serious economic and social difficulties."⁵⁶ Western countries, in particular the United States, objected to this on the grounds that "while governments should co-operate with each other in this regard," the subject of international co-operation belonged in other fora.⁵⁷ A somewhat weaker version was eventually adopted which stated "[r]ecognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries."⁵⁸

However, there is little additional support for this in the Convention. According to Article 4, activities should be undertaken "where needed, within the framework of international co-operation,"⁵⁹ and Article 24 urges States to "promote and encourage" international co-operation in the field of child health.⁶⁰ The delegation of Brazil told the Commission:

[W]e would have preferred that the draft would have put a more precise accent on the indispensable concept of the progressive application of economic, social and cultural rights of children, taking into consideration the difficult conditions of developing countries. Furthermore, it is our view that this text should

56. *Id.* at 14.

57. *Id.*

58. *Id.* See also *Second Reading*, *supra* note 1, preambular para. 13.

59. See *Second Reading*, *supra* note 1, art. 4.

60. *Id.* art. 24.

have reinforced the vital role of international cooperation, in this field.⁶¹

The question of funding the new Committee will overshadow all other factors affecting its work. The Working Group was unable to choose between financing from the regular United Nations budget, the preference of most States, and the use of assessments against the States Parties to the CRC, which is chiefly demanded by the United States.⁶² The choice has now been left to the General Assembly.⁶³ The experience of existing supervisory bodies shows that State-Party financing is unstable and discourages ratifications by developing countries. Because of this, the Committee on the Elimination of Racial Discrimination (CERD), which is financed by State Parties, has had difficulty meeting for three years.

VI. RESERVATIONS AND CLARIFICATIONS

In view of the great diversity of national conditions and legal systems, human rights instruments must focus on ends rather than on means. They must state clear goals and leave the choice of the specific legislative and administrative machinery to individual States. Likewise, monitoring bodies should concentrate on the effect of national measures and not on the measures. Ensuring that children grow up, as far as possible, within their own families, is an example of a goal that can even be assessed statistically. Maximizing the survival of children is also important. To the extent that the CRC contains detailed procedural and administrative directions, it will pose difficulties for ratification by many States.

61. U.N. Doc. E/CN.4/1989/SR.54 at 6 (para. 19).

62. In the Commission's plenary debate on the CRC, Brazil, Portugal, Switzerland and Sweden all expressed strong preferences for financing under the regular budget.

63. The final text, adopted in November 1989, provides for financing of the Committee from the U.N. resources. *Report, supra* note 4, art. 41 (11).

Future difficulties with the convention can be predicted from the extent to which governments insisted on making reservations or clarifications in the reports of the Working Group, which constitute the travaux préparatoires. Explicit reservations were made with regard to the effect of Article 10 (family reunification) on immigration law,⁶⁴ the requirements of Article 21 with respect to adoption,⁶⁵ procedural safeguards for children accused of crimes (Articles 37 and 40),⁶⁶ the lack of explicit protection of children from medical experimentation (Article 24),⁶⁷ and provisions for the children of minorities.⁶⁸ Various clarifications were made for the record by at least fifteen governments, and by the chairman.⁶⁹ When the Commission reviewed and adopted the draft Convention,⁷⁰ the government of Japan made no fewer than twelve reservations during the course of the debate.⁷¹

Two points of non-consensus merit special attention: the status of unborn children, and the age at which children may serve in armed conflicts. Several governments insisted on the protection of children from conception, which would have the practical effect of forbidding or at least restricting abortion. When consensus seemed impossible, an unusual procedural compromise was struck. The phrase "protection

64. By the United Kingdom, Japan, New Zealand, Venezuela, and India. The Federal Republic of Germany reserved its position on this in the Commission debate. *Report, supra*, note 4, at 7, 8, 139-40.

65. Venezuela, Honduras, Brazil and Mexico objected to the reference to "improper financial gain" in inter-country adoptions, while Japan raised procedural questions. *Id.* at 59, 61 and 142.

66. Reservations were made by the United States, United Kingdom, Federal Republic of Germany, Japan, Netherlands and India. *Id.* at 101, 109, 136, 140-41.

67. Reservations were made by Venezuela, Norway, Philippines and the United States. *Id.* at 73 and 125.

68. Turkey and Venezuela made reservations. *Id.* at 54, 55, 142.

69. Sweden, Mexico, Portugal, Federal Republic of Germany, German Democratic Republic, India, Senegal, Italy, Finland, the Holy See, Venezuela, Canada, Brazil, Australia and Japan. *Id.* at 21, 27, 36, 37, 40, 44, 45, 48, 54, 61, 73, 88, 90, 108.

70. Commission Res. 1989/57, 45 U.N. ESCOR Supp. (No. 2) at 6-7, 138-38, U.N. Doc. E/1989/20, E/CN.4/1989/86 (1989).

71. *Report, supra* note 4, at 7, 61, 90, 108, 109, 140-41. It should be noted that the convention contains no non-reservation or non-derogation provisions.

before as well as after birth," was included in the preamble, as part of a direct quotation from the 1959 Declaration.⁷² The Working Group's final report warns, however, that this "[d]oes not intend to prejudice the interpretation of Article 1 [defining "child"] or any other provision of the Convention."⁷³ At the request of the United Kingdom, the Legal Advisor was asked whether this provision in the *travaux* was binding, and a rather ambiguous reply was tendered to the effect that the working group could use the *travaux* any way it pleased. That the matter is far from settled is demonstrated by the fact that the Federal Republic of Germany announced, in the Commission plenary two months later, that the preambular reference does affect article 1, and as such was "a great success" in protecting the unborn!⁷⁴

In the case of armed conflicts, the working group was very nearly unable to agree on any text at all.⁷⁵ After a flurry of proposals the chairman ruled that a text had been adopted, but Switzerland later argued that there had in fact been no consensus, complaining about the "speed and confusion which characterized the meeting."⁷⁶ At the Commission, Austria, Belgium, Italy, the Netherlands, Sweden (for the five Nordic countries), and Switzerland stated reservations on this provision.⁷⁷

VII. FATE OF THE CONVENTION

As the draft CRC neared completion, NGOs argued that any further political compromise and consensus was

72. *Declaration on the Rights of the Child*, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No.16) at 19, U.N. Doc. A/4354 (1959).

73. *Id.* at 11.

74. In the same plenary debate, moreover, China reserved its position on this point.

75. Report, *supra* note 4, at 112-15.

76. *Id.* at 116, 143.

77. *Id.* at 114. Although Western countries expressed outrage at this weakening of international humanitarian law, it was the Federal Republic of Germany which proposed that States need to cooperate with refugee agencies "only as they saw fit to do so." *Id.* at 65.

unnecessary, because governments would not risk the public embarrassment of refusing to ratify the CRC, regardless of whether they agreed with the text. This rationalization of pressing for premature adoption is self-defeating, however, because a government which ratifies for the sake of appearances is unlikely to make a serious effort at implementation. Premature completion means not only a poor text, but half-hearted ratifications.

Although the resolution transmitting the text to the Assembly attracted 36 co-sponsors and was quickly adopted without a vote, this scarcely indicated an end to controversy. When the draft went to the Commission, there was fear of permitting a plenary debate, lest the uneasy compromise fall apart. After several nonaligned delegations insisted, two meetings were set aside during the Commission's sixth and final week. The Austrian representative expressed the mixed feelings of most governments:

Austria's continuous participation in the Working Group has been guided by the principle of improving or at least preserving the standards already set by existing human rights instruments. We think that, on the whole, the Draft Convention satisfies these demands, although in certain instances a higher level of protection could have been obtained. However, after ten years of discussion and drafting, it is not premature to complete our work, especially since this year marks the 10th anniversary of the International Year of the Child. Still, my delegation had expected that there would be time, in this Commission, for a substantive discussion of a few selected issues on which no genuine consensus could be reached.⁷⁸

78. A transcript is available from Radda Barnen International, U.N. Doc. E/CN.4/1989/SR.55 at 7 (para. 34) (1989).

Similar emotions of exhaustion, disappointment or inevitability were voiced by others.⁷⁹ Sri Lanka warned against "opening up any issues of a contentious nature," while at the same time hinting that it was not yet convinced of "the extent to which we could give effect to these obligations."⁸⁰ Senegal, having led the nonaligned attack on the draft's ethnocentricity, agreed to support the final draft with reluctance: "In deciding to join in the "consensus" or general agreement, if the term "consensus" is too strong, this delegation had wished to demonstrate its pragmatism and realism, lest its demands "open Pandora's box;" for each society understands the welfare of children in accordance with its own realities."⁸¹

Some governments nevertheless maintained that no consensus had been achieved on Article 38, and for this reason the Netherlands was unable to co-sponsor the Commission resolution transmitting the draft CRC to the Assembly. At least two governments, Venezuela and Switzerland, hinted at intentions to reopen the convention at the Assembly. Others, such as Canada, ironically blamed the draft's shortcomings on the very cultural flexibility it lacks, indicating the extent to which Western countries still fail to accept the legitimacy of developing countries' concerns.⁸²

We must recognize and accept that we live in a
multicultural world, with many different

79. For example, France "had certainly hoped that the text would go further on certain points;" Switzerland feared that "[s]ome provisions of the draft, far from agreeing with the existing body of international law on the subject of human rights, weakened it;" and Belgium "[f]ound it necessary to say that this draft does not appear completely satisfactory, above all with respect to those provisions which, instead of complementing existing law, constitutes a retreat with regard to other binding international instruments."

80. A transcript is available from Radda Barnen International, U.N. Doc. E/CN.4/1989/SR.54 at 18 (para. 81)(1979).

81. Compare Venezuela: "As a result of the efforts made for reaching consensus, the draft convention contains some imperfections."

82. In fairness, this perception probably arose from the fact that the problems with Article 20 (armed conflict) were associated with certain Islamic countries. See generally *Report, supra* note 4, at 111-16.

philosophies and views of how the interests of the child can best be served. This diversity has led us to structure and devise a Convention that allows for flexibility and as such, offers us an international instrument upon which we can build. Those who would wish to restrict this flexibility should be aware that a Convention which offers little latitude to States on issues of vital national concern, will itself be ignored by the very States that we wish to become party to it.⁸³

As the Canadian delegation also observed, however, the convention will not be "cast in proverbial stone," but rather will be interpreted and applied by a committee which "has the potential to develop its own unique style and role." Similarly, Portugal did not foresee any "crystallization" of the convention, reasoning that:

a spirit of dialogue is, in our view, the key to the future of this Convention. It will make possible a *progressive evolution* of the well-being of children, not excluding new problems which are not obvious from the current situation.⁸⁴

Failure to follow this advice could contribute to discrediting the whole human-rights system. Establishing more bureaucracy in the form of another supervisory committee and reporting system, when the existing six committees are barely able to function effectively, is a temptation for those who would accuse the United Nations of merely elaborating paper

83. Senegal agreed that "[t]he aim of this convention on the rights of the child, as indeed is the case of all international standards, is to promote a general framework with a view to better *harmonizing our differences*." Radda Barnen International; E/CN.4/1989/SR.54, at 4. (emphasis added).

84. A transcript is available from Radda Barnen International; U.N. Doc. E/CN.4/1989/SR.55 at 9, 14 (1989).

castles.

VIII. CONCLUSION

The drafting of the CRC illustrates the dangers of reopening the historic compromises contained in existing instruments, such as the International Bill of Human Rights. It also shows clearly the extent to which cultural diversity is an unresolved challenge to the further elaboration of human-rights norms. Earlier instruments reflected an East-West compromise: in effect, the two Europes. The CRC for the first time triggered a substantial North-South debate. The Europeans successfully resisted most Southern concerns, yet blamed the South for watering-down existing norms. The product is unsatisfactory to North and South alike.

To a large extent, the NGOs have themselves to blame for the problems with the text, having insisted on completion by 1989. The "Target 1989" campaign was launched in 1987, giving the Working Group barely two years, for practical purposes, four weeks of meetings, to complete the first and second readings. The argument in favor of Target 1989 was to mobilize public attention and pressure around the 30th anniversary of the Declaration. The anniversary was seen as a one-time public-relations opportunity. It was far too soon, however, especially in view of the fact that few developing countries had yet been involved in the drafting process. The result was a rush to completion at the expense of clarity, consistency, and a great deal of substance.