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WHOSE RIGHT (AND WHOSE DUTY) IS IT? AN ANALYSIS OF THE SUBSTANCE AND IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

*Donna Gomien**

I. INTRODUCTION

Over the course of the last decade, the Working Group on the Question of a Convention on the Rights of the Child has worked diligently to draft such a Convention in the hope of its being opened for signature and ratification in 1989, an anniversary year for its most important predecessors.¹ In spite of these good faith efforts, at its first reading² the Convention still contained many serious flaws in the language, structure and substantive content. In an earlier version of this article,³ several suggestions for improvements in the Convention were proposed: the Working Group took cognizance of some of these at the second reading of the Convention.⁴ Nevertheless, the Convention still needs to see several improvements prior to its submission to the governing United Nations bodies.

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1. 65 years after the 1924 League of Nations Declaration of Geneva, see Protection of Children Report of the Fifth Committee to the Fifth Assembly: Geneva Declaration on the Protection of Children, League of Nations A.107.124 IV (Geneva, Sept. 24, 1924), setting forth five basic principles for child welfare and protection; 30 years after the 1959 United Nations 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); tenth anniversary of the International Year of the Child. G.A. Res. 31/169, 31 U.N. GAOR Supp. (No. 39) at 74, U.N. Doc. A/3139 (1976).

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

3. D. Gomien, *Whose Right (and Whose Duty) is it?*, in Independent Commentary: United Nations Convention on the Rights of the Child 10 (C. Cohen ed. 1988).

4. The second reading of the Convention occurred in November and December of 1988.

II. WHO HOLDS THE RIGHTS AND THE OBLIGATIONS UNDER THE DRAFT CONVENTION?

The Convention on the Rights of the Child will add a new dimension to international human rights law by including provisions both on civil and political and on economic, social and cultural rights. It is the first time that both types of rights have been embodied in a single international legal instrument although they often appear together in political instruments. In addition to integrating these two types of rights, the Convention adds other new -- and more problematic -- dimensions to international human rights law. It departs from the traditional forms of international human rights law in two important ways. First, it introduces the idea that, in some instances, private individuals may be held to have an affirmative duty to act. This is in sharp contrast to the Genocide⁵ and Torture Conventions⁶ under which individuals are merely required to refrain from acting. Second, it departs from the position that the States themselves are the parties bound to ensure that treaty provisions are upheld and that individual violators are held accountable for their actions. There is no lucid statement of analogous principles in the Draft Convention of the Rights of the Child.⁷

To compound the problems created by entrenching the duty of the individual to act affirmatively as well as to refrain from acting harmfully, the draft Convention suffers from vague substantive standards and norms. For example, it has done little to resolve one of the central dilemmas in the area of

5. Convention on the Prevention and Punishment of the Crime Of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278.

6. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N.GAOR Supp (No. 3) at 197, U.N. Doc. A/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified, 24 I.L.M. 535 (1985).

7. These themes are developed further in Gornien, *Duties of Private Parties under the Convention on the Rights of the Child: An Obstacle to Implementation?* (unpublished paper prepared for the international Congress on "Working for Children's Rights" held at Haikko, Finland (June 16 - 19, 1989), available from the author at the Norwegian Institute of Human Rights, St. Olavsgate 29, N - 0166 Oslo 1, Norway).

children's rights -- the fact that there are automatically three parties to most legal conflicts, the child, the adults responsible for the child, and the state. Nor does the draft Convention help to unravel the web of legal fictions woven by much domestic law about the presumed commonality of interests of parent and child and the principle of state non-interference in the family without good cause. For example, the Convention fails to recognize consistently that in different cultures, members of the extended family may often have rights and duties to children of the family. The Convention recognizes this reality in only two articles. Article 5 states:

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 local custom, legal guardians or other persons legally responsible for the child⁸

In addition, Article 27 uses the phrase, "parent(s) or others responsible for the child."⁹ However, Article 3(2) requires states parties to take into account the rights and duties only of "parents, legal guardians, or other individuals *legally* responsible for him or her"¹⁰ and Articles 14, 18, and 40 look only to parents or legal guardians.¹¹ In order to be consistent and culturally sensitive, the Convention should ensure that extended family relationships are respected throughout its substantive provisions.

8. *Adoption of A Convention on the Rights of the Child*, G.A. Res. --, -- U.N. GAOR --, U.N. Doc. A/44/616 at 5 (1989) [hereinafter *Adoption of A Convention*].

9. *Id.* art. 27.

10. *Id.* art. 3(2) (emphasis added).

11. *Id.* arts. 14, 18, 40.

III. WHAT IS THE SUBSTANCE OF THE RIGHTS AND OBLIGATIONS UNDER THE DRAFT CONVENTION?

The lack of clarity as to the holders of rights and duties under the draft Convention is compounded by the lack of clarity as to the nature of the rights and duties themselves. The structural aspect of the latter problem has two faces within the Convention. First, several of the substantive articles are either ambiguous or include a "laundry list" of rights under the aegis of a single article. Second, a few of the articles are inconsistent with one another. In addition to these structural difficulties, the draft Convention includes general statements of policy that properly belong in the preamble if anywhere. Finally, the draft Convention vests extremely broad discretion in the States when compared with the discretion afforded them under other human rights instruments. This discretion serves to weaken further the protections afforded by the Convention.

Article 1 and Article 38

In addition to the aforementioned State discretion problem, Article 1 directly conflicts with Article 38's blanket exception to the principle that 18 should normally be considered the age of majority.¹² Under Article 38, the State

12. Article 1, as submitted to the United Nations General Assembly in October 1989, states that "[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier." See *Adoption of A Convention*, *supra* note 8, art. 1. Under Article 38, fifteen year-olds may be recruited by the State:

2. States Parties shall take all reasonable measures to ensure that persons who have not attained age of 15 years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years, States Parties shall endeavour to give priority to those who are oldest.

Id. art. 38(2)(3).

is allowed to recruit 15-year-olds into the armed forces.¹³ Although this exception is consistent with the Geneva Conventions and Protocols, it is inconsistent with the many other provisions of the draft Convention relating to health, exploitation of child labour, peace, security, and the ideals of the United Nations Charter.¹⁴

Article 3

Article 3(1) introduces the nebulous standard, "best interests of the child" into the Convention.¹⁵ At the December 1988 meeting of the Working Group, the delegate from Venezuela correctly noted that because this standard is not defined anywhere in the Convention, it is open to arbitrary interpretations by whichever individual or body has power over a child.¹⁶ Other experts have pointed out the paternalistic tone of the "best interests" standard, suggesting that those Convention articles containing the phrase should add a counterpart phrase, "the rights of the child." Such a phrase would help to ensure objectivity and to keep the focus of the Convention on the child himself.¹⁷

Without belaboring the difficulties attached to the interpretation of the phrase "best interests of the child," Article 3(1) places this concept in an inferior position to that which it enjoys elsewhere in the Convention. It does so by allowing the public and private duty-holders to apply the standard as merely one of many factors to be taken into

13. *Id.*

14. *Id.* arts. 24, 32.

15. *Id.* art. 3.

16. *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 (1988).

17. See, e.g., P. Capriolo, J.P. Boulais & V. Dowie, *An Innovative Model for the Promotion and Defence of Children's Rights* (unpublished paper presented at the International Congress on "Working for Children's Rights," June 16-19, 1989 at Haikko, Finland, available from the author at the Norwegian Institute of Human Rights, St. Olavsgate 29, N - 0166 Oslo 1, Norway).

consideration by the state. Thus, the State, or perhaps the other duty-holders, e.g., private social welfare institutions, may override the best interest standard.

Article 4

Article 4 perpetuates one of the most common myths about the implementation of human rights -- that the realization of *all* economic, social and cultural rights requires the outlay of resources and, conversely, that the realization of civil and political rights does not.¹⁸ One need only consider the right to be free from State interference with the preservation of culture and the fundamental right to have the services of defense counsel in criminal trials to understand that this position is untenable.

Article 8(1)

Article 8(1) states that, "[s]tates Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations *as recognized*

18. Prior to the second reading of the Draft Convention, Article 4 (which previously was numbered Article 5), read,

[T]he States Parties to the present Convention shall undertake all appropriate administrative and legislative measures in accordance with their available resources, and, where needed within the framework of international co-operation, for the implementation of the rights recognized in this Convention"

Draft Convention on the Rights of the Child, 43 U.N. ESCOR (85th mtg.), U.N. Doc. E/1988/85 (1988).

The current Article 5, as adopted after the second reading, the United Nations Commission on Human Rights, the Economic and Social Council, and submitted to the United Nations General Assembly in October 1989 reads:

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

See, *Adoption of A Convention*, *supra* note 8, art. 4.

by law without unby lawful interference.¹⁹ The juxtaposition of the phrases, "as recognized by law without unlawful interference" renders this paragraph meaningless.

Article 9

Although Article 9 reflects the adversarial nature of most parent/State conflicts and attempts to establish appropriate protections in such a context, neither this Article nor any other Convention Article establishes similar protections in instances where a parent has voluntarily and temporarily placed a child in the care of the State.²⁰

Article 15 and Article 32

Under either Article 15 or Article 32, the Convention should guarantee to children the right to form and to join trade unions.²¹

19. See *Adoption of A Convention*, *supra* note 8, art. 8 (emphasis added).

20. *Id.* art. 9. Defective protections of parental rights in this context were at issue in several cases heard at the European Court of Human Rights in 1987. See, e.g., *W v. United Kingdom*, 4 Eur. Ct. H.R. 102, 150 (1986) (judgment of July 8, 1987).

21. The draft Convention, as submitted to the United Nations General Assembly, provides:

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 32

1. State Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of this article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

Article 18

Article 18 encourages the State to recognize the common responsibilities of both parents for the upbringing and development of the child.²² This provision appears to be an anti-discrimination formulation between two adults, but that seems to have no direct bearing on children's rights. Also, the declaration that "the best interests of the child will be their basic concern"²³ serves no purpose in this article. It reflects wishful thinking given the high level of parent-to-child abuse and neglect. And it defines a parental duty with a standard too vague to be a useful guideline for conduct. Furthermore, it is the State's province to determine the best interests of the child in most other contexts under the Convention.

Article 25

Article 25 States that

[S]tate Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection, or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.²⁴

(a) Provide for a minimum age or minimum ages for admissions to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment; and

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.

See Adoption of A Convention, supra note 8, arts. 15, 32.

22. *Id.* art. 18

23. *Id.* art. 18(1).

24. *Id.* art. 25 (emphasis added).

This article seems to imply that "place[ment] by the competent authorities"²⁵ is presumptively correct, and that a child's rights are adequately protected by the vague practice of "periodic review."²⁶ This is an extremely weak degree of protection in light of the fact that many parents have total civil control over the disposition of their children for the purposes cited in this article, such as "care, protection, or treatment of his or her physical or mental health"²⁷ For example, in Japan, parents may have their incorrigible adolescent children locked up for a variety of reasons. The Strasbourg organs have reviewed a case in which a divorced Danish mother had her adolescent son committed to a mental institution partly on the grounds that he preferred to live with his father.²⁸ It is crucial to the protection of children's rights that a minor be entitled to contest the initial legitimacy of his "placement" without the delays implicit in the term "periodic review." Article 25 is also flawed in that it provides no criteria pertaining to the length of time between the proposed "periodic" reviews, a matter of great importance particularly when young children are involved.²⁹ The principle of prompt review of administrative and judicial placement decisions is established in most domestic legal systems and in recent Strasbourg jurisprudence.³⁰

Article 33

Under Article 33, States Parties are to take appropriate measures to protect children from "[n]arcotic drugs and psychotropic substances as defined in the relevant international

25. *Id.*

26. *Id.*

27. *Id.*

28. *Nielsen case*, 7 Eur. Ct. H.R. 130 n.181 (1987) (judgment of November 28, 1988).

29. *Id.*

30. *See W v United Kingdom*, 4 Eur. Ct. H.R. 102 (1986). A provision on prompt review does appear in Article 37(2) on detention, although this Article implicitly covers only criminal matters. *See Adoption of A Convention, supra* note 8, art. 37(2)(4).

treaties and to prevent the illicit production and trafficking of such substances."³¹ However, the article neglects to mention alcohol, the drug most abused by children. Also, a child's use of narcotic and psychotropic substances properly belongs under Article 24 which addresses health concerns.³²

Article 34

Although this article focuses on such forms of sexual exploitation as prostitution and/or other commercial activities,³³ it neglects to mention child marriages, and indeed would seem to preserve them by using the qualifying term "unlawful" to describe the practices prohibited under the article.³⁴ This issue relates also to the Article 1 right of the State to enact statutes lowering the age of majority, as well as health and discrimination issues (in that many domestic legal systems allow girls to marry at a younger age than boys).

Article 37

This Article includes a list of rights that do not necessarily relate to one another and that serve to weaken one another in the context of the Article. For example, the prohibition against "torture or other cruel, inhuman or degrading forms of treatment or punishment"³⁵ is amongst the strongest in international human rights law. It is a non-derogable right and applies in both the civil and criminal contexts. Thus, it is a *much* broader protection than is implied by this Article, which places it within the purview of the nature and scope of criminal sentencing policies.³⁶

31. *Id.* art. 33.

32. This protocol was opened for ratification in November 1988 and requires eleven ratifications for its entry into force.

33. This would include "pornographic performances and materials." *Id.* art. 34(c).

34. *Id.* art. 34.

35. *Id.* art. 37(1).

36. *Id.* art. 37.

In a similar vein, deprivation of liberty can occur in either the civil or criminal context, a point which might be more clear if the rights set forth in Article 37(2) through (4) were listed in a separate article and if "arrest, detention or imprisonment"³⁷ were not considered as counterparts.

Finally, the phrase "exceptional circumstances" in paragraph 3³⁸ seems to allow the State excessive latitude to restrict the exercise of very important rights. It is difficult to envision circumstances so exceptional that an imprisoned child should lose his *right* to maintain contact with his family.

IV. HOW IS THE CONVENTION TO BE IMPLEMENTED?

During the drafting of the Convention on the Rights of the Child, the Convention's authors, the NGO community, and interested individuals placed a strong emphasis on ensuring that the protections afforded by the Convention would be at least as effective as those afforded by other international instruments that may apply to children. However, the proposed means of implementation of the Convention may not meet that laudable goal.

A. *State Reporting Mechanisms*

As in the majority of human rights instruments, the Convention on the Rights of the Child depends almost exclusively on the regular submission of State Reports for monitoring its implementation. But this reporting mechanism needs to see major improvements, particularly as the Convention itself is unclear about its expectations and its characterization of some of the substantive rights to be protected. This vagueness, coupled with the fact that private individuals may be held to be legally liable for the implementation of some of the rights at issue, make it of

37. *Id.* art. 37(2).

38. *Id.* art. 37(3).

fundamental importance to include input from these private parties in any reporting that occurs. As a supplement to Article 44(6)'s requirement that States Parties make their reports available to the public,³⁹ the Convention should include a provision requiring States Parties to solicit and to take into consideration the views of the public *prior to* submitting their reports in the first place. Article 45(b) should include a clause entitling both States Parties and those directly affected by the Convention, to submit "a request, or indicate a need, for technical advice or assistance."⁴⁰ Article 45(d) should provide a mechanism for affected individuals, and not just States Parties, to comment on Committee suggestions and general recommendations.⁴¹ In short, the reporting system under the Convention should be inclusive rather than exclusive: the States are binding their citizens and the citizens should have a voice.

39. Article 44(6) provides that "[S]tates Parties shall make their reports widely available to the public in their own countries." *Id.* art. 44(6).

40. Article 45(b), as submitted to the United Nations General Assembly, states:

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

Id. art. 45(b).

41. Article 45(d), as submitted to the United Nations General Assembly, provides:

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of this Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

Id. art. 45(d).

B. Complaint Mechanisms

When considering effective means of implementing the Convention on the Rights of the Child, it is important to remember that it covers a broad spectrum of human rights - civil, political, economic, social and cultural. Although the majority of other international human rights instruments establish state reporting mechanisms for monitoring effectiveness, those instruments addressing civil and political rights often provide for complaint mechanisms. In such instruments, States may make complaints against other States, and in some instances individuals may even make complaints against the State. Why then should children be afforded a lower level of protection in the Convention than in these other instruments? There is certainly no guarantee that every State that ratifies the Convention on the Rights of the Child will already be a party to every other international human rights instrument. The Convention itself should therefore guarantee that every child receive an equivalent level of protection as is provided in the other instruments. This pattern has been followed in the recent Protocol to the American Convention on Human Rights, which specifies that individuals may claim violations of their rights to education (Article 13) and to form and join trade unions (Article 8(1)).⁴² Thus, there is precedent for the Convention on the Rights of the Child to follow in providing for complaint mechanisms with respect to certain specified articles.

C. Ombudsman Mechanisms

In addition to improving individuals' access to the reporting system and to introducing rights of individual petition where appropriate, the Convention on the Rights of the Child should also require States Parties to institute an

42. This Protocol was opened for ratification in November 1988 and requires eleven ratifications for its entry into force.

ombudsman or similar service. The rights set forth in the Convention are often complex and vague. It is also frequently unclear who holds a given right under the Convention -- parent, child, (or, as discussed above, the State) -- or whose claim or which right takes priority when a conflict arises. On the other hand, despite these difficulties, there is no doubt that States electing to ratify the Convention will do so in good faith and with every intention of ensuring that their youngest citizens have the opportunity to lead healthy and fulfilling lives. An ombudsman would be a very effective instrument towards such an end, as the ombudsman's goal is to use informal but effective means to resolve problems and conflicts. As an independent expert and trained negotiator, the ombudsman is the powerless lay person's protector. Who needs such a person more than children and what better way to fulfill that need than to require States' Parties to create such an institution?

D. The Rights Of The Child

One final point about implementation: the Convention should emphasize at every possible point that its purpose is to guarantee the rights of the *child*. This principle must apply whether it is the State or the private individual whose mandate it is to fulfill a given right. It follows that every article of the Convention that addresses implementation, whether through State Reports, technical advice and assistance, or other means, should include a provision to ensure that the voice of the child is heard. Indeed, Article 12 of the Convention sets forth this very principle.

V. CONCLUSION

By integrating the two major strains of human rights in a single international legal instrument, the Convention on the Rights of the Child represents a major departure from earlier human rights law and practice. At the same time, the

Convention suffers from the lack of a clear conceptual framework both as to the nature and scope of its rights and duties and as to the identity of the parties bound to implement them or entitled to invoke them. These failures act in conjunction to create a rather weak but salvageable legal instrument. The best solution for the Convention's problems would be to divorce the issues of its drafting and submission to the relevant United Nations bodies from any "anniversary" deadlines, and instead spend an extra period of time improving the quality of the instrument itself. Given that this proposal will be unpopular in many powerful circles, however, the next best solution at this late date would be to improve the protections afforded by the Convention by strengthening its implementation provisions. Because the Convention on the Rights of the Child places duties on private individuals as well as States, it follows that the Convention *must* afford those individuals a voice in the implementation of the rights it contains and, ideally, a remedy against a State's arbitrary policy decisions or other actions. Should this be done, it will be the first time in international human rights law that individuals will be directly empowered to participate in processes that heretofore have been largely reserved to the States as the only players in the international arena. The Convention thus has the potential to contribute to the progressive development of human rights law even if it leaves the substantive standards themselves less than perfect.