

CHAPTER 3

The Status of Children in International Law

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INTRODUCTION

One of the purposes of International law is to lay out the common ground of understanding between two or more states and formulate that understanding into an agreement. Over time such agreements have come to be treated as creating binding obligations. Readers who are only familiar with international law through instances like the dramatic treaty breaking of Hitler's forces or the Iranian government's approval of the taking of the United States embassy mistakenly associate international law with pie in the sky idealism or paper promises cast into a void.

But the fact remains that the representatives of sovereign states take international law seriously. They are very reluctant to enter into internationally binding agreements; they meticulously and painstakingly peruse each word and comma, struggling to limit the nature and extent of the serious obligations they are accepting on a paper which they know all too well they cannot cast aside without painful consequences. That some state leaders do, in fact, act contrary to the obligations they have voluntarily accepted in no way changes the seriousness of their obligation or the relative ease with which the rest of the world can then identify that the state has indeed committed a violation of law.

The fact that human rights treaties have been drafted and ratified in substantial numbers and with substantive content in an age when sovereignty and nationalism are thriving, is itself a phenomenon worth investigating. Not only do the treaties define serious substantive obligations, but most lay out as well, a system of monitoring and implementation and some form of dispute resolution. We are surprised by this international legal development because human rights have until the second half of the twentieth century been, for the most part, a subject of purely national consideration. Human rights issues appeared to the drafters of the United Nations Charter, towards the close of the first half of the century, to be perfect examples of the need for Article 2 paragraph 7,

which retained to the member states the right to cite national law in order to limit the international organization's jurisdiction.

The Charter and Judgement at Nuremberg and the Universal Declaration of Human Rights signaled a fundamental change in the conceptualization of the legal status of the individual, but the seriousness with which states have enlarged and expanded the domain of human rights has also signaled a fundamental change in the conceptualization of the state. To take internationally defined human rights seriously is to acknowledge that the idea of national borders as sacrosanct delimiters of solely domestic jurisdiction is an anachronism.

This conceptual change suggests that a new set of global norms is emerging, the very existence of which challenges our thinking about national/international dichotomies. If a state cannot claim exclusive jurisdiction over its own citizens within its own borders, to what extent is the concept of sovereignty usefully descriptive? This very question constitutes one of the only valid challenges which the right wing within the United States has made to the international human rights movement. They are absolutely correct in their claims that ratifying human rights treaties will subject the United States to international scrutiny and lay groundwork which could in the future be used to criticize in legal terms the actions of the United States government against its own people. Even without ratification, some human rights treaties have been so widely ratified, so frequently cited in international conferences and in UN resolutions, and so generally included in unilateral and international statements of government officials, it can be reasonably argued that the United States is bound by their provisions on the basis of customary international law (Kaufman, 1990).

HOW GLOBAL IS INTERNATIONAL LAW?

If we consider the large number of human rights treaties and the extensive ratification of these treaties with relatively few limiting attachments or conditions, it is impossible to deny that the formal apparatus of the state system has embraced a set of fairly consistent obligations which represents a new level of consensus on moral and ethical norms. Along with these treaties, we find an even larger number of declarations from international conferences, United Nations resolutions, regional international organization resolutions, unilateral, supportive statements by official representatives of governments, and individual state constitutional and statutory action which testify to the global governmental acknowledgment of the obligatory nature of international human rights norms.

Even when representatives of states publicly agree to statements of norms which they may not intend to implement fully or speedily, they are giving added force to the legitimation of the norms they adopt. And although the International Court of Justice stands symbolically as the ultimate arbiter of international law, it is in the national courts, national legislatures, national administrations, and national public policy debates that the impact of these norms will be most strongly felt. Government officials, members of legislatures,

and national judges often find themselves caught up in rhetoric about human rights standards; although initially accepted with a view to applying them to foreign strangers they have been forced to see their application to familiar constituents.

Some have argued (Kaufman, 1995) that since the validity of international law partially depends on overt or tacit consent to the obligations set forth in the law, a process of law making or ratification which excludes significant groups may not be globally valid. For example, women's voices are rarely included in the formal governmental delegations that draft international law and may be absent, as well, from the governmental level ratification process. Children, or those who can claim to speak on behalf of children, will also generally fall into this category. An important exception to the normal process, however, was the very active involvement of non-governmental organizations (NGOs) in the drafting of the children's convention, including the most important child advocacy groups. Hopefully this example and the involvement of these groups, as well, in the monitoring process, augurs well for future international law codification. In addition to the participation of particular organizations, since women and children are not monolithic groups, it is especially important to seek diverse input into the interpretation and implementation of human rights treaties if they are to achieve the level of consent that would give them maximum validity.

Human rights treaties have also been challenged on the grounds that they often reflect western law and values and neglect the rich legal and cultural traditions of non-western societies. Although there is some merit in this accusation, it is important to note that multilateral human rights treaties were drafted by representatives of all the governments of the world and large numbers of non-governmental organizations. The normal drafting process allows as well for numerous opportunities for input from those not in attendance at the drafting conferences. Following adoption of the treaty there is, of course, a national process of ratification, which is in the minds of each delegation during the drafting process. Finally, most countries have a process of national legislation, which they use to incorporate the treaty provisions into their domestic constitutional system. Thus, a careful analysis of the drafting process of most human rights treaties reveals a very thoughtful and necessarily slow deliberation about each word and phrase primarily because the drafters aim for universality with respect for flexibility within maximally perceived allowable limits.

THE STATUS OF CHILDREN

What are the obligations vis à vis the child that states have taken on in the major domains of globalization?

The global recognition of human rights is one of the most significant dimensions of an emerging system of globally shared values. The extension of human rights regimes to encompass the least powerful citizens—ethnic, racial, and religious minorities, women and children—means that even the most

vulnerable are now entitled to equal protection of the law. The creation of a High Commissioner for Human Rights is a more recent development which highlights the importance nations are attaching to the monitoring and implementation in this one area of global values consensus.

The underlying assumption of most law on human rights is the dignity of the individual. Individuals are posited to have rights because they are human aside from their membership in any particular national group. When we speak of inalienable rights, we are acknowledging an understanding that rights are not coterminous with nationality. One indication that this belief is fundamental is that when governments historically have deprived whole groups of people of their rights, they first deny their humanity and next deny them citizenship in the state. (For example, Jews in Germany under the Third Reich and African slaves in the United States prior to 1860.)

Thus, one of the hurdles for the group we call children is the presumption in many cultures that children are less than fully human; children can be denied fundamental rights until they reach an age of maturity. The rejection of the notion that children lack human rights has been developing throughout the century most notably since the Declaration of the Rights of the Child in 1924. The 1989 Convention on the Rights of the Child (CRC) lays aside any lingering idea that children are not entitled to human rights. (The Convention was preceded by the non-binding United Nations Declaration on the Rights of the Child, 1959.) The CRC covers the largest scope of any single human rights treaty and states take on extensive obligations for the survival, development, protection, and participation of children. The language includes all children and is in the form of binding obligations. "States shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" (Article 2, paragraph 1).

There are a number of regional rights documents that reinforce the international claim that children have legal rights. The European Convention on Human Rights and Fundamental Freedoms (1950) uses "everyone" in Article 5 (liberty and security of person) and Article 8 (respect for privacy, family life, home and correspondence) so one might presume that children are included. The European Social Charter (1961) most specifically in Article 7 (protection of children and young people at work), Article 10 (right to vocational education), and Article 17 (social and economic protection for mothers and children) specifically include children as those having rights.

In the American Convention on Human Rights (1969) Article 16 is devoted entirely to the "Rights of children," which protects children's status as minors, states their right to be with their parents, and their right to free education. And under Article 19 the child is entitled to protection by the family, society and the state. The child's education rights are elaborated in Article 13 of a protocol to this convention focusing on economic, social and cultural rights (1988).

Africa is the only region that has a separate regional agreement on children's rights, the African Charter on the Rights and Welfare of the Child (1990) (ACRWC). This document covers the same rights domains as the CRC and has specific articles devoted to regional concerns such as Article 26 on protection against apartheid and discrimination and Article 30 on children of imprisoned mothers. The Charter also sets up a regional committee to monitor the rights of the child as set forth in the treaty.

There are numerous other international legal agreements with one or more references to children's rights. Some will be discussed below as relevant to the domain of globalization.

To exemplify the globalization of human rights norms for children, we can look briefly at the concept of the dignity of the person which is essential to the very definition of what it means to have rights, and finds a central place in the CRC. One example of a norm that has been newly developed in the second half of this century is that of the right of the child to protection from abuse. Here is an issue which is still controversial within states, basically in tension with the right of the family to privacy, and in line with longstanding attitudes that the child is the property of the parents. As Van Bueren (1995) has pointed out, the lack of reservations to the CRC articles on abuse and neglect are a positive sign that states are willing to entertain the idea that children have the right to live in families without being subject to emotional or physical abuse (Article 19, paragraph 1).

Also related to respect for the dignity of the child is the even more controversial emergent norm prohibiting corporal punishment as degrading and humiliating. The Riyadh Guidelines aimed at the prevention of juvenile delinquency, for example, recommend "the avoidance of harsh disciplinary measures, particularly corporal punishment" (Section IV, paragraph 21 (h)). An example of this changing norm is an effort in Scandinavia to prohibit parental corporal punishment. The European Commission on Human Rights upheld a Swedish law prohibiting parental corporal punishment when it was challenged by Swedish parents, on the grounds of the vulnerability of children. The decision means that states that have ratified the European Convention are not required to abolish parental corporal punishment, but that if they choose to do so, they are not violating the rights of parents. One may hope that as research on the damage of corporal punishment and its conflict with the dignity of the child is more widely promulgated, a potential limitation on parental abuse may gain international status.

Although the CRC does not specifically prohibit parental corporal punishment, it is increasingly difficult to reconcile such practice with the convention's emphasis on the dignity of the child. The convention does provide a basis for eliminating corporal punishment in schools in one of the articles on education. Article 28, paragraph 2 requires states to "ensure that school discipline is administered in a manner consistent with the child's human dignity...." For children in the juvenile justice system, an especially vulnerable population, the United Nations Standard Minimum Rules for the Administration of Juvenile

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