

UN Committee on the Rights of Child

Day of Discussion on

**THE PRIVATE SECTOR AS SERVICE PROVIDER
AND ITS ROLE IN IMPLEMENTING CHILD RIGHTS**

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Submission by

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**WHO HAS LEGAL OBLIGATIONS UNDER THE CRC?
The Relation of Private Actors to the CRC**

by

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When discussing the role of private actors in implementing the CRC, one of the most basic questions is whether private persons are bound by the Convention. There are various ways to ask the legal question, such as: “Are the rights that children and adolescents hold under the CRC held against private actors?”; or, “Does the CRC place legal obligations on private actors?” or, “Can private actors violate the CRC?” Regardless of the precise way the question is put, it boils down to the same legal issue.

The mainstream view is that private actors are not bound by the CRC; the legal obligations are those of State parties, not parents, corporations, or other civil society entities. The duties that private actors have in implementing the CRC are ethical obligations, at most; they are not legal duties. Private actors do play a role in implementing the Convention, but their actions are not, strictly speaking, “implementation.”

Right-holders and duty-bearers

There are actually two sets of right-holders under the CRC. First, as the CRC is a multilateral treaty, each State party is both a right-holder and a duty-bearer with respect to each other party to the treaty; this applies to all three Parts of the Convention (i.e., articles 1 to 54). A State’s failure to live up to its CRC’s obligations constitutes a breach of the treaty, at least if the failure is material and unexcused.

The second set of obligations is the one that concerns us at the Discussion Day. By ratifying the treaty, a State recognizes all the boys and girls in its jurisdiction to be right-holders, with the State being the corresponding duty-bearer. Ratification legally obligates the State to fulfill each of the rights in the articles in Part I of the CRC (i.e. articles 1 to 41) with respect to each right-holding child and adolescent. The obligation is “legal” in the sense that the State is bound to comply with the treaty according to the rules of international law. What the State’s obligations are to the right-holders under national law are, of course, determined primarily by national law (e.g., national law determines whether CRC rights are justiciable, that is, whether courts can use the CRC as a source of law in deciding cases).

Private actors are not parties to the treaty, and therefore they are not bound by the CRC rights in articles 1 through 41. When a State proceeds to “implement” the Convention, that is to

say, when it carries out or fulfills its obligations to the right-holders, it will often enact legislation that will regulate the conduct of private persons. Some of these laws will be civil in nature, which can make a child or adolescent a right-holder against the private actors; but in these cases the right is a right under domestic law; it is not, strictly speaking, a CRC right.

Since private actors are not duty-holders under the CRC, they cannot violate the human rights that boys and girls hold under the treaty. They can, however, be guilty of complicity in a State's violation of a CRC right.

Complicity

International law usually draws upon concepts first developed in the national legal systems of States. The concept of complicity in human rights violations comes from principles of criminal law, which makes a distinction between the commission of a crime and complicity in the commission of the crime.

For instance, the crime of embezzlement is a type of theft that can only be committed by a person who is an employee of the victim, or who is in some other specifically defined position of trust. If Mrs. A, a non-employee, is accused of embezzling a million dollars from a bank, she will be found not guilty even though she took money: since she does not have the status of a person who can commit the crime, she cannot be guilty. However, Mrs. A can be guilty of complicity in Mr. B's crime of embezzlement, if he is an employee of the bank. Mrs. A's inciting Mr. B to commit the crime, aiding and abetting his commission of the offense, or being an accessory after-the-fact, as when she helps him to escape detection, are all acts of complicity.

The same concept of complicity applies to the violation of human rights treaties. At least that is the mainstream view. For instance, the Subcommission on the Prevention of Discrimination and the Protection of Minorities has been working on a code of conduct for transnational businesses. The working group on this project has not defined corporate good practices in terms of human rights obligations of corporations.¹ It has, however, said that corporations must "avoid complicity in human rights abuses."² The High Commissioner of Human Rights, Mrs. Mary Robinson, in promoting the Global Compact, has spoken about businesses having "policies of good corporate citizenship," and about "corporate social responsibility," but she has not asserted that businesses are duty-bearers under UN human rights treaties. Instead, she urges businesses to ensure that "they are not themselves complicit in human rights abuses."³ Commentators in the human rights literature have also taken the complicity approach in explaining the relation of private actors to human rights abuses.⁴

¹ "Draft Universal Human Rights Guidelines for Companies," UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1 (31 May 2001), at para. 6 ("Although it may be beneficial for transnational corporations and other business enterprises to embrace human rights standards, it may still be questioned if it is appropriate to impose human rights obligations on these business associations."), and at para. 14 (noting that the Subcommission has not addressed the "difficult issue" of human rights obligations of non-state actors, which "requires further study").

² See Commentary (a) to General Obligations A.1 and 2, "Addendum 1: Draft Universal Human Rights Guidelines for Companies," UN Doc. E/CN.4/Sub.2/2001/WG.2/WP.1/Add.1 (31 May 2001), at p. 4.

³ Mary Robinson, "Beyond Good Intentions: Corporate Citizenship for a New Century," London, 7 May 2002. "Complicity" is expressly mentioned in the Global Compact, principle 2 ("make sure they are not complicit in human right abuses"). Both documents are available at www.unhchr.ch.global.htm.

⁴ Steven Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," 111 Yale L.J. 443, 449 (2001).

Bribery is a classic example of complicity. When a corporation bribes legislators to water down a child-labor law, or when it bribes government inspectors to ignore child-labor abuses, then it is complicit in the State's violations of its human rights obligations to protect children and adolescents from exploitation and harm (e.g. CRC article 32).⁵

Respect

There are two sources of confusion that should be mentioned in a discussion about legal obligations. First, it is not unusual to see statements in the human rights literature referring to the "responsibility" of corporations and other private actors to "respect" human rights. Oftentimes there is an explicit reference to, or a quotation from, the preamble to the Universal Declaration of Human Rights which speaks about everyone "respect[ing]" human rights. The UDHR is a resolution of the General Assembly, and does not itself impose legal obligations on member States; it is the function of the human rights treaties to impose those duties, and the adoption of the UDHR was the first step in the process of creating legally binding treaties. In speaking about private persons "respecting" the Universal Declaration or the rights it spells out, the term can mean two things. First, "respect" can refer to an attitude of esteem, deference, or appreciation, as when we respect Mrs. Mary Robinson in her role as High Commissioner of Human Rights. Second, "respect" can refer to ethical obligations. "Showing respect" to the High Commissioner and "showing respect" for human rights implies that there are ethically appropriate and inappropriate behaviors. What these behaviors are will be defined by social mores, such as in the adoption of codes of good business practices.

The Outline for the theme day contains an example of a call for private persons to "respect" human rights. The Outline quotes from General Comment 12 of the Committee on Economic, Social and Cultural Rights:

While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society -- individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector -- have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private sector -- national and transnational -- should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.⁶

⁵ Another domestic law concept is interference with the exercise of rights. Interfering with a contract right can be a tort, while interfering with a fundamental right, like the right to vote, can be a crime. In each case, the tort and the crime, as well as the right that is interfered with, are national laws. The concept of interference can be extended to human rights, but this would require the enactment of laws defining the tort or the crime. In addition, there is an overlap and an interplay between the human rights treaties and international crimes. Slavery and genocide, for instance, are crimes against humanity, which means that private persons are duty-bearers (i.e., they can be guilty of these crimes). At the same time, the ICCPR contains a right to be free from slavery (art. 8), and a right to life (art. 6), both of which the State violates if it engages in, or permits, slavery or genocide.

⁶ "Outline for the day of General Discussion on the private sector as service provider and its role in implementing child rights," (undated), *quoting* General Comment 12, para. 20, UN Doc. HRI/GEN/1/Rev.5 (26 April 2001), at p. 70.

The Committee is apparently referring to ethical responsibilities of private actors, rather than legal obligations imposed by the ICESCR. Indeed, the reference to “the private sector” speaks about codes of conduct that have yet to be written and agreed upon, rather than about any duty to comply with ICESCR obligations. A “code of conduct” normally refers to a set of ethical principles. The principles laid out in the draft code being written by the Subcommission, or that are contained in the Global Compact, are ethical principles, and it is anticipated that these will stimulate the development of legally binding rules. Furthermore, a “family” and a “local community” are not normally thought of as entities that can be bearers of legal duties; they are not “legal persons” like a corporation. The Committee is obviously not speaking about legal duties when it talks about “respect.”

The Committee is making a rhetorical point about ethical conduct, and the quotation must be understood in its context. The ICESCR and the CRC do not require the State party to be the provider of all education, health services, food, or any other such social good; the State’s duties to fulfill the rights to education, to health, and to an adequate standard of living are obligations of results, with the treaties leaving the State a tremendous amount of discretion as to the means of achievement. Private actors obviously play an important role in achieving the results required by the human rights treaties, and it is entirely proper to speak about their ethical duties to promote the common good; States translate these ethical duties into legal duties when they write the laws that regulate the conduct of civil society actors; speaking about ethical duties helps to legitimate the laws that the State imposes. On the other hand, the legal obligations imposed by the treaties are borne only by the State party, and the General Comment says nothing that departs from the mainstream view.⁷

There is another way in which the General Comment lacks precision that is of interest to CRC advocates. The Committee says that “all members of society” have “responsibilities” in the realization of the right to food in ICESCR article 11(1). This cannot be taken at face value: babies bear no responsibilities, ethically or legally, for realizing either article 11(1) or CRC article 27. Babies are in no position to be duty-bearers, a matter too obvious to need discussing. If we took the Committee at its word, it would be asserting that babies are not members of society, which is tantamount to denying that they have human rights, or that they are even human beings. We must conclude that the Comment is not a precise statement. It is, at best, only a “general comment,” although that does not excuse making babies invisible.

UN human rights v. natural rights

⁷ A State’s regulation of relations between private actors is usually referred to as “horizontal effects” of a treaty’s obligations. The metaphorical language could lead to the mistaken impression the treaty creates legal duties in private actors. See Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999) at 31 (“In general, the term ‘horizontal effects’ refers to effects that human rights have on relations between private parties, as opposed to the effects they have on the vertical level between the individual and the State. It is not to be confused with the misconception that international human rights treaties can impose, directly, any duties upon entities other than the State.”), citing, among others, Manfred Nowak, *U.N. Covenant on Civil and Political Rights* (1993) at xxii. While Detrick’s basic point is correct, the phrase, “the effects that human rights have,” creates an ambiguity. The rights in the treaty do not themselves have effects between private persons; instead, they impose duties on the State to achieve certain results, usually stated in rather abstract language, leaving the State with a large scope of discretion. In fulfilling its obligations, the State will frequently have to regulate the conduct of private persons, such as in requiring parents to send their children to school, or criminalizing sex abuse. So it is the precise manner in which the State discharges its duty that affects the private relations, not the treaty right itself.

The other source of confusion is the failure to distinguish the two senses in which people talk about human rights (including “children’s rights”). “Human rights” can mean either the rights recognized in the UN treaties, or it can be used to refer to natural rights.

When it comes to defining the meaning or scope of human rights in the first sense of UN treaty-rights, one can use the rules of legal interpretation as laid down by the Vienna Convention on the Law of Treaties, which are, primarily, the “ordinary meaning rule” and the “legislative history rule” (i.e., resorting to the travaux préparatoires). By contrast, a natural right is whatever a person says it is; the rules of interpretation in the VCLT are not important in determining what is and what is not a natural right. For instance, to say that animals have “rights,” or that gorillas have “human rights,” is to be speaking of natural rights. Similarly, to say that corporations have “human rights obligations” is to be using the term in the second, natural law sense.

Some examples

Thinking of the CRC in terms of legal rights, identifying the right-holder and the corresponding duty-bearer when discussing the meaning of a particular CRC article, will help clarify many discussions that concern the “implementation” of the Convention.

For instance, Dad gets the kids up in the morning, packs their lunch, and drops them off at the public elementary school on his way to work. Is Dad “implementing” CRC article 28(1)(a) (the right to compulsory primary education)? No; he is fulfilling his ethical duties as a parent, and, as most States make primary education mandatory, he would also be complying with domestic law. It is the State that is fulfilling CRC obligations by providing the school. What if Dad sends the kids to a private school at the family’s expense? The CRC does not require the State party to run the school system; it sets out obligations of results. By allowing private education and by regulating the quality of the instruction, the State is implementing CRC article 28. The CRC duty-bearer is the State, not Dad.

Or, when article 12 says that a young person’s views must be listen to and respected “in all matters” affecting that person, who is the duty-bearer? If CRC rights are held against the State only, then “all matters” refers to decisions that State actors are making; it is not referring to parents, corporations, the fellow members of a kids’ stamp club, or any other private actors. If you are running to catch a bus and a teenager asks for a hand-out, article 12 does not impose on you an obligation to either listen to the demand or to respect it according to that teenager’s age and maturity. Nor does the CRC obligate you to meet the teenager’s needs to the maximum extent of your available resources (article 4), or to ensure his right to food (article 27) or right to play (article 31). Nor does the CRC require you to make his best interests one of your primary considerations (article 3) as you quickly decide what to do about your bus and your money. What morality, good manners, and your own values require of you is one thing, what international law requires of State parties under the CRC is another. Article 12 does not apply to this situation because you, the private actor, are not bound by the Convention.

The connections between private actors and the State

Since the duty-bearer is the State, “implementing the CRC” refers to the actions that a State takes to fulfill its obligations to all the children and adolescents within its jurisdiction. Private actors are essential to the State’s successful discharge of its CRC obligations, however. Private actors help the State to fulfill its duties by, among other things: paying their taxes so the

State will have resources to carry out its responsibilities; obeying the laws pertaining to child and adolescent welfare; pressuring the State to fulfill its CRC responsibilities (e.g., lobbying for a budget increase, or to pass a child-abuse law); assisting boys and girls in enforcing their rights under the both the CRC and under national laws (e.g., informal conflict resolution, or litigation); and entering into, and fulfilling, contracts as service-providers.

Private actors as contractual service-providers

When private actors enter into contracts with a State to carry out child- or adolescent-related activities, then new sets of duty/right relations will be created. This can happen in privatization, as when a corporation runs a juvenile detention facility, and it can happen when an ngo gets a government grant, as in the case of a pilot project for kids with drug problems. The new legal relations require us to separate out the various sets of duties and rights.

For instance, the State has CRC obligations to protect kids from drugs (article 33) and to promote rehabilitation (article 39). The duty-holder/ right-bearer relations are defined in terms of obligations of results, which leaves the State with wide discretion. The grant for the pilot project makes the ngo a duty-bearer to the State, with the specific obligations being defined by the terms of reference and the relevant statutory provisions; it also makes the State a right-holder, allowing it to hold the ngo accountable. In addition, the grant will make the ngo a right-holder against the State, permitting it to enforce the contract if government officials fail to live up to the agreement. When the ngo carries out the terms of the project, it is fulfilling its contractual obligations, but it is not implementing the CRC; it is helping the State to implement the CRC.

Finally, either the contract or national law might impose obligations on the ngo that create duty-right relations with the minors. A law defining the minors' rights of privacy in drug counseling will create such a relation, for instance. An important part of CRC advocacy is putting flesh on the bones of the Convention by making sure that the abstract rights in the treaty are backed up by enforceable national laws that hold all actors accountable for the respect of human dignity of the minors who lives they affect. A service-provider contract gives a private actor the power to affect the lives of boys and girls, but if the State does not guard against abuses of power, or provide remedies, then this could be a violation of the State's obligations under CRC articles 3 and 4, in conjunction with the substantive rights in the treaty.⁸

Conclusion⁹

While it easy to fall into the habit of speaking of private persons having human rights obligations, or about ngos implementing the Convention, these expressions can create confusions for the children and adolescents who want to understand their rights under the Convention. The CRC movement stresses the need to "take children's rights seriously," that CRC rights are legal

⁸ The regulation of the relations between the ngo and the minors they serve would be "horizontal effects" of the State's discharge of its duties.

⁹ This paper has not discussed the legal interpretation of CRC art. 3 ("In all actions concerning children, whether undertaken by ... private welfare institutions, ... the best interests of the child shall be a primary consideration.") A legal discussion would include such issues as: Does "private welfare institutions" refer only to quasi-governmental entities? If not, does this article impose direct legal obligations on private institutions, or is its function hortatory? Or instead of itself imposing obligations, does it impose a duty on the State to impose obligations under national law? These matters have not been debated in the CRC literature, as far as I know.

obligations, and that kids must be taught their rights so that they can exercise them. This implies that the information they are given is technically correct from a legal point of view. Furthermore, the State's duty to "make the principles and the provisions of the Convention" known to kids (article 42) implies that what they are told will be clear and accurate. We therefore have a duty of care in the way we talk about human rights.

Making it clear that CRC rights are obligations of the State, and using the reciprocal notions of right-holder and duty-bearer with respect to both CRC articles and national laws, will avoid many misunderstandings.