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QUESTION OF A CONVENTION ON THE RIGHTS OF THE CHILD

Written statement submitted by the Four Directions Council, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV)

[3 February 1986]

We have the honour to submit the attached study for distribution to the Commission at its second session as a written NGO statement under agenda item 13, "Question of a convention on the rights of the child".

At its 1986 meeting, the pre-sessional Working Group on the Rights of the Child completed virtually all of its work on the substantive articles of the draft convention, and it plans to take up the question of implementation, and conduct a second reading, at its 1987 meeting. We have undertaken a thorough review of the substantive articles, with a view to facilitating the second reading and harmonizing the final draft of the convention with existing instruments. In our view it will be more useful to issue this study as an NGO document of the present Commission session, than as a document of the 1987 Working Group meeting, to give Governments ample time to consider whether they will wish to propose specific amendments.

ANALYTICAL SUMMARY OF THE DRAFT CONVENTION ON THE RIGHTS OF THE CHILD: ARTICLES ADOPTED BY THE WORKING GROUP BY ITS 1986 SESSION

1. The text of the draft convention on the rights of the child has developed by amendments and substitutions to the 1979 Polish draft, and the addition of a number of entirely new provisions proposed by various Governments and non-governmental organizations. Growing, as it were, by accretion, the text as it now stands contains a number of redundancies and inconsistencies which merit attention at the second reading. There also remain a number of gaps. A summary analysis of the current text highlights the substantive work still to be done.

2. General provisions. State parties are to afford each child "such protection and care as is necessary for his well-being" (art. 3, para. 3) and to take "all appropriate ... measures to protect the child from all forms of physical and mental injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse" (art.8 bis, para.1). This includes provision of "appropriate assistance to parents [for] ... child-rearing" (art. 8, para. 2) and "effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child" (art. 8 bis, para. 2). All State, private, and parental actions are to be guided by the "best interests of the child" (arts. 3, para. 1 and 8, para. 1), which is to be a "primary" but not exclusive consideration (art. 3, para. 1).

3. Existing universal instruments (art. 10, para. 1) of the International Covenant on Economic Social and Cultural Rights and art. 23 of the International Covenant on Civil and Political Rights refer to the protection and assistance of families, rather than children, and require "the widest possible protection and assistance" (ICESCR art. 10, para. 1) rather than "effective procedures for the establishment" of programmes. The 1959 Declaration of the Rights of the Child refers to the child's best interests as "the paramount" rather than "a primary" consideration (Principle 2). Thus the draft convention shifts attention from strengthening families to protecting children, at the same time somewhat inconsistently admitting the legitimacy of considerations other than the child's best interests.

4. Legal identity. States parties recognize the child's right to a name and nationality from birth (art. 2), and to preserve and if necessary re-establish his name, nationality, and family relationships as defined by national law (art. 9 bis). These provisions restate existing law (ICCPR art. 24), adding only States' obligation to assist in re-establishing the child's identity when it has been lost "illegally" (art. 9 bis, para. 2).

5. Legal equality. The rights conferred by the draft convention are to be enjoyed by all children (persons under 18 years - art. 1) without regard to "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" (art. 4, para. 1). This parallels existing instrument (ICESCR art. 2, para. 2, ICCPR art. 2, para. 1), adding ethnicity and culture to the list of prohibited distinctions. The catch-all, "or any other basis whatever" is inconsistent with the rest of the draft, which recognizes the special needs, for some purposes, of disabled, minority, indigenous, and refugee children.

6. Non-stigmatization. The draft convention protects children from being stigmatized on the basis of illegitimacy (art. 2 bis) or the family's "status, activities, expressed opinions, or beliefs" (art. 4, para. 2). The first flows from article 25, paragraph 2, of the Universal Declaration of Human Rights. The second is a novel and important principle.

7. Freedom of conscience. The only political right made specially applicable to children by the draft convention is "freedom of thought, conscience and religion," including the right to "have or to adopt a religion or whatsoever belief of his choice," albeit subject to the right of parents "to provide direction to the Child" in a manner consistent with his evolving capacities and to ensure the religious and moral education of the child in conformity with the convictions of their choice" (art. 7 bis). Associated with this is the child's right of "access to information ... from a diversity of national and international sources" with "particular regard to the

linguistic needs of the child who belongs to a minority group or an indigenous population," under guidelines controlling "material potentially injurious to his well-being" (art. 9).

8. Draft article 7 bis restates existing law (ICCPR Art. 18, which applies to "everyone"), differing only in the addition of the parents' right "to provide direction" to their "liberty" (ICCPR art. 18, para. 4) to "ensure the religious and moral education of their children". However, draft article 9 goes well beyond the existing right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers" (ICCPR art. 19) to require State encouragement and support of mass media programmes beneficial to children.

9. Self-determination. The draft convention ensures the child's right "to express his opinion freely in all matters, the wishes of the child being given due weight in accordance with his age and maturity" (art. 7), or to be heard and considered if the child is mature enough to be "capable of forming his own views" (art. 3, para. 2). These two formulations of the same right are not entirely consistent, since one contemplates giving greater weight to the wishes of older children, and the other giving weight only to the wishes of older children. The progressive formulation is probably more in keeping with respect for the child's individuality. In addition to restating existing law (ICCPR art. 19, para. 1) with regard to freedom of expression, these draft provisions clarify the child's evolving legal identity, distinct from his parents, which is necessary as long as the Convention refers to the rights of parents as well as the rights of children.

10. Integrity of families. State parties "recognize that the child should enjoy parental care" (art. 6, para. 1) and that parents "have the primary responsibility for the upbringing and development of the child" (art. 8, para. 1) including, in particular, their right to ensure the child's "religious and moral education" (art. 7 bis, para. 4). The parental rights of men and women are "common and similar" in these respects (art. 8, para. 1). States are obliged to "render appropriate assistance to parents" (art. 8, para. 2), including appropriate measures "to make child care available to working parents (art. 8, para. 3), and protective measures must take "into account the rights and duties" of the child's parents (art. 3, para. 3). No involuntary separation of the child from his parents should be permitted except in the child's best interests, as determined by competent State authorities (art. 6, para. 2).

11. Under existing instruments the family is recognized as "the natural and fundamental group unit of society," and as such it is "entitled to protection by society and the State (ICCPR art. 23, para. 1) as well as "the widest possible protection and assistance" (ICESCR art. 10, para. 1). Families are protected from "arbitrary or unlawful interference" (ICCPR art. 17), requiring a legitimate basis, fairly determined, for any separation of the child from either parent, both parents enjoying "the same rights and responsibilities" under the Convention on the Elimination of All Forms of Discrimination against Women (art. 16 (d)). According to the 1959 Declaration of the Rights of the Child, a child "shall, wherever possible, grow up in the care and under the responsibility of his parents" and, during his "tender years," shall not be separated from his mother "save in exceptional circumstances" (Principle 6).

12. To summarize, the draft convention applies a qualitatively different standard to the continuity of the family unit ("best interests of the child" instead of "wherever possible" and "exceptional circumstances"), suggesting a

new balance of interests favouring State intervention. Similarly, the draft convention reduces States' obligations to strengthen families, from "widest possible assistance" to "appropriate assistance". This suggests a basic shift in philosophy, from the view that strengthening families is in the child's best interests, towards the view that families are often the problem. The draft convention also reneges on the previously-established equality of men and women as parents. Both conflicts with existing law will make it difficult for State parties to the International Covenants on Human Rights and the Convention on the Elimination of All Forms of Discrimination against Women to ratify and implement this new instrument. Although allowance is made for the continued effect of higher standards previously established by multilateral instruments (art. 21), which standards are "more conducive to the realization of the rights of the child" in a matter such as the equality of parental rights or the importance of family relationships?

13. Substitute care. Children separated from their families for any reason are entitled to "special protection and assistance" (art. 10, para. 1), including the provision of alternative family care, such as foster care or adoption, and institutional care (art. 10, para. 2). Adoption of such children is to be facilitated "where appropriate," subject to "appropriate measures" to regulate intercountry adoptions (art. 11, para. 2) and "to combat the illicit transfer and non-return of children abroad" (art. 6 ter, para. 1). In any case, children are entitled to maintain direct contact with both parents "save in exceptional circumstances" (art. 6, para. 3), even if they reside in different States (art. 6 bis, para. 2). States must "ensure competent supervision of ... institutions ... responsible for the care of children" (art. 3, para. 4) and establish standards for their operation (art. 8, para. 4). Children "placed by the competent authorities" in public or private care are entitled, with their parents, to "periodic review of the treatment" (art. 12 ter).

14. There is some confusion here, as elsewhere throughout the draft Convention, between the rights of children separated temporarily from their parents by social welfare authorities, children separated permanently by legal termination of parental rights or adoption, and children wrongfully separated from their families, for example, by the wrongful detention of a parent, or in the course of an armed conflict. Provisions for maintaining contact should indicate the circumstances to which they apply. In addition it bears mention that the Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees relating to Adoption (1965) (art. 6) limits adoptions to circumstances where it can be shown to be in the child's best interests, while the draft convention on the rights of the child encourages adoption wherever it is "appropriate."

15. Penal law. Juvenile offenders are to be treated in a manner "which takes into account their age and the desirability of promoting their rehabilitation" (art. 19, para. 1 - see ICCPR art. 14, para. 4), with "the essential aim" of State intervention being "their reformation and social rehabilitation," including opportunities for training and non-institutionalized care (art. 19, para. 3 - see ICCPR art. 10, para. 3 and Rule 26, para. 1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ["Beijing Rules"]). Accused juveniles are to be separated from adults (art. 19, para. 4 - see ICCPR art. 10, para. 2) and enjoy familiar procedural rights such as the presumption of innocence, right to legal counsel, speedy and impartial trial, and right to appeal (art. 19, para. 2). In addition they are entitled to freedom from torture or other cruel, inhuman or degrading treatment, and from capital punishment (see ICCPR art. 6, para. 5) or life imprisonment without possibility of parole.

They are also entitled to maintain contact with their families (art. 19, para. 4, - see Rule 26, para. 5, of the Beijing Rules). The restriction on life imprisonment is a significant departure from instruments in force.

16. Adequate health and welfare. The draft convention obliged States to "strive to ensure" the right of every child to "the highest attainable standard of health" regardless of his or her ability to pay, in particular taking "appropriate measures" to strengthen primary maternal and child care, preventive health care education, and information regarding infant nutrition (art. 12 bis). States are also to take "appropriate measures" to protect children from the "illegal use of narcotic and psychotropic substances" (art. 18 bis), "necessary measures" to extend to all children the benefits of social security (art. 13), as well as appropriate measures to assure every child "a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (art. 14, para. 1). These provisions largely restate existing law (ICESCR arts. 9, 11 and 12) and the Declaration of the Rights of the Child (Principle 4), adding a number of more specific aims for child health, but at the same time leaving somewhat greater flexibility for progressive implementation. The problem of progressive implementation affects the entire draft convention, and is dealt with in greater detail in paragraph 19 of this analysis.

17. Access to education. States parties are obliged to make primary education "free and compulsory as early as possible," and to take "appropriate measures" to make secondary and higher education equally accessible regardless of the child's ability to pay (art. 15), without restricting the establishment of private schools meeting minimum State standards (art. 16, para. 2). Education is to include "the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance and friendship among all peoples, ethnic and religious groups," including "respect for all human rights and fundamental freedoms" as well as "respect for the natural environment" (art. 16, para. 1). Associated with these rights is the child's right to have "appropriate [to his age] and equal opportunities for cultural, artistic, recreational and leisure activity" (art. 17). These provisions largely restate existing law (ICESCR arts. 13, 14 and 15, para. 1) and the Declaration of the Rights of the Child (Principles 7 and 10), once again leaving somewhat greater flexibility for progressive implementation.

18. Labour standards. States parties are to "take measures" to protect children 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," including regulation of minimum ages of employment and the hours and conditions of employment (art. 18). Children under the age of 15 years may not be recruited into States' armed forces, and no child may take "a direct part" in combat (art. 20, para. 2). These provisions restate the Declaration of the Rights of the Child (Principles 8 and 9) and with regard to minimum ages of employment must be interpreted in the light of relevant Conventions of the International Labour Organisation. The principal departure is in establishing a universal minimum age for military service.

19. Progressive implementation. As observed earlier, the draft convention gives States considerable room for progressive implementation. All its obligations are subject to States' "available resources" (art. 5), and it makes specific reference to progressive achievement of educational rights (art. 15, para. 1) and, taking "particular account ... of the needs of developing countries," health (art. 12 bis, para. 3). Social security is to be

provided "in a manner appropriate to national conditions ... taking into account the national resources available" (art. 13, paras. 1 and 2), and States are to raise living standards "in accordance with national conditions and within their means" (art. 14, para. 3). By comparison, existing instruments require immediate respect for civil and political rights (ICCPR art. 2, para. 1) and steps, "to the maximum of [the State's] available resources," for the achievement of economic and social rights (ICESCR art. 2, para. 1). Hence the draft convention, far from giving priority to the improvement of children's rights and conditions, fails even to give children the priority they already enjoy under existing instruments. This could discourage universal acceptance.

20. Children with special needs. The draft convention refers to the special needs of three classes of children. Following Principle 5 of the Declaration of the Rights of the Child, it requires additional measures, "subject to available resources," for the care of mentally and physically disabled children (art. 12), and encourages the mass media, to have particular regard to "the linguistic needs of the child who belongs to a minority group or an indigenous population" (art. 9 (c)). In so far as the draft convention nowhere affirms the rights of minority or indigenous children to the use of their own languages or the enjoyment of their own cultures, it falls short of existing law (ICCPR art. 27, ILO Convention No. 107 arts. 23 and 26). The draft convention also fails to address the special problems of children of migrant workers.

21. Children as refugees. States parties are to ensure respect for international humanitarian law applicable to the protection of children in armed conflict (art. 20), and to take "appropriate measures" to protect refugee children, including affording them the same rights as other children separated from their parents (art. 11 bis). Children separated from their families as a result of State action have the right to information regarding their parents' whereabouts (art. 6, para. 4), and applications to enter or leave a country for the purposes of family reunification are to be "dealt with ... in a positive, humane and expeditious manner" (art. 6, para. 2 bis). These provisions generally restate or incorporate the Protocols Additional to the Geneva Conventions of 12 August 1949 and the Convention relating to the Status of Refugees, with the exception of giving refugee children separated from their parents the same protection and assistance as the children of nationals. This is an important and progressive departure.

22. Recommendations. The draft convention should be amended on its second reading to provide, above all, (i) adequate recognition of the role of assistance to families in the protection of children; (ii) adequate protection of children's opportunity to learn and enjoy the cultures of their parents and communities; and (iii) top priority for the progressive achievement of children's social and economic rights above other uses of national resources. The following amendments would suffice:

To the end of article 6, paragraph 2 add the words: "Efforts to assist and strengthen the family unit should wherever possible precede any decision to separate the child from his parents". This will harmonize the draft convention with ICESCR article 10, paragraph 1 and ICCPR article 23.

To article 7 bis, add the word "culture" after the word "religion" wherever it appears, to harmonize the draft convention with ICCPR article 27.

To article 10 add a new paragraph 3 as follows: "Preference shall be given to placement in an otherwise suitable family of the same culture as the child's parents." This standard is particularly appropriate in the light of article II (e) of the Convention on the Prevention and Punishment of the Crime of Genocide, which prohibits the systematic removal of children of a particular national, racial or ethnic group.

To the end of paragraph 1 (a) of article 15, add the words: "and available wherever possible in the language of the child's parents as well as the official language or languages of the State." At least in the case of indigenous children, this would be a restatement of existing law (ILO Convention No. 107, arts. 23 and 26).

Delete references to available resources or means in articles 12, paragraph 2, 13, paragraph 2 and 14, paragraph 3, and amend article 5 to read: "The States parties to the present Convention shall take steps, to the maximum extent of available resources and, where needed, within the framework of international co-operation, for the full realization of the rights recognized in article 12 to 15 of this Convention, and ensure respect for all of the other rights recognized in this Convention."