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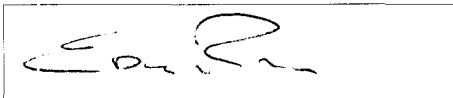
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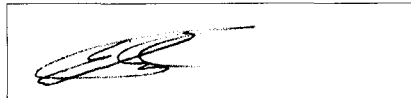
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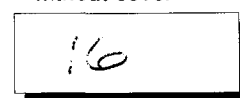
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**Legislative History of the
Convention on the Rights of the Child
(1978 - 1989)**

ARTICLE 41

(RESPECT FOR HIGHER STANDARDS)

The *Legislative History of the Convention on the Rights of the Child (1978-1989)* was prepared with the support of Rädde Barnen (Swedish Save the Children). It consists of a series of 45 booklets covering the drafting and adoption of each article of the Convention, as well as the preamble, based on United Nations records. This series will ultimately be collected and produced in a single set of volumes.

HR/1995/Ser.1/article.41

ARTICLE 41

(RESPECT FOR HIGHER STANDARDS)

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ARTICLE 41

(RESPECT FOR HIGHER STANDARDS)

I. FINAL TEXT ADOPTED BY THE GENERAL ASSEMBLY (1989)

The following text is that approved by the General Assembly in its resolution 44/25 of 20 November 1989.

Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) **The law of a State Party; or**
- (b) **International law in force for that State.**

II. FIRST POLISH DRAFT CONVENTION AND COMMENTS (1978)

In a letter dated 17 January 1978 addressed to the Director of the Division of Human Rights (see E/CN.4/1284), the Permanent Representative of Poland to the United Nations Office at Geneva proposed that "The question of the Convention on the Rights of the Child" be included in the agenda of the thirty-fourth session of the Commission of Human Rights. At that session, the Polish delegation presented a draft resolution (E/CN.4/L.1366) which contained a draft convention based upon the provisions of the 1959 Declaration of the Rights of the Child. The resolution was subsequently revised (E/CN.4/L.1366/Rev.1) and two additional articles (XI and XII) were added to the draft convention annexed in the final version of the draft resolution (E/CN.4/L.1366/Rev.2) which was then adopted by the Commission on Human Rights (see E/CN.4/1292, pages 122 to 127) as resolution 20 (XXXIV) of 8 March 1978. In that resolution, the Secretary-General was requested to invite Member States, competent specialized agencies, regional, intergovernmental organizations and non-governmental organizations to communicate to him their views, observations and suggestions concerning the draft convention submitted by Poland. Neither that draft nor the views received on it (see E/CN.4/1324 and Corr.1 and Add.1-5) addressed the issues raised in article 41 of the Convention.

III. FIRST READING (1979-1988)

In 1979, the Commission on Human Rights decided to establish an informal open-ended working group to meet for one week to consider the question of a draft convention on the

rights of the child during the session of the Commission. The Working Group met again in 1980 and was authorized in 1981 and each year thereafter to meet prior to the Commission session. In 1988, the Working Group met for two weeks in order to complete the first reading. The text of article 41 was discussed and adopted by the Working Group in 1986. This article was referred to as article 21 throughout the first and second readings.

A. 1983: PROPOSALS SUBMITTED TO THE WORKING GROUP

1. Poland

For the text of this proposal see paragraph 15 in section B below.

2. Union of Soviet Socialist Republics

For the text of this proposal see paragraph 17 in section B below.

B. 1983: DISCUSSION AT THE WORKING GROUP

The following is taken from the 1983 report of the Working Group to the Commission on Human Rights, E/CN.4/1983/62, paragraphs 14-17.

14. It should be noted that in the course of the discussions, some speakers raised the question of the inclusion in the draft convention of a clause relating to the applicability of other international instruments, in particular, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In the view of some representatives, references to the Covenants could be the object of a final clause.

15. A number of proposals have been made concerning the inclusion in the draft convention of a saving clause dealing with the question of the applicability of other international human rights instruments. The representative of Poland proposed as article 19(b) (E/CN.4/1983/WG.1/WP.10), the following text:

"This Convention shall not have the effect of diminishing the rights which the child may enjoy by virtue of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights".

Several delegations supported the Polish proposal.

16. The representative of the United States suggested the inclusion of an article which would be formulated along the lines of article 23 of the Convention on the Elimination of All Forms of Discrimination against Women to the effect that:

"Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) in the legislation of a State Party; or
- (b) in any other international convention, treaty or agreement in force for that State."

17. Mention should further be made of the proposal made by the USSR (in relation to paragraph 1 of article 6 bis) (E/CN.4/1983/WG.1/WP.7), which reads as follows:

"The States Parties to the present Convention recognize that the child should enjoy all the basic human rights in the spirit of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights".

C. 1984: PROPOSAL SUBMITTED TO THE WORKING GROUP

1. Canada

For the text of this proposal see paragraph 146 in section E below.

D. 1986: MODIFIED PROPOSAL PRESENTED BY POLAND

At its 1986 session, the Working Group had before it an elaboration of the draft convention which had been made available to the General Assembly in 1985 (see A/C.3/40/3) by the Polish delegation with a view to expediting the drafting process. That document contained the text of the articles which had already been adopted as well as a number of modified proposals which had been made at the Working Group. The following text is taken from A/C.3/40/3, paragraph 12.

Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) The legislation of a State Party; or
- (b) Any other international convention, treaty or agreement in force for that State.

E. 1986: DISCUSSION AND ADOPTION AT THE WORKING GROUP

The following is taken from the 1986 report of the Working Group to the Commission on Human Rights, E/CN.4/1986/39, paragraphs 146-151.

146. In 1984, the delegation of Canada submitted a proposed new article to read:

"Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) The legislation of a State Party; or
- (b) Any other international convention, treaty or agreement in force for that State."

That proposal, which was also contained in document A/C.3/40/3 submitted by Poland to the General Assembly at its fortieth session, was reintroduced and generally supported by the members of the Working Group.

147. The representative of Austria proposed that the words "instrument or" be inserted in subparagraph (b), between the words "international" and "convention". The delegation of Canada supported by the representative of the German Democratic Republic expressed its preference for retaining the subparagraph as submitted.

148. The representative of the United States, while supporting the article under consideration by the Working Group, felt that a third subparagraph should be included to read: "Other applicable law". The observer for the Netherlands suggested that, in subparagraph (a), the words "or laws" be added between the words "legislation" and "of a State Party", and in subparagraph (b) that the words "customary law" be introduced between the words "international" and "convention".

149. The representatives of Austria and the United States decided not to insist on their respective amendments which they accordingly withdrew.

150. The observer for Canada, supported by the delegations of the Netherlands and the United Kingdom, proposed that the word "laws", in subparagraph (a), be replaced by the singular.

151. After a further exchange of views, the Working Group adopted the following text:

"Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) The law of a State Party; or
- (b) Any other international convention, treaty or agreement in force for that State."

F. 1987: PROPOSAL SUBMITTED TO THE WORKING GROUP

1. Finland

For the text of this proposal see paragraph 130 in section G below.

G. 1987: DISCUSSION AT THE WORKING GROUP

The following is taken from the 1987 report of the Working Group to the Commission on Human Rights, E/CN.4/1987/25, paragraphs 130-132.

130. The Working Group had before it the following proposal, put forward by the delegation of Finland, for a paragraph 2 to article 21:

"Nothing in the present Convention may be interpreted as implying for any State Party to the present Convention any right to impose any restriction upon or derogation from any of the fundamental human rights recognized or existing in that State Party by virtue of law, conventions, treaties, agreements, regulations or customs on the pretext that the present Convention does not recognize such rights or that it recognizes them to a lesser extent (or that such restrictions or derogations would be necessary for the realization of the rights of the child)."

131. The observer for Finland orally amended the proposal by deleting the words in parenthesis "or that such restrictions or derogations would be necessary for the realization of the rights of the child", at the end of the paragraph.

132. Following a brief exchange of views between the delegations of Finland and the United States as to the reasoning behind and justification for such a provision, no decision was taken by the Working Group on the proposal, and the observer for Finland suggested that it be considered at the second reading of the draft Convention.

H. 1988: PROPOSAL SUBMITTED TO THE WORKING GROUP

1. Finland

The following is taken from the 1988 report of the Working Group to the Commission on Human Rights, E/CN.4/1988/28, paragraph 235.

"Nothing in the present Convention may be interpreted as implying for any State Party to the present Convention any right to impose any restriction upon or derogation from any of the fundamental human rights recognized or existing in that State Party by virtue of law, conventions, treaties, agreements, regulations or customs on the pretext that the present Convention does not recognize such rights or that it recognizes them to a lesser extent."

2. Germany, Federal Republic of

The following is taken from the 1988 report of the Working Group to the Commission on Human Rights, E/CN.4/1988/28, paragraph 235.

"Nothing in this Convention shall affect the right and the duty of parents and, where applicable, legal guardians, to take such measures as are required for the upbringing and well-being of the child."

I. TEXT AS ADOPTED AT THE FIRST READING

The following is taken from E/CN.4/1988/WG.1/WP.1/Rev.1.

Article 21

Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) The law of a State Party; or
- (b) Any other international convention, treaty or agreement in force for that State.

IV. TECHNICAL REVIEW (1988)

By a letter addressed to the Secretary-General (see E/CN.4/1988/28, paragraph 248), the Working Group requested that a technical review of the draft convention be undertaken by the United Nations Secretariat in advance of the second reading. Among the aims of the technical review were to identify overlap and repetition between and within draft articles; to check for linguistic consistency and accuracy in the text; to compare the standards established with those in other widely accepted human rights instruments; and to make recommendations as to how any overlaps or inconsistencies might be corrected in the second reading.

The Secretary-General subsequently requested comments on matters within their respective mandates of a number of the specialized agencies and other United Nations bodies, as well as the International Committee of the Red Cross. Those comments were compiled in the Technical Review of the text of the draft Convention on the Rights of the Child (E/CN.4/1989/WG.1/CRP.1 and Add.1), which was taken into account by the Working Group during the second reading of the draft Convention.

A. Comment by the International Labour Organisation (ILO)

The following is taken from E/CN.4/1989/WG.1/CRP.1, page 42.

In connection with comments concerning article 7 ter, it is arguable whether the saving clause in article 21 of the draft Convention would be adequate to ensure the trade union rights of young workers. This clause refers to "provisions that are more conducive to the realization of the rights of the child" that may be contained either in the law of a State Party or in an international instrument in force for that State. A State Party to the future Convention and to both Covenants and to Convention No. 87 might argue that as a "child", a worker under 18 might have restrictions imposed by law on his/her right to form and join trade unions. To prevent any possible litigations of this kind, it would be well to consider an appropriate addition to the present text of article 21 with a view to safeguarding the rights of the child as a worker.

The need for safeguarding the rights of the child as workers leads to a wider consideration: that of the need for a general saving clause in respect of other rights of the child as an individual human being. This appears necessary since the draft Convention addresses a variety of human rights as directed towards the child, but does not cover all human rights pertaining to every human being, irrespective of age or other distinction or status.

It may be noted that a general saving clause regarding "fundamental human rights" was proposed by Finland at the 1987 session of the Working Group (see paragraphs 130-132 of its report E/CN.4/1987/25) with the suggestion that it be considered at the second reading of the draft Convention. In the view of the International Labour Organisation, it appears desirable to include an appropriate additional paragraph to article 21 to provide that nothing in this Convention shall be deemed to affect any human rights which are laid down in international instruments or in national law that are in force and to which the child is otherwise entitled in his/her capacity and activities as a human being and as an individual person.

Such a saving clause would ensure coherence not only of principles (this is taken care of by the preamble of the present draft recalling that childhood is entitled to special care and assistance) but also of law between the future Convention and other major texts of human rights.

B. Comment by UNICEF

The following is taken from E/CN.4/1989/WG.1/CRP.1, page 42.

As this article is presently formulated, it could be claimed that a provision of the Convention which is less conducive to the realization of the rights of the child than a rule of customary international law should nevertheless take precedence over the latter. In order to avoid such a possibility, the Working Group might wish to consider adding the following provision:

"(c) customary international law".

V. SECOND READING (1988-1989)

By a letter addressed to the Secretary-General (see E/CN.4/1988/28, paragraph 248), the Working Group requested that the draft of the convention as adopted at the first reading be circulated to all Member States so that their comments could be taken into account during the second reading of the draft. The Working Group conducted the second reading from 28 November to 9 December 1988 and adopted its report from 21 to 23 February 1989.

A. PROPOSALS SUBMITTED TO THE WORKING GROUP AT THE SECOND READING

1. Finland

The following is taken from E/CN.4/1989/WG.1/WP.53.

Article 21

2. Nothing in the present Convention may be interpreted as implying for any State Party to the present Convention any right to impose any restriction upon or derogation from any of the [fundamental] human rights recognized or existing in that State Party by virtue of law, conventions, treaties, agreements, regulations or customs on the pretext that the present Convention does not recognize such rights or that it recognizes them to a lesser extent."

NOTE: Our delegation proposes that a new paragraph 2 be added to the present article 21. The proposed paragraph 2 is consistent with Article 5 of the Covenant on Economic, Social and Cultural Rights (1966) as well as with Article 5 of the Covenant on Civil and Political Rights (1966).

2. Germany, Federal Republic of

The following is taken from E/CN.4/1989/WG.1/WP.52.

Reformulate article 21 as follows:

1. The scope of general human rights as enshrined in the law of a State Party or in any other international instrument shall not be affected by the provisions of this Convention which such rights only ensure for children.
2. States Parties shall ensure that any other human right which is not provided for in this Convention but is recognized by the State Party concerned apply to children as far as possible.
3. Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in the law of a State Party or in any other international instrument.

B. DISCUSSION AND ADOPTION AT THE SECOND READING

The following is taken from the report of the Working Group to the Commission on Human Rights, E/CN.4/1989/48, paragraphs 623 to 636.

623. The Working Group had before it a text of article 21 as it had been adopted during the first reading incorporating a suggested revision by UNICEF (E/CN.4/1989/WG.1/WP.2). The text read as follows:

"Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) the law of a State Party; (or)
- (b) any other international convention, treaty or agreement in force for that State; or
- (c) customary international law."

624. The Working Group also had before it a proposed text for article 21 submitted by a drafting group consisting of Brazil, Canada, Finland, the German Democratic Republic, the Federal Republic of Germany, the Netherlands and the ILO (E/CN.4/1989/WG.1/WP.59). The text read as follows:

"Nothing in this Convention shall affect the obligation of a State Party:

(a) to apply to the child any human right or any rule relating to the protection of the child to which that State Party is bound by its national law, by custom or by any international instrument, irrespective of such right or protection being recognized in this Convention as a right of the child,

(b) to apply any other provision that is more conducive to the realization of the rights or protection of the child and that may be contained in the law or custom of the State Party or in any international instrument by which that State Party is bound."

625. The representative of the Federal Republic of Germany, in introducing the proposal contained in E/CN.4/1989/WG.1/WP.59, indicated that the main concern of the drafting group was to ensure that the present Convention would not derogate from the existing human rights obligations undertaken by States Parties. He further indicated that the words "irrespective of such right or protection being recognized in this Convention" in paragraph (a) of the proposal was to meet possible questions as to why certain rights accruing to children were not included in the Convention. The representative of the Federal Republic of Germany also stated that the group had not included a reference to customary international law in its proposal because few such laws referred to children and therefore may cause confusion if mentioned.

626. Participants in the Working Group debated the proposal contained in E/CN.4/1989/WG.1/WP.59 during the course of which a number of delegations voiced reservations about the proposal.

627. The representatives of Italy, Portugal and the United States of America questioned the omission from the proposal contained in document E/CN.4/1989/WG.1/WP.59 of a direct reference to customary law because, especially in the field of humanitarian law, they felt it was directly relevant to children. The representative of Italy further pointed out that in not providing for customary international law the Convention would be excluding the applicability of such law which may develop in future years. The representative of Argentina argued that such a reference would not be necessary because his delegation took the view that if customary international law did exist it only existed in special cases and not in the field of children's rights.

628. The representatives of Poland, Portugal and Sweden also questioned why the proposal contained in document E/CN.4/1989/WG.1/WP.59 only spoke in terms of the protection of the child and not in terms of the rights of the child. The observer for Australia also questioned the use of the word "rule" in the proposal. He took the view, as did the representatives of Norway and Sweden, that as submitted the proposal could absolve States Parties from applying the obligations of the Convention simply by acting in accordance with their domestic legislation, even if such legislation was not of as high a standard as the Convention provided. A number of delegations felt that the text of the proposal was not adequately clear for effective implementation.

629. The representative of Argentina expressed the view that although the language of the proposal contained in document E/CN.4/1989/WG.1/WP.59 was cumbersome it was more legally precise than the text as adopted during the first reading. The representative of the ILO also made the point that the reference in the text adopted during the first reading to "more conducive" raised the question of who would be the arbiter of such a decision and on what criteria the decision would be based.

630. In order to meet some of the concerns raised regarding the proposal contained in document E/CN.4/1989/WG.1/WP.59 the observer for Finland suggested that in line 3 of paragraph (a) the words "by its national law, by custom or" be deleted and that in line 4 of the same paragraph the word "any" be deleted and the word "instrument" be replaced by the word "law". He indicated that in simplifying its terms the text of the proposal became clearer and that, in having a reference to "international law", States would have the option of interpreting the phrase to include customary international law or not. Also with a view to meeting the concerns raised regarding the proposal contained in document E/CN.4/1989/WG.1/WP.59 the observer for Canada suggested that the text of article 5(2) of the International Covenant on Economic, Social and Cultural Rights be substituted for paragraph (a). Both representatives felt it important to retain paragraph (b) as it was. The representative of the International Labour Organisation agreed that a safeguard clause such as article 5(2) of the Covenant would be a satisfactory alternative, should the proposal of the drafting group not be acceptable.

631. There was a consensus in the Working Group that the aim of article 21 was to ensure that the Convention established a minimum standard of rights to be enjoyed by children. However, in view of the fact that the Working Group could not arrive at a consensus in support of the proposal contained in document E/CN.4/1989/WG.1/WP.59 and because the drafting group which submitted it did not insist on its adoption, the Chairman suggested that consideration of article 21 should continue based on the text adopted during the first reading.

632. With regard to the text adopted during the first reading the representative of France wished to see the article remain as it was. The representatives of India, Italy, Poland, Portugal and the United States of America however expressed a preference for the text including the suggested revision by UNICEF, as contained in document E/CN.4/1989/WG.1/WP.2.

633. The representative of the Union of Soviet Socialist Republics proposed that the words "or protection" be inserted after the word "rights" in the chapeau to the article, that paragraph (b) be redrafted to read "any other provisions of international law in force for that State" and that the suggested revision proposed by UNICEF be omitted. He indicated that this proposal would allow States to interpret international law as covering customary international law if they took the view that it did do so. The representative of Senegal also proposed that article 21 be basically left unchanged from the text adopted during the first reading but with a new paragraph reading "international law applicable to that State". He took the

view that it was desirable to avoid a listing or definition of international law for the same reason as the representative of the Union of Soviet Socialist Republics.

634. The representatives of Italy, Portugal and Sweden questioned the inclusion of the words "or protection" in the proposal of the representative of the Union of Soviet Socialist Republics. They took the view that the word "rights" alone covered any idea of "protection" and avoided possible misinterpretation. The representative of Portugal questioned the inclusion of the words "provisions of" in paragraph (b) of the proposal by the representative of the Union of Soviet Socialist Republics since the word "provisions" already existed in the introductory phrase to the article.

635. On the basis that the representative of the Union of Soviet Socialist Republics was willing to accept the amendments to his proposal and on the basis that "international law" was to be given the broad interpretation as covering customary international law, consensus was reached on a text for article 21.

636. The text of article 21 was adopted to read as follows:

"Nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in:

- (a) the law of a State Party; or
- (b) international law in force for that State."

VI. CONSIDERATION BY THE COMMISSION ON HUMAN RIGHTS, THE ECONOMIC AND SOCIAL COUNCIL AND THE GENERAL ASSEMBLY

The text of article 41 as adopted by the Working Group at the second reading was adopted along with the other articles of the Convention by the Commission on Human Rights by its resolution 1989/57 of 8 March 1989, by the Economic and Social Council by its resolution 1989/79 of 24 May 1989 and by the General Assembly by its resolution 44/25 of 20 November 1989.

VII. RELATED REFERENCES

See annex 1, "Related articles of the Convention".

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RELATED ARTICLES OF THE CONVENTION

The following grouping of related substantive articles is based on the guidelines adopted by the Committee on the Rights of the Child for the preparation of State party reports (CRC/C/5):

GENERAL MEASURES OF IMPLEMENTATION

- Implementation of rights (article 4)
- Promotion of rights and dissemination of information (article 42)
- Respect for higher standards (article 41)

DEFINITION OF A CHILD

- Definition of a child (article 1)

GENERAL PRINCIPLES

- Non-discrimination (article 2)
- Best interests of the child (article 3)
- Right to life, survival and development (article 6)
- Respect for the views of the child (article 12)

CIVIL RIGHTS AND FREEDOMS

- Name and nationality (article 7)
- Preservation of identity (article 8)
- Freedom of expression (article 13)
- Access to appropriate information (article 17)
- Freedom of thought, conscience and religion (article 14)
- Freedom of association and peaceful assembly (article 15)
- Protection of privacy (article 16)
- Prohibition of torture and the death penalty (article 37(a))

FAMILY ENVIRONMENT AND ALTERNATIVE CARE

- Parental guidance and the child's evolving capacities (article 5)
- Parental responsibilities (articles 18(1) and (2))
- Separation from parents (article 9)
- Family reunification (article 10)
- Recovery of maintenance for the child (article 27(4))
- Children deprived of a family environment (article 20)
- Adoption (article 21)

- Illicit transfer and non-return (article 11)
- Prevention of abuse and neglect (articles 19 and 39)
- Periodic review of placement (article 25)

BASIC HEALTH AND WELFARE

- Disabled children (article 23)
- Health and health services (article 24)
- Social security and child care services and facilities (articles 26 and 18(3))
- Standard of living (article 27)

EDUCATION

- Education, including vocational training and guidance (article 28)
- Aims of education (article 29)
- Leisure, recreation and cultural activities (article 31)

SPECIAL PROTECTION MEASURES

Children in situations of emergency

- Refugee children (article 22)
- Children in armed conflicts (article 38)

Children in conflict with the law

- Administration of juvenile justice (article 40)
- Children deprived of their liberty (article 37(b), (c) and (d))
- Sentencing of juveniles (article 37(a))
- Physical and psychological recovery and social reintegration (article 39)

Children in situations of exploitation, including physical and psychological recovery and social reintegration

- Economic exploitation, including child labour (article 32)
- Drug abuse (article 33)
- Sexual exploitation and sexual abuse (article 34)
- Sale, trafficking and abduction (article 35)
- Other forms of exploitation (article 36)
- Children belonging to a minority or indigenous group (article 30)