Chapter 8  
CRC Legislative History and the Child
Before Birth

**Strong support for recognition of the rights of the unborn child**

The recent UN publication *Legislative History on the Convention on the Rights of the Child* issued by the Office of the High Commissioner for Human Rights (Geneva, 11th June 2007) provides strong support for the Convention’s recognition of the human rights of the unborn child and States parties’ obligations to protect them.¹

In distinct contrast, the *Legislative History* provides only feeble and disjointed support for the theory advanced in the Introduction that the Convention successfully excluded unborn children from the Convention’s definition of the child in Article 1. For as conceded in the Introduction, the Convention’s Preamble reaffirms what was agreed in the 1959 *Declaration on the Rights of the Child* that the States parties have a specific obligation to recognize the human rights entitlement of the unborn child:

...the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth...

Understanding this in the context of Principle 1 of the Declaration, it is clear that the degree of this immaturity is not to be allowed to diminish in any way the child’s inherent humanity: human rights are equally valid for the child before birth as for the child after birth without any discrimination whatsoever.²

**Preamble integral to the Convention**

The *Legislative History* provides clear evidence that, although certain delegates attempted to quarantine the Preamble’s human rights protection for the child before birth from the obligations set out in the articles of the Convention, the attempt was...

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² *UN Declaration on the Rights of the Child* (1959) Principle 1: “Every child without any exception whatsoever is entitled to these rights ...”
ill-conceived and set for failure.\(^3\) Legal Counsel, requested by the representative of the United Kingdom at the time of negotiation and included here in the *Legislative History*, gave fair warning that such an attempt was inconsistent with the rules of interpretation as set out in the *Vienna Convention on the Law of Treaties*.

The preamble to a treaty serves to set out the general considerations which motivate the adoption of the treaty. Therefore, it is at first sight strange that a text is sought to be included in the travaux préparatoires for the purpose of depriving a particular preambular paragraph of its usual purpose, i.e., to form part of the basis for the interpretation of the treaty.\(^3\)

The theory that preambular paragraphs do not entail legally binding obligations on States parties to a Convention is a direct contradiction of Article 31 General rule of interpretation of the *Vienna Convention on the Law of Treaties*:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, its preamble...

In other words, the operative provisions within the Convention on the Rights of the Child (i.e., in the text) shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (i.e., in the context of its preamble in addition to the text). Clearly, operative provisions must be read *consistently* with the preambulatory paragraphs, which set out the themes and rationale of the Convention.

Furthermore, operative provisions must be read *consistently* with commitments already established in the International Bill of Rights and in the whole accumulative body of human rights protection for the child before as well as after birth beginning with the Geneva Declaration of the Rights of the Child of 1924. This agreement to honour all previous human rights commitments is confirmed in the full text of the most relevant consecutive preambular paragraphs of the Convention on the Rights of the Child which are as follows:

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights

\(^3\) The validity of the attempt to exclude the child before birth from rights protection was first seriously questioned in some original research by Dr. John Fleming and Dr. Michael Hains. See Fleming, John I. and Hains, Michael G., “What Rights, if Any, Do the Unborn Have Under International Law?” *Australian Bar Review*, December 1997.