UN Committee on the Rights of Child

Day of Discussion on

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

Friday, 20 September 2002
Office of the High Commissioner for Human Rights
Palais Wilson, Geneva

Submission by

World Organization Against Torture (OMCT)

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Privatisation of basic services, public order and law enforcement within the context of the rights of the child

World Organisation Against Torture contribution to the

Committee on the Rights of the Child
Day of General Discussion on

"The private sector as service provider and its role in implementing Child Rights"

Friday, 20 September 2002

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September 2002

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Part one
I. Privatisation within the context of public order and law enforcement

1. Relevant existing international norms: brief overview

The major universal and regional instruments do not, when defining human rights or when dealing with deprivation of liberty, punishment and permissible restrictions on human rights, mention the mode of prison administration or the status of prison staff. However, several subsidiary instruments are relevant and some guidelines can be deduced from them.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[1] and the Code of Conduct for Law Enforcement Officials[2] might seem to indicate that State practice is such that prisons must be operated by public officials[3].

The **Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment** in Principle 2 provides that "Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by *competent officials of persons authorized for that purpose*" (emphasis added). In the Body of Principles there are numerous references to "authorities" in relation to detained or imprisoned persons (Principles 29-33).

The **Code of Conduct for Law Enforcement Officials** defines "law enforcement officials" as to include "all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention" (article 1). It seems implicit that persons exercising police and responsible for detention are "law enforcement officials" and that private citizens acting in terms of contract were not contemplated as forming part of the criminal justice system[4]. Furthermore, article 3 of the Code of Conduct provides that "(l)aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty". This obligation was detailed in 1990 in the "**Basic Principles on the Use of Force and Firearms by Law Enforcement Officials**"[5].

Norms related to forced labour include **ILO Convention No. 29 Concerning Forced Labour**[6]. In article 2.1 it provides that "forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". Furthermore, article 4 of the Convention prohibits forced or compulsory labour for the benefit of private individuals, companies or associations. Under article 5 no concession to private individuals, companies or associations shall involve any form of such labour for the production or collection of goods which the said private individuals or bodies utilize or trade.

[1] Approved by the U.N. General Assembly in resolution 43/173 of 9 December 1988
[2] Approved by the U.N. General Assembly in resolution 34/169 of 17 December 1979
[3] U.N. Doc. E/CN.4/Sub.2/1993/21, June 1993, Para. 73
[4] U.N. Doc. E/CN.4/Sub.2/1993/21, June 1993, Para. 73
[5] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.
[6] Adopted on 28 June 1930 by the General Conference of the International Labour Organisation, 14th session.

2. The privatisation of prisons and detention centres for children and juveniles

2.1. The concept of privatisation of prisons

"Privatization" means private sector involvement in government functions or provision of services. Privatization of the penal system therefore means private sector involvement in the implementation of penal policy and functions[7]. There has been private sector involvement in a wide range of penal functions, facilities and services. The involvement in relation of detained or imprisoned persons and to persons facing trial or undergoing punishment covers, *inter alia*: prison construction, provision of professional services, facilities and goods, control of or participation in prison work programmes and industries, management and operation of entire prisons or places of detention, including juvenile reform schools, community treatment centres and illegal immigrant centres, punishments alternative to prison[8]. For the scope of the present paper, privatisation of prisons and detention centres will exclusively refers to private and for-profit companies, leaving aside any possible involvement of associations, religious groups or non-governmental organisation in the running of such facilities.

2.2 Responsibility of the state: beyond monitoring

Several important issues arise when addressing the question of the privatisation of prisons and detention facilities. These include: the legality of privatisation under international human rights law; the extent of delegation of duties possible under privatisation; the minimum safeguards required; the most appropriate human rights monitoring methods for private prisons[9].

Another very important argument when discussing privatisation of services in general, and of prisons in particular, has often been the allegation that the responsibility of the State for the administration of civil and criminal justice would be reduced and therefore become ineffective in such cases. However, it should be noted that such internal arrangements in no way effect the responsibility of the State at the international level. In consequence, such responsibility would indeed engage the establishment of a monitoring system whereby an independent body would supervise the observance of the relevant laws and regulations[10], irrespective of whether the prison or detention centre is state or privately run. The running of a prison or a detention facility cannot be considered as a mere economic activity, and privatised prisons have to be regulated as all sectors of state activities. In fact, there are several arguments that can be raised as to demonstrate that running a prison cannot be treated as equivalent to managing and carrying out an economic activity within the market.

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[7] U.N. Doc. E/CN.4/Sub.2/1993/21, June 1993, Para. 20
[8] U.N. Doc. E/CN.4/Sub.2/1993/21, June 1993, Para. 21
[9] U.N. Doc. E/CN.4/Sub.2/1997/21, 19 August 1997, Para 39.
[10] Principle 29 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establishes that "In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment. Furthermore, rule no 72 of the United Nations Rules for the Protection of Juvenile Deprived of their Liberty (adopted by the General Assembly Resolution 45/113 of 14 December 1990) establishes that "Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. (…)".

2.3 Economic arguments versus protection of human rights and respect of fundamental freedoms

Governments privatising prisons and detention centres argue that privatisation is a way to reduce their budgets and increase efficiency through the salutary effect of competition. Privatisation of prisons has also been used as an answer to poor prison conditions and to enhance their accountability[11]. Nevertheless, these arguments have proved to be more ideological than factual. For instance, contracts for the construction and operation were not always open for scrutiny, nor subject to freedom of information because of the issue of commercial confidentiality; private corporations have cut costs by reducing services to prisoners; there was evidence of corruption and interference in government policy on law and order issues[12]. What was even more disturbing was that in some cases the occurrence of the use of the force was systematic and excessive, prison conditions were poor, there was no increase of recreational facilities and costs in health and medical services were cut[13].

2.4 Privatisation of prisons within the framework of the rights of the child

Because of their particular vulnerability, children need special protection under international law. This means that specific children's rights standards must be applied to them when general human rights are not adequate. The Convention on the Rights of the Child both asserts children's status as holders of human rights and adds specific provisions appropriate to children's status[14]. Furthermore, several principles and guidelines have been developed for the administration of juvenile justice and for the protection of child and juvenile offenders. In particular the United Nations Rules for the Protection of Juveniles Deprived of their Liberty[15] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)[16] establish particular safeguards and standards for children being deprived of their liberty. This greater responsibility that almost every State in the world has accepted[17] and to which the majority of the States have still to comply[18], put serious questions on whether the privatisation of prisons and detention centres for children would be a committed response to their obligations or rather a way to get away from them.

There are fundamental basic principles established for the administration of juvenile justice and fundamental rights of children deprived of their liberty that a policy of privatisation of detention centres and prisons for children might put in danger.

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[11] Geoffrey Binder, *Corrections Incorporated: the privatisation of prisons*, url: http://www.greenleft.org/au/back/1992/71/71p11.htm

[12] Amanda George, *The privatisation of prisons*, url: http://www.greeleft.org.au/back/1993/112/112p11a.htm

[13] Geoffrey Binder, *Corrections Incorporated: the privatisation of prisons*, url: http://www.greenleft.org/au/back/1992/71/71p11.htm

[14] OMCT, *Children, Torture and Other Forms of Violence. Facing the facts, forging the future*, International Conference, 27 November – 2 December 2001, Tampere, Finland, p. 69.

[15] Adopted by General Assembly resolution 45/113of 14 December 1990

[16] Adopted by General Assembly resolution 40/33of 29 November 1985

[17] Articles 37 and 40 of the Convention on the Rights of the Child establish in details the requirements for the protection of children in conflict with the law. Only the USA and Somalia are not parties to the Convention as yet.

[18] According to a research carried out by Defence for Children International (DCI), out of 141 State reports submitted to the Committee on the Rights of the Child between 1993 and 2000, the Committee has asked to 21 States to undertake comprehensive reforms of their juvenile justice system; to over two dozen other States the Committee has recommended to undertake reforms, without using the word "comprehensive"; furthermore, the Committee asked to 17 States to bring their laws in compliance with article 37 (prohibition of death penalty, life imprisonment and torture); the Committee has found 25 States not separating child from adults detainees. For further details see Defence for Children International, *Juvenile Justice 'the Unwanted Child' of State Responsibilities*, 2000.

For example, article 37(b) of the Convention on the Rights of the Child establishes that "(…)The arrest, detention or imprisonment of a child shall be in conformity with the law and *shall be used only as a measure of last resort and for the shortest appropriate period of time*" (emphasis added)[19].

Another fundamental principle, linked to the previous one, is the requirement by the state of alternative procedures, including alternative to deprivation of liberty, as to avoid contact with the ordinary justice system. Article 40.3 of the Convention on the Rights of the Child establishes that "States Parties shall seek to promote the establishment of *laws, procedures, authorities and institutions specifically applicable to children* alleged as, accused of, or recognised as having infringed the penal law (…)" (emphasis added). Furthermore, rule no 17 of the UN Rules for the Protection of Juvenile Deprived of their Liberty establishes that "(…) Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, *all efforts shall be made to apply alternative measures*. (…)" (emphasis added).

Leaving the construction, running and management of a prison to a private company might pave the way to the construction of too many prisons, providing an incentive for greater sentencing which would then result in a sustained supply of profit producing customers. Profit being the ultimate goal of a private company, and detainees being the customers of a company running a prison, States might be willing to be subject to political pressure and not to live up to their obligations to prevent and reduce the deprivation of liberty for children[20].

Another fundamental principle for children and juveniles in conflict with the law is that the aim of detention is their rehabilitation and reintegration into society. Article 40(1) of the CRC reads that "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and *the desirability of promoting the child's reintegration and the child's assuming a constructive role in society*" (emphasis added). Furthermore, rule 80 of the UN Rules for the Protection of Juvenile Deprived of their Liberty establishes that *"Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles*. These services should ensure, to the extent possible, that the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself or herself upon release *in order to facilitate successful*

[19] The same principle is also established in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 1 (imprisonment should be used as a last resort), and in the Beijing Rules in rules 13.1 (pre-trial detention as a measure of last resort) and 19.1 (placement of juveniles in institutions as a measure of last resort).

[20] Examples of prisons and correctional centres for juveniles run by private companies include the ones run by the Corrections Corporation of America (CCA), in the USA:
- Okeechobee Juvenile Offender Correction Center - Okeechobee, Florida. A 96-bed, secure juvenile facility
- Shelby Training Center - Memphis, Tennessee. A 200-bed, secure juvenile center
- Tall Trees - Memphis, Tennessee. A 63-bed, non-secure juvenile residential facility
- Ponce Young Adult Correctional Facility - Ponce, Puerto Rico

Furthermore, there are also CCA Jails housing Juvenile Offenders:
- Bay County Jail and Annex - Panama City, Florida
- Hernando County Jail - Brooksville, Florida
- David L. Moss Criminal Justice Center - Tulsa, Oklahoma
- Houston Processing Center - Houston, Texas
- Liberty County Jail/Juvenile Center - Liberty, Texas

reintegration. The representatives of agencies providing such services should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community" (emphasis added).

Privatisation of prisons, on the contrary, has very often resulted in a reduction in the numbers of prison staff, in inappropriate and/or inadequate recreational facilities, and in the reduction of the availability of health and medical services[21]. This can be considered as one of the results of the profit motive which inevitably undermines the cost reduction activities by causing the cutting of corners, leading to poor or unsafe conditions[22]. Furthermore, an indicator of how little reintegration is a concern within certain detention facilities for juveniles, is the excessive use of force, the use of corporal punishment and gas grenades, the use of chemical and mechanical restraints[23].

A further issue of concern linked to the privatisation of prisons for children and juveniles is the use of forced or compulsory prison labour, and the question as to whether children and juveniles might be more likely to be subject to it. As was noted by the ILO supervisory bodies with regard to child labour in prisons, the question arises whether, and if so, under what circumstances a minor can be considered to have offered himself or herself "voluntarily" for work or service and whether the consent of the parents is needed in this regard and whether it is sufficient, and what the sanctions for refusals are[24]. It has to be noted that while the minimum age for admission to work is normally established at the age at which compulsory school attendance ends, hazardous work likely to jeopardize health, safety or morals is generally prohibited for persons below 18 years of age. This means that no child deprived of his/her liberty should be legally allowed to perform work in prison, in accordance with ILO Convention No. 29. Nevertheless, ILO has regularly raised cases of exploitation of children under the Forced labour Convention[25] and one can wonder whether a privatised detention centre or prison is not more likely to be exploiting the labour of children and juveniles.

3. Privatisation of the function of maintaining the public order and the unlawful use of force by private security guards

According to article 6 of the CRC, "States Parties recognize that every child has the inherent right to life". This provision imposes, among other things, that the State abstain from using force unlawfully. Whereas the international norms regulating the use of force are focused on State agents activities[26], in some countries, part of the mandate of maintaining social peace and public safety has been transferred to private companies, which are entitled by the State to bear arms in order to exercise their activities. As such power may be unlawfully used, it must be determined to which extent the State may be held responsible in such situations.

[21] Geoffrey Binder, *Corrections Incorporated: the privatisation of prisons*, url: http://www.greenleft.org/au/back/1992/71/71p11.htm
[22] Evan Sycamnias, *All prisons should be managed by private enterprise. The pros and cons*, url: http://www.uplink.com.au/lawlibrary/Documents/Docs/Doc17.html
[23] Stephen Nathan, *Prison Privatisation*, url : http://penalreform.org/francais/article_privatisation.htm
[24] Report of the Committee of Experts 1984, observation, Convention No. 29, Federal Republic of Germany.
[25] ILO, Les normes internationales du travail, Une approche globale, 2001, pp. 62-63.
[26] See above.

OMCT has received allegations that human rights violations, including summary executions, have been perpetrated by private security guards in various countries.[27] Although no statistics are available on the nature and extent of this phenomenon, it has been shown that children have been victims of such practices.

On 29 May 2002, the International Secretariat of OMCT was informed by Casa Alianza, a member of the OMCT network, that two child immigrants were extra-judicially executed, on 24 May 2002, in northern **Mexico** by a man allegedly being employed as security guard. The security firm involved in this case had previously received complaints concerning its treatment of immigrants.[28]

On 10 June 2002, the International Secretariat of OMCT was also informed by Casa Alianza that children and young adults were regularly murdered in **Honduras**, bringing the total to more than 1210 victims since January 1998. According to the information received, no killer had been identified in 66% of the cases, but 4% were attributed to police and guards.[29]

In July 2002, the International Secretariat of OMCT was also informed by Casa Alianza that at least 97 children and young **Nicaraguans** less than 23 years of age met violent deaths during the last eight months of the year 2001. According to the reports, among those responsible for the killings, two were private security guards (2%).[30]

Since States are ultimately responsible for maintaining order and security within the limits of their territories, they also bear the responsibility for the legal use of force. When they choose to delegate parts of this function to private security companies, they must strictly ensure that these companies fulfil their activities within the framework of human rights.

Because of the administrative delegation of power which establishes a link between the State and the company, OMCT deems that the latter does not act anymore as a purely private actor, but as an entity which is not an organ of the State *stricto sensu*, but "which is empowered by the law of that State to exercise elements of the governmental authority" in the meaning of the Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the Drafting Committee of the UN International Law Commission. Acts of such an entity engage the State's international responsibility.[31]

State responsibility vis-à-vis unlawful killings perpetrated by private security companies includes the obligations to prevent, to stop, to investigate and to punish violations of human rights, as well as to provide adequate compensation and to promote recovery and reintegration of the victim. In order to fulfil this obligation, the State must take into account international standards applicable to the use of force. In particular, the State must ensure that article 9 of

[27] See for example: Justicia Global, *Execution Killings in São Paulo, Images of Violence: A Portrait of Social Exclusion*, Annual Report 2000. Amnesty International, *Annual Report 2000*, Philippines. Human Rights Watch, *Turkey, Human Rights and the European Union Accession Partnership*, September 2000.
[28] OMCT Case, MEX 290502.CC/MEX 290502
[29] OMCT Case HND 241001.2 EE
[30] OMCT Case NIC 190702.CC
[31] Draft articles on Responsibility of States for internationally wrongful acts adopted by the Drafting Committee of the UN International Law Commission, A/CN.4/L.602/Rev.1, 26 July 2001, Article 5 Conduct of persons or entities exercising elements of governmental authority: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".

the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials be also respected by private security guards. This provision reads as follows:

> "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

The Special Rapporteur on extrajudicial, summary or arbitrary executions also recognized that State responsibility may be engaged for human rights violations perpetrated by private security companies. In the definition of her mandate, the Special Rapporteur include "(b) Death threats and fear of imminent extrajudicial executions by (…) private individuals or groups cooperating with or tolerated by the Government, as well as unidentified persons who may be linked to the categories mentioned above". [32]

Furthermore, the Committee against Torture (CAT), in its concluding observations to Indonesia, listed amongst the subjects of concern "Allegations that *human rights abuses related to the Convention* are sometimes committed by *military personnel employed by businesses* in Indonesia to protect their premises and to avoid labour disputes"[33]. From this formulation it can be inferred that, firstly, by speaking of "human rights abuses" the CAT implies an international responsibility of the State under the Torture Convention for violations committed by subjects who, by domestic law, might be defined as private actors; secondly and as a consequence, the CAT might imply that the "military personnel employed by business" is comparable to state officials and therefore engaging the same kind of state responsibility at the international level.

In this regard, OMCT deems that a delegation of power from the State to a private security company constitutes a cooperation relationship, which means that wrongful acts by the company may be attributed to the State.

4. Recommendations

In light of the above, OMCT recommends to the Committee on the Rights of the Child:

- to unequivocally call upon all States and Governments to live up to their obligations and not engage in any privatisation of detention centres, prisons, or correctional or remand centres for children and juveniles in the form of management and/or operation of the entire place of detention by private and for-profit companies; other services or activities linked, for example, to the construction or provision of facilities and services, provided that they are merely of an executive nature, can be sub-contracted to private companies on an ad-hoc basis and under strict regulations;
- to reiterate to the States that already have detention centres and/or prisons for children and juveniles which are privatised and/or run by private companies, that they bear full

[32] Special Rapporteur on extrajudicial, summary or arbitrary executions, Mandate: Violations of the right to life upon which the Special Rapporteur takes action, http://www.unhchr.ch/html/menu2/7/b/execut/exe_mand.htm.

[33] Conclusions and Recommendations of the Committee against Torture : Indonesia. 22/11/2001, CAT/C/XXVII/Concl.3., para 7(a), emphasis added.

international responsibility for their management and running and for the respect of fundamental rights and freedoms as well as their violation;

- to urge to the States, who choose to delegate parts of their function to maintain the order and security to private security companies, to strictly ensure that these companies fulfil their activities within the framework of human rights and be held fully accountable for any human rights violations they might commit;
- to state that police and security guards employed and/or working in privatised detention centres and/or prisons for children and juveniles as well as for private security companies maintaining order and security, although they might not be considered by domestic law as state officials *stricto sensu*, bear the same responsibility for the respect of fundamental freedoms and rights of detainees and are therefore as accountable as state agents for their violations.

Part two
II. The privatisation of basic services

1. The Provision of Basic Services: the Human Rights Framework and International Human Rights Law

The provision of basic services constitutes an essential element towards the realisation of human rights, and in particular of the right to health, the right to education and the right to safe drinking water.[34] As recalled by the Sub-Commission on the Promotion and Protection for Human Rights in its 2001 resolution on the '*Liberalisation of Trade in Services and Human Rights*', the delivery of basic services, particularly in the areas of health and education, constitutes a fundamental means of promoting the realisation of human rights.[35]

International human rights law does not specify that the provision of basic services shall be and remain a governmental prerogative. Moreover, within the framework of the Convention on the Rights of the Child (CRC), the right of children belonging to minorities or indigenous peoples to enjoy their own culture and to use their own language might recognise that basic services such as education, can be provided on a private basis.[36] In this respect, the Council of Europe's Framework Convention for the Protection of National Minorities leaves no doubt that persons belonging to national minorities have a right to set up and to manage their own private educational and training establishments.[37]

[34] See General Comment No. 14 of the Committee on Economic, Social and Cultural Rights on the Right to Health, para 43 (c); UN Doc. E/CN.4/2002/59, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, March 2002, paras 49-68; See also the work of the Expert of Sub-Commission for the Promotion and Protection of Human Rights, Mr. Guissé, on the right to safe-drinking water.

[35] UN Doc. E/CN.4/SUB.2/RES/2001/4, *Liberalization of trade in services and human rights*

[36] See article 30 of the Convention on the Rights of the Child and article 27 of the International Covenant on Civil and Political Rights

[37] See article 13(1) of the Framework Convention for the Protection of National Minorities

However, while letting the modalities of basic services' provision open with respect to the involvement of the private sector, international human rights law puts precise conditions and benchmarks upon the manner through which basic services should be delivered, along with the final aim of services' delivery.

Through the work of the Committee on Economic, Social and Cultural Rights (CESCR) -review of States' report and General Comments- essential principles have been defined concerning the delivery of basic services, in order to guarantee the equitable, non-discriminatory and universal enjoyment of human rights.

Indeed, the delivery of basic services shall be consistent with the principles of accessibility and acceptability.[38] The principle of accessibility entails the dimensions of non-discrimination, physical accessibility and economic accessibility, while the notion of acceptability stresses upon the quality of the basic services.[39]
The principle of accessibility puts emphasis upon the most vulnerable, poor or marginalized sections of the population and, therefore, upon the concurrent obligation to guarantee that these groups have, in law and in fact, access to basic services such as health, education and safe-drinking water. On this basis, health facilities, education and water provision must be affordable and within safe physical reach for all.[40] The principle of accessibility also prohibits *de jure* or *de facto* discrimination, a requirement that is not subjected to the progressive realisation clause.[41]

The delivery of basic services, being an essential element towards the realisation of human rights, is also subjected, under international human rights law, to the principle of non-retrogression. This principles requires that any retrogressive measure affecting one of the above-mentioned criteria in the frame of services' delivery needs to be to be fully justified by reference to the totality of economic, social and cultural rights and in the context of the full use of the maximum available resources.[42]

In this regard, the adoption of any deliberately retrogressive measure that would affect the availability, accessibility and quality with respect to education, health or water facilities, can be considered as a violation of any international human right instrument encompassing dispositions related to economic, social and cultural rights, including the CRC.[43] On this basis, the non-retrogression principle demands two measures: prior assessment and compensatory measures when a retrogression took place. Concerning the assessment, it can be expected that the implementation of any administrative, legal, economic, social or other measure that is likely to have a retrogressive impact on the enjoyment of economic, social and cultural rights would require prior assessment. With regard to compensation, the Committee on Economic, Social and Cultural Rights notes, with respect to the right to adequate housing, that a general decline in living and housing conditions directly attributable to policy and

[38] See the following General Comments of the Committee on Economic, Social and Cultural Rights: General Comment No. 12 on the right to adequate food; General Comment No. 13 on the right to education; General Comment No. 14 on the right to the highest attainable standard of health
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.* See article 2 of the International Covenant on Economic, Social and Cultural Rights: 'Each State Party (…) undertakes to take steps (…), to the maximum of its available resource, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant (…).
[42] General Comments No 3 on the nature of State parties obligations of the Committee on Economic, Social and Cultural Rights, para 9
[43] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 14(e)

legislative decisions, and in the absence of accompanying compensatory measures, is inconsistent with the International Covenant on Economic, Social and Cultural Rights.[44] Concerning the assessment, it can be expected that the implementation of any administrative, legal, economic, social or other measure that is likely to have a retrogressive impact on the enjoyment of economic, social and cultural rights would require prior assessment.

Finally, under the CRC, the delivery of basic services shall also respond to the best interests of the child. In this respect, and within the framework of the CRC, specific children's rights standards should be applied to evaluate the effect of the provision of basic services, notably with regard to the principles of accessibility, availability, quality and non-retrogression.

2. Privatisation of Basic Services: Water, Health and Education

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights note the trend, in all regions of the world, to reduce the role of the State and to rely on the market to resolve problems of human welfare.[45] Policies towards the privatisation of basic services such as water, health and education make part of this broader trend and have been implemented in developing, developed and transition countries.
In terms of the human rights impact of such policies, concrete examples of the privatisation of basic services' highlight situations in which the principles of availability, accessibility, acceptability, non-retrogression and the child's best interests are being infringed upon.

With regards to the issue of economic accessibility, the introduction of user fees, implicit to the privatisation of sectors such as health, education and water, often places these services out of reach for the poor, the destitute and the vulnerable. In these circumstances, and in the absence of subsidies provided by the government for the affected groups, these are often unable to afford the privatised services.[46]

Moreover, in instances of basic services delivery to remote regions or areas inhabited by low-income groups, privatised services providers, relying on a cost-benefits analysis, might decide either not to operate in such regions or to stop operations that were, prior to the privatisation, carried out by a public entity. Such a situation, corresponding to a 'market failure' raises serious concerns with respect to the principle of physical accessibility.

In terms of quality, privatisation can also lead to the creation of different systems, a private of good quality but out of reach for the majority of the population, and another one, public and affordable, but of very low quality.

A report on Zambia released by OMCT in October 2001 showed that the introduction of user-fees in the health and educational sectors has put both services out of reach for a significant portion of the population.[47] In terms of education, the report highlights that the percentage of educational costs in households' non-food expenses raised from 7 percent to 16 percent in 3

[44] General Comment No. 4 (1991) on the right to adequate housing (Article 11(1) of the Covenant), UN Doc. E/1992/23, para 11
[45] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 2
[46] See in this respect the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. E/CN.4/2002/59, March 2002, para 58
[47] OMCT, *Zambia : Violations of Economic, Social and Cultural Rights, Violence and the Protection Against Torture*, October 2001, unpublished

years, increasing therefore the number of drop-out in the educational system.[48] The same patterns have been documented with respect to a significant drop in attendance at health institutions.[49]

In Bolivia, the 1999 privatisation of the Cochabamba water and sanitation system and the award of a 40-year concession for the water and sanitation system to a private consortium led to massive price hikes, up to 200 percent according to government sources.[50] Uprising and social unrest emerged as the population was severely hit by these price hikes. The protests were met by military and police response, live ammunitions being used against demonstrators and the state of emergency being declared in the whole country.[51] Approximately 5 months after the price hikes, and after a boy was shot in the head and killed by live ammunitions during a demonstration, the government revoked the concession.[52]

The increased role played by privatised service providers is often closely related to international financial policies. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights observe that such a situation is 'often brought by conditions generated by international and national financial markets and institutions in an effort to attract investment'.[53] In such a context, a clash between a State's human rights obligations and its commitment towards private service suppliers and international financial institutions can emerge. For instance, in the context of the Cochabamba water system's privatisation, which was pushed by the World Bank, the revocation of the foreign consortium's concession by the Bolivian government has been brought, by the said consortium, to the International Centre for the Settlement of Investment Disputes of the World Bank.[54]

Similar clashes might occur between States' human rights obligation and States' obligations and/or commitments under international trade law.

3. Liberalisation of Trade in Services and Human Rights

Developments in the trade agenda and implementation of trade agreements, at the international and regional levels or bilaterally, have raised increasing concern within the human rights community.[55] While the primacy of human rights obligations over economic policies has been reiterated on several occasions by various United Nations Human Rights mechanisms, in practice, two parallel regimes continue to develop separately, with a risk that the human rights principles, instruments and mechanisms will be marginalized .

With respect to the delivery of basic services and human rights, the implementation of the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO) raises serious concerns regarding the performance of States' duty 'to regulate to achieve

[48] *Ibid.*
[49] *Ibid.*
[50] Public Services International Research Unit (PSIRU), *Cochabamba-water war*, June 2000
[51] *Ibid.*
[52] *Ibid.*
[53] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 2
[54] *Ibid.* ; See the Report of the High Commissioner, *Liberalisation of Trade in Services and Human Rights*, UN Doc. E/CN.4/Sub.2/2002/9, para 49
[55] See UN. Doc. E/CN.4/SUB. 2/RES/2001/5, Globalisation and its impact on the full enjoyment of all human right; UN. Doc. E/CN.4/SUB., Intellectual Property and Human Rights; UN. Doc. E/CN.4/SUB.2/ RES/2001/4, Liberalization of trade in services and human rights; UN Doc E/CN.4//SUB.2/2002/11

legitimate policy objectives such as to ensure the availability, accessibility, acceptability and quality of basic services'.[56]
In brief, the GATS provides a legal framework for the progressive liberalisation of trade in services. As other WTO agreements, the GATS entails different requirements, including the 'most favoured nation' and the 'national treatment' principles. The concurrent application of both principles requires equality of treatment between foreign services and service suppliers and non-discrimination between national and non-national services and service suppliers. Under the GATS, non-compliance with these requirements renders WTO members subjected to the enforceable WTO dispute settlement system.

Article 1(3) of the GATS excludes 'services supplied in the exercise of governmental authority', meaning services that are supplied neither on a commercial basis nor in competition with other suppliers. As the wording of this exclusion is ambiguous and unclear as to the exact extent of such exclusion, the GATS is clearly encompassing sectors such as health, social security, education and water, and is likely to encompass other such as prisons and public security (see the parts on privatisation of public order and law enforcement).

Whereas the GATS recognizes the right of Members to regulate in the public interest, the fact that this recognition appears in the preamble and is subjected to the rule that services regulations do not constitute unnecessary barriers to trade, raise serious concerns as to whether the 'most favoured nation' and the 'national treatment' principles will not clash with States' obligations under international human rights law.

In her report on the *'Liberalisation of Trade in Services and Human Rights'*, the High Commissioner for Human Rights notes that while the principles of non-discrimination exists both under human rights law and trade law, their meaning remains different and the implementation of this principle under trade law might well prevent that the same principle is being realised under human rights law.[57] Indeed, as mentioned in the High Commissioner report, non-discrimination in trade law envisages equal treatment for all service providers. Under the GATS, and assuming that a government made a commitment in a particular sector, the principle of non-discrimination (national treatment and most favoured nation) might well prevent this government from subsidising a given service provider –public or private- in order to guarantee the equal access of vulnerable groups or communities.

For instance, the concept of affirmative action, in human rights, is understood as "a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality".[58] Policies of affirmative action can be carried out by actors belonging to the public sector or to the private one and have targeted women, blacks, immigrants, poor people, disabled persons, veterans, indigenous people, other racial groups, specific minorities, etc.[59] Programmes for disadvantaged areas in order to balance internal inequalities of economic and political power have also been implemented as affirmative actions measures.[60]

[56] UN. Doc. E/CN.4/SUB.2/RES/2001/4, Liberalization of trade in services and human rights
[57] Report of the High Commissioner, *Liberalisation of Trade in Services and Human Rights*, UN Doc. E/CN.4/Sub.2/2002/9, paras 59-62
[58] U.N. Doc. E/CN.4/Sub.2/2001/15, June 2001, para 7
[59] *Ibid*, paras 8, 12
[60] *Ibid*., para 35

The overall aim of affirmative action policies is to bring out de facto equality in the enjoyment of all human rights. In its General Comment on article 26 of the International Covenant on Civil and Political Rights (ICCPR), which is a general non-discrimination provision, the Human Rights Committee stressed that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination (…)".[61] The UNESCO Declaration on Race and Racial Prejudice of 1978, adopted by unanimity and considered to have become part of international human rights law[62] stresses in its article 9 that particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination, the advantages of social measures in force, in particular with regard to housing, employment, health and education.[63]

Affirmative action policies can cover a whole range of measures from the establishment of quotas, the granting of subsidies, the implementation of training programmes for specific groups, etc. The limits put on affirmative action measures by international law are that these measures shall not lead to discrimination and that they must be temporary.[64]Consequently, international law does not recognise the implementation of trade-related agreements as a limitation to the implementation of affirmative action policies. Moreover, the international Law Commission has recently acknowledged the fundamental nature of the non-discrimination principle, at least on the basis of race, defining it as a peremptory norm of international law.[65]

The intrinsic nature of affirmative action policies is to give preferential treatment to certain groups or regions in order to guarantee a de facto equal enjoyment of all human rights. Regulatory measures as well as the provision of subsidies can be considered as implementing measures of affirmative action policies. While under human rights law affirmative action policies are not considered as a form of discrimination, subsidies to a particular actor operating in a given sector that has been liberalised under the GATS might be considered as discriminatory in nature.

4. Recommendations

Under international human rights law, the State is ultimately responsible for guaranteeing the realisation of children's economic, social and cultural rights. While many developments have shown that in instances related to trade, economic and financial policies States are often unable or unwilling to implement their human rights obligations, they continue to be the duty-bearers of human rights obligations.

Given the fundamental importance of basic services' delivery for the realisation of these rights, when States choose to delegate such delivery to private providers, they must strictly ensure that these providers conduct their activities within the human rights framework and in a way that does not impair the realisation of these rights.

[61] Human Rights Committee, General Comment No. 18, para 10
[62] U.N. Doc. E/CN.4/Sub.2/2000/11, June 2000
[63] *Ibid.*
[64] *Ibid.*, para 41
[65] Cited in the Report of the High Commissioner, *Liberalisation of Trade in Services and Human Rights*, UN Doc. E/CN.4/Sub.2/2002/9, para 59

This responsibility also implies that before undertaking commitments, under the GATS or any other trade agreement, States shall carefully assess the impact that such a commitment would have on the realisation of children's human rights.

In light of these remarks, and of the above development, OMCT recommends to the Committee on the Rights of the Child:

- to unequivocally call upon States to live up to their obligations and that before making any commitment to the liberalisation of basic services under the GATS, they conduct thorough and careful assessment of the impact that such a commitment would have for the realisation of children's economic, social and cultural rights;

- to call upon States that have privatised the provision of basic services (under the GATS or independently of the GATS) to guarantee that these services are being delivered according to the principles of accessibility, availability and quality as described by the Committee on Economic, Social and Cultural Rights in its General Comments No. 12, 13 and 14.

- To call upon States to adopt a human rights approach to trade, as described by the High Commissioner on Human Rights in her report on *'Liberalisation of Trade in Services and Human Rights'*