

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To the President from John Podesta and Todd Stern re: UN Convention on the Rights of the Child (2 pages)	12/06/1994	P1/b(1)
002. memo	To the President from Anthony Lake and Patrick Griffin re: the UN Convention on the Rights of the Child (4 pages)	12/05/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20027

FOLDER TITLE:

Children's Rights [2]

2013-0534-S

ry1656

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

**U.S. RATIFICATION OF
U.N. CONVENTION ON THE RIGHTS OF THE CHILD:
SUMMARY OF ISSUES PRESENTED**

SUMMARY OF CONCLUSIONS

All agencies support ratification of the U.N. Convention on the Rights of the Child, if feasible. In view of the results of the inter-agency analysis of potential issues and problems presented by the Convention, the question whether and on what basis ratification could be feasible requires further consideration.

For the most part, the Convention is consistent with state and federal law and policy in the United States. A relatively large number of reservations and understandings are nonetheless required, given the broad scope and vague terms of the Convention. Of particular concern in this respect are certain essential reservations on juvenile justice which are highly controversial and would be viewed as invalid by some, likely including the oversight Committee which is established by the Convention.

In addition, three issues are presented which cannot entirely be resolved through reservations or understandings. The first concerns the general character of this Convention. This Convention does not simply establish a fixed set of standards which must be met, but rather establishes in addition a number of general principles and goals which are to be progressively achieved. Thus, it must be recognized that the obligations undertaken by joining this Convention will grow over time and that adherence represents a commitment to making adequate and continuing progress in more and better services and treatment for children.

Second, a policy decision is required whether to take the position that the U.S. is or is not in compliance with certain requirements at the present time. Given the terms of the obligations (certain rights are to be realized to "the maximum extent of available resources"), this is in part a policy judgment rather than a strict legal determination. As discussed below, in certain areas a strong argument can be made that the U.S. is not in compliance and that additional programs or resources are required. It is possible, nonetheless, to maintain the legal position that the resources currently devoted to these areas represent the "maximum available" and thus that the U.S. is in compliance.

In connection with the question of compliance, it should be noted that the Committee is very likely to recommend or insist that the U.S. take more or different steps to implement the Convention in various respects, based on its view of what is desirable or required. The Committee's views are not, however, legally authoritative or binding. Similarly, there will likely be public

criticism, e.g. by NGOs, that the U.S. is in violation of the Convention in various respects. With the proviso that the Convention is not self-executing, however, along with a reservation to the compulsory dispute resolution provisions involving the ICJ, any such debate or dispute would also not lead to a legally binding conclusion.

It is also necessary to decide what position to take on current or future lack of compliance by states. That is, it will be necessary to have a position on what types of federal action will be taken, if necessary, to ensure compliance in areas now primarily under state jurisdiction. As discussed below and in the accompanying analysis, it can be argued that state action is in certain respects insufficient even at the present time. While state policy is generally consistent with the goals and policy of the Convention, there are minor deviations and state practice may often fall short of its policy for resource and other reasons. While there is some limited federal oversight and control -- primarily consisting of such constitutional standards as exist and the requirements of federal programs and funding -- it does not extend to all of the subjects and requirements addressed by the Convention.

If the U.S. ratifies this Convention it will be necessary to designate a lead agency to be concerned with ongoing issues of implementation and compliance, including the preparation of the Reports on implementation which the Convention requires be submitted to the Committee every five years. While a number of agencies have an important role to play in this respect, based on its past experience with the Covenant on Civil and Political Rights the Department of State believes that the lead agency for the Convention on Rights of the Child should be one with expertise and responsibilities which are relevant to the treatment of children, namely, Health and Human Services.

It should also be noted that ratification would entail the need for Health and Human Services and other relevant agencies to devote greater attention and effort to ensuring compliance with federal standards.

Additional Commitments

The Convention mandates programs, services or benefits in virtually every area. In general, such economic, social and cultural rights are subject to the general proviso that States should seek to implement them "to the maximum extent of their available resources." This is not a particularly clear or precise requirement, but it does constitute an obligation. The extent of U.S. compliance and ability to comply will be debated and assessed, particularly in view of the relative level of economic resources and development of the United States. The requirements in these areas are thus something more than mere "goals."

As a relatively affluent and developed country, the U.S. will be expected to achieve a relatively high level of implementation.

In general, the U.S. has many state and federal programs, benefits and services which promote the welfare of children. In some respects, however, there is universal criticism of U.S. performance and the U.S. would clearly be vulnerable to charges that it is failing to implement the Convention. The principal of these are described below. To the extent that initiatives to address these problems are not already underway, further consideration should be given to whether additional action is required in these areas.

Adequate Standard of Living. The United States is one of the richest countries in the world by any standard, yet has one of the highest percentages of children living in poverty of developed countries. Data from the Center for the Study of Social Policy, for example, indicate that in 1989 some 20% of children in the United States lived in poverty. This figure rises to 44% for African-American children and 39% for Hispanic children. Domestic programs are not even designed to eliminate this. States first determine what the standard of need is to live in each state. States are then free to set levels of benefits provided in relation to that standard. At present, benefit levels are below the needs standards and below the poverty level in all states (even adding food stamps, except in a couple of states). (HHS - clarify previous if necessary.) Thanks to food stamps, which is an entitlement program, the U.S. does have a guaranteed minimum standard for food for children. The same cannot be said of housing and other needs.

Health Care, Especially Infant Mortality. Given the relatively high infant mortality rates in the U.S., and the considerable differentials according to race/minority status, the U.S. is particularly vulnerable to an argument that U.S. compliance with this article is inadequate and discriminatory. More generally, while Medicaid exists for the very poorest children, the children of poor working parents are often not covered by any health insurance or health program. This latter problem may greatly improve as a result of the current health care initiative. Infant mortality, however, results from a more complex set of factors and may not be greatly changed.

Standards for Child Care and Treatment Institutions and Services. The Convention requires that parties "ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities" governing such matters as safety and staffing. This is an area largely governed by state law at present. In some states, there are no standards at all in important areas such as institutional care (residential treatment centers, juvenile justice facilities, etc.) Some states also do not have standards for day care provided by religious institutions or by families. Even where standards exist, they are often too low or inadequately enforced. Despite federalism concerns, remedial federal action in this area is possible, e.g., states could be

required to adopt program standards as a condition for federal funding in other areas. While it is possible that a state could "opt out" of federal funding, as a practical matter this is not foreseeable in connection with the most basic programs, provided that the conditions imposed on such funding are not unreasonable.

A particular issue with respect to state-level institutions is presented by "voluntary" mental health commitments of children by parents and others. Governing state standards may require only the presence of mental illness or mental retardation, without consideration of whether institutionalization is an appropriate or useful response, and the interest of the child, therefore, may not be considered even implicitly. The number of mental illness institutionalizations have dramatically increased in recent years and public attention has recently been drawn to the problems in this area. Parental commitments could be handled by a broad understanding or reservation on parental rights, but further study is required to determine to what extent problems may occur with non-parental commitments as well.

Overburdening of State Services for Care and Protection of Children. Many services already exist, primarily at the state level, to provide the many kinds of care, protection and support called for by the Convention. In general, however, state services for protecting abused, neglected, abandoned and institutionalized children are widely perceived as overburdened, understaffed, and consequently often inadequate. Such services are generally not fully monitored at the federal level and, as discussed above, may also not be effectively monitored at the state level.

Open-Ended and Additional Future Commitments

Whatever the state of current compliance, joining the Convention will entail an obligation and pressure to take additional steps in the future. This is due in part the requirement for progressive realization of economic, social and cultural rights and in part due to the role of the oversight Committee under the Convention. The Committee views its role broadly and, based on its approach thus far, it will press states to take measures representing the broadest possible interpretation of, and even going beyond, Convention requirements. The following recent statement of Committee views is indicative:

The Government must take all necessary steps, in all areas, to ensure the respect and actual implementation of the provisions contained in national legislation relating to the rights of the child. Furthermore, the Committee recommends that the State party take necessary steps to fully harmonize federal and state legislation with the provisions of the Convention. . . . Relevant mechanisms should also be set up . . . to monitor the implementation of the Convention at the federal, State and local levels. . . . (Report on the Fifth Session, CRC/C/24, para. 40.)

The attached analysis, of necessity, takes a relatively narrow and literal reading of the Convention requirements. No country would be in compliance with all of its provisions on a broad view. The Committee, however, regards the Convention as calling upon States to pursue the "best interests" of the child generally in all matters, and may make its own judgment of what the child's best interests are. It has called upon States to take a number of measures which arguably go beyond strict Convention requirements, including joining major international human rights instruments and other conventions, training child care and law enforcement personnel in the principles, norms and rights contained in the Convention, seeing that the principles and provisions of the Convention are widely known to children and reordering budgetary priorities.

The other side of this coin, of course, is that it is not necessary to be fully in compliance in order to ratify this Convention, provided that there is a bona fide commitment to continuing to pursue compliance in the future. Criticism by the Committee and others can be deflected by pointing to progress over time.

Reservations and Understandings

In General. As indicated in the attachment, a number of reservations may be required to address areas in which Convention requirements may conflict with or exceed the provisions of U.S. law. The scope of the latter category depends in part on how broadly one reads the Convention requirements, which are in general very broadly and vaguely worded. With further study it might be possible to conclude that the intended reach of the Convention is not so broad and thus to address certain concerns with understandings rather than reservations.

Juvenile Justice. One critical area in which Convention requirements clearly are in direct conflict with U.S. law, however, is juvenile justice. In this area a number of reservations are necessary to cover the treatment of juveniles who are tried as adults or in the military system. In such cases, the death penalty or life imprisonment without parole may be imposed, the sentence does not take into account the best interests of the child, incarceration is not limited to "the shortest appropriate period of time," and juveniles will generally not be segregated from adults -- all in contravention of clear Convention requirements.

Death Penalty. For similar reasons, reservations concerning the death penalty and segregation of juveniles were also submitted in joining the International Convention on Civil and Political Rights. A number of countries (e.g., list) and others have objected that the reservation to the death penalty is impermissible as inconsistent with the object and purpose of the treaty. These objections will take on additional force in the context of this Convention, as the treatment of juveniles is central to the object of the Convention as a whole.

We believe that these objections to the death penalty reservations are unsound as a matter of law. In the negotiation of the relevant provision of the Rights of the Child Convention, moreover, the negotiating record clearly establishes that U.S. delegate allowed adoption of this provision only on the clear and general understanding that the U.S. would reserve to it and that such a reservation was permissible. Nonetheless, such a reservation will be highly controversial and will be challenged. Given the general trend of opinion in several quarters, however, it is quite likely that the oversight Committee under the Convention will condemn the U.S. for these reservations. The Committee's views are not legally binding. The remote possibility exists, however, that the question will be decided authoritatively, e.g., by an advisory opinion of the ICJ, and the reservation held invalid, leaving the U.S. with the question of whether to withdraw from the Convention.

U.N. CONVENTION ON THE RIGHTS OF THE CHILD

Tentative List of

Reservations and Understandings

Required

and of Areas in Which Insufficient Compliance May be an Issue

A. Reservations Which May Be Required

1. Generally: A general understanding or reservation should be submitted that this Convention was not intended to affect the general rights of States to establish and regulate their respective immigration laws in accordance with their international obligations. (The question is raised in particular in relation to Articles 2, 3, 9, and 10.

2. Article 2 (prohibition of discrimination of any kind) and Article 26 (social security): A reservation may be required regarding discrimination on the grounds of legitimacy of birth, i.e., against children born out of wedlock.

3. Article 2: A reservation or understanding should be submitted which clarifies that non-immigrant and illegal alien children are not necessarily entitled to certain of the rights specified in the Convention.

4. Article 3 (best interests of child a consideration in all actions concerning children) and Article 9 (separation of child from parents against their will only in child's best interests): These articles are vague and possibly overbroad. The best interests of a child may not be considered at all in actions based on parental consent or request, in delinquency and involuntary mental health proceedings where the child is a danger to others, in deportation and other immigration law matters (covered below), and in the administration of laws of general application. If Article 9 is interpreted as applying to any situation in which a child is separated from its parents, similar problems are presented.

5. Article 3: Further research is required to determine whether "voluntary" mental health commitments pose a particular problem for which a separate reservation is required.

6. Article 3: Not all institutions, services and facilities necessarily conform to standards established by competent authorities; standards may not exist, may be too low, or may not be enforced. (To some extent, this may be addressed by a reservation in lieu of additional action.)

7. Article 17 (access to media and information): This Article could be read as requiring greater government control over media than is compatible with U.S. law and practice. A reservation or understanding should be considered.

8. Article 25 (review of placement of child for treatment): The scope of the requirement that there be a periodic review of placements is a concern. There is non-compliance to the extent that it applies to juvenile delinquency placements, foster care placements, and "voluntary" mental health commitments by parents. A reservation or understanding may be required.

9. Article 28 (education): Paragraph 2 may be interpreted as barring corporal punishment, which is still permissible in the U.S. (This should be covered by the "cruel and unusual punishment" reservation addressed in connection with Article 37.)

10. Article 29 (requirements regarding the aims of education): Although no specific problems were identified, the need for a reservation should be considered further, as there is no assurance that school curricula meet any particular requirements and this is a major area of federalism concern.

11. Article 32 (protections regarding work and employment): The FLSA has some minimum age exemptions, e.g. actors and performers, newspapers, workers on family farms. Although most of these can be covered by an understanding, a limited reservation might be required.

12. Article 37 (juvenile justice): The prohibition on imposition of death penalty or life imprisonment without parole conflicts both with state practice when children are tried as adults and also with practice under the UCMJ for 17 year olds who voluntarily enlist. A reservation on this point is required but will be highly controversial internationally and is likely to be challenged.

13. Article 37: The requirement for segregation of juveniles presents a similar problem.

14. Article 37: The requirement that imprisonment be "as a last resort for the shortest appropriate period of time" presents a similar problem.

15. Article 37: The meaning and scope of prohibition on "cruel, inhuman or degrading treatment or punishment" must be narrowed to conform to U.S. constitutional limitations.

B. Understandings Which May be Required

1. Article 1: An understanding should be submitted that the Convention will apply to children as of birth rather than conception. (An exception must be made for pre-natal care, however, or else this would be a reservation rather than an understanding.)

2. Article 2 (prohibition on discrimination of any kind): An understanding should be submitted narrowing the potential reading of the scope of the prohibition against discrimination of "any kind."

3. Article 4 (implementation of the Convention): It should be made clear that the Convention is not self-executing. (This would be a declaration.)

4. Article 5 (parental role and rights): An understanding emphasizing that the Convention generally does not interfere with or govern parental rights and responsibilities may be desirable. (This must be tailored to recognize that certain restrictions, e.g., on child abuse, do apply to parents.)

5. Article 5: Further consideration should be given to whether it is desirable to define who are "parents" and "families" for purposes of the Convention.

6. Article 7 (right to nationality, name, and parents): The Convention could arguably be interpreted as requiring that adoptees have a right to know their biological parents, which is not currently the case under the law of most states.

7. Article 9 (role of other interested parties in separation of child from parents): It may be desirable have an understanding that this Article is not intended to apply in the international context.

8. Article 9: Further consideration should be given to whether it would be desirable to define who are "interested parties" who can participate in separation proceedings.

9. Article 12 (right of child to be heard in proceedings affecting the child): Although as a general rule an opportunity to be heard is provided at least for a child who asks to express an opinion in matters affecting the child, the extent and means by which a child's views are represented in such proceedings is a complex and variable subject and law and practice are arguably not fully in compliance. Further study is required; this would probably be an understanding rather than a reservation.

10. Article 14 (freedom of thought, conscience and religion): Parental rights are arguably an issue here. Further consideration should be given to whether an understanding is required or whether a general understanding on parental rights coupled with a clear statement in the analysis is sufficient.

11. Article 19 (protection of child from parental and other abuse): Children are not protected against "negligent treatment" by their parents, as distinct from "neglect." This would probably be an understanding rather than a reservation.

12. Article 22 (refugee children): The question of the rights of children as distinct from parents can be problematic in this area. Further thought should be given to whether an understanding is required.

13. Article 24 (health care): This is another area in which there is a possible need for understanding regarding children's rights (to treatment) as distinct from parental decisions.

14. Article 40 (juvenile justice): There could be argument whether U.S. law conforms to the requirement for a minimum age below which children are presumed not to have the capacity to violate the criminal law. The possible need for an understanding on this point should be further considered.

C. Questions of Compliance

The following Articles have been noted as raising a question of compliance in view of either the state of enforcement of existing laws and policy or an arguably insufficient quantity or quality of resources or programs. This includes, as indicated, certain criticisms voiced in the ABA and CDF analyses.

1. Article 2 (discrimination): CDF cites continuing racial, ethnic and sex discrimination, particularly in housing and education, as a problem. The ABA cites de facto discrimination against poor children in many areas such as economic rights and education.

2. Article 3 (child welfare services generally): In general, state services for protecting abused, neglected, abandoned and institutionalized children are widely perceived as leaving much to be desired.

3. Article 6 (survival): High infant mortality rates, and minority differentials, pose a problem here.

4. Article 18 (child welfare services to support parental care): There is an arguable need for more programs and services. HHS notes that U.S. practice may fall quite short of providing a sufficient number of the institutions, facilities and services necessary for the proper care of all children. The ABA says that more federal spending is necessary in this area.

5. Article 19 (abuse and neglect): There is a possible need for greater federal monitoring of state compliance to ensure that protective measures against abuse and neglect are effective; additional programs or resources could also be required. The ABA says U.S. falls far short of effective measures owing to overwhelming caseloads and insufficient resources. CDF agrees that the child welfare system is overburdened, as well as the juvenile and family court system.

6. Article 20 (services for parentless children): The CDF cites the same problems in relation to protecting children without a family.

7. Article 21 (adoption): The ABA cites the same problem of overburdening, as does the CDF.

8. Article 23 (disabled): Arguably more could be done here as well, although this is an area in which the United States compares well internationally.

9. Article 24 (health care): This is a major area of concern. Both CDF and ABA strongly criticize performance as well.

10. Article 27 (standard of living): This is another major area of concern. Both CDF and ABA strongly criticize performance as well.

11. Article 28 (education): Arguably more should be done in the area of vocational education.

12. Article 32 (child labor): CDF and ABA criticize inadequate enforcement or effectiveness of child labor laws.

13. Article 33 (drug abuse): CDF calls for more aggressive action to deal with drugs.

14. Article 34 (sexual exploitation): CDF calls for more aggressive action to deal with this problem as well.

15. Article 39 (rehabilitative care): ABA says the U.S. is not taking appropriate measures to reintegrate children who have been abused or neglected.

16. Article 40 (juvenile justice): CDF criticizes the supply of alternative programs to detention and also states that the assistance of counsel is an illusion for many juvenile offenders.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To the President from John Podesta and Todd Stern re: UN Convention on the Rights of the Child (2 pages)	12/06/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20027

FOLDER TITLE:

Children's Rights [2]

2013-0534-S
ry1656

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE
WASHINGTON

DECEMBER 6, 1994

94 DEC 6 P1:36

MEMORANDUM FOR JOHN PODESTA
STAFF SECRETARY

FROM ABNER J. MIKVA 
COUNSEL TO THE PRESIDENT

SUBJECT Rights of the Child Convention

You sought my views on whether the President should sign the Rights of the Child Convention.

The memo to the President properly identifies the legal issues presented by the Convention, the primary one being federalism concerns. I agree with the memo and inter-agency legal review that none of the legal issues present insurmountable obstacles to U.S. ratification, subject to appropriate reservations.

As the memo to the President indicates, there is likely to be an organized effort to portray the Convention as anti-family-- e.g. by claiming that the Convention gives children the right to sue their parents. Objectively, these are false arguments. However, to blunt the political charge, I suggest that if the President decides to sign, the major supportive non-governmental organizations (child advocacy and religious groups) be prompted to lead an effort prior to the signing event to put the Convention in the proper light. We might also want to have some of the Republican supporters of the Convention present at the signing. We should also make clear at the signing that when submitted to the Senate, we will propose an appropriate federalism clause to the Convention.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. memo	To the President from Anthony Lake and Patrick Griffin re: the UN Convention on the Rights of the Child (4 pages)	12/05/1994	P1/b(1)

COLLECTION:

Clinton Presidential Records
First Lady's Office
Melanne Verveer
OA/Box Number: 20027

FOLDER TITLE:

Children's Rights [2]

2013-0534-S
ry1656

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

SUMMARY OF MAJOR PROVISIONS

- o Prohibition against any kind of discrimination against children.
- o Right to freedom of expression, freedom of thought and access to information.
- o Requirement that best interests of the child be a primary consideration in all actions concerning the child.
- o Child's right to survival and development, adequate health care, education, freedom from hunger and a minimum standard of living.
- o Prohibition against the imposition of the death penalty or life imprisonment without parole for juveniles.
- o Requirement that incarcerated juveniles be segregated from adults.
- o Child's right to be heard in proceedings affecting him or her.
- o Requirement that States protect children from negligent treatment by parents.

LIST OF MAJOR SUPPORTING ORGANIZATIONS

- o Children's Defense Fund
- o UNICEF
- o Christian Children's Fund
- o American Federation of Teachers
- o CARE
- o B'nai B'rith International
- o Save the Children
- o International Catholic Child Bureau
- o National Education Association
- o American Public Health Association
- o Church World Service
- o American Nurses Association
- o Evangelical Lutheran Church in America
- o American Academy of Child and Adolescent Psychiatry
- o Child Health Foundation
- o Child Welfare League of America
- o The Children's Health Fund

LIST OF MAJOR PROPOSED RESERVATIONS, DECLARATIONS AND
UNDERSTANDINGS

- o Federalism reservation or understanding explaining that the federal government would promote implementation of the Convention requirements by the States, consistent with the federal system.
- o Non self-executing declaration to ensure that the Convention not serve as a basis for litigation in domestic courts.
- o Reservation or understanding to make clear that the Convention does not impose particular educational curricula.
- o Understanding emphasizing that the Convention generally does not interfere with or govern parental rights and responsibilities.
- o A reservation with regards to the prohibition against the imposition of the death penalty or life imprisonment without parole for juveniles.
- o Understanding or reservation stating that the Convention does not affect the general rights of parties to establish and regulate their respective immigration laws, consistent with international obligations.



8537
United States Department of State

Washington, D.C. 20520 9423822

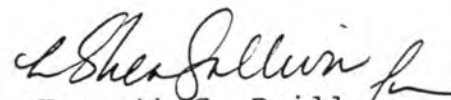
October 19, 1994

LIMITED OFFICIAL USE
DECL:OADR

MEMORANDUM FOR ANTHONY LAKE
THE WHITE HOUSE

SUBJECT: U.N. Convention on the Rights of the Child

Attached is the final inter-agency analysis and recommendations regarding signature of the U.N. Convention on the Rights of the Child. As you may recall, our prior analysis of the issues presented by possible U.S. ratification of the U.N. Convention on the Rights of the Child stopped short of a final recommendation regarding signature because further policy guidance on certain issues was required. That guidance has now been provided by Domestic Policy Council and National Security Council staff. Accordingly, we submit the attached final analysis and recommendations for your consideration.


Kenneth C. Brill
Executive Secretary

Attachments:

TAB A - Final Analysis
TAB B - Summary and Issues Presented

LIMITED OFFICIAL USE

The U.N. Convention on the Rights of the Child Summary of Issues

This memorandum summarizes the issues identified with respect to the United Nations Convention on the Rights of the Child in the course of the study directed by the Department of State pursuant to the tasking by the NSC staff. (Also included are the conclusions and views of two major NGO studies, that of views of the Children's Defense Fund (CDF) and the American Bar Association Working Group on the United Nations Convention on the Rights of the Child (ABA).)

Federalism

The Department of the Interior (DOI) recommends that the federalism understanding be modified to expressly cover tribal governments.

The Department of Labor (DOL) recommends its own versions of federalism "reservation" in which the federal government will only "promote" implementation by the states."

The Department of Education (DOE) recommends clarification (tantamount to a reservation) that appropriate federal measures to ensure fulfillment of the Convention "do not include direct federal enforcement of Article 28 and 29 through actions directed against states." The Department of Education also questions what the responsibility of states would be and how this would be enforced.

The Departments of Agriculture (DOA) and Health and Human Services (HHS) support the need for an understanding on federalism.

The Department of Justice (DOJ) advises that federalism is a substantial issue on which a clear position is needed as well as an understanding.

The Department of State agrees that the Administration must articulate a clear position on what the federal government will do if it appears that the law or practice in a certain state is not in compliance. This is a very likely contingency given the extent to which Convention obligations concern subjects within the jurisdiction of states. A reservation such as is proposed by DOL would be too broad to be acceptable internationally.

Article 1 -- Definition of the "Child"

Potential Significant Problems/Issues:

1. The Convention does not define whether a child's rights begin at conception or after birth. (Understanding required.)

Comments/Notes:

1. DOS: An understanding is called for with respect to when the Convention begins to apply. This not only relates to abortion but possibly other issues such as wrongful death actions. A number of other countries have submitted such understandings or declarations.

If ratification is pursued, the treaty analysis should note that the Convention does not affect or apply to situations in which the age of majority may be above 18 (e.g., drinking.)

NGO Studies/Views:

1. ABA: Recommends that the United States include a declaration defining when childhood begins that says: "The United States declares that this Convention imposes no legal obligations on the United States regarding the voluntary interruption of pregnancy and that this Convention cannot be interpreted as affecting law in the United States relating to such interruptions. For purposes of Article 1, the United States declares that the age of majority is reached at age 18."

Article 2 -- Non-discrimination

Potential Significant Problems/Issues:

1. In some respects there may still be discrimination on the grounds of legitimacy of birth, i.e., against children born out of wedlock. (Reservation or understanding may be required.)

2. The scope of the prohibition against discrimination of "any kind" may be interpreted too broadly. (Understanding may be required.)

3. In particular, a reservation or understanding should be submitted which clarifies that non-immigrant and illegal alien children are not necessarily entitled to certain of the rights specified in the Convention.

Comments/Notes:

1. DOS:

a. DHHS waivers permitting states under AFDC to carry out punitive actions against parents for having a second child out-of-wedlock could be construed as discriminating against a child because of the status and activities of the parent. In some states, the punitive action takes the form of not permitting the second child to be on the family AFDC budget. Other questions of discrimination could arise under this Article, e.g., with respect to deportation, poverty, and language.

b. The prohibition on discrimination, nonetheless, should not be understood as an absolute ban on differential treatment. In a statement delivered at the time of the adoption of the Report on the Convention, Belgium declared its view that Article 2 only "rule[s] out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies." This is consistent with interpretations developed in the context of other human rights treaties.

c. While the United States has relatively extensive legal protections against discrimination, we are still vulnerable to charges that considerable discrimination persists in practice.

2. DOI: raises the question whether Indian preference provisions for employment and training could pose problems. (DOS comment: this type of "discrimination" should be viewed as permissible -- see., e.g., Articles 1(4) and 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination.)

3. DOJ: The description of obligations as extending to each child "within the jurisdiction" of a State could be read as mandating that all persons within the territorial jurisdiction of the U.S. are equal beneficiaries. An understanding is needed clarifying the differential status of non-immigrant or illegal alien children. (DOS Note: Some could view this as requiring a reservation.)

NGO Studies/Views:

1. CDF: Although the Supreme Court has struck down most forms of discrimination against children born out-of-wedlock, only a couple of states have eliminated this distinction from their laws. Generally, the United States has a panoply of laws forbidding discrimination, but private compliance and government enforcement are often spotty. On education in particular, although the United States has made considerable progress toward greater educational opportunity for all children, racial and ethnic discrimination remains the largest barrier to meeting the Convention standards. The CDF cites three principal indicators that explain the inequality of the

education that minority children receive -- segregation, tracking, and resources. CDF further notes that, while Title IX of the 1972 Education Amendments prohibits gender discrimination in educational institutions that receive federal funding, in reality, the CDF says opportunity is not equally distributed between the sexes. They cite as examples the recent American Association of University study on "How Schools Shortchange Girls;" differences in science education, vocational education and sports; and the high dropout rate because of teen age pregnancy.

2. ABA: Since the Convention forbids discrimination only in regard to the rights it protects and not all discrimination generally, the remaining differences between the treatment of legitimate and illegitimate children will likely be unaffected. Does the Convention's bar against discrimination against children on the basis of their parents' views preclude deporting a child based on parents' misrepresentations when obtaining entry to the country? The ABA believes that the Convention would serve to clarify United States law on the question of whether a child of parents who are being deported has a right to remain here when the grounds of deportation do not relate personally to him or her. The ABA also points to de facto discrimination against poor children in many areas like economic rights and education.

Article 3 -- Best Interests of the Child

Potential Significant Problems/Issues:

1. The requirement that best interests be a primary consideration in "all actions concerning children" could be interpreted very broadly. The best interests of a child may not be considered at all in actions based on parental consent or request, in delinquency and involuntary mental health proceedings, in deportation and other immigration law matters, and in the administration of laws of general application. (Reservation or understanding may be required.)

2. "Voluntary" mental health commitments may pose a particular problem for which a separate reservation is required.

3. In general, state services for protecting abused, neglected, abandoned and institutionalized children are widely perceived as leaving much to be desired.

4. Not all institutions, services and facilities necessarily conform to standards established by competent authorities; standards may not exist, may be too low, or may not be enforced. (Reservation may be required; additional action may be required.)

Comments/Notes:

Para. 1 - Best Interests

1. DOS: This article requires only that best interests be "a" consideration, not "the" consideration. The rights and duties of parents will also be a significant factor in many cases. Nonetheless, there are instances in which the best interests of a child are not considered at all. As noted in connection with Article 37, best interests are not a consideration in adult criminal proceedings. The child's best interests are also often not specifically considered in cases in which a parent requests that an action be taken, e.g., in parental placements of children for mental health or other treatment, voluntary placements for adoption, and consensual divorces and custody arrangements. (Query also whether this requirement covers proceedings which are limited to jurisdictional questions, e.g., would this undermine the Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction Act?) (Similar difficulties are presented in connection with Article 12.)

Mental health commitments may pose a larger problem. In some states, not only parents but others may make a "voluntary" commitment of a child. The governing standard may require only the presence of mental illness or mental retardation, without consideration of whether institutionalization is an appropriate or useful response. "Mental illness," moreover, may be defined by standard treatment codes, developed to ensure that all therapy is reimbursed by insurers, which include such things as "adolescent adjustment syndrome." The interest of the child, therefore, may not be considered even implicitly. Under existing case law, the child's constitutional due process rights require only that an admitting physician be satisfied that governing statutory standards are met. This limited protection may not even apply to placements in private institutions when no state action is involved. Parham v. J.R., 442 U.S. 584 (1979). Unwarranted placement may be a particular problem with respect to private institutions, which have apparently in some cases pursued profits overly aggressively. The number of mental illness institutionalizations have dramatically increased in recent years and public attention has recently been drawn to the problems in this area. Parental commitments could be handled by a broad understanding or reservation on parental rights, but further study is required to determine to what extent problems may occur with non-parental commitments as well.

Also potentially problematic are deportation and immigration decisions generally, administrative determinations in administering various benefits or programs ("best interests" may underlie program generally, but not usually a separate factor in the individual case).

The INS notes that, due in large part to the liberal U.S. approach of granting citizenship to virtually all who are born here, U.S. immigration law generally resists the granting of

immigration benefits to the alien parents of minor children. The Supreme Court has recently stated explicitly that the Constitution does not require the INS to consider the best interests of the child in determining custodial arrangements for alien juveniles who have been arrested and are awaiting deportation proceedings. See Reno v. Flores, 61 LW 4237, 4240-41 (March 23, 1993). At the suggestion of the DOJ, a general understanding is proposed for immigration matters as discussed in connection with Article 9.

The wider range of determinations involved in benefits or programs and application of general laws might also be addressed by an understanding, e.g., defining "actions concerning children" as referring to actions which specifically concern the care, protection, or treatment of children (or, in which the child is the subject of proceedings) and not including actions concerning the administration of laws of general application.

Para. 2 - General Undertaking to Protect

1. DOS: As discussed more specifically in connection with subsequent articles, although the U.S. regulatory scheme for protecting abused, neglected and abandoned and institutionalized children may be adequate, state practice leaves much to be desired. Stories of understaffing, inadequate training, lack of oversight, etc. are fairly common.

Para. 3 - Standards

1. HHS: HHS does establish some standards related to child care facilities, family day care homes, foster homes, and health care facilities, but most of the duties and obligations under this Article fall to states. It is likely that a number of institutions, facilities and service programs fall short of meeting state or national standards. Further effort to bring about compliance with these standards may be required.

2. DOS: There are problems with paragraph 3. There are only limited federal standards for child care services, children's institutions, or child protective services. State standards are often not acceptable to professional groups, advocates, or other states. In some areas some states have no or inadequate standards and even where there are standards there is limited or no enforcement (e.g. child care services, child detention and shelter facilities , juvenile court procedures.)

NGO Studies/Views:

1. ABA: It is far from clear that sentencing judges in criminal proceedings affecting children are required to have any regard for the best interests of the child. However, as a realistic matter, the gap between practice and the best interests standard may not be large. If United States laws are not in conformity with the Convention, they should be.

Article 4 -- Implementation of Rights

Potential Significant Problems/Issues:

1. Whether Convention is self-executing (declaration required.)

Comments/Notes:

1. DOS: States are obligated to take "all appropriate" measures for implementation of the rights recognized in the Convention. The Convention is not designed to operate directly as a sort of "constitutional" law. Rather, it is intended that States will individually determine how to implement it. In other words, it will not be a "self-executing" treaty which can be invoked directly in U.S. courts as a basis for a private action. A declaration to this effect should be made in connection with ratification.

The Convention requires that States Parties shall undertake all appropriate measures for the implementation of these rights "to the maximum extent of their available resources." This is not a particularly clear or precise requirement, but it does constitute an obligation. The extent of U.S. compliance and ability to comply will be debated and assessed, particularly in view of the relative level of economic resources and development of the United States. The requirements in these areas are thus something more than mere "goals."

NGO Studies/Views:

1. ABA: The United States need not be in a position to implement fully all of the rights by the time it ratifies the Convention. The report required to be submitted two years after ratification should identify the areas of law and practice that call for implementing action. On realization of economic, social and cultural rights, the ABA acknowledges that it is not clear what amount would constitute the maximum extent of available United States resources. However, in its view the United States is not spending enough now.

Article 5 -- Respect for Parental Rights and Responsibilities

Potential Significant Problems/Issues:

1. An understanding emphasizing that the Convention generally does not interfere with or govern parental rights and responsibilities may be desirable. (This must be tailored to recognize that certain restrictions, e.g., on child abuse, do apply to parents.)

2. It may be desirable to define who are "parents" and "families" for purposes of the Convention.

Comments/Notes:

1. DOS: Domestic audiences have already expressed concern whether the Convention impinges on the rights of parents. Recognition of and non-interference with the rights of parents was a major objective of U.S. delegations throughout the negotiation of the Convention and we believe it was achieved. Nonetheless, in view of the importance of this issue and to avoid any question, and understanding on this point may be desirable. It could also be useful to check w/ the FRG, which originally thought it might need a reservation on this point but decided against it.

In view of the potentially competing rights, e.g., of biological, adoptive, and step-parents, further consideration should be given to whether an understanding regarding the definition of "parent" is desirable, in general or with respect to particular articles. Consideration should also be given to whether "family" should be defined.

Article 6 -- Survival and Development

Potential Significant Problems/Issues:

1. Given the relatively high infant mortality rates in the U.S., and the considerable differentials according to race/minority status, the U.S. is particularly vulnerable to an argument that U.S. compliance with this article is inadequate and discriminatory.

Comments/Notes:

1. HHS: U.S. law and policy is consistent with the goals of maximizing the survival and development of children. HHS administers a large number of programs that promote these goals. More could certainly be done; thus the interpretation of the available resources proviso of Article 4 has relevance here.

2. DOS: See comments to Article 24.

NGO Studies/Views:

1. ABA: An understanding should be included that clarifies that the Convention language regarding the right to life has nothing to do with the United States anti-abortion movement's language relating to protecting the unborn. (DOS Note: If an understanding is submitted as discussed in connection with Article 1, no further understanding is required here.)

Article 7 -- Name and Nationality

Potential Significant Problems/Issues:

1. The Convention could arguably be interpreted as requiring that adoptees have a right to know their biological parents, which is not currently the case under the law of most states. (Understanding may be required.)

Comments/Notes:

1. HHS: U.S. law at the State and federal levels generally supports a child's right to know and be cared for by the child's parents. There is a potential conflict in the area of adoption, and in situations when the parents do not live together. Both adoption and custody law are largely the province of State law. Some, but not all, States allow adopted children to eventually learn the identity of their biologic parents. State custody law may limit the care provided by one of the parents. The Article modifies the proposed rights with the words "as far as possible", which may cover these and other situations where a child loses the "right" to be cared for by a parent, such as when parental rights are terminated due to abuse, neglect or abandonment or when parents must give up custody because they cannot afford to care for the child. Under State law children are registered at birth, if the birth occurs at a hospital. When the parents are not married, only the mother may be identified. Federal law has been moving in the direction of requiring States to identify the father as well.

2. DOS: The right to know biological parents is a controversial issue at present. Adoptees, both as individuals and as organized groups, have been pushing for such a right, but in most states adoption records are normally sealed and neither the child nor the parent has any right to know the other. Note that this issue might be handled in various ways, e.g., by a direct understanding or reservation, by the definition of parent and family, or by reference to parent's rights.

During the negotiations, the U.S. sought to clarify that the Convention did not require that an adopted child had a right to know his or her natural parents. The words "as far as possible" are intended to address this problem. Some States nonetheless have submitted declarations or reservations on this point.

Article 8 -- Preservation of Identity

Potential Significant Problems/Issues:

None.

Comments/Notes:

1. DOS: Some could view this article as raising the same question as Article 7. This article, however, reflects and Argentine proposal having to do with disappearances, and in particular the related practice of placing children for adoption under assumed identities as if they were orphans. It thus addresses a very specialized problem which is unlikely to occur in the U.S. and which certainly would be a crime if it did. If ratification is pursued, this point should be made clear in the formal record.

Article 9 -- Separation from Parents

Potential Significant Problems/Issues:

1. This article is vague and possibly overbroad. If interpreted as applying to any situation in which a child is separated from its parents, similar "best interests" problems are presented as are discussed in connection with Article 3 are presented. (Reservation or understanding may be required.)

2. It may be desirable also to have an understanding that this Article is not intended to apply in the international context.

3. More generally, an understanding is desirable that nothing in the Convention limits the power of the United States to control immigration.

4. Further consideration should be given to whether to define who are "interested parties" who can participate in separation proceedings either in an understanding or in the official U.S. record.

Comments/Notes:

1. HHS: U.S. law and practice generally adhere to Section 1 of this Article. However, children may be separated from their families against their parents' will when a minor is found delinquent or convicted of a crime.

2. DOS: The law in many states restricts who may participate in abuse, neglect and dependency cases. For example, in Pennsylvania foster parents who have not cared for a child for more than six months have no standing to participate in juvenile court cases. Stepparents, foster parents, and informal longterm caretakers who have taken on a parental role would not necessarily have an opportunity to be heard; some states would deny their access to the court because of a lack of standard. The Uniform Parentage Act and similar state laws would deny a biological father the opportunity to establish paternity and thus access to the child in certain circumstances. The biological father of the child of a married woman, for example, can effectively be denied access by the mother. Such exclusions may be justified on the grounds of the child's best interests. On participation of the child, see Article 12.

It appears from the negotiating history that this Article was not intended to apply to international contexts, e.g., deportation.

3. DOJ: Notes that children may be separated from parents against their best interests when the parent is incarcerated and recommends a reservation to cover this point. Notes also potential problems with Article 9 in connection with deportation and recommends an understanding that nothing in the Convention limits the power of the Government of the United States to control immigration.

NGO Studies/Views:

1. ABA: If the United States does not give children rights in involuntary separation proceedings, we should. The ABA proposes an understanding (re: Articles 9, 37, and 40) that children may be separated from their parents in a penal context even if this is not in the best interests of the child.

Article 10 -- Family reunification

Potential Significant Problems/Issues:

1. Possible need for an understanding that this does not apply to immigration matters. (This can also be covered by a

broader reservation on immigration, but in relation to this article only an understanding appears to be required.)

Comments/Notes:

1. DOS: As worded, the Article does not require that family unification applications be granted. It was the understanding of those drafting the Convention that this Article was "not intended to affect the general rights of States to establish and regulate their respective immigration laws in accordance with their international obligations." The term "expeditious" could pose some problems, although this must be considered in relation to the number of applications and available resources. Family reunification is given priority in the immigrant visa system, although there are annual numerical limitations.

2. DOJ: Notes that problems could arise in the application of this Article to immigration determinations. As discussed in connection with Article 3, due in large part to the liberal U.S. approach of granting citizenship to virtually all who are born here, U.S. immigration law generally resists the granting of immigration benefits to the alien parents of minor children. Applications by children to join parents in the U.S., on the other hand, depend on at least one parent's being a U.S. citizen or legal permanent resident. At the suggestion of the DOJ, a general understanding or reservation is proposed for immigration matters.

Notes as well in relation to Article 10(2) that some restrictions may in exceptional cases be placed on the departure of aliens from the U.S., although the grounds for such action fall within the permissible scope of derogations, e.g., national security and public order.

NGO Studies/Views:

1. ABA: Article 10 may allow separations that are not in the best interests of the child. Therefore, an understanding should be included that says international separations can only occur if they are in the best interests of the child. (DOS note: the thrust of the above recommendation would appear to be directly contrary to the ABA view.)

Article 11 -- Illicit Transfer

Potential Significant Problems/Issues:

None.

Comments/Notes:

None.

NGO Studies/Views:

1. ABA: The Hague Convention on the Civil Aspects of International Child Abductions governs, but provisions extend only to children under 16. Therefore, the ABA recommends an understanding that the Rights of the Child Convention extends more protection than the Hague Convention. (DOS Note: This proposed understanding would be inaccurate. The Convention requires only that States "take measures" and "promote" the conclusion of or adherence to agreements. It doesn't require that any specific quantity or quality of measures be taken.)

Article 12 -- The Child's Views in Proceedings

Potential Significant Problems/Issues:

1. Although as a general rule an opportunity to be heard is provided at least for a child which asks to express an opinion in matters affecting it, the extent and means by which a child's views are represented in such proceedings is a complex and variable subject and law and practice is arguably not fully in compliance. Further study and probably an understanding are required.

Comments/Notes:

1. HHS: The issue of representation and status of children in legal proceedings affecting their interests is largely a matter of State law and practice. State and local practice vary widely on the role children are given in various types of proceedings and in how much weight their views are given, if they are heard at all. States that request funding under the federal Child Abuse Prevention and Treatment Act (CAPTA) are required to guarantee that children who are the subject of a child abuse or neglect proceeding will have a Guardian Ad Litem appointed to represent their interests. This does not always guarantee that the minor's voice will be heard. Ratification of the Convention might mean that the federal government will be asked to adopt regulations to try to implement further the requirements of CAPTA and to expand the coverage to other types of proceedings affecting children.

2. DOS: In order meaningfully to assess this article, it is first of all necessary to consider the phrase "all matters affecting the child" in paragraph 1 as referring only to the judicial and administrative proceedings in paragraph 2.

Otherwise, the scope of 1 is so broad as to reach many matters which are not regulated in any way. The phrase "affecting the child," moreover, must also be narrowed. As noted in connection with Article 3, many matters involving the application of general laws affect a child in a general sense. It should also be noted that there is disagreement in practice about when a child is "capable of forming his or her own views" and compliance would vary depending on the interpretation of that requirement.

That being said, the principle enunciated would find widespread support as a generally desirable objective, but it is not necessarily accepted or implemented as a governing rule in all cases. There will be a number of areas in a number of states that are not in compliance. A court would not know the child's views related to custody in a consensual divorce, for example, and the child would not participate in the

proceedings. Even in jurisdictions and proceedings in which it is required that the child's wishes be taken into account, this does not necessarily mean that the child would participate either through a representative or directly. If testimony of a social worker or psychiatrist about the child's wishes is "an appropriate body" then compliance would increase. This would only hold true for disputed matters, however, and not those in which the court was approving a private agreement pro forma.

The extent of arguable non-compliance should not, however, be overstated. While children often may not be directly represented, their views are generally solicited in various ways. The general picture is as follows:

Juvenile crime and delinquency: the child always has the right to be heard.

Custody/Visitation: the child will always be allowed to give his or her opinion upon request; most states also provide for soliciting opinion in some way without the necessity of request.

Child abuse: the child must always be interviewed by impartial agent at some stage.

Paternity and support: the child is generally deemed to be represented by the mother and her counsel, although under the Uniform Parentage Act the child is made a separate party.

Adoption: if the child is capable of giving an opinion and desires to do so, generally the courts will allow the child to be heard.

Mental commitment: children have the right to be heard and represented by counsel in virtually all states.

School discipline, etc: children generally do not have full due process protection.

Moreover, U.S. practice appears to be far ahead of that of most other countries in this area. Accordingly, it would be difficult to interpret the Convention as requiring more from the United States in the foreseeable future. Although domestic groups may well criticize U.S. performance, international criticism is less likely.

NGO Studies/Views:

1. CDF: On a legislative level, the United States has taken substantial strides towards ensuring children an adequate voice in judicial and administrative proceedings. However, the right to be heard and represented is affected directly by state statutes and court rules in specific proceedings and the resources allocated for, and the quality of, the representation of children. Contrary to the Convention provisions, children are not consulted in divorce and custody proceedings, mental commitment proceedings, and foster care placements.

a. Divorce and Custody Proceedings. The child generally is not consulted. Few states give preference to a child's choice of a custodian; 40 states allow consideration, but do not mandate acceptance, of a child's wishes in custody proceedings; and a few states refuse to give a child's preference any weight at all. 2 states mandate appointment of a representative and 28 states allow a judge to appoint a representative in these proceedings.

b. Mental Commitment Proceedings. A child's views are given no consideration in these proceedings because it is assumed that a child's interests are sufficiently protected by a neutral fact finder.

c. Abused and Neglected Children. The Child Abuse Prevention and Treatment Act requires states to appoint a guardian ad litem. Many states have laws that provide children with the right to independent court assigned counsel. However, the CDF believes there is still insufficient protection for many children because states often assert that the attorney representing the state against the parents also represents the child. In addition, evidentiary rules in court proceedings present problems, but new developments like video taping and allowing one-way closed circuit television testimony offers promising options.

d. Foster Care Placements. Voluntary placements rarely reflect the wishes of the children involved. New York City is an exception.

2. ABA: Children's participation in proceedings affecting them should not be objectionable. This is a core Convention provision that should not be diluted.

Article 13 -- Freedom of Expression

Potential Significant Problems/Issues:

None

Comments/Notes:

1. DOJ: No problem here.

NGO Studies/Views:

1. ABA: Articles 13 through 16 may grant children broader speech and expression rights than the Constitution does. However, the Supreme Court's position that approves certain restrictions when it comes to children would fall into the Convention exceptions for "public morals" and "public order." Therefore, no reservation is necessary.
2. CDF: Children have fewer rights than adults in the areas covered by Articles 13 - 16. Recent restrictive United States Supreme Court decisions on speech and other civil liberties for children are inconsistent with the spirit and the intent of the Convention.

Article 14 -- Freedom of Thought, Conscience and Religion

Potential Significant Problems/Issues:

1. Parental rights are arguably an issue here. Further consideration should be given to whether an understanding is required or whether the general understanding on the impact of the Convention on parental rights coupled with a clear statement in the official record would be sufficient.

Comments/Notes:

1. DOJ: No problem here.
2. DOS: During the negotiations, there was considerable debate over the rights of parents to choose a child's religion. The final result is somewhat ambiguous, as countries on both extremes expressed concern. This somewhat muddled middle ground is probably just right for us, as children must surely have some degree of independence in the choice of religion at some stage, but we would presumably prefer not to articulate a rigid legal rule.

NGO Studies/Views:

1. ABA: This article limits state' rights, not parental rights. Religious groups who argue that the article insulates children from their parent's religious convictions are wrong.

Article 15 -- Freedom of Association

Potential Significant Problems/Issues:

None

Comments/Notes:

1. DOJ: No problem here.

Article 16 -- Privacy

Potential Significant Problems/Issues:

None

Comments/Notes:

1. DOJ: No problem here.

NGO Studies/Views:

1. ABA: This provision governing privacy is only applicable to states parties, not parents. There is a possibility that the Convention rights are broader than current United States law. However, the margin of discretion in interpreting this article can readily accommodate prior United States law.

Article 17 -- Access to Information

Potential Significant Problems/Issues:

1. This Article could be read as requiring greater government control over media than is compatible with U.S. law and practice. (Reservation or understanding should be considered.)

Comments/Notes:

1. FCC: is concerned that Article 17, when read together with Article 4, could be interpreted as directing a party to control or coercively regulate the mass media in ways which are contrary to the First Amendment. The FCC analysis notes that television stations are required to serve the educational and informational needs of children. The current approach does not, however, necessarily include each of the factors mentioned in section 17(a). The reference to "spiritual" well-being in particular could suggest a requirement to mandate the dissemination of religious information, which could raise separate First Amendment issues. The FCC also does not specifically encourage regard for linguistic needs of minority group or indigenous children, although this may occur nonetheless at the initiative of broadcast and cable systems.

NGO Studies/Views:

1. ABA: The Convention would require that the United States develop guidelines for protecting children from injurious information and material. However, the case law that has developed on the subject may be sufficient as a guideline.

Article 18 -- Parental Responsibilities

Potential Significant Problems/Issues:

1. Arguable need for more programs/services.

Comments/Notes:

1. HHS: U.S. law generally is consistent with Section 1 of this Article. The joint financial obligation of both parents for their children, even if the parents are living apart, is now a central part of State and Federal policy. U.S. policy also is consistent, in theory, with Sections 2 and 3. U.S. practice may fall quite short of providing a sufficient quantity of the institutions, facilities and services necessary for the proper care of all children, however. It is unclear what obligation is entailed in the commitment to "ensure" the development of these programs, with respect to both quantity and quality.

NGO Studies/Views:

1. ABA: The Convention's requirements about rendering appropriate assistance and supporting the development of children's institutions and services affects both state and federal governments. The ABA says that more federal spending is necessary in this area.

Article 19 -- Protecting Children from Abuse and Neglect

Potential Significant Problems/Issues:

1. Children are not protected against "negligent treatment" by their parents, as distinct from "neglect."
(Understanding required.)

2. Possible need for greater federal monitoring of state compliance to ensure protective measures are effective or for additional programs or resources.

Comments/Notes:

1. DOL: ok from DOL point of view.

2. HHS: U.S. law, at both the state and federal levels, formally establishes extensive legislative, administrative, social, and educational measures to protect children from

various forms of maltreatment or exploitation. Since the Article speaks in terms of "appropriate" measures, it does not necessarily require a particular definition of maltreatment, or dictate how it is best to protect children from maltreatment (however defined), two issues about which there is substantial dispute.

Section 2 of this Article requires the establishment of "effective" procedures for intervening to help maltreated children. Various federal laws administered by the Department of Health and Human Services provide funds to States conditioned upon the State establishing the types of procedures and programs referred to in this Article. There is widespread agreement that many of these programs are far less effective than they might be. Increased federal monitoring of State compliance might be required under this Article.

3. DOS: Every state provides protection for children from abuse and neglect, although only a few states use those specific words. The protection against "negligent treatment," however, may go beyond the law in most states. Ordinarily, the care and treatment that must be afforded to children by parents is judged by a standard of whether the parental conduct falls below the minimum level that is necessary for the welfare of the child. International practice, however, is generally the same, so it appears reasonable to address this point with an understanding rather than a reservation.

While current U.S. state laws are technically in compliance with this Article, there is great variability in the laws themselves and in the administrative and fiscal capacity of states to implement them effectively. The federal government

could use its leverage through various funding streams to encourage or enforce greater compliance and uniformity but the Congress has shown no will to do so. Thus, the national picture is quite diverse and protection is hardly "equal" everywhere.

NGO Studies/Views:

1. ABA: Current United States laws comply, but often overwhelming caseloads and insufficient resources make the procedures for protecting children from abuse and neglect fall far short of being effective.

2. CDF: On articles 19 through 21. State and federal law creates a legal framework that is in accord with the Convention. However, the reality lags far behind the theoretical framework. The child welfare system is overburdened, with unmanageable case loads, poor staff supports, and poor recruitment and supervision of foster families. There are more children entering foster and other forms of care and the rate of children exiting care has declined. The juvenile and family court system is also overburdened.

Article 20 -- Protecting Children Without Family

Potential Significant Problems/Issues:

None.

Comments/Notes:

1. HHS: This Article is consistent with U.S. law and practice. There is debate, however, about how much "regard is due" to the factors indicated in Section 3. The provision should not require any change in current policies.

2. DOS: Despite problems in practice, this Article seems consistent with domestic law.

NGO Studies/Views:

1. CDF: See note Article 19.

Article 21 -- Adoption

Potential Significant Problems/Issues:

None.

Comments/Notes:

1. HHS: Adoption is largely a matter of State law and policy. State laws are all in compliance with this Article as it relates to intra-state and interstate adoptions.
2. DOS: This is consistent with domestic law. The U.S. understands that the reference to "relatives" does not require consent by relatives in case of adoption, but rather reflects the fact that in some cases it may be preferable for a relative to care for children than for them to be adopted by a stranger. An issue could arise, however, with respect to the presumption against inter-country adoption implicit in subparagraph (b). Which this presumption has been acceptably modified in the recently-concluded Hague Convention on Inter-Country Adoption, a declaration or understanding could be considered on this point.

NGO Studies/Views:

1. ABA: Systemic deficiencies exist in the current adoption system due to a lack of quality placements and heavy caseloads. Recent legislation prohibiting mandatory matching of children in foster care to families of the same race or ethnic group does not conflict with the Convention provisions. A detailed analysis of each state's statutory scheme and practice is necessary to determine whether there is compliance in the area of private placements.
2. CDF: See article 19.

Article 22 -- Refugee children

Potential Significant Problems/Issues:

1. The question of the rights of children as distinct from parents can be problematic in this area. Further thought should be given to whether an understanding is required.

2. An understanding may be desirable that refugees and persons seeking refugee status are afforded protection as provided by the 1967 Protocol Relating to the Status of Refugees, as implemented through United States law.

Comments/Notes:

1. DOS: A potential problem is the extent to which children are given special rights apart from parental decisions. In re Polovchak, 97 Ill.2d 212, 454 N.E.2d 212 (1983).
2. DOJ: Believes that, even though U.S. treatment of refugees is generous, the sweeping promise of Article 22 to provide a parentless child seeking refugee status "the same protection" guaranteed by the Convention to any other parentless child is overbroad.

NGO Studies/Views:

1. ABA: This article is consistent with existing United States law, including the Refugee Convention and the Refugee Act of 1980. The United States interpretation of the Privacy Act does not require and may not permit revealing the whereabouts of the parents of refugee children. However, the only requires cooperation with other countries and there is a pre-existing duty to cooperate that stems from the 1945 United Nations Cooperation Act.

Article 23 -- Disabled children

Potential Significant Problems/Issues:

1. Arguably requires greater effort and more resources.

Comments/Notes:

1. DOI: Defers generally to the views of the Department of Education, since 90% of Indian children are educated in public schools. Notes, however, that BIA does operate or fund schools for the remaining 10% and disabled programs are funded in this context.
2. DOE: notes that federal law takes a slightly different approach to this subject, but concludes that U.S. law is sufficient to meet Convention requirements.
3. DOE: further notes that the reference to "cultural and spiritual development" should not be understood in a way that would impinge on freedom of religion or speech.

4. HHS: The goals and aspirations articulated in this Article is consistent with the goals of state and federal policy. To fully implement these goals, and the standards specified in the Article, clearly would require substantially more resources. Thus, the interpretation of Article 4 will be central to resolving issues of compliance.

5. DOS: SSI, Medicaid, and IDEA create a framework for compliance. The large gap is health insurance. Therefore, to some extent the outcome of the current health care reform initiative will be especially important. The framework, moreover, is widely perceived as underfunded and insufficient to ensure adequate programs in many states and cities.

Article 24 -- Health Services

Potential Significant Problems/Issues:

1. This is another area in which the U.S. faces a particular vulnerability to arguments that it does not adequately comply in relation to its resources.

2. This article also raises a question of childrens' rights as distinct from parental decisions. Further consideration should be given to whether an understanding is required or whether the understanding on parents coupled with a clear statement in the analysis is sufficient.

Comments/Notes:

1. DOA: Nutrition education is addressed to some extent as part of the Food Stamp Program, but not uniformly, because only 50% of state costs for informing low income households of the benefits of this program are reimbursed. In addition, the Nutrition Education and training Program requires states to hire a nutrition coordinator to assist in the delivery of nutrition education to students, parents and food service workers. (Do all states do this? How extensive is it?) WIC also provides nutrition education. The Extension Service also provides several important nutrition education and food safety and quality education programs.

2. HHS: The goals and aspirations articulated in this Article is consistent with the goals of state and federal policy. To fully implement these goals, and the standards specified in the Articles, clearly would require substantially more resources. Thus, the interpretation of Article 4 will be central to resolving issues of compliance.

3. DOS: This Article arguably could be interpreted as establishing a child's right to health care as distinct from the rights of their parents. (Also for Article 23.)

A strong argument can be made that the U.S. is not in compliance given (a) the large numbers of children with no or inadequate health insurance coverage, (b) the significant numbers of low-income pregnant women with no effective access to prenatal care, and (c) The relatively high rates of infant mortality which, moreover, are significantly higher for blacks and Hispanic groups. Again, the proposed health care reform initiative may be significant.

NGO Studies/Views:

1. CDF: The U.S. commits insufficient resources in this area. Overall, the health of the nation's children is far worse than one would expect given our expenditures and we do not rank in the top 10 or 15 nations on key indicators of maternal and child health. We do not provide health insurance for all children. The United States 1988 infant mortality rate of 8.5 overall and 17.6 for black children is a disgrace. As a nation, we do not do enough to provide pre-natal care. 20 percent of American children do not receive regular primary health care. An important program like the Title X Family Planning Program lost 54 percent of its funding between 1981 and 1991. United States immunization rates dropped in the 1980's.

2. ABA: United States laws and policies indicate a general compliance with the Convention provisions. However, there are gaps -- lack of health insurance for millions of children. Many of the programs in these areas are under funded and provide for inadequate access.

Article 25 -- Review of Placements

Potential Significant Problems/Issues:

1. The scope of the requirement that there be a periodic review of placements is a concern. Except to the extent that voluntary in-house review by institutional personnel may suffice, U.S. laws may not guarantee such review for juvenile delinquency placements, foster care placements, and possibly some mental health commitments. A reservation or understanding may be required.

Comments/Notes:

1. HHS: Under federal law, the status and treatment of all children who have been placed out-of-home, and whose care is paid for pursuant to Title IV-E of the Social Security Act, must be reviewed on a periodic basis by the appropriate State Officials. When a state fails to conduct a review it is subject to financial penalties. Monitoring of state compliance, both as to the quality and quantity of the reviews, might need to be increased to comply with this Article. In addition, it may be necessary to develop similar requirements for children whose placements are paid for entirely by State funds.

2. DOS: Periodic review of treatment is guaranteed by federal law with regard to foster care for dependent and neglected children, but implementation is not always monitored or enforced. Periodic review is not guaranteed for children in delinquency or status offender programs. Many permanent foster care placements are not reviewed on any regular basis. Where parents voluntarily commit a child to a mental health or mental retardation institution, there may not be a formal review apart from the normal ongoing evaluation by institutional personnel. Under existing case law, periodic review at least by institutional personnel appears to be required to satisfy due process requirements, but is unclear whether this requirement would apply in situations in which no state action is involved. Parham v. J.R., 442 U.S. 584 (1979).

NGO Studies/Views:

1. ABA: It is impossible to know without a comprehensive review whether United States laws require periodic review of all foster care and other placements. The periodic review provision should apply to juvenile justice commitments as well, but it is not clear from the Convention provisions that it does apply.

Article 26 -- Social Security

Potential Significant Problems/Issues:

1. This is an area in which there is arguable discrimination against children born out of wedlock. (A reservation or understanding may be required.)

Comments/Notes:

1. HHS: Children in the United States are eligible for 2 broad social security programs, Aid to Families with Dependent Children and the Social Security (Old Age, Survivors, and Disability Insurance) program. Neither of these programs guarantees benefits to all children. Social Security payments are based on the adults participation in the program or on a child being disabled. AFDC is a means-tested program, with the level of access determined by each state. The language in Section 2 seems to give great leeway in establishing conditions, so that there may not be compliance issues.

2. DOS: This provision establishes a highly qualified right and leaves sufficient national discretion that it is relatively easy to be in compliance overall. Nonetheless, discrimination against children born out of wedlock could be an issue here.

NGO Studies/Views:

1. ABA: Some children born out of wedlock are not eligible for social security insurance and the Convention prohibits that kind of discrimination.

Article 27 -- Standard of Living

Potential Significant Problems/Issues:

1. A particularly strong argument can be made that the U.S. is not doing enough to comply with this article in relation to its resources.

Comments/Notes:

1. HHS: Children in the United States do not have a right to any particular standard of living. U.S. policy does not make parents primarily responsible for providing for their children's welfare. There are numerous federal and state programs that assist parents, materially and otherwise, in fulfilling this obligation. Nonetheless, many children live in families that have incomes below the federal poverty line. While states are required to establish a "standard of need" for determining the amount of support a family may receive through the Aid to Families with Dependent Children Program, states are not required to make payments that meet this standard. Depending upon how this Article is interpreted in conjunction with Article 4, ratification of the Convention might ultimately require revising national income support policies.

2. DOA: The Food Stamp Program is a statutory entitlement program and available to all eligible individuals who apply. All states participate. Food stamp allotments are determined based on a low cost model diet taking into account Recommended Dietary Allowances and food choices of low income households. (DOA -- does this mean it is sufficient to provide an adequate diet? Who is eligible? Everyone who can't afford an adequate diet?)

The National School Lunch and School Breakfast Programs provide free or reduced priced meals or snacks to school aged children with family incomes at or below 185% of poverty. The former is available to 97% of all public school programs. The latter and other programs (Summer Food Service, Child and Adult Care Food Program in licensed child care facilities) are less widely available due to local choice.

The Special Supplemental Food Program for Women, Infants and Children (WIC) and Commodity Supplemental Food Program are targeted at pregnant, post partum and breastfeeding women, infants and young children. FNS estimates that WIC serves 90% of eligible infants and pregnant women, but only 60% of all eligible women, infants and children because of insufficient funding.

With regard to federalism, DOA notes that state participation in these programs is optional. Federal funding is available both for benefits and administrative costs. Nonetheless, a state might choose to withdraw from one of these programs.

3. DOS: The United States is particularly vulnerable to charges that it does not comply with this article. Recognizing that provision of an adequate standard of living is primarily the responsibility of parents or others directly responsible, States are nonetheless obliged to take "appropriate measures" to provide necessary material assistance and support, in accordance with national conditions and means and, more generally, "to the maximum extent of available resources." Although this obligation is qualified and progressive, the United States is one of the richest countries in the world by any standard, yet has one of the highest percentages of children living in poverty. Data from the Center for the Study of Social Policy, for example, indicate that in 1989 some 20% of children in the United States lived in poverty. This figure rises to 44% for African-American children and 39% for Hispanic children. A particularly vulnerable group are the children of women who have less than 12 years of schooling, are unmarried to the child's father, and are under age 20 at the time of the birth of the first baby -- 80% of the children of such women live in poverty. The current Welfare Reform Initiative, therefore, may have significance for compliance with this Article.

Under AFDC, the states have the right to set their own definitions of financial need and to determine the portion of the need they will meet. Child maintenance budgets combining AFDC benefits and Food Stamps leave almost all AFDC children

below the Census Bureau's poverty line. There is no minimum standard for housing or clothing that is set nationally or in most jurisdictions. Food stamps and WIC may be said to provide a minimum standard of living with regard to food. (WIC is capped?)

NGO Studies/Views:

1. Both the ABA and CDF: assert that the United States does not adequately comply with this article for the 14 million children who live in poverty. CDF also points to problems of discrimination in the area of housing, stating that housing discrimination against minority families is still pervasive and continues to frustrate access for minority families with children. Per CDF, a 1991 analysis commissioned by HUD concluded that housing discrimination against blacks and Latinos is still commonplace.

Article 28 -- Education

Potential Significant Problems/Issues:

1. Paragraph 28(2) may be interpreted as barring corporal punishment. (A reservation is required; this may be covered by the "cruel and unusual punishment" reservation addressed in connection with Article 37.)

2. This article and article 29 present particular federalism concerns.

3. Possible argument that programs or resources for vocational education are inadequate in some respects.

Comments/Notes:

1. DOI: while deferring generally to the views of the Department of Education, questions whether there is any assurance that vocational and higher education education (28(1)(b)) is "available and accessible to every [Indian] child due to limited funding."

2. DOL: reserves comment until after enactment of the School To Work Opportunities Act.

3. DOE: Notes that the constitution "does not give the Federal Government authority directly to regulate education" but that it plays a significant role nonetheless via funding. Federal programs are broadly supportive of the objectives of Articles 28 and 29. However, such funding does not provide a basis for federal control. Even withholding funds would go far beyond existing authority. See §103(b) of the Department of Education Organization Act (no federal control prohibition).

Notes the Goals 2000: Educate America Act, which is consistent with Article 28 and specifically relates to Article 28 (1)(e) and queries how far that might go toward constituting adequate federal effort in this area and in relation to Article 29.

Notes generally that, strictly speaking, education is not a "right."

6. DOS: Corporal punishment is not unconstitutional and may occur in some states. Notice and hearing are not necessarily required. Ingraham v. Wright 430 U.S. 651 (1977).

We do not interpret this article as requiring free education or greater financial assistance beyond grade twelve, or financial assistance to non-public school students in grade school, this would present a problem.

Article 29 -- Aims of Education

Potential Significant Problems/Issues:

1. There is no assurance that school curricula meet any particular requirements.

Comments/Notes:

1. DOE: notes that curricula in particular are determined at a highly decentralized way. In many states, even the state law provides only a general framework or set of minimum requirements and individual school districts or even schools may determine the details. In general, one appropriate way that the federal government could take further action without exercising direct control would be categorical funding programs. This, however, would be subject to budgetary constraints.

2. DOI: Similarly notes that Indian tribes are expressly authorized to determine the course of their children's education.

NGO Studies/Views:

1. ABA: United States law only requires that children be provided with "basic minimal skills." Therefore, there is a gap between the Convention provisions and United States law. This should be remedied by an education reform agenda. The ABA also suggests that the United States include an understanding providing that we do not have to regulate private education beyond what is permitted by the First Amendment.

Article 30 -- Minorities and Indigenous Children

Potential Significant Problems/Issues:

None.

Comments/Notes:

1. DOS: A question could arise due to the unqualified nature of this article, as certain aspects of culture and religion may constitutionally be regulated. Thus, for example, cultural and religious practices which are deemed unduly harmful to the child may be prohibited. This Article may, however, be reasonably understood as forbidding the suppression of culture, religion, or language rather than forbidding the regulation of some aspects of it.

Article 31 -- Recreation, Culture and Leisure

Potential Significant Problems/Issues:

None.

Comments/Notes:

1. DOS: This article repeats language which is found in other human rights documents and treaties. It does not by its terms require the government to develop programs or provide funding, although one might reasonably imply an obligation to take some action in the unlikely event that play and recreational activities and cultural and artistic opportunities for children were wholly lacking. If this Article nonetheless proves controversial, an appropriate understanding could be fashioned.

Article 32 -- Child labor

Potential Significant Problems/Issues:

1. The FLSA has some minimum age exemptions, e.g. actors and performers, newspapers, workers on family farms. It appears that these generally can be covered by an understanding, although a limited reservation (e.g., covering newspapers) might be required.

Comments/Notes:

1. DOL: has "serious reservations concerning whether the FLSA could be considered to be in compliance with the minimum age requirements" due to FLSA exemptions. Also, assume "work" only embraces employment, rather than any activity whatsoever involving exertion. Questions whether there a need to clarify that "spiritual development" language is not a justification for exemption from labor standards on religious grounds. See McLaughlin v. Wendell's Woodworking, Inc. 867 F.2d 196 (4th Cir. 1989). (This could be adequately addressed on the record in connection with Senate consideration of the Convention.)

2. DOS: The original references to "employment and work" in paragraph 2 were changed to "employment" to reflect the general understanding that the minimum age and regulation requirements should not apply to work in or for the family. U.S. laws are in compliance, although not always enforced. The U.S. and Japan both expressed an understanding that this article allowed exceptions for artistic performances and light work that was not hazardous or potentially harmful.

NGO Studies/Views:

1. CDF: The Fair Labor Standards Act (FLSA) and state laws put the United States facially in substantial compliance with the Convention. However, some of the facial standards are too weak to prevent exploitation, hazardous work, and interference with education. In addition, the FLSA is inadequately enforced.

2. ABA: The combined laws of state and federal governments clearly comply with these requirements. There is room for controversy about how much work interferes with education and whether the farm and family work exception sufficiently protects children from hazardous work. Child labor laws often appear lax and ineffective.

Article 33 -- Drug Abuse

Potential Significant Problems/Issues:

None.

Comments/Notes:

None.

NGO Studies/Views:

1. ABA: United States law clearly complies with these provisions. However, there is reason to believe that too much money is being spent on law enforcement and too little is spent on prevention and treatment.

2. CDF: U.S. law, by and large, is consistent with Articles 33, 34, and 39. However, widespread use of drugs and sexual exploitation of children continues. U.S. law also makes no explicit provision for the rehabilitation and reintegration of child victims. Accordingly, the United States must take more aggressive legislative, administrative and social action.

Article 34 -- Sexual Exploitation

Potential Significant Problems/Issues:

None.

Comments/Notes:

None.

Article 35 -- Abduction and Sale of Children

Potential Significant Problems/Issues:

None.

Comments/Notes:

None.

Article 36 -- Other Exploitation

Potential Significant Problems/Issues:

None.

Comments/Notes:

None.

Article 37
Torture and Cruel and Unusual Punishment
Deprivation of Liberty

Potential Significant Problems/Issues:

1. U.S. law is not in compliance with the prohibition on imposition of death penalty or life imprisonment without parole. (Reservation required.)

2. U.S. law is not in compliance with the requirement for segregation of juveniles. (Reservation required.)

3. U.S. law is not in compliance with the requirement that imprisonment be "as a last resort for the shortest appropriate period of time." (Reservation required.)

4. U.S. law is not in compliance with the requirement that a juvenile's privacy be respected at all stages of proceedings. (Reservation required.)

5. The meaning and scope of the prohibition on "cruel, inhuman or degrading treatment or punishment" must be narrowed to conform to constitutional limitations. (Reservation required.)

Comments/Notes:

1. DOS: Every state has laws which in some way can hold people under the age of 18 responsible for criminal offenses in the same manner as adults. Some states declare that children above a specified age, but below 18, are responsible for their crimes. For example, in New York and Vermont 16 year olds will be prosecuted in adult criminal court. Specified offenses may also be excluded from the jurisdiction of the juvenile court, often irrespective of age. For example, in Pennsylvania a child of any age (perhaps subject to the common law infancy cut

off of 7) could be prosecuted for murder; a 9 year old recently was. In addition, all states have transfer procedures from juvenile to criminal courts. When children are tried as adults, the following requirements of the Convention may not be met: (1) prohibition on death penalty, (2) prohibition on life imprisonment without parole, (3) requirement for segregation, (4) requirement that privacy be fully respected.

For these reasons, reservations concerning the death penalty and segregation of juveniles were also submitted in joining the International Convention on Civil and Political Rights. A number of countries and others have objected that the reservation to the death penalty is impermissible as inconsistent with the object and purpose of the treaty. In the negotiation of this article, however, the U.S. delegate allowed adoption of this provision only on the clear and general understanding that the U.S. would reserve to it and that such a reservation was permissible. Nonetheless, such a reservation will be highly controversial and will be challenged.

With respect to cruel, inhuman and degrading treatment or punishment, the United States has entered a reservation on this point with respect both to the Covenant on Civil and Political Rights and the Convention Against Torture, as follows:

the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

The same reservation, which should be crafted to address also the corporal punishment issue noted by the ABA in connection with Article 28, should be made with respect to this Convention.

The requirement for a minimum age below which children shall be presumed not to have the capacity to infringe the penal law may call for an understanding, at least. When children are tried as adults, this requirement is met, as it is believed that the common law infancy defense would be recognized in criminal prosecutions everywhere. This defense would prevent the prosecution of children under 7 entirely and would create a rebuttable presumption that children under 14 lacked the capacity to commit the offense. Contrary to CDF's view as noted below, this should be sufficient to meet the Convention requirements. A question arises, however, with respect to for "delinquency," which are like criminal trials in that they are generally based on commission of an act criminal in nature and can result in commitment to an institution, albeit in principle this is therapeutic rather than punitive in nature. While a few states have established a minimum age limit for delinquency cases, in other jurisdictions there is none -- not even the infancy defense. It appears that in fact delinquency proceedings have never been brought against a child 7 years or younger, but there is nothing legal to prevent this.

2. DOD: A reservation is required for the same matters discussed in 1.a. above for individuals under 18 on active duty and subject to the Uniform Code of Military Justice.

3. HHS: This Article is applicable to the care provided children living in institutions, not with their families. As such, it is consistent with State and Federal law, although these laws are not always carried out in practice.

NGO Studies/Views:

1. Death Penalty and Life Imprisonment

The ABA and CDF identify the same problems noted above. The CDF states that 26 states and the District of Columbia do not impose the death penalty on children. Most of the statutes that allow capital punishment of children specifically mention that age is a mitigating factor when determining whether to impose the sentence. The ABA's view is that United States law allowing the death penalty for children who commit crimes when they are over 16, but less than 18 should be changed. On segregation, however, the ABA notes that the United States would have to commit substantial resources to comply with the Convention provision requiring the segregation of children prosecuted and convicted as adults from adults when it is not in the child's best interests. The United States should include a reservation describing when it is permissible to confine children with adults.

2. Other Issues

The CDF says that guidelines should be provided for detention facilities and that a mechanism for policing juveniles' rights in detention facilities should be established. The ABA states that the Convention may require the United States to outlaw corporal punishment. The ABA acknowledges that although American parents oppose corporal punishment, state laws may not reflect the sentiment. They suggest an understanding that would force the United States to abolish corporal punishment in implementing legislation.

Article 38 -- Armed conflicts

Potential Significant Problems/Issues:

None.

Comments/Notes:

None.

Article 39 -- Rehabilitative Care

Potential Significant Problems/Issues:

1. Arguable underfunding and insufficient programs.

Comments/Notes:

1. See comments to Article 19 above.

NGO Studies/Views:

1. ABA: The United States is not taking appropriate measures to reintegrate children who have been abused or neglected.

Article 40 -- Juvenile Justice Systems

Potential Significant Problems/Issues:

1. There could be argument whether U.S. law conforms to the requirement for a minimum age below which children are presumed not to have the capacity to infringe the criminal law. (The possible need for an understanding should be further considered.)

Comments/Notes:

1. DOS: potential problems include (1) right to have privacy fully respected, whereas the Supreme Court has left open the question whether the exclusionary rule would be applied in delinquency cases to the same extent as in adult criminal cases; (2) minimum age below which children do not have the capacity to infringe the penal law. As to the latter, while most states' statutes contain no explicit provision concerning the minimum age of criminal responsibility, it is believed that the common law infancy defense would be recognized in criminal prosecutions everywhere. This defense would prevent the prosecution of children under 7 entirely and would create a rebuttable presumption that children under 14 lacked the capacity to commit the offense. Juvenile courts, however, do not generally accept the common law infancy defense in delinquency cases.

NGO Studies/Views:

1. CDF argues that the infancy defense is not sufficient to meet Convention requirements; a strict minimum age is required. On alternatives to detention, state laws are in agreement with the Convention, but the supply of programs is inadequate when compared with the need. On due process, the CDF is concerned that recent court cases have not granted juvenile offenders rights equal to those of adult offenders. In addition, the requirement that juveniles be provided the assistance of counsel is an illusion for many juvenile offenders.



United States Department of State

Washington, D.C. 20520

TO: H - Wendy Sherman

FROM: H/LMO - Susan Jacobs *dy*

SUBJECT: Convention on the Rights of the Child

Current Status

The Convention on the Rights of the Child was passed by the United Nations General Assembly in 1989 but has not been signed by the President of the United States.

In addition, there are four treaties pending with the Senate: the International Covenant on Economic, Social and Cultural Rights; the American Convention on Human Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; and the Convention on the Elimination of All Forms of Racial Discrimination. Over the past few years, the Senate's receptivity to human rights treaties has improved dramatically and the Senate Foreign Relations Committee has been pressing to move one or more of the human rights treaties.

The Bureau of Human Rights and Humanitarian Affairs (HA) recommends moving ahead with the two anti-discrimination conventions which appear to pose the fewest obstacles to ratification. The United States delegation to the Organization of American States (USOAS) would prefer that we push forward with the American Convention on Human Rights. In addition, implementing legislation for the Anti-Torture Convention was re-introduced in the House and hearings are expected this Spring.

Procedure for Moving Convention

If we decide to move on the Rights of the Child Convention, the usual procedure is for the Department's Office of the Legal Advisor to prepare an analysis which notes the various reservations, understandings, and declarations that may be required to resolve differences between current U.S. law and the provisions of the treaty in question. In addition, it raises issues that are likely to prove contentious. The analysis is then circulated throughout the Executive branch prior to recommending final signature of the President.

-2-

Background Information on the Convention

The Convention requires each State Party to respect and ensure to each child (under 18 years of age) within its jurisdiction a broad list of enumerated rights without discrimination of any kind, irrespective of the child's race, color, sex, language, religion, political affiliation, etc. States must ensure that the "best interests of the child" are a primary consideration in all social welfare institutions, courts, administrative and legislative bodies. States must also take all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention.

Among others, States are required to recognize the child's right to life, to a name and nationality, to preserve her identity, not to be separated from her family, to freedom of expression, thought, privacy, health (including treatment and rehabilitation), social security (including social insurance), a standard of living adequate to the child's physical, mental, spiritual, moral and social development, education and rest and leisure (including the right to engage in age-appropriate play and recreational activities).

States must use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child; they must take all appropriate measures to protect the child from physical or mental violence, injury or abuse, neglect and exploitation while in the care of parents, guardians or custodians. States must also protect children from economic exploitation, illicit use of narcotic drugs and psychotropic substances, sexual exploitation and abuse, and "all other forms of exploitation prejudicial to any aspects of the child's welfare."

The Convention sets forth specific requirements for the system of adoption, for refugee children, and for the mentally and physically disabled. It accords all children freedom from arbitrary arrest and detention, as well as basic rights of due process in criminal matters.

The Convention established the Committee on the Rights of the Child --ten independent experts elected by States Party--to consider implementation reports by States Party. The Committee does not consider state-to-state complaints or individual petitions.

-3-

Issues Likely to be Raised in the Senate

- o Federalism: The Convention addresses areas traditionally considered to be primarily or exclusively within the province of state governments, such as adoption, education and certain kinds of child welfare.
- o Abortion: Anti-abortion groups will push for an understanding that the Convention protects the unborn; abortion rights groups will urge the Administration to say that the Convention is abortion-neutral.
- o Juvenile Death Penalty: Article 37(a) prohibits imposition of the death penalty for crimes committed prior to age 18. The Supreme Court recently held that the U.S. Constitution does not prohibit imposition of the death penalty in all such cases. A proposed reservation on this point may prove controversial.
- o "Soft" Rights: The Convention purports to guarantee such "rights" as health care, an adequate standard of living and social security. We have not traditionally regarded such items as "rights" but rather as services, benefits or entitlements that may be amended or rescinded solely on the basis of political or budgetary considerations. While we can probably fashion an understanding to cover this point, it may undermine our long-standing position in international organizations that economic rights are not on a par with civil and political, but rather goals to be achieved progressively.
- o Parental Rights/Family: Critics argue the Convention accords insufficient attention to the central role of parents and invites governmental intervention in family matters.