EXECUTIVE SUMMARY: STATE OBLIGATIONS, CHILDREN’S RIGHTS AND BUSINESS

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INTRODUCTION

Business policy and action can have a very significant impact – both positive and negative – on children’s rights. Children are at times more vulnerable to the effects of corporate violations of their rights than adults: they have a greater susceptibility to pollution; they are more vulnerable to exploitation and discrimination in the work place; and may be more swayed by irresponsible marketing than adults. Violations of children’s right at key stages in their development may have life-long consequences: economic exploitation, sexual exploitation and abuse of children and harmful physical punishment can have long-term negative effects on health and physical and mental development. It is not always possible to make up years of schooling lost because of economic exploitation or violence in the workplace. Lack of health care at critical stages owing to discrimination in provision of health care by private providers may have irreversible effects on a child’s development.

States have an obligation to protect children’s rights from corporate violations and this is a crucial aspect of their duties under the UN Convention on the Rights of the Child (CRC). However, States have been slow to fully acknowledge this duty; with regards to the duty to protect human rights from corporate violations, this reluctance has been explained as a result of a lack of knowledge of the duty and lack of ability and willingness to act upon it1. The issue of the State duty to protect children’s rights from corporate violations has received even less attention despite being a critical issue2.

Children constitute 34% of the global population, and in many developing and low-income countries, children make up 50% of the population3. Yet children are usually politically voiceless and their rights at times have to compete with the interests of more vocal and powerful constituencies such as businesses. Since children do not vote, they must rely on appropriate systems of governance to deliver results for them to ensure that their rights are not ‘left-behind’ and over-shadowed by State support and consideration for business interests4.

2 Children do not feature explicitly in the UN “Protect, Respect and Remedy” Framework and limited reference is made to them in the Guiding Principles. Furthermore, the UN Framework and Guiding Principles as well as the OECD Guidelines, the UN Global Compact and others all use the “International Bill of Human Rights” as their benchmark to assess the human rights impact of business. This does not explicitly include the CRC.
3 Figures cited in Children and Good Governance Policy Brief Save the Children (2010) p1
This is a Summary of a longer piece of research examining the scope and nature of State obligations to protect children’s rights from corporate violations. It emphasises the importance of robust and comprehensive child rights governance mechanisms to counter-balance the influence and power of business. It falls into three sections:

- The scope and nature of State obligations to protect against child rights violations by business;
- Measures of implementation of the State obligation to prevent and remedy corporate violations of children’s rights; and
- Challenges and opportunities in meeting State obligations.

1. SCOPE AND NATURE OF STATE OBLIGATIONS TO PROTECT AGAINST CHILD RIGHTS VIOLATIONS BY BUSINESS

1.1 The State has a duty to protect children’s rights from corporate violations
The duty to protect against human rights violations by third parties, including business, is a well-established principle of human rights both regionally and internationally. The CRC, along with other international child rights standards, imposes positive obligations on States Parties to take measures to regulate and control corporate activities to prevent the violation of children’s rights. Further, they impose an obligation to take effective enforcement measures that is to investigate, adjudicate and redress violations of children’s rights when they occur. This is consistent with the UN Guiding Principles on business and human rights. The UN Committee on the Rights of the Child has made recommendations to States to apply the UN Framework. The UN Committee on the Rights of the Child has made recommendations to States to apply the UN Framework.

1.2 The State duty to promote, fulfill and respect children’s rights is also important vis à vis the private sector
Promoting children’s rights can play an important role in preventing corporate violations of children’s rights. The UN Committee recommends that States increase knowledge and understanding of the Convention across the whole of society including amongst children and by inference the private sector. Promotion of the CRC can help ensure that negative impacts on children’s rights linked to the activities of business, such as the use of exploitative child labour, discrimination in the workplace, child trafficking or emitting pollution which endangers children’s survival and development are no longer tolerated or accepted as somehow inevitable but are defined as clear and unacceptable violations.

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5 Please note the issue of children’s access to remedy for corporate violations of their rights is addressed separately in an accompanying piece of research.
7 See for example, New Zealand, Concluding Observations (2011) CRC/C/NZL/CO/3-4 Para 23 and for Bahrain (2011) CRC/C/BHR/CO/2-3 Para 21
Fulfilling rights generally means providing resources to assist with the realization of rights. Logically an important element of this obligation is to ensure that States are maximizing revenues through eliminating corrupt practices within the private sector and through collecting taxes from the private sector efficiently. Respecting rights means ensuring that the State itself does not harm children’s rights through either actions or omissions and that it addresses harm when it occurs. There are many different contexts where the State duty to respect children’s rights has relevance for how it regulates the private sector not least in contexts where the State itself has ownership or control over business actions; for example, with regards to State-owned enterprises or State procurement of goods or services.

1.3. There are limits to the extent of State responsibility for child rights violations committed by businesses

Human rights treaty bodies have suggested that there are limits to the extent of a State’s responsibility for corporate violations. A State cannot be held responsible for every violation of human rights that is brought about by corporate activity unless there has been some act or omission by the State that evidences a failure to exercise due diligence in fulfilling the duty to protect. Exercising due diligence in the State context is generally understood as taking reasonable steps to prevent, punish, investigate and redress abuse by non-State actors such as business. The UN Guiding Principles also take the view that the State duty to protect is a standard of conduct rather than result. The concept of due diligence also features in General Comment 31 of the Human Rights Committee. The Committee on the Rights of the Child has not expressed the duty to protect from third party abuse in terms of an obligation on the State to undertake due diligence meaning that States should take measures which are ‘reasonable’ to ensure violations are prevented and remedied. However, it seems that this could be a very useful approach to adopt since it provides States with a practical framework for protecting children’s rights from corporate violations that is rooted in international human rights law.

2. MEASURES OF IMPLEMENTATION OF THE STATE OBLIGATION TO PREVENT AND REMEDY CORPORATE VIOLATIONS OF CHILDREN’S RIGHTS

The CRC does not merely state what children’s rights are but goes much further. Article 4 demands that governments “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights”. In 2003, the Committee on the Rights of the Child highlighted the necessary steps that all governments must take, and for which they should be held accountable, in its General Comment No. 5 on ‘General Measures of Implementation’.

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9 See for example, Guatemala, Concluding Observations (2010) CRC/C/GTM/CO/3-4 Para 26 and Georgia (2003) CRC/C/15/Add.222 Para 14
10 For more on this point see Chirwa, Danwood Mzikenge The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights (2004) 5(1) Melbourne Journal of International Law 1
11 UN Guiding Principles Para 1
12 General Comment No. 31 (2004) Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add.13 Para 8
The following examines different measures States can employ to protect children’s rights from corporate violations.

**Legislation and regulation**

- Adopt appropriate legislation and related regulations to protect children from business abuse of their rights – this might include proscribing the employment of children under a certain age; protecting children from violence in the workplace; introducing anti-discrimination law for private sector providers; criminalising the sale of children, prostitution and child pornography; regulating marketing of harmful substances such as alcohol and tobacco to children; maternity leave in line with relevant ILO Conventions; and environmental regulation. It should also include protecting children’s rights through trade law, investment rules, and related legal measures.\(^{13}\)
- Monitor business activity and ensure that legislation and regulations are enforced;
- Establish effective and accessible remedies for violations\(^{14}\);
- Periodically assess legislation and regulations and fill the gaps where necessary;
- Introduce mandatory corporate reporting which includes children’s rights - States can encourage reporting by creating instruments to benchmark and recognize good performance with regard to children’s rights; promoting awareness of the benefits of reporting; and requiring state-owned companies to publish reports on their impact on children’s rights; and
- Improve regulation so that foreign and domestic investment through private and state business is mindful and responsive to child rights.

**Administrative measures**

- Have a comprehensive strategy for child rights which takes into account the links between business and children and includes a strategy for preventing and remedying corporate violations.
- Ensure cross-sectoral co-ordination within all government departments on implementation of the CRC including those that shape business policy and action such as ministries of trade, investment, finance as well as departments who ‘traditionally’ cover children’s issues such as education, health and family welfare.
- Monitor how effectively the State is implementing the CRC both internally within government and externally through NHRIs and NGOs.

**Other measures**

- Support NHRIs in their mandate to protect children’s rights from corporate violations;
- Use voluntary initiatives to encourage business to respect children’s rights;

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\(^{13}\)For further discussion on this in the European context see Augenstein, *A Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside of the EU (2010)*

\(^{14}\)Please note that the issue of remedy is covered in a companion piece of research
• Ensure that all businesses have a clear understanding of their responsibility to respect child rights wherever they operate and provide them with guidance on how to go about respecting children’s rights;
• Ensure that children and their families have a clear understanding that business has a responsibility to respect child rights where ever they operate; and collaborate with civil society to ensure children are protected from corporate violations.

3. CHALLENGES AND OPPORTUNITIES IN IMPLEMENTATION

3.1 The duty to protect is heightened in contexts where the State owns, controls or supports business
The duty to protect places an obligation on the State in respect of child rights violations by public and private corporations alike. It is heightened in contexts where the State has a strong nexus with a particular business and there is an increased likelihood that the State may be held responsible for failing to protect children’s rights from violations committed or contributed to by businesses with which it is closely associated. Furthermore, in certain contexts, corporate conduct can be directly attributed to the State by virtue of State ownership and control of corporations, by virtue of corporations exercising public functions or relying on statutory authority or taxpayer support, or by virtue of a combination of these. The UN Guiding Principles suggest ‘additional steps’ should be taken to protect against business violations when such a nexus exists.15

Measures States could take to protect children’s rights from violations when the State owns, controls or supports business

• Regulate Export Credit Agencies (ECAs)
ECAs are usually closely linked to the State and the projects they support, through finance or insurance, can result in large-scale violations of children’s rights. For example, they may result in environmental pollution damaging children’s right to health; they may involve relocation of communities inhibiting the right to education; they may support the establishment of construction sites which can be a magnet for large number of migrant workers with concomitant challenges of sexual exploitation for girls in particular. States can push for a range of regulations over ECAs including ensuring they take steps to prevent, mitigate and remediate any adverse impacts the projects they support might have on children’s rights. States can also make it a requirement that companies receiving support from an ECA carry out their own child rights due diligence, to demonstrate they have identified and are addressing related risks.

• Regulate private service providers
As the private sector often features as a service provider to children, the Committee on the Rights of the Child has identified it as a major target for regulation. In 2002, the Committee held

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15 UN Guiding Principles, Para 4
a day of general discussion on the issue. It concluded that the State continues to be bound by its obligations under the CRC, even when the provision of services is delegated to non-State actors. Furthermore, States have a legal obligation to ensure that non-State service providers operate in accordance with the CRC thus creating indirect obligations on such actors. In practical terms, this creates an obligation on States to set standards for the private sector in conformity with the CRC and to closely monitor private service providers.

- **Use public procurement to protect children’s rights**
  This can be done by mainstreaming children’s rights into various stages of the procurement process such as tender, contract documentation, conditions for performance of contracts as well as the award and performance of the contract. In practice this would imply that States would need to take steps to ensure that contracts they enter into are only awarded to bidders who respect child rights. Such steps could include assessing whether the companies concerned have a policy on child rights which is actively implemented and whether they undertake due diligence to prevent, mitigate and remediate any negative impacts on children’s rights.

- **Ensure government-sponsored investors are in compliance with child rights**
  Some States already require their national pension and saving funds to disclose whether and to what extent social, environmental and ethical impacts of investments are taken into account. However, the impact on child rights is rarely included above and beyond the issue of child labour. States should make responsible investment in line with children’s rights an integral part of how the financial assets they control (e.g. State pension funds, sovereign wealth funds) are run.

- **Ensure investment agreements are in compliance with child rights**
  The negotiation process between host States and business investors is an opportunity for States to identify, avoid and mitigate any negative impacts on children’s rights arising from the investment. Home states also need to review their investment treaties to ensure that their provisions do not prevent host States from complying with their obligations to children’s rights or give rise to the potential for a violation of the home State’s own child rights obligations. The SRSG has developed ten Principles to integrate the management of human rights risks into State-investor contract negotiations which provide a useful framework.

### 3.2 Holding TNCs accountable for their impact on children’s rights

Companies invest in foreign countries for a variety of reasons. They might be looking to expand into new markets; searching for natural resources; pursuing access to cheap energy, or taking advantage of relatively low labour and production costs. In doing so, their impact on children’s rights – positive and negative - in their host countries can be significant whether they are

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operating through a subsidiary, a commercial partner of the parent company or working with the host government. This can create particular challenges for both the State where they are based (the home State) and the States where they are operating (host State).

Foreign investment by TNCs can be a positive force for children’s rights. It can generate increased revenues for host countries that, if managed properly, can help fulfill child rights particularly those rights closely associated with poverty. It can bring benefits to children and their families in the form of technology transfer, local jobs and improved services. TNCs employ cutting-edge technologies, have leading research units, and possess organizational and logistical operations that are in many cases better quality than those in the public sector. The concern is not with foreign investment in and of itself, but with a lack of monitoring and accountability by either host or home States that can mean that TNCs may benefit from the operations of their subsidiaries and contractors, while not being held directly responsible for child rights abuses committed in the course of these operations.

When a subsidiary company is involved in child rights violations, it may be difficult for children to access remedy in a host State which may have weaker governance and accountability mechanisms than home States. It may be the case that the parent company was actively involved in the violation and/or knew of this conduct, tolerated it or even directed it. Holding the parent company liable in such instances is very important as a way of deterring future violations but also as a way of obtaining remedy and meaningful compensation for the children affected. However, economic arrangements between the host State and the TNC may restrict the ability of the host State to regulate the TNC in practical and legal terms. For under-resourced or developing States, resource constraints present another difficulty for regulating and controlling business. Where a regulatory regime is in place, it may be undermined by other factors, including corruption or cooption of State officials. It may be impossible to establish that a parent company in the home State jurisdiction is liable for acts of subsidiaries and associates. There may be legal and evidential difficulties in connecting the behaviour of the home State companies to subsidiaries.

The issue of jurisdiction over companies acting abroad is highly complex and State practice in asserting jurisdiction over conduct abroad is varied depending on many factors. It is helpful to consider the issue of extra-territorial jurisdiction not as a binary issue but rather as a spectrum of State actions and interventions which can help meet their obligations under the CRC.

There is no prohibition on States applying the CRC beyond its national borders - that is extra-territorially. The term ‘territory’ is not referred to at all in Article 2 (1) and Committee jurisprudence actively encourages States to respect, protect and fulfill the rights of children who may be beyond their borders but still within their jurisdiction; for example, Concluding Observations have urged the use of extraterritorial jurisdiction to help combat female genital mutilation.18

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18 For example, Ireland, Concluding Observations CRC/C/IRL/CO/2 (2006) para. 55.
Under the Optional Protocol on the sale of children, child prostitution and child pornography (OPSC), States have an express obligation to establish criminal liability for offences committed under the Optional Protocol whether committed domestically or transnationally [emphasis added]. Under the OPSC States, where appropriate, should also establish liability for legal persons (including business) for offences committed under the Protocol although the Committee has not yet addressed if such measures should apply to acts by businesses committed transnationally.

The Preamble and the provisions of the CRC consistently refer to the “importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries.” The CRC thereby creates obligations to engage in international co-operation towards the realisation of children outside their territory. The obligation is not very well-defined and not specific to the private sector. However, it does imply that the full realisation of children’s rights is not exclusively a function of States actions or omissions but is also in part a function of how States interact to engage in the realisation of children’s rights beyond their borders.

It is also important to consider whether the Committee on the Rights of the Child could accept a situation where a home State applied double standards relating to children’s rights in different territories where it had jurisdiction. The object and purpose of the CRC is the collective realisation of rights for all children everywhere and at all times. It would be profoundly at odds with this fundamental purpose for States to exercise different standards towards children within their jurisdiction who are living inside their borders and those living in other countries.

There are several convincing arguments that home States are under an obligation to protect children in other countries from violations of their rights by TNCs where both the following conditions are met: a) the home State has jurisdiction over the TNC and b) the home State exercises some influence over the ability of TNCs to operate abroad. The question of jurisdiction is often an issue of domicile. Generally, the place of incorporation is taken as the best indication of domicile, followed by the “real seat” of the company (or the place from which day-to-day decision-making is made).

States often provide a degree of support for TNCs to enable them to operate. This comes in a variety of forms: States negotiate bilateral and multilateral investment treaties that define the

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19 Preamble to the CRC
20 Article 4 States: “States Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention......where needed within the framework of international co-operation.” Article 24(4) regarding the right to health and Article 28(3) regarding the right to education both say that States Parties should promote and encourage international co-operation to realise these rights. Art. 17 encourages the use of international cooperation in the dissemination of socially beneficial information to children from a diverse range of sources. Art. 22(2) speaks of cooperation in the context of parent and family tracing.

21 See M. Sepulveda and C. Courtis, Are Extra-Territorial Obligations Reviewable Under the Optional Protocol to the ICESCR?, Nordisk Tidsskrift for Menneskerettigheter, Universitetsforlaget, 2009, Vol 27, Nr.1, 54-63 for a discussion of international cooperation in the context of the IESCR
22 http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf
framework for the legal rights of TNCs; ECAs offer overseas investment insurance to cover political risks, and in some cases commercial risks carried by TNCs; and regional and national development finance institutions offer private sector financing. Home States can therefore play a considerable role in financing and constructing an advantageous environment for TNCs’ operations abroad. Without insurance their risks may not be covered; without capital, they may not be able to finance their ventures abroad; without trade agreements, they may not be able to do business abroad; without the home States’ political influence, they may not enjoy such a high degree of deregulation or be able to profit from contracts that are tilted heavily in their favour. While the TNC is clearly the driving force behind its own conduct, the home State “may be a key facilitator” of the activity of a TNC through “complex acts and omissions.”

It is therefore not unreasonable to conclude that in many cases home State support is vital to TNCs’ survival in host States. While this State conduct may not in and of itself directly cause child rights violations, it can play an essential supporting role without which the rights violation could not occur. There is therefore a strong argument that home States do have an obligation to protect children from corporate violations in other countries provided the companies are within their jurisdiction and provided they have a decisive influence over their ability to operate.

Measures States could take to regulate TNCs extra-territorially

There is a whole spectrum of legal and regulatory measures that could have extraterritorial dimensions in relation to the child rights impacts of business, including:

- withholding of State support, for example through ECAs, to corporate entities that fail to respect child rights;
- making access to public finance and other forms of official support, such as insurance, explicitly conditional on companies respecting child rights;
- introduction of reporting obligations explicitly concerned with impact on children’s rights extra-territorially;
- regulation of influential institutional investors to ensure they take into account the impact of their decisions on children’s rights; and
- enabling access to judicial and effective non-judicial mechanisms for children and their families whose rights have been abused by corporate entities extra-territorially.

3.3 Regulating the conduct of business in conflict zones

Home States can be in a strong position to minimise the negative impacts of business activities of their TNCs and to maximise the positive impacts on children’s rights in conflict zones. Home States should perform at least some level of due diligence before encouraging “their” companies to operate in conflict zones including:

- Ensuring that existing laws and regulations are properly enforced.
- Ensuring that officials in all government agencies promoting foreign investments are aware of the child rights situation in the conflict zones where an investment is proposed.

• Ensuring that those agencies provide companies with current, accurate and comprehensive information of the local child rights context so that companies can act appropriately, particularly when engaging with local parties accused of abuses.

• Providing meaningful advice to companies through their embassies in host countries on whether they should continue to conduct business in conflict areas or how they should manage human rights risks.

• Having ECAs require adequate child rights due diligence before providing loans to companies operating in conflict zones.

• Cooperating with other governments to ensure that investments comply with human rights standards.

In extreme circumstances when a TNC will not respond to State advice regarding management of risk, then additional measures should be considered such as invoking civil, administrative or criminal liability.

4. CONCLUSIONS

• Children have to rely on appropriate systems of governance to deliver results for them to ensure that their rights are not over-shadowed by State support and consideration for business interests. NHRIs can play an important role in ensuring that children’s rights are not over-looked within different government departments and agencies.

• The CRC imposes positive obligations on States Parties to take measures to regulate and control corporate activities to prevent the violation of children’s rights. It also imposes an obligation to take effective enforcement measures that is to investigate, adjudicate and redress violations of children’s rights when they occur. This is consistent with the UN Guiding Principles on business and human rights.

• The Committee on the Rights of the Child has not expressed the duty to prevent, investigate and remedy third party abuse of children’s rights in terms of an obligation on the State to exercise due diligence, that is taking reasonable or appropriate measures to prevent, investigate and remedy corporate violations. However, it seems that this could be a very useful approach to adopt.

• Policy coherence within government is vital so those arms dealing with law and policy on trade, investment and business co-ordinate with those charged with implementing the CRC.

• There are a number of significant grey areas where State obligations lack clarity and direction within international child rights law: the extent to which States have an heightened duty to protect children when they have a close relationship with business and what this means in practical terms; the obligations on States to regulate the impact on children’s rights of companies domiciled in their territory when they are operating in other countries and how this might be achieved; the obligation to hold such companies accountable and to provide the children affected with effective remedy; and the related issue of how States should ensure that companies domiciled in their territory do not violate children’s rights when they are operating in conflict zones abroad.