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,