

SCOPING DOCUMENT FOR GENERAL COMMENT BY THE UN COMMITTEE ON THE RIGHTS OF THE CHILD REGARDING CHILD RIGHTS AND THE BUSINESS SECTOR

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Acronyms

CRC	UN Convention on the Rights of the Child
CSR	Corporate Social Responsibility
ESG	Environmental, social and governance
ECAs	Export Credit Agencies
GRI	Global Reporting Initiative
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
ILO	International Labour Organisation
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
OECD	Organisation for Economic Cooperation and Development
OPAC	Optional Protocol on the involvement of children in Armed Conflict
OPSC	Optional Protocol on the sale of children, child prostitution and child pornography
PMSCs	Private military and security firms
SOE	State-owned Enterprise
SRSG	Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
TNC	Trans-National Corporation
UPR	Universal Periodic Review
UNPRI	UN Principles for Responsible Investment

SUMMARY

Introduction

The Committee on the Rights of the Child (‘the Committee’) has had a long-standing interest in how the activities and operations of business have an impact on States Parties’ implementation of the Convention on the Rights of the Child (CRC) and related Protocols. The Committee has therefore decided to prepare a General Comment on ‘Child Rights and the Business Sector.’ This document has been prepared to assist with the development of the General Comment. It aims to do the following:

- Identify the main problems and obstacles to the realisation of the rights of the child that emerge from business activities and operations; and
- Identify areas where States parties’ obligations would benefit from further clarification and guidance.

The Rationale for a General Comment

Business has a huge impact on children’s rights at many different levels. The Committee has already identified a number of the key obstacles and challenges to the realisation of the rights of the child which will need to be considered in the General Comment. A General Comment could build on the approach already taken by the Committee and other international organizations and provide States with further clarity and guidance on other issues which need to be directly addressed.

Given the breadth of children’s rights that can be affected by business activities and operations, it is not anticipated that the General Comment will provide guidance in relation to implementation of individual rights within the CRC. It may be more instructive to provide States Parties with a legal framework and guidance for implementation of the CRC as a whole with specific regard to the business sector. Such guidance will be based primarily around the duty to protect children’s rights from corporate violations, that is, to take steps to prevent, investigate, punish and redress violations. It will also be framed by the duty to respect, promote and fulfil children’s rights with regards to the business sector and will acknowledge the significance of developments in policy guidance at an international level for States and businesses alike. Finally, it will be guided by the principles of the CRC: the best interests of the child, non-discrimination, the right to be heard and the right to life, survival and development.

Issues to be addressed by the General Comment

The Committee has not articulated the content of the States’ duties “to ensure” children’s rights against harmful actions by private actors. In other human rights systems, such as the Inter-American and African systems these obligations have been defined in terms of an obligation on the State to undertake due diligence. This concept merits further attention and research to understand its relevance for protecting children’s rights from corporate violations.

States would also benefit from clarity and direction in the following areas: the scope and nature of State obligations under the CRC when it has a close nexus with business; the obligations on States to regulate the impact on child rights of businesses 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 affected countries abroad. A final consideration is the nature and type of implementation measures that could serve to protect children's rights from corporate violations.

PART ONE: RATIONALE FOR THE GENERAL COMMENT

1.1 Business has a significant impact on children's rights

The question of how business and children's rights interact is complex and potentially covers a huge range of different issues¹. Children are not a single, unified constituency – in relation to business they might be employees, consumers, users of services, watchdogs, affected by their parents' employers or victims of rights violations caused by trafficking, child labour, environmental pollution or land acquisition. Furthermore, the word 'business' encapsulates a multitude of different commercial endeavours which range from Trans-National Corporations² (TNCs), to State-owned enterprises, to small and medium sized enterprises, to the businesses operating within the informal economy and service providers whether for profit or not for profit.

It is clear that the policy and action of business can have a very significant impact on child rights whether they are acting alone, through business partners or in concert with government agencies. Some of the links include: the use of child labour whether directly or within supply chains; making sure that the rights of working children are respected; ensuring parents have good working conditions and benefits so they in turn can properly care for their children; respecting the rights of children, particularly indigenous children, who are being compelled to relocate following a land acquisition for business purposes; the use of aggressive marketing targeted at children; ensuring products are safe for children to use; ensuring essential services such as water and education are provided safely and fairly to children by the private sector; use of violence, exploitation and abuse of children by security employees protecting facilities; recruitment of children as security employees; and through taking the specific needs of children into account when planning and implementing environmental and resource strategies.

It is important to note that children are at times more vulnerable to the effects of corporate violations of their rights than adults: for example, they are more vulnerable to exploitation and discrimination in the work place and may be more swayed by irresponsible marketing than adults. Children are at greater risk from environmental hazards than adults because of their physical size, immature organs, behaviour, natural curiosity and lack of knowledge. Growing environmental degradation and contamination from deforestation, desertification, soil erosion,

¹ The SRSG for business and human rights reviewed 320 cases of alleged corporate related human rights abuse in 2008 and concluded that corporations impact the full range of human rights. See Addendum to the SRSG's 2008 Report to the Human Rights Council (A/HRC/8/5)

² For the purposes of this document, the definition of a TNC is: any firm which owns (in whole or in part), controls and manages income generating assets in more than one country.

over grazing, over-use of fertilisers and pesticides, lack of watershed management and dumping of wastes often compromise household food security and health, especially for children.

Violations of children's right at key stages in their development may have life-long consequences. Economic exploitation, sexual exploitation, abuse of children and harmful physical punishment can have long term negative effects on health and physical, spiritual and mental development. It is not always possible to make up lost years of schooling as a result of economic exploitation or violence in the workplace. Lack of health care at critical stages as a result of lack of access to private health care providers may have irreversible effects on a child's development. It is also extremely challenging for a wide variety of reasons for children to obtain remedies when their rights are violated by business. This is also the case for adults but there are aggravating factors for children in obtaining remedy which are discussed in more detail in 2.5.4 below.

1.2 States have an obligation to protect children's rights from violations by business

In general terms, the obligation to protect against human rights violations committed by third parties, including businesses, is a well-established principle of human rights both regionally and internationally³. International human rights treaty bodies require that States take all necessary steps to protect against abuse by non-State actors, including prevention, investigation and punishment, and providing access to redress. The duty to protect is of primary importance when considering States parties obligations under the CRC in the context of the business sector and includes the steps of prevention, investigation, punishment and redress. The duty has both legal and policy dimensions, and while States have discretion as to how to implement the duty, both regulation and adjudication are considered appropriate measures.

The practice of international and regional human rights bodies recognises this duty in terms of States' obligations of due diligence, which will include, depending on the circumstances, measures to prevent, mitigate, investigate and provide redress to victims. This duty to protect formulated as a due diligence duty acquires specific contours according to the nature of the rights and the groups at issue. For instance, children deserve a heightened level of protection because of their characteristics and circumstances. The CRC itself is a set of specific and additional obligations vis-à-vis children beyond those already contemplated in general international human rights instruments. This is evidence of States' view about the need for heightened level of protections for children.

The UN Framework and Guidelines⁴, endorsed by the UN Human Rights Council, assert that States have a duty to protect "against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps

³ The origins of the 'respect, protect, promote, fulfill' typology lie in a 1983 report and a 1987 report by Eide, the Special Rapporteur to the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (The Right to Adequate Food as a Human Right, Report prepared by Mr A. Eide, E/CN.4/Sub.2/1987/23 (1987). This typology has since gained wide acceptance as a tool for clarifying the scope and nature of state obligations and is referred to in Committee jurisprudence including in General Comment No. 5.

⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework

to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” Consistent with this, the Committee has made recommendations to States to apply the UN Framework⁵.

In addition to the duty to protect children’s rights from corporate violations, the duties to promote, fulfil and respect children’s rights are also important *vis à vis* the private sector. The State duty to promote children’s rights can play an important role in preventing violations of children’s rights. The Committee recommends that States increase knowledge and understanding of the Convention across the whole of society including amongst children and the private sector. The CRC also imposes a negative duty to respect children’s rights which means that State laws, policies, programmes and practices with regard to business must not violate child rights and States must avoid interfering with children’s pursuit of their rights. The duty to fulfil child rights has direct implications for the way in which States go about allocating resources to realise child rights ‘to the maximum extent of their available resources’ in line with Article 4. An important element of this obligation is to ensure that States are maximizing revenues through collecting taxes from the private sector efficiently. The Committee also emphasizes the importance of eliminating corrupt practices within the private sector and strengthening anti-corruption measures as a way of ensuring available resources⁶.

Businesses of all sizes can impact on child rights in a multitude of significant ways; corporate violations of child rights in conflict zones and involving trafficking of children whether directly or indirectly within the supply chain can be particularly grave. However, States have been slow to fully acknowledge their duty to protect child rights from corporate abuse. 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 it⁷. On the other hand, attempts at drawing voluntary “codes of conduct” have been criticized as being insufficient and ineffective. A General Comment is urgently needed to assist States in fulfilling their obligations under the CRC by providing guidance and clarity as to the scope and nature of their duty to respect, protect, promote and fulfil child rights in the context of business activities and operations.

1.3 Existing policy guidance at an international level does not adequately focus on children’s rights

Over the past decades, there has been growing awareness and understanding of the relationship between State obligations under human rights treaties and the operations and activities of business. In 1977, the International Labour Organisation (ILO) developed the Tripartite Declaration on Multinationals and Social Policy⁸ and in 2011, the Organisation for Economic

⁵ See for example, Concluding Observations, New Zealand (2011) CRC/C/NZL/CO/3-4 Para 23 and for Bahrain (2011) CRC/C/BHR/CO/2-3 para 21

⁶ Concluding Observations, Georgia (2003) CRC/C/15/Add.222 Para 14

⁷ Report from Expert Consultation, Copenhagen 7, 8 November 2007 on *The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights*. Summary Report p. 2 Available at: <http://www.business-humanrights.org/Documents/Ruggie-Copenhagen-8-9-Nov-2007.pdf>

⁸ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, available at: http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm

Cooperation and Development (OECD) updated its Guidelines for Multinational Enterprises⁹. In 2000, the UN Global Compact was established as a policy initiative for businesses committed to aligning their operations and strategies with ten principles including human rights, labour, environment and anti-corruption¹⁰. In 2012, UNICEF, Save the Children and the UN Global Compact will launch Principles for Child Rights and Business. These are directed at business entities but will have relevance to States as well particularly when States themselves have commercial functions.

In 2005, John Ruggie was appointed as the Special Representative to the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. In 2008, the Human Rights Council endorsed the “Protect, Respect and Remedy” Framework proposed by the SRSG. This proposes that States have a duty to protect against human rights abuses by business, business has a responsibility to respect human rights and there is a need for greater access by victims to effective remedy, both judicial and non-judicial. In 2011, the Human Rights Council endorsed Guiding Principles on the implementation of this framework.

These documents establish a conceptual framework for business and human rights in general. However, children do not feature explicitly in the UN Framework and limited reference is made to children in the Guiding Principles where they are defined as a vulnerable group facing “specific challenges” and requiring “particular attention.” Furthermore, the UN Framework and Guiding Principles, as well as the OECD Guidelines,¹¹ the UN Global Compact and others all use the “International Bill of Human Rights” as their benchmark to assess the human rights impact of business¹². This does not explicitly include the CRC.

The overall policy framework at an international level governing business in relation to child rights is based on a mixed picture of soft law principles and voluntary corporate social responsibility (CSR) initiatives. There are significant ‘child-sized’ gaps in this existing policy guidance and in particular there is a striking lack of recognition of the role that children themselves can play to maximise the positive impact and minimise the negative impact of business on their rights. A General Comment is needed to address these critical child-sized gaps.

⁹ The OECD Guidelines for Multinational Enterprises available at:

http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html

¹⁰ The website of the UN Global Compact available at: www.unglobalcompact.org

¹¹ OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business in a Global Context (2011)

¹² The ‘International Bill of Human Rights’ is defined by the SRSG and others as the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. See Guiding Principles para 12 and OECD Guidelines on Multinational Enterprises (2011) para 30. The UN Global Compact’s ten principles derive from the same instruments as well as the Rio Declaration on Environment and Development and the UN Convention against Corruption.

1.3 The Committee has already identified a number of problems and obstacles to the realisation of the rights of the child that emerge from business activities and operations but other issues still need to be addressed

Numerous provisions in the CRC and its related Protocols refer directly or indirectly to the operations and activities of the business sector. The following is a short overview of issues covered in the CRC or raised by the Committee in its jurisprudence with regards to some of the problems and obstacles to the realisation of the rights of the child that emerge from business activities and operations. This is not an exhaustive overview but highlights the extent to which the Committee has already addressed a number of the key obstacles and challenges which will need to be considered in the General Comment. A General Comment could build on the approach already taken and provide States with further clarity and guidance on other issues which need to be directly addressed (many of which are outlined in Part Two below). This overview of substantive issues is provided by way of background and in order to put the options for the General Comment into context.

1.3.1 General Principles

- *Best interests of the child*

The principle of the best interests of the child in Article 3 of the CRC is central to the development of legislation which may affect children. The explicit extension of the obligation to “legislative bodies” clearly indicates that every law, regulation or rule that directly affects children must be guided by the “best interests” criterion. This includes those laws and regulations which shape business law and policy and which may impact on children. Article 3 (1) also establishes that the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare bodies. This is particularly relevant in situations where States have privatised alternative care for children therefore taking more institutions out of direct State control.

- *Non-discrimination*

Article 2 of the CRC calls on States to respect and ensure rights to all children in their jurisdiction “without discrimination of any kind.” This has important implications for how the private sector operates. The Committee has been explicit that States must ensure that private sector service providers, in particular pharmaceutical companies and internet services, do not discriminate against children. It has recommended monitoring and the use of legislation to combat discrimination by private parties, especially in relation to health services and employment¹³.

The Committee has emphasised that indigenous children are a group who require particular protection from discrimination by business actors. In General Comment No. 11 on indigenous children and their rights, the Committee says unequivocally that the obligations of States to ensure the right to non-discrimination for indigenous children, extends not only to the public but

¹³ For example, the Committee has recommended that States review existing laws or enact new ones in order to combat discrimination based on HIV/AIDS status with the implication that this includes the private sector. See General Comment No. 3, *HIV/AIDS and the right of the child*, CRC/GC/3 (2003) para. 3

also to the private sector. The Committee refers to the importance of raising awareness about the right to non-discrimination for indigenous children amongst ‘professionals’ (amongst others) – the implication being this includes private sector workers.

- *Right to be heard*

On the whole, the question of the right to be heard in the context of the private sector’s operations has not been explicitly dealt with by the Committee. General Comment No. 12 on the right to be heard¹⁴ refers to the importance of working children being heard when worksites and conditions of work are examined by inspectors investigating the implementation of labour laws. The General Comment also reminds States that the media, which will include privately owned media, are an important means of providing opportunities for children to be heard¹⁵.

- *The right to survival and development*

The right to survival and development is broad and encompasses the right to food, shelter, clean water, formal education, primary health care, leisure and recreation, cultural activities and receiving information about rights. The impact of the private sector on the right to survival and development has been considered quite extensively by the Committee.

With regards to the right to health, the Committee makes various recommendations in relation to business. It discusses the pharmaceutical industry in General Comment No. 3. While it does not explicitly call for regulation of the industry, it does say that “States parties should negotiate with the pharmaceutical industry in order to make the necessary medicines available at the lowest costs possible at local level.” Several Concluding Observations call for impact assessments when entering into trade related agreements concerning access to medicine, implying that in concluding such agreements with other States and pharmaceutical companies, States are expected to consider the impacts of such agreements on children’s rights, particularly health rights¹⁶. The Committee routinely calls on States to implement the International Code of Marketing of Breast-milk Substitutes including through legislation and regulation of the private sector.

The Committee notes ethical concerns regarding biomedical research and says that “children have been subjected to unnecessary or inappropriately designed research with little or no voice to either refuse or consent to participation¹⁷.” The Committee has asked States to ensure that children do not participate in research trials until an intervention has been thoroughly tested on adults, that children give their full and informed consent when testing occurs and that privacy rights are protected. These measures imply that those conducting trials, including the private sector, will have to be regulated.

The Committee has referred to the importance of family friendly policies for employees. It has recommended to States that maternity leave policy governing the private sector should be made

¹⁴ General Comment No. 12 *The Right of the Child to be Heard* CRC/C/GC/12 (2009) para 117

¹⁵ General Comment No. 12 para 83

¹⁶ Concluding observations, Ecuador (2005) CRC/C/15/Add 262, para 21

¹⁷ General Comment No. 3, *HIV/AIDS and the right of the child*, CRC/GC/2003/3 (2003) para 29

to comply with ILO Convention No.183. The Committee sees the right to health at risk when private sector bodies give employees less than the ILO mandated maternity period (14 weeks). Under Article 18 (3) of the CRC States must ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible. This implies that private sector employees should be encouraged to provide child care services and facilities.

Article 24 (2) (c) calls on States to combat disease and malnutrition ‘taking into consideration the dangers and risks of environmental pollution.’ In Concluding Observations for Nigeria, the Committee encouraged the State to establish and implement regulations in order to ensure that the business sector complies with international and domestic standards on corporate social and environmental responsibility¹⁸. It has recommended that South Korea apply the legal obligation to conduct environmental impact assessments of investment projects¹⁹.

1.3.2 Other CRC provisions concerning child rights and business

- *Media and Advertising*

Under Article 17 of the CRC, States are obliged to encourage the mass media, including privately owned media, to disseminate socially and culturally beneficial information and to consider minority or indigenous children’s linguistic needs. General Comment No. 4 urges States to “protect adolescents from information that is harmful to their health and development ...” which implies that some regulation of private media will be required. The Committee has also expressed concern about the role the media, both public and private, and advertising industries play in reinforcing gender-based prejudice and discrimination against certain groups of children. It has recommended that States regulate the media and advertising industry, introduce voluntary codes of conduct and implement mechanisms for monitoring the respect of children’s rights by the media²⁰. Certain industries are targeted including alcohol, tobacco and unhealthy food: the Committee has urged States “to regulate and prohibit information on and marketing of substances such as alcohol and tobacco, particularly when it targets children and adolescents²¹.” It also recommended that Finland “establish restrictions on marketing of unhealthy food having negative effect on the children’s health²²”.

- *Economic exploitation*

Article 32 recognizes “the right to be protected from economic exploitation” and from performing harmful or hazardous work. States are required to “take legislative, administrative, social and educational measures” to ensure the implementation of Art. 32 including establishing minimum ages for employment; providing for appropriate regulation of the hours and conditions of employment, ensuring an appropriate age for and enforcement of compulsory education, and providing for appropriate penalties and other sanctions to ensure the effective enforcement of Art. 32. This is one issue regarding child rights and business which has received

¹⁸ Concluding Observations, Nigeria (2010) CRC/C/NGA/CO/3-4 Para 47

¹⁹ Concluding Observations, South Korea (2011) [CRC.C.KOR.CO.3-4.doc](#) Para 28

²⁰ Concluding Observations Panama (2011) CRC//C/PAN/3-4 Paras 29 and 30

²¹ General Comment No. 4 *Adolescent health and development in the context of the Convention on the Rights of the Child* CRC/GC/2003/4 para 18

²² Concluding Observations, Finland (2011) CRC/C/FIN/CO/4 Para 24

considerable attention in past decades from the Committee, from civil society and from business itself.

In General Comment No. 4, the Committee calls on States to: “take all necessary measures to abolish all forms of child labour, starting with the worst forms, to continuously review national regulations on minimum ages for employment with a view to making them compatible with international standards, and to regulate the working environment and conditions for adolescents who are working (in accordance with article 32 of the Convention, as well as ILO Conventions Nos. 138 and 182), so as to ensure that they are fully protected and have access to legal redress mechanisms.”²³ Many of the Committee’s Concluding Observations include the general call to adopt and enforce anti-child labour policies and legislation targeting private sector employers.²⁴ The Committee has also recommended that several States strengthen their labour inspectorates to more effectively monitor and prosecute child labour.²⁵ Further, the Committee has often called for more data to be gathered on child labour from countries where data was sparse.²⁶

- *Private sector as service provider*

As the private sector often features as a service provider to children, the Committee has identified it as a major target for regulation. In General Comment No. 5²⁷, the Committee acknowledges that: “The process of privatization of services can have a serious impact on the recognition and realization of children’s rights²⁸.” In 2002, the Committee held a day of general discussion on the subject of “The Private Sector as Service Provider and its Role in Implementing Child Rights²⁹.” 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 this context, the Committee defined the private sector as encompassing businesses, NGOs and other private associations, both for profit and non-profit. The Committee may wish to consider whether it adopts a similar definition within the General Comment or limits reference to the non-profit sector to discussion of service provision.

- *Corruption and tax evasion and avoidance*

The Committee has made it clear that it sees comprehensive and progressive tax reform and improving collection as an important aspect of ensuring maximum available resources are

²³ General Comment no. 4, paras. 18 and 39 (e)

²⁴ See, for example: Concluding Observations, Georgia, CRC/C/GEO/CO/3, 2008 at para. 63; Concluding Observations, Pakistan, CRC/C/PAK/CO/3-4, 2009 at para. 88

²⁵ Concluding Observations, Mozambique 2009, para. 81; Georgia, Concluding Observations 2008, para. 63

²⁶ Concluding Observations, Qatar, CRC/C/QAT/CO/2, 2009, para. 62; Concluding Observations, Bulgaria, CRC/C/BGR/CO/2, 2008 at para. 60

²⁷ General Comment No. 5 (2003) *General measures of implementation for the Convention on the Rights of the Child* CRC/GC/2003/5

²⁸ As above para 42

²⁹ The Private Sector as Service Provider and its Role in Implementing Child Rights. Available at: <http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommandations/service.pdf>

available to realize children's rights³⁰. The loss of tax revenues to developing countries has been estimated by Christian Aid to amount to \$160 billion per year due to tax evasion and avoidance by Multinational Companies³¹. The Committee also emphasizes the importance of strengthening anti-corruption measures as a way of ensuring available resources³². It is increasingly becoming illegal in a company's home country to engage in corrupt practices in another country. The principle that it is illegal to bribe foreign officials was first established in the US Foreign and Corrupt Practices Act of 1977 and since then, this principle has gained legal standing within the whole of the OECD and in a number of other countries including the UK.

- *Sale of children, child prostitution and child pornography*

Although companies are rarely directly involved in acts relating to the sale of children, child prostitution and child pornography, they can be complicit in these violations through their actions; for example, child sex tourism can be facilitated by travel and tourism companies and internet companies as they enable the exchange of information and planning of sex tourism activities. Child pornography can be indirectly facilitated by internet companies as well as credit card providers. Companies can facilitate the sale of children through their core activities, such as transportation of a child from one place to another. They can knowingly, or unknowingly, make use of trafficked children through their supply chains, in factories and workshops, on farms and plantations, and in other forms of child labour.

In recognition of this link between the private sector and violations of children's rights regarding their sale, prostitution and pornography, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC) addresses State responsibility to regulate and engage with the private sector at various levels. The Preamble to the OPSC stresses "the importance of closer cooperation and partnership between Governments and the Internet industry" in respect of child pornography on the internet. Article 9(5) requires preventive action in relation to the production and dissemination of material advertising the offences, implying that States might need to regulate companies providing marketing services.

Most significantly Article 3(4) establishes the liability of legal persons for offences committed under the Optional Protocol. Legal persons are persons other than physical persons that have legal personality, such as corporations and other businesses, local or regional governments and legally recognized foundations, organizations and associations³³. This liability may be criminal, civil or administrative depending on the legal principles of the State party and subject to the provisions of national law. The OPSC is therefore aimed at companies and individuals but the Protocol gives States more discretion in responding to violations committed by business since the liability may not be solely criminal but also civil or administrative in character. In its interpretative guidance, the Committee has recommended that States establish liability for legal

³⁰ Guatemala, Concluding Observations (2010) CRC/C/GTM/CO/3-4 para 26

³¹ Christian Aid, (2008) *Death and Taxes: The true toll of tax dodging*.

³² See Georgia, Concluding Observations (2003) CRC/C/15/Add.222 para 14

³³ Definition of 'legal persons' given in the Revised Guidelines regarding initial reports to be submitted by States parties under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2006)

persons and has made specific recommendations in relation to employers, Internet service providers and the tourism industry.

The OPSC also has provision for extra-territorial jurisdiction. It requires each State party to “ensure that, as a minimum, [certain offences against children] are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis.” The Protocol goes on to authorise, though not require, the use of nationality jurisdiction over nationals and residents to prosecute and punish extraterritorial offences. The Committee has not yet addressed if such measures should apply to acts by businesses committed transnationally.

- *Optional Protocol on Armed Conflict*

There is little direct reference to the private sector in the Optional Protocol on Children and Armed Conflict (OPAC). However, the Committee has recommended that States ban the sale of arms and munitions to countries where there are child soldiers.

PART TWO: ISSUES TO BE ADDRESSED BY THE GENERAL COMMENT

As noted, the General Comment may not focus on specific Articles of the Convention. This is because the impact of business activities and operations on the realisation of substantive child rights is too broad to be captured adequately in a General Comment. It may be more instructive for the General Comment to provide States with a legal framework and guidance for implementation of the CRC with specific regard to the business sector. Such guidance will be based primarily around the duty to protect children’s rights from corporate violations, that is, to take steps to prevent, investigate, punish and redress violations. It will also be framed by the duty to respect, promote and fulfil children’s rights with regards to the business sector and acknowledge the significance of developments in policy guidance at an international level for States and businesses alike. It will also be guided by the four principles of the CRC, which are rights unto themselves: the best interests of the child, non-discrimination, the rights to be heard and the right to life, survival and development. Building on the issues identified in Part One above, the following section outlines some inter-linked issues which it is proposed the Committee will need to address in the General Comment.

2.1 Under what circumstances are States responsible for violations of children’s rights committed or contributed to by business?

2.1.1 Attribution and the concept of due diligence

The circumstances in which States might be held responsible for corporate violations of child rights will vary according to the nature of the relationship. Under customary international law a state will incur international responsibility for a breach of an international legal obligation, such as an obligation under the CRC, where the act in question *can be attributed* to the state. This has been codified by the International Law Commission (ILC) in its Articles on the Responsibility of

States for Internationally Wrongful Acts³⁴. Under these Articles, acts or omissions of a business entity may be attributed to a state when it is exercising public or governmental functions³⁵. Governmental authority in many countries would include a wide variety of public functions relevant for child rights including running prisons, health and education facilities. Even where a business entity is not exercising elements of governmental authority, then its activities may be attributed to the State if it is “acting on the instructions of, or under the direction and control of³⁶” a State.

Where direct attribution of conduct to the State is not clear or even possible, States can still be held responsible for failing to prevent and/or remedy child rights violations by business. The concept of due diligence, that is taking appropriate measures to prevent and/or remedy child rights violations, therefore becomes of significance. In the landmark case *Velásquez Rodríguez v Honduras*³⁷, the Inter-American Court of Human Rights (‘IACHR’) held that a State can be held responsible for violations occurring in the private sphere only where it can be shown that it failed to exercise ‘due diligence’ to prevent and respond to the violations. The Court held expressly that ‘the existence of a particular violation does not, in itself, prove the failure to take preventive measures³⁸’. However, the State must take *reasonable steps* to prevent human rights violations and to use the means at its disposal to carry out a *serious* investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation³⁹.

The African Commission for Human and Peoples’ Rights also applied this test in the decision, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*⁴⁰. It found that the Nigerian government had breached its duty to protect the people from damaging acts of oil companies by failing to control and regulate the activities of these companies and allowing them to deny or violate these rights with impunity. Similarly, in *Guerra v Italy*⁴¹, the European Court of Human Rights held that Italy was responsible when 150 people had to be hospitalised on account of acute arsenic poisoning caused by an explosion at a fertiliser factory. It found that Italy had failed to protect the people from the emissions and explosion and had therefore infringed their right to private and family life⁴².

Human rights treaty bodies have suggested that the obligation to protect human rights is one of process or conduct rather than result - the Human Rights Committee provides that “there may

³⁴International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd session, A/56/10, August 2001, UN GAOR. 56th Sess Supp No 10, UN Doc A/56/10(SUPP) (2001)

³⁵ ILC Article 5: “The conduct of a person or entity which is not an organ of the State . . . 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”

³⁶ ILC Articles, Article 8

³⁷ 1988 Inter-Am Court HR (ser C) No 4

³⁸ As above para 175

³⁹ As above para 174

⁴⁰ African Commission, Communication No 155/96 (2001) (‘SERAC Case’)

⁴¹ (1998) I Eur Court HR 210; [1998] ECHR 7; 26 EHRR 357

⁴² As above paras 228 and 360

be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities⁴³.” This means that a State cannot be held responsible for every violation of children’s 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 protect⁴⁴. The UN Guiding Principles on business and human rights also make the distinction between a State duty of conduct and a State duty of result.⁴⁵

The Committee has not elaborated upon the States’ obligations “to ensure” the rights in the Convention from third party abuse in terms of an obligation on the State to undertake due diligence. The concept of due diligence merits further attention and research since in its articulation by regional human rights bodies it provides States with a clear and flexible standard to evaluate state actions for protecting children’s rights from corporate violations. Whether steps to prevent, investigate, punish and redress violations of child rights arising from or contributed to by the conduct of business enterprises are ‘reasonable’ or ‘appropriate’ can be interpreted in light of the circumstances: the nature of the rights at stake, the characteristics and circumstances of the group of children concerned (indigenous, with disabilities, trafficked or migrant children, etc) and the position and capacities of the State itself. States must ensure that due diligence measures are in the best interests of the child, are non-discriminatory and strengthen the rights of children who are affected in terms of their right to survival and development and right to be heard.

Section 2.5 below outlines a whole raft of different measures, which it is argued could be appropriate and reasonable for States to adopt in order to protect children’s rights from corporate violations. Regarding the prevention of violations, they include legislation criminalising the use of child labour and the commercial sexual exploitation of children. Regarding the investigation of violations, they include introducing monitoring bodies such as environmental and health and safety inspectors. Regarding punishment and redress for violations, they include ensuring criminal prosecutions of businesses are undertaken where an offence is suspected of having taken place and that children have access to other civil and non-judicial remedies.

2.1.2 Due diligence and child rights impact assessments

When assessing whether or not measures are in fact reasonable and do meet the required standard of conduct to protect child rights from third party abuse, it is helpful to consider whether or not States have used child rights impact assessments. These ensure children are visible within government and their rights considered and embedded in policy development and

⁴³ 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

⁴⁴ 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] *MelbJIntLaw* 1; (2004) 5(1) *Melbourne Journal of International Law* 1

⁴⁵ UN Guiding Principles para 1

decision- making relating to business, trade and investment. They are tools for looking at a policy, law or decision relating to the business sector and assessing its impact on children and their rights. This includes the differential impact of measures on particular groups of children such as girls and/or indigenous children. It allows the impact to be predicted, monitored and, if necessary, avoided or mitigated. They can also be used retrospectively to evaluate the actual impact of implementation. Children must be consulted as part of these assessments.

It is unlikely that all law and policy relating to business that has a direct or indirect effect on children can undergo an impact assessment. When law and policy is developed which is explicitly directed at children, for example a prohibition on child labour, it is likely that their interests will be taken into account. However, where law and policy has a more indirect impact on children, it is less likely that they will have been considered in the policy and drafting process. This is often the case regarding business, trade and investment issues, such as intellectual property provision or bilateral investment treaties and it is here, that children's rights impact assessments could be especially valuable and should be prioritised. It is likely that States would need to encourage, or even mandatorily require, business to co-operate in evaluations of the impact of laws and policies on children's rights.

Different governments will develop different methodologies for conducting assessments with some taking the CRC as the starting point for any assessment. Assessments are not an end in themselves – their findings should be taken account of and acted upon in decision and policy-making processes. In practice, this quite technical process of assessing the actual or potential child rights impacts of law, policy or budgetary allocation is undertaken by a very small number of States and even then in an ad hoc fashion.

2.2 Under what circumstances are States Parties responsible for violations of children's rights committed or contributed to by business with which it has a "close association" or "nexus"?

2.2.1 Obligations where the State has an economic nexus with business

There is a wide variety of relationships between government and business which blur the boundaries between conduct which is public and conduct which is private; for example, governments might enter into contractual relationships with business such as joint ventures, "host-government agreements" (typical for major infrastructure projects) or "public private partnerships" (for major utilities or development projects). They might out-source provision of essential services to private companies, procure goods and services from businesses or provide companies with guarantees and insurance when operating abroad.

In situations where governments have a close relationship with business, in the form of control or influence, it could be argued that this fact means they are in a better position to prevent abuses by those businesses; the burden is 'higher' by dint of having more control and more influence. The following section explores a variety of different contexts where there is an increased likelihood that the State will be held responsible for failing to protect children's rights from violations committed or contributed to by businesses owing to its proximity to the

business. It also considers situations where a corporation's conduct could be directly attributed to the State.

It makes proposals for measures States could take to meet its obligations to protect in the following contexts: when enterprises are state-owned; when Export Credit Agencies (ECAs) support and/or finance business operating abroad; when the State privatises key services which affect children's rights; and when the State itself has a commercial role and for example, procures goods and services and makes large-scale investments.

2.2.2 State-owned enterprises

State-owned enterprises (SOEs) are defined by the OECD as enterprises where the state has significant control, through full, majority, or significant minority ownership⁴⁶. Typically SOEs are engaged in large-scale utilities and infrastructure industries such as energy, transport, media and telecommunication which have a direct impact on children's lives and can be responsible for myriad violations of children's rights. State owned media for example can be a vehicle for transmitting discriminatory images of children; State owned railway companies may facilitate the trafficking of children for economic exploitation; State owned oil and gas companies may be responsible for serious environmental degradation and pollution.

Apart from situations in which States may be directly responsible for actions or omission of enterprises that can be attributed to it, States might also be found responsible for failing in their duty to protect child rights from violations when they are caused by conduct of SOEs⁴⁷ rather than a business entity with a less close relationship with the State. In addition, there is a stronger possibility of a State being held directly responsible for acts of an SOE⁴⁸ so where they act in violation of children's rights and the conduct can be attributed to the State then the State will be responsible for this violation.

Some States have introduced measures at the national level which provide SOEs with guidance regarding their human rights obligations. The Swedish 'Guidelines for External Reporting by State-owned Companies'⁴⁹ for example, require Swedish SOEs to report using the Global Reporting Initiative (GRI). The GRI has limited direct reference to children's rights but is a very useful point of reference for business in terms of overall impact on human rights. India too has produced guidance for its enormous number of SOEs⁵⁰ and has established a National CSR hub for SOEs to carry out advocacy, research and promotional activities.

⁴⁶ See Preamble to the *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2005)

⁴⁷ For further exploration of this link between 'due diligence' and influence over SOEs see ICJ Danish Section (2008) *Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of corporate accountability and state responsibility*

⁴⁸ International Law Commission Articles on State Responsibility, Article 2

⁴⁹ Swedish Ministry of Enterprise: 'Energy and Communications: 'Guidelines for External Reporting by State-owned Companies'', November 2007 Available at: <http://www.sweden.gov.se/content/1/c6/09/35/06/453ac39d.pdf>

⁵⁰ The [Guidelines on Corporate Social Responsibility for Central Public Enterprises](#) were issued in April 2010 by the Ministry of Heavy Industries and Public Enterprises and are part of a process initiated by the Department of Public Enterprises to ensure that the public sector enterprises across India commit themselves to the concept of CSR.

2.2.3 Export Credit Agencies (ECAs)

States can play a considerable role in financing and constructing an advantageous environment for their TNCs' operations abroad and, recently, States have received increasing attention for the support they provide their companies through their ECAs. An ECA is defined as “an institution engaged in export credit and investment insurance activities usually with official government support and always in accordance with a government mandate⁵¹”. They provide insurance, guarantees and export credit services to corporations registered in their country that seek to do business abroad primarily in developing and emerging markets. They provide capital for medium and long-term transactions in support of corporate investment, in an array of loans, guarantees and insurance, all backed by taxpayers. A large portion of this capital supports industrial and large-scale infrastructure projects in politically and commercially risky environments in which the private sector often would not venture on its own without the protective cushion of public money. The NGO ECAWatch claims that collectively, ECAs represent the single largest source of public funding for projects in developing countries or emerging markets⁵².

The sort of large-scale investment projects they support can result in serious violations of children's rights. 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.

In exercising their duty to prevent violations of children's rights by business, States can push for a range of regulations over ECAs which have both legal and policy dimensions, including:

- Ensuring that ECAs take steps to prevent, mitigate and remediate any adverse impacts the projects they support might have on children's rights before they offer support to businesses operating abroad.
- Making 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.
- Publicly disclosing the impact of all ECA supported projects on children's rights.
- Training of ECA staff on child rights so they have the necessary understanding, experience and resources to undertake effective child rights due diligence.
- Independent periodic reviews of the child rights due diligence process.
- Taking action to terminate projects which violate children's rights.
- Creating enforcement mechanisms including an office to hear claims for violations.

2.2.4 Private sector as service provider

The role of business in the provision of public services such as detention facilities, energy, education, transport or water remains contentious. Children are particularly reliant on some of

⁵¹ Can, O and Seck, S (2006) *The legal obligations with respect to human rights and export credit agencies* ECA-Watch, Halifax Initiative Coalition and ESCR-NET

⁵²See [ECA Watch \[www.eca-watch.org\]](http://www.eca-watch.org), who contend that ECAs are now the world's biggest class of public finance institution operating internationally, exceeding the size of the World Bank Group and funding more private-sector projects in the developing world than any other class of financial institution.

these services and are at risk when they are not delivered in an equitable and universal manner. Poor children are most at risk of not having access to utilities such as water as they often live in areas where establishing infrastructure is physically and financially challenging. The General Comment should address the possibility that the conduct of private service providers may be attributed to States if they are exercising public or governmental functions⁵³ such as health care provision or the running of juvenile detention facilities. Their conduct may also be attributed to the State if they are acting on the instructions of, or under the direction and control of States which will be the case for many private sector providers.

The Committee has already considered this issue at length during a Day of General Discussion in 2002. It has set out clear measures which protect child rights from violations by private service providers. According to the Committee, States have an obligation to set standards for the private sector in conformity with the CRC and to closely monitor private service providers⁵⁴. The recommendations from the Committee also emphasize the importance of ensuring that privatisation does not threaten children's accessibility to services on the basis of prohibited criteria, especially under the principle of non-discrimination. The Committee has further recommended that States:

- Undertake an assessment before contracting out services to a non-State provider looking at the political, financial and economic implications and the possible limitation on the rights of beneficiaries in general, and children in particular. Such assessments should determine the manner in which the availability, accessibility, acceptability and quality of the services will be affected and involve children, families, NHRIs, civil society, relevant Ministries such as Health, Finance and Social Welfare, etc.
- Identify the amount and proportion of the State budget spent on children through public and private institutions or organizations in order to evaluate the impact and effect of the expenditures.
- Ensure that for all service sectors, beneficiaries, in particular children, have access to an independent monitoring body, and where appropriate judicial recourse, that can ensure the implementation of their rights and provide them with effective remedies in case of violations.

2.2.5 Public procurement to protect child rights

Public procurement is an important part of the economies of many states and government procurement is believed to comprise 10-30% of GNP in all states.⁵⁵ States are directly responsible for the child rights impacts of their procurement policies and practices. Given the scale of States' commercial activity, implementation of procurement policies which further children's rights could have a major effect on the practices of suppliers and States need to take

⁵³ ILC Article 5

⁵⁴ The Private Sector as Service Provider and its Role in Implementing Child Rights. Available at: <http://www.ohchr.org/EN/HRBodies/CRC/Documents/Recommendations/service.pdf>

⁵⁵ Callendar, G. & Mathews, D. *Government Purchasing: An Evolving Profession?* Journal of Public Budgeting, Accounting and Financial Management (Vol. 2(2), 2000) cited in Zeisel, K *The Promotion of Human Rights by Selective Public Procurement under International Trade Law* Global Law Working Paper 01/05 Symposium - 'Transnational Corporations and Human Rights' (2005)

steps to ensure that procurement contracts they enter into are only awarded to bidders who respect child rights.

Child rights should be mainstreamed 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. Criteria should be used such as whether the bidding companies 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 child rights. Lessons can be learned from efforts to combat discrimination within public procurement. The Committee on the Elimination of Discrimination against Women for example has called on the Netherlands to introduce a scheme for promoting equality in public contracts.⁵⁶

Since public procurement policies are in effect trade policies, they are subject to international trade law. The General Comment will have to address whether there is any conflict or difficulty in meeting obligations under the CRC to implement child rights public procurement clauses and meeting obligations in the context of international trade law provisions such as the WTO Agreement on Government Procurement (1994).

2.2.6 Ensure state-sponsored investors are in compliance with the CRC

States can hold significant financial assets (eg pension funds and sovereign wealth funds⁵⁷) which are invested in a variety of assets. In the course of investing, States may support business activities which violate child rights; for example they may invest in a company whose security personnel abuse children or which is responsible for pollution. The conduct of this company cannot be attributed directly to the State. However, States may be responsible for failing to take reasonable measures to foresee, mitigate and remediate any adverse impacts the projects they invest in might have on children's rights. Such measures might include having a policy on responsible investment with regards to child rights, conducting in-depth research on the potential child rights impacts of investment decisions, monitoring investment decisions and responding if there is a negative outcome for children's rights. Such response might include divestment.

The stand-out example of a state-sponsored investor is Norway's Government Pension Fund which seeks to invest in ways which are consistent with its obligations under the CRC. It focuses explicitly on the impact that companies have on children's rights as part of its criteria for investment decisions. It has developed Investor Expectations on Children's Rights⁵⁸ that lay out how companies should prevent the worst forms of child labour and promote children's rights in

⁵⁶ CEDAW's Concluding Observations to the Netherlands CEDAW/C/NLD/CO/5 (2010)

⁵⁷ Sovereign Wealth Funds have been estimated to have a total market size of \$2.5 to \$3 trillion, a number expected to grow to between \$10 and \$15 trillion by 2015. To provide context, other institutional investors control the following amounts globally: hedge funds, \$1.4 trillion; pension funds, \$15 trillion; insurance companies, \$16 trillion; and mutual funds, \$21 trillion. Vincent Gasparro and Michael Pagano, "Sovereign Wealth Funds' Impact on Debt and Equity Markets during the 2007-09 Financial Crisis," *Financial Analysts Journal* 66, no. 3 (2010): 92-103

⁵⁸ More information available at: <http://www.nbim.no/en/Investments/ownership-strategies/Childrens-rights/childrens-rights-risk-assessment/>

their operations and supply chains. It annually assesses the extent to which the companies it invests in meet its expectations, and publishes the results in compliance reports.

2.2.7 Ensure foreign trade and investment agreements are in compliance with the CRC

Foreign investment is governed by a patchwork of bilateral investment treaties (BITs) and free trade agreements. State-investor contracts may involve large extractive industry, agricultural and construction projects all of which can have a significant impact on child rights. Furthermore, there is a risk from common provisions that the State will not impose further regulations on the investor that could diminish the profitability of the investment⁵⁹. These may be used to challenge host state regulations supportive of child rights (eg tighter regulation on pollution) which affect their investment interest. They may also use contractual provisions to challenge host state policies to realise child rights (eg legislation on non-discrimination against indigenous children) which also affects their investments⁶⁰.

States often fail to ensure that their foreign investment and trade agreements are consistent with their obligations under the CRC. The Committee has called on States to incorporate clauses on the rights of the child into “business agreements, investment treaties and other foreign investment agreements with transnational corporations and foreign governments.”⁶¹ The SRSR has developed ten Principles to integrate the management of human rights risks into State-investor contract negotiations⁶² that provide a useful framework.

Another measure of prevention is the use of impact assessments and several of the Committee’s Concluding Observations call for States to undertake impact assessments when entering into trade related agreements concerning access to medicine, implying that in concluding such agreements with other States and pharmaceutical companies, States are expected to consider the impacts of such agreements on children’s rights, particularly health rights⁶³.

In practice, this implies that before entering into trade and investment agreements, States should undergo an assessment of their potential or actual impact on child rights. In reality, the technical process of assessing the human and child rights impacts of trade related agreements is undertaken by a very small number of States and even then in an ad hoc fashion. The Canada-Colombia Free Trade Agreement⁶⁴ is unusual in this respect and requires both governments to

⁵⁹ See above

⁶⁰ Research by Andrea Shemberg for the SRSR on Human Rights and Business into the impact of ‘stabilisation’ clauses found that it was difficult to draw conclusions owing to the lack of transparency around investment agreements but that: ‘it is possible to infer further that some stabilization clauses in modern contracts may negatively impact the host state’s implementation of its human rights obligations.’ *Stabilization Clauses and Human Rights*-A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights (2008) para 146

⁶¹ Concluding Observations, Angola (2010) CRC/C/AGO/CO/2-4 para 25. See also Concluding Observations, Bolivia (2009) CRC/C/BOL/CO/4, paras 17 and 18

⁶² Principles for responsible contracts, available at:

<http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf>

⁶³ Concluding Observations, Ecuador (2005), CRC/C/15/Add 262, para 21

⁶⁴ For more information see <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-colombia-colombie.aspx?view=d> [accessed November 2011]

produce an annual human rights impact assessment of their bilateral free trade agreement. This type of assessment is in its infancy and there is no universally accepted definition of what a child rights impact assessment of trade agreements would look like. Currently the UN Special Rapporteur on the Right to Food, Olivier de Schutter is drafting Guidelines for Human Rights Impacts of Trade Agreements that will provide useful guidance for the General Comment.

2.3 What are the obligations of home States with regards to preventing and remedying child rights violations committed or contributed to by business enterprises domiciled in their jurisdiction and operating in a different jurisdiction?

2.3.1 Foreign investment and accountability

Foreign investment can be a very positive force for State implementation of children's rights. It can bring benefits to people living in host countries in the form of technology transfer, local jobs and increased 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. Article 24 (c) of the CRC itself provides that States should make full use of available technology to combat disease and malnutrition. A recent analysis of the effects of foreign investment on local firms in developing and transition countries suggests that foreign investment robustly increases local productivity growth⁶⁵. Increased governmental revenues from investment, if managed properly, can bring indirect benefits for children in that country. Such revenues can be used to help fulfil child rights particularly those rights closely associated with poverty such as the right to survival and development, right to an adequate standard of living, right to health, education, non-discrimination and participation amongst others.

However, this kind of investment carries significant risks for children whether foreign companies are operating through a subsidiary, contractor, sub-contractor, supplier or working in joint venture with the host government. Children's rights are threatened in part because of the types of industry which TNCs frequently engage in such as large scale extractive industries which may carry particular risks for child rights. In part this is because investment may be made in particularly dangerous areas such as conflict zones. If we consider for example some connections between children's rights and large scale extractive industries which are frequently run by TNCs, the following issues emerge:

- The use of child labour on actual work sites as well as on sites in peripheral industries that support the extractive industry.
- The sexual exploitation and abuse of children in the "hostels" and bars that surround the site areas as well as on site where they might be used to provide "domestic work" services that can make them vulnerable to sexual exploitation and abuse⁶⁶.
- Security personnel may abuse children in the course of their work.

⁶⁵ *Which Foreigners are Worth Wooing? A Meta-Analysis of Vertical Spillovers from FDI* William Davidson Institute Working Paper 996 (2010)

⁶⁶ Save the Children UK and Norway, *A Bridge Across the Zambezi: What needs to be done for children?* 2006

- During resettlement programmes, families may be relocated to areas with worse living standards on key issues to children – such as no established schools or health facilities. Where that relocation does not re-establish families with equal rights of tenure or at least some measure of security of tenure, families and their children are at risk of further evictions and relocations with increased trauma and uncertainty for children. Children are very rarely involved in community consultations with the company considered.
- Indigenous children may be particularly at risk of resettlement programmes and the Committee has emphasised that the right to exercise cultural rights among indigenous peoples may be closely associated with the use of traditional territory and the use of its resources.⁶⁷
- Extractive industries can have serious damaging impacts on the environment which can be a risk for children's health and development.
- Children of migrant workers who travel from site to site for work may have their right to education negatively affected.
- Children above the minimum age for work may not be sufficiently protected from exploitation at abuse in the workplace.

Despite these risks to child rights, there is a significant lack of accountability for violations of child rights in these situations whether a company is operating through partners, subsidiaries, suppliers or in concert with the government. It is important that the General Comment acknowledges these risks and provides both home and host States, with guidance on their obligations under the CRC to prevent and remedy violations of child rights that occur in this context.

2.3.2 Challenges in holding companies accountable in host states

The host State has primary responsibility for the realisation of child rights in its territory and negotiates the terms under which TNCs can operate in its country. In theory, it will have administrative and judicial machinery which can provide a clear and direct regulatory framework for TNCs. States should have adequate guidance about what legal and procedural measures should be in place to prevent abuse and hold companies accountable. Victims of human rights abuse by companies should be able, as a matter of principle and priority, to find relief in their own countries. However, host States may have weaker governance and accountability structures than home States. 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.⁶⁸ Resource constraints in host States present another difficulty for regulating and controlling business. It has been argued for example that the resources needed to ensure compliance by TNCs with labour rights far outweigh the resource capabilities of developing countries⁶⁹.

⁶⁷ General Comment No. 11, *Indigenous children and their rights under the Convention*, CRC/C/GC/11 para 16

⁶⁸ See Olivier De Schutter, *Transnational Corporations as Instruments of Human Development, in Human rights and development: towards mutual reinforcement* 403, 406 (Philip Alston & Mary Robinson, eds., 2005)

⁶⁹ Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (2nd ed, 2000) 1349 cited in Chirwa

Where a regulatory regime is in place, it may be undermined by other factors, including corruption or cooption of State officials. Nigeria, for example, has detailed laws in the sphere of the private sector and environmental protection but it has been observed that these laws have not been enforced to prevent environmental degradation by oil companies because of corruption and reluctance to put any pressure on oil companies, which are considered to be central to the Nigerian economy⁷⁰.

Generally speaking, causes of action—whether criminal or civil—are not intended to operate outside of the State in which they are established. Invoking the civil liability of a TNC can only be done at the national level, either in the corporation’s country of origin or in its host country. Litigation against parent companies and their subsidiaries in host countries may founder on insufficient legal capacity among local authorities due to inadequate legislation, poor infrastructure, corruption, lack of legal aid, the politicisation of the judiciary, etc. It is not uncommon for a TNC’s subsidiaries, sub-contractors or business partners to be uninsured. They may have limited liability. Access to information in such situations can be very problematic. Much of the evidence in the form of documents, records and archives might be in the control of the parent-company and be located at head-quarters in the home State.

The parties to the dispute will often have very unequal access to financial resources to prepare their respective cases which means that children and their representatives may not be able to produce the evidence required to make their case. In cases where State military forces provide security to TNC operations and both the State and the TNC are implicated in the abuse, it may be futile and even dangerous for victims to bring claims or to seek prosecution of the corporations.

2.3.3 Challenges in holding companies accountable in home States

Holding a company accountable for direct or indirect involvement in child rights abuses in its home State is also not straightforward. Some of the most complex issues relating to TNCs arise out of the fact that, in law, they are not one corporate entity but several, linked by shareholding or contractual relationships which give rise to varying degrees of control or influence over the activities of subsidiaries or associates. The situation is further complicated by the fact that States do not generally regard foreign subsidiaries of parent companies domiciled within a separate jurisdiction as their own nationals. Even if the foreign subsidiary is a wholly owned subsidiary, it is not a “corporate expatriate,” but a foreign corporate national with a separate legal existence. States very rarely assert direct extraterritorial jurisdiction over foreign subsidiaries of parent companies domiciled in their territory on the basis of the nationality principle, meaning shared nationality with the parent company: “the principle of separate legal personality presents a difficult, if not insurmountable, obstacle in situations in which the parent company has incorporated subsidiaries to carry on its overseas operations⁷¹”.

⁷⁰ Godfrey Odhiambo Odongo, *Making Non-State Actors Accountable for Violations of Socio-Economic Rights: A Case Study of Transnational Corporations in the African Context* (LLM Dissertation, University of the Western Cape, 2002) 47–8, available at www.up.ac.za/chr/academic_pro/llm1/dissert_b_2002.html cited in Chirwa

⁷¹ University of Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses* (2008)

In principle, parent companies or associates of companies operating overseas should be held accountable for their own acts through national systems. The General Comment may also provide some guidance in this respect. It can be very challenging to establish that a parent company in the home State jurisdiction is liable for acts of subsidiaries and associates. There may also be legal and evidentiary difficulties in connecting the behaviour of the home State companies to subsidiaries. Even where claimants can establish liability of the parent company, can establish jurisdiction and can identify an available cause of action under the relevant applicable law (whether that of the host State or home State), a claim may be challenged on the grounds that the home State is not the appropriate forum for the case to be heard (the doctrine of *forum non conveniens*). *Forum non conveniens* can be raised when the claim is processed in a common law country outside Europe (where the Brussels II Regulation provides for automatic jurisdiction of European courts over civil cases relating to companies domiciled within the EU).

States have an obligation to take measures to prevent violations of children's rights by corporate activities. Further, they have an obligation to take effective enforcement measures that is to investigate, adjudicate and redress violations of children's rights when they occur. When TNCs contribute to or are complicit in violations of child rights which take place abroad through the actions or omissions of a subsidiary, contractor, sub-contractor or supplier, they should be held accountable for this conduct. As long as TNCs fail to be held accountable for child rights violations in which they are implicated, States, both host and home, are not adequately meeting their obligations.

2.3.4 What are the obligations of home States with regards to preventing and remedying child rights violations committed or contributed to by business enterprises domiciled in their jurisdiction and operating abroad? - The debate about "extra-territorial application" of the convention.

States often argue that domestic law does not have 'extra territorial application' and wish to prevent problems of incursion into sovereign domains and in particular difficulties of enforcement action in foreign States. They maintain that such policies may create undue risk and uncertainty for businesses operating abroad. It is important for the General Comment to address this issue and further research will be required. The following discussion provides an introduction to some of the core issues.

The UN Guidelines assert that:

States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

The sort of recognized jurisdictional basis referred to here is borrowed from international criminal law principles of jurisdiction: Territoriality (each state has jurisdiction over actors and activities taking place within its own territorial boundaries. However, sometimes activities can cross State borders so more than one State may have jurisdiction); Nationality (states may exercise jurisdiction over their own nationals wherever they are in the world); and Universality

(states have the right to assert jurisdiction over certain very serious international crimes (and their perpetrators) wherever in the world they have taken place.) Furthermore, the use of direct extraterritorial jurisdiction is subject to an overarching “reasonableness” requirement.

Amnesty International⁷² and others have argued that the interpretation given in the Guidelines does not reflect the full picture of international human rights law. They assert that treaty bodies have been clear and assertive that home States do have an obligation to take appropriate measures to ensure that their companies do not violate human rights in other jurisdictions – this is particularly the case within the General Comments of the Committee on Economic, Social and Cultural Rights⁷³. The Committee on the Elimination of Racial Discrimination has also recently said that State responsibility is engaged even when the nexus between the State and a TNC is limited to that of domicile rather than any further ‘influence’ criteria.⁷⁴ Furthermore, a variety of human rights treaties and instruments expressly impose obligations on States to establish criminal jurisdiction over their nationals in relation to, for instance: complicity in torture, enforced disappearance, and the sale of children, child prostitution, child pornography, wherever the acts are committed. They also refer to the State duty to engage in international cooperation for the realisation of human rights as suggestive of an obligation to assert extra-territorial jurisdiction.⁷⁵

2.3.5 The provisions and jurisprudence of the CRC and extra-territorial jurisdiction

The provisions of the Convention, and the interpretative guidance provided by the Committee, point to the fact that State obligations to children’s rights do, unequivocally, extend beyond national borders where they also apply to protect child rights from third party abuses.

Under Article 2 (1) of the CRC, a State’s obligation to respect and ensure children’s rights is engaged within its own jurisdiction. The term ‘jurisdiction’ is usually linked to the right and power to apply the law within a certain area or territory⁷⁶. However, there is no prohibition on States applying the CRC beyond its national borders – the term ‘territory’ is not referred to at all in Article 2 (1) or elsewhere in the CRC. Furthermore, the Committee has actively encouraged States to respect, protect and fulfil the rights of children who may be beyond their borders; for example, Concluding Observations have urged the use of extraterritorial jurisdiction to help combat female genital mutilation.⁷⁷

⁷² *Comments in response to the UN Special Representative Of The Secretary General On Transnational Corporations And Other Business Enterprises’ Guiding Principles* (October 2010) Available at: <http://www.amnesty.org/en/library/asset/IOR50/001/2010/en/1123b7b1-4fb1-47fd-9832-d4307dd09bff/ior500012010en.html>

⁷³ UN Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health, E/C.12/2000/4 11 August 2000, para 39. See also UN Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water, E/C.12/2002/11, 20 February 2003, para 33. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 19: The right to social security (Art. 9 of the Covenant), 4 February 2008, E/C.12/GC/19, para 54.

⁷⁴ See for example, Concluding Observations, UK (2011) CERD/C/GBR/CO/18-20

⁷⁵ As above

⁷⁶ See ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para 109

⁷⁷ For example, Concluding Observations, Ireland CRC/C/IRL/CO/2 (2006) Para. 55

The OPSC has explicit language on extraterritorial jurisdiction. Under the OPSC, States have an express obligation to establish criminal liability for offences committed under the Optional Protocol whether committed domestically *or transnationally*. This means that States are obliged to prosecute offences committed by their own nationals which take place beyond their territory. This has not on the whole been contested given the international disgust such crimes generate. This is not to say that the reaction would be the same in relation to asserting extraterritoriality over other more ‘controversial’ children’s rights such as the rights of indigenous children to enjoy their own culture implying a right to remain on land.

The OPSC also provides that, subject to national law, each State Party shall take measures where appropriate to establish legal liability for legal persons (including corporations and other businesses) for offences under Art. 3(1). The Committee has not yet addressed if such measures should apply to acts by businesses committed transnationally. However, the OPSC does confirm that States Parties have duties to prevent and punish abuses which occur outside their territory in some situations and that there is a possibility under the OPSC that this could apply to businesses as well as to individuals.

The Committee has already begun to encourage States to introduce measures of control that have extra-territorial effect over business enterprises at a domestic level. This capacity to regulate with extra-territorial effect arises from the influence home States can exert over parent companies incorporated within their jurisdictions. Objections to these regulatory provisions based on interference with national sovereignty can be countered by the argument that the Convention has been universally ratified and so realisation of its provisions will, in theory, have the support of both host and home States.

The Committee has recommended the following domestic measures which have extra-territorial effect: establishing regulatory frameworks for TNCs domiciled in their country regarding their impact on child rights⁷⁸; working with the national OECD National Contact Point mechanism in addressing non-compliance with the OECD Guidelines by multinationals extra-territorially⁷⁹; providing clear guidance to companies on their responsibilities to child rights both domestically and abroad; and providing a framework for mandatory reporting on child rights by corporations including TNCs headquartered in their countries. The Committee has also emphasised the importance for host and home States to include clauses on the rights of the child in business agreements, investment treaties and other foreign investment agreements with multinational corporations and foreign governments⁸⁰.

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 countries⁸¹.” The CRC thereby creates obligations to engage in

⁷⁸ Concluding Observations, Bahrain (2011) CRC/C/BHR/CO/2-3 Para 21

⁷⁹ Denmark, Concluding Observations, (2011) CRC/C/DNK/CO/ Para 30

⁸⁰ Concluding Observations Angola (2010) CRC/C/aGO/CO/2-4 Para 25; Concluding Observations Nicaragua (2010) CRC/C/NIC/CO/4 at Para 31

⁸¹ Preamble to the CRC

international co-operation towards the realisation of children outside their territory⁸². 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 interact⁸³ to engage in the realisation of children's rights beyond their borders.

It is important to consider whether the Committee could accept a situation where a home State applied double standards relating to children's rights in different countries. In regards to the applicability of the ICCPR, the UN Human Rights Committee has stated that: "it would be unconscionable to permit a State to perpetrate violations on foreign territory which violations it could not perpetrate on its own territory⁸⁴." The ICJ has also stated: "[The *travaux préparatoires* of the ICCPR] show that, in adopting the wording chosen, the drafters of the [ICCPR] did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory⁸⁵." 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 who are living inside their borders and those living in other countries.

Furthermore, the obligation to respect human rights entails an obligation of accountability owed to the whole world—or obligation *erga omnes*, as the ICJ termed it in the *Barcelona Traction* case.⁸⁶ This obligation is focussed on gross human rights violations which engage criminal responsibility (specifically genocide, crimes against humanity and war crimes)⁸⁷ but the Committee could consider if there is an argument for the jurisprudence to evolve toward allowing similar universal jurisdiction for systemic/chronic abuses of human rights that arise in the course of business conduct.

2.4 What are the obligations on home States with regards to preventing and remedying child rights violations committed or contributed to by

⁸² 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.

⁸³ 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 ICESCR

⁸⁴ HRC, *Lopez Burgos v Uruguay*, Communication No. R 12/52, 6 June 1979, para 10.3

⁸⁵ See ICJ, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para 109 cited in Interights

⁸⁶ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ Reports (1970), paras 33 and 34.

⁸⁷ See UN General Assembly resolution 60/1 (2005) of 24 October 2005, '2005 World Summit Outcome', paras 138 and 139. See also UN General Assembly, *A more secure world: our shared responsibility*—Report of the High-level Panel on Threats, Challenges and Change' Doc No A/59/565 of 2 December 2004.

business domiciled in their jurisdiction and operating in conflict affected and high risk zones abroad?

For companies of all sizes, being operational in "conflict-prone", "weak" or "post-conflict" countries poses a number of challenges with regard to children's rights not least because it is highly likely that a conflict-affected State is defined by weak governance and an absence of fully functioning rule of law systems. It is also likely that it will not be able to meet its obligations under the CRC and protection mechanisms for children are weak. Companies operating in this context are at a greater risk of being complicit in child rights violations.

Business can be linked to a conflict directly through for example provision of arms or infrastructure and the Committee has recommended to various States that they ban the sales of arms and munitions to countries where there are child soldiers.⁸⁸ The implication is that states need to regulate businesses in their jurisdiction which are active in the arms trade to prevent them from doing business with certain armed groups or regimes abroad. Business may also be directly engaged in conflict as private military and security firms (PMSCs) contracted by the state and operating in areas of armed conflict. PMSCs have been known to recruit children as employees as well as to be responsible for exploitation and violence against children in the course of protecting facilities.

Two voluntary initiatives regarding PMSCs are important for child rights. The Voluntary Principles on Security and Human Rights seek to regulate the use of private security forces that operate abroad but which are incorporated in home States. The principles encourage companies to assess the risks of their actions, set clear ethical standards for their security forces, use force only where necessary and adhere to the rule of law. The Montreux Document seeks to restate the legal obligations of States with regards to PMSCs in conflict situations including setting clear standards for PMSCs and building human rights concerns into contracts. Furthermore, it recommends that States take into consideration past conduct of companies when making decisions on contracting and licensing such companies.

Business can also be linked to a conflict indirectly through paying taxes and royalties and sharing profits with joint venture partners. There is often a relationship between conflict zones and resource wealth when companies in conflict zones are engaged in natural resource extraction, mineral trade, infrastructure, or financing projects. Conflict over natural resources can encourage the use of child soldiers and of child labour to extract the resources needed to finance hostilities. Companies sourcing natural resources from conflict-affected countries can therefore indirectly finance these activities.

Through these links, business may be complicit in gross human rights violations with grave implications for children including war crimes, crimes against humanity and genocide. Host governments are unlikely to have the capacity or political will to hold businesses accountable for complicity for these violations and the onus falls on home States to provide regulation and policy to prevent and remedy complicity of their companies in child rights abuses.

⁸⁸ Concluding Observations, Uganda (2008) CRC/C/OPAC/UGA/CO/1 Para 36

Businesses can also be linked to conflict through its supply chain. The extent to which child rights violations, such as the use of child labour or trafficking of children for sexual exploitation, feature as part of supply chains will depend in part on States' ability to adopt and effectively enforce legislation and regulation relating to preventing and remedying these violations at a national level. However, businesses have a responsibility to respect child rights in all contexts and to have knowledge about the supply chain and the origin of products and services.

Home states can play a role in regulating their companies conduct towards supply chains and to ensure child rights due diligence measures are undertaken. With the adoption of the US Dodd-Frank Act in 2010, companies will have to not only disclose whether conflict minerals in their products originate from the Democratic Republic of Congo, but also report on the due diligence exercised when they do. The assumption is that this disclosure and auditing requirement will help to stop the exploitation and trade of conflict minerals in the DRC which is helping to finance a conflict characterised by the use of child soldiers and gender-based violence against girls and women. The California Transparency in Supply Chains Act is another regulatory initiative that requires companies doing business in the state to disclose their policies, processes, and controls to eradicate slavery and human trafficking. In both cases, these measures appeal to public/consumer consciousness and preferences to exert pressure on companies and their brands, and empower local communities with information that can be used to hold governments and companies to account.

The General Comment should consider the nature of home State obligations to prevent and remedy child rights violations committed or contributed to by companies domiciled in their jurisdiction and operating in conflict zones. This should take into account provisions of the CRC relating to children in conflict such as Article 39 obliging states to provide appropriate psychological recovery and social reintegration and OPAC provisions regarding recruitment of children into armed forces over 18 years of age. It is also important to note that there are no provisions in the CRC allowing for derogation in times of emergency so that the entire Convention is applicable in times of conflict.

As a matter of law and policy, measures of prevention could include providing 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. A further preventive measure is to ensure that ECAs undertake child rights due diligence before providing loans to companies operating in conflict zones. The General Comment should also consider the question of provision of civil, administrative or criminal remedy for violations arising in conflict zones. There is a limited but growing number of States Parties to the ICC Statute that have included corporate criminal responsibility in the domestic legislation they have adopted to implement the ICC Statute⁸⁹ and it is important to note that the recruitment and use of children under the age of 15 in hostilities is included as a war crime in the ICC Statute⁹⁰.

⁸⁹ See for example, Article 689-11 of the French Code of Penal Procedure, as amended in 2010 to implement the ICC Statute which gives French courts jurisdiction over crimes against humanity and genocide committed abroad by French nationals (corporations and human beings).

⁹⁰ Article 8 (b) (xxvi) of the ICC Statute

2.5 Which measures of implementation could serve to protect children's rights from corporate violations?

2.5.1 General Measures of Implementation

The CRC does not merely state what children's rights are; it goes much further. Article 4 demands that governments "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights". In September 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' for the CRC.

In general, States have discretion in the measures they deploy to respect, protect, promote and fulfil children's rights, although the jurisprudence of regional bodies has established parameters and minimum thresholds. The following are examples of measures of implementation that may be appropriate and reasonable in different contexts in order to prevent and remedy harm caused or contributed to child rights by business.

LEGISLATIVE MEASURES

2.5.2 Adopt appropriate legislation and related regulations

Legislation is a vital tool to realise children's rights and most States do in fact have domestic law imposing some responsibilities on business operating within their jurisdiction that have an explicit connection with children's rights. Some of the most common include: occupational health and safety law for workers who are over the minimum age for employment and under 18; anti-discrimination and equal opportunity employment law; law prohibiting the commercial sexual exploitation of children; law criminalising trafficking of children; and social and environmental regulation and laws proscribing the employment of children under a certain age. Despite the wide range of different substantive issues addressed by States in regulating the actions of business, there are gaps and States often do not (fully) realise or utilise their potential to protect children's rights through trade law, investment rules, and related legal measures.⁹¹

As a starting point States must ensure that the principle of the best interests of the child is central to the development of legislation which may affect children including those laws and regulations which shape business policy and which may impact on children. The best interests of the child implies the ability to satisfy all rights and therefore all CRC provisions should apply. There is also scope for States to adopt legislation and related regulations to ensure the business sector complies with its responsibility to respect child rights⁹². For example, the Committee has encouraged Nigeria to implement regulations to ensure that the business sector complies with international and domestic standards on corporate social and environmental responsibility⁹³. It

⁹¹ Augenstein, D *Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union* (2011)

⁹² See for example, recommendations made in Concluding Observations, Seychelles (2011) CRC/C/SYC/CO/2-4 Para 21

⁹³ Concluding Observations, Nigeria (2010) CRC/C/NGA/CO/3-4 Para 47

has also recommended that South Korea ensure that the private sector conducts legally mandated environmental impact assessments of investment projects⁹⁴.

2.5.3 Implement and enforce legislation and regulations

Legislation relating to protecting children from corporate violations of their rights may require specific implementation measures or tools (such as regulations or codes of conduct) or additional policies or institutions to be effective (such as monitoring bodies and law enforcement institutions). Law does not function in a vacuum and it is the lack of implementation or poor enforcement of laws regulating business activity and operations that poses the most critical problem for children. This can arise for many different reasons including lack of resources, tax evasion, corruption, indifference to the rule of law and lack of capacity of staff within the relevant government bodies. The following measures can be used to ensure proper implementation and enforcement of law relating to child rights and business:

- the dissemination of law regarding child rights and business to key stakeholders and the general public;
- training of judges who may be unfamiliar with these issues to help develop jurisprudence regarding business and child rights;
- establishing monitoring systems such as labour inspectorates⁹⁵, government-run monitoring bodies to ensure that private service providers protect rights and independent oversight bodies for environmental pollution⁹⁶.
- establishing appropriate mechanisms to ensure redress in case of violation of rights such as criminal proceedings, civil proceedings, employment tribunals or through non-judicial mechanisms such as NHRI or other monitoring mechanisms such as labour inspectorates; and
- establishing mechanisms for free legal advice for children.

2.5.4 Provide children with effective remedy

- **What is effective remedy?**

An important element of the duty to protect is the obligation to take effective enforcement measures - that is to investigate, adjudicate and redress violations of children's rights when they occur when the harm is caused or contributed to by business. The Committee states in General Comment No. 5 that "for rights to have meaning, effective remedies must be available to redress violations." Several provisions in the CRC call for penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties⁹⁷. In its General Comment No. 11, the Committee asserts that States should provide effective remedies

⁹⁴ Concluding Observations, South Korea (2011) [CRC.C.KOR.CO.3-4.doc](#) Para 28

⁹⁵ Concluding Observations, Mozambique (2009), Para. 81; Concluding Observations, Georgia (2008), Para. 63

⁹⁶ Concluding Observations, Nigeria (2010) CRC/C/NGA/CO/3-4 Para 47

⁹⁷ For example, Article 32 (2) regarding the economic exploitation of children requires States to provide penalties or other sanctions; Article 19 regarding protecting children from violence refers to investigation and judicial involvement as protective measures; and Article 39 demands that States promote recovery and reintegration following harm such as neglect or exploitation.

for children whose right to non-discrimination has been violated and that: “the obligations of the State party extend not only to the public but also to the private sector⁹⁸.”

The OPSC requires that all victims of Protocol offences have “access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.” The term ‘those legally responsible’, includes legal persons such as business enterprises. The Committee also encourages States to give children access to different forms of complaints mechanisms and General Comment No. 2 focuses on the importance of NHRIs in providing children with remedies⁹⁹. The implication of the Committee’s interpretative guidance is that providing children with just and timely remedy for corporate violations of their rights is a central part of a State’s obligations under the CRC.

Because of children’s unique status, there are particular dimensions to the concept of “effective remedy” for corporate violation which should be taken into account by States. Many children, especially the very young, may not be able to speak out about violations nor fully understand that they have a right to remedy from business. The Committee states: “Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are fast-acting, child-sensitive procedures available to children and their representatives¹⁰⁰.” At the same time remedy processes will only be effective if they fully acknowledge that children have the capacity to be actively engaged in the remedy process according to their age and maturity and this participation needs to be fostered and encouraged where appropriate.

In terms of outcome, remedies should provide for appropriate reparation when a violation is established – such reparation might be “compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39¹⁰¹.” When determining the level of reparation, mechanisms should take into account that children can be more vulnerable to the effects of corporate violations of their rights than adults can in terms of susceptibility to environmental degradation and pollution; vulnerability to exploitation and discrimination in the workplace; malleability to forceful marketing practices; and the long-term negative effect on their survival and development of economic exploitation and sexual exploitation and abuse.

States can provide a variety of different forms of remedy available for children that enable them to hold companies accountable for their involvement in rights’ abuses including criminal law, constitutional law and civil law. Children may also have recourse to regional and international human rights tribunals once domestic remedies have been exhausted. This will include recourse to the Third Optional protocol of the CRC, once it becomes a ratified international instrument.

⁹⁸ Committee on the Rights of the Child, General Comment No. 11, *Indigenous children and their rights under the Convention* CRC/C/GC/11 (2009) para 23

⁹⁹ Committee on the Rights of the Child, General Comment No. 2, *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child* CRC/GC/2002/2 (2002)

¹⁰⁰ Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5 (2003) Para 24

¹⁰¹ As above Para 24

Litigation is the most regulated form of response with binding outcomes for children. Settled case-law at national and international levels can create clarity about the substance of children's rights and about how they apply to business. It can thereby function as a form of deterrent for corporate violations. However, non-judicial remedies supported by the State can also be effective for children and involve investigation, adjudication and mediation with NHRIs and ombudspersons.

- **Challenges in providing access to remedy**

As we have discussed, it is extremely difficult for children to obtain access to remedy for violations of their rights against a parent company domiciled in another State. This section looks at the issue of access to remedy for corporate violations more broadly. Children with claims against business for violations of their rights face many obstacles in gaining access to the courts. Many of these obstacles are not specific to business related child rights claims and are challenges regardless of the cause of a violation; for example, a failure by the State to prosecute under relevant legislation for rights violations; children's lack of legal standing; children's lack of knowledge about their rights and the mechanisms available to them to seek redress; and overall lack of trust and confidence in the judicial process.

There are further obstacles which are specific to the issue of accessing remedy against business. These include the way in which large corporations are structured which make attribution of legal responsibility challenging; the complexities of extra-territorial jurisdiction; power imbalances between the respective parties and the sheer costs involved in large scale litigation against companies who are highly motivated to avoid negative judgements. Large companies are also often motivated to settle out of court with the result that there is little case law to refer to. In the absence of a body of developed case law, children and their families may be more likely to be put off undertaking litigation given extremely uncertain outcomes¹⁰².

Non-judicial remedies for rights violations can play a very important part in establishing accountability. Most States will have some agencies with oversight of particular standards relevant to children's rights; for example, health and safety inspectorates, environmental tribunals and bodies focussed on non-discrimination and unequal treatment in the private sector. These agencies may have regulatory powers allowing them to impose administrative sanctions on businesses which violate children's rights. Other non-judicial mechanisms established with the support of the State include publicly funded mediation services, NHRIs, or similar mechanisms. These mechanisms can enable redress for children through mediation, investigation, fact-finding or producing recommendations.

Non-judicial remedies can create flexible, innovative and sustainable solutions to issues concerning children and at times it may be in a child's best interests for concerns raised about a company's conduct to be resolved or settled informally. Furthermore, they operate in the 'shadow' of litigation and this may go some way to mitigate the weakness of non-judicial remedies that they lack strong enforcement of their decisions. Non-judicial mechanisms can therefore play an important complementary role alongside judicial processes.

¹⁰² See CORE, *The reality of rights: Barriers to accessing remedies when business operates beyond borders* (2009)

However, in many instances, they are reliant on the cooperation and good will of companies both for their functioning and for implementation of decisions. They lack strong enforcement powers and claimants may not have much trust or confidence in them as effective mechanisms. Furthermore, they may be uncertain about how they function, distrust their perceived relationship with the government, find them physically difficult to access and may fear retaliation from others for bringing cases to public attention.

The General Comment should provide States with guidance regarding their obligations to provide children with effective remedy for corporate violations of their rights. This should emphasise that children must be provided with information about their rights and remedies for violation of their rights by the private sector through for example the school curriculum, health centres or similar community-based programmes. For remedies to be meaningful, children need to be able to access advice and information at local levels in the communities where they live. This advice will often be provided through decentralized, community-based centres such as socio-legal defence centres, legal clinics or child rights promotion centres, where children and their families can obtain information on avenues of redress. NHRIs should be encouraged to raise awareness of remedy mechanisms amongst children.

Children with the appropriate capacity should be allowed to initiate proceedings against companies in their own right and their standing before civil courts should be enhanced. Children need to have access to legal aid and the support of lawyers in bringing cases against business enterprises in order to even out the unfair balance of arms. States which do not already have provision for class actions should consider introducing this as a means of increasing accessibility to courts for large numbers of people. States should not put obstacles in the way for children to obtain remedy when the harm was caused or contributed to by a business enterprise domiciled in its jurisdiction but which occurred abroad.

States need to ensure that non-judicial mechanisms are effective for children as well as for adults. They should be in accord with key child rights instruments – primarily the CRC but also relevant regional instruments such as the African Charter on the Rights and Welfare of the Child as well as ILO Conventions concerning children. They need to be trusted and used by children, child-sensitive and adapted to children’s evolving maturity and understanding. A crucial part of building this trust and legitimacy is through ensuring that children have a voice and participate in the remedy process. Under Article 12 of the CRC, children’s voices should be heard and their views taken into account. Business has a responsibility to respect this right within company-level grievance mechanisms. Another important element of legitimacy is ensuring that the confidentiality and privacy of child complainants is respected and that children are kept informed of progress at all stages of the process giving due weight to the child’s maturity and any speech, language or communication difficulties they might have.

Steps also need to be taken to make mechanisms accessible by providing children with multiple points of entry, including face-to-face meetings, written complaints, telephone conversations, or e-mail. Specific assistance may need to be granted to more vulnerable children, such as migrant children, refugees and asylum seeking children, unaccompanied children, children with

disabilities, homeless and street children and children in residential institutions to facilitate the bringing of their case including for example, translation of documents into local languages.

ADMINISTRATIVE MEASURES

2.5.5 Monitor the impact of business activities and policies on child rights

There are a number of measures which States can introduce to meet this obligation. They should gather data regarding the impact of business on child rights. This requires a regular flow of statistical information, in-depth research, and consistent monitoring and evaluation by those implementing policy regarding the private sector. This data can be used to identify problems as well as to inform policy development. The Committee encourages States to use different methods for the collection of qualitative and quantitative data including asking children directly for their views on the impact of business on their rights.

Another measure States can employ to monitor the activities of the business sector with regards to child rights is to encourage transparency and disclosure through child-focused corporate reporting. This reporting can be used by States, consumers and other stakeholders to test business performance against standards provided for in the CRC thereby encouraging accountability. The Committee has asked Singapore¹⁰³ and Denmark¹⁰⁴ to provide a framework for reporting on child rights by corporations, including TNCs, headquartered in their countries. States can encourage business to report on their impact on child rights by creating instruments to benchmark and recognize good performance with regard to child rights and leading by example and requiring state-owned enterprises to publish reports on their impact on child rights.

In order to meet their obligation to monitor the impact of the business on child rights, States could introduce regulations that require private pension funds and other asset owners not only to have a policy on responsible investment with regards to child rights, but also to publish details of how they intend implementing their policy, and to report regularly on the outcomes for child rights that result from the implementation of their policy. Institutional investors such as pension funds, insurance companies and investment managers can play a very important role in encouraging the companies in which they invest to respect child rights. The pressure from investors to put short-term profits ahead of corporate responsibility and the failure of many investors to play the part of active owners (i.e. by not holding company boards properly to account for their governance) are often contributory factors to unethical behaviour by companies.

The argument that investors have social and environmental responsibilities is increasingly accepted in the investment industry. Perhaps the most high-profile example is the UN-backed Principles for Responsible Investment (UNPRI)¹⁰⁵. These are intended to develop and promote best practice in investment analysis and decision-making through the integration of

¹⁰³ Concluding Observations, Singapore (2011) CRC/C/SGP/2-3 para 26

¹⁰⁴ Concluding Observations, Denmark (2011) CRC/C/DNK/CO/ para 30

¹⁰⁵ As of November 2011, over 900 investment institutions (asset owners, investment managers and professional service providers) had become signatories to the UNPRI List of signatories available at: <http://www.unpri.org/signatories/>

environmental, social and governance (ESG) issues into mainstream investment practice. ESG issues can have a strong complementarity with children's rights even though the Principles are not expressed explicitly in terms of human rights. States can encourage large investors to adhere to voluntary initiatives¹⁰⁶ such as the PRI as a means of encouraging them to build more substantive consideration of children's rights issues into their investment decisions.

However, these initiatives have relatively limited take up amongst institutional investors. States should also establish appropriate regulatory frameworks to encourage or require investors to be accountable for the child rights impacts of their investment decisions. These regulatory frameworks can have effect both domestically and extra-territorially. Ten countries¹⁰⁷ have already introduced regulations that – in broad terms - require asset owners to adopt policies that set out their views on the relevance of ESG issues to their investments and explain how these are to be implemented. In the main the issue of the impact of investment upon children is limited to reference to child labour.

2.5.6 Develop and implement comprehensive strategies for children

States must develop a comprehensive, CRC-based national strategy for children which includes explicit reference to the role that the private sector can play in supporting and respecting children's rights and the measures required for States Parties to prevent and punish corporate violations.

2.5.7 Co-ordinate implementation of the CRC

The full implementation of the CRC requires effective co-ordination, both horizontally between government agencies and departments and vertically across different government levels; from local, regional to central, as well as between the government and the private sector.¹⁰⁸ Typically, the departments and agencies which are directly involved with business policies and practices will work quite separately from those department and agencies with responsibility for implementing the CRC. The SRSG on business and human rights describes this phenomenon in terms of 'policy incoherence'¹⁰⁹:

If the impact of business on child rights is only taken into account within departments such as family welfare and social solidarity and not within those dealing with trade and industry then there is a significant risk that the State will not be meeting its obligations under the CRC. States need to ensure that governmental departments that shape business law and practices are also aware of the State's obligations to children's rights. They may require relevant information, training and support about children's rights, so that they act in a manner compatible with obligations under the CRC. The UK, for example, has a publicly available business and human

¹⁰⁶ Other relevant initiatives include: the European SRI Transparency Code, the Carbon Disclosure Project, the Investor Statement on Sustainability Reporting in Emerging Markets and the Investors' Statement on Transparency in the Extractives Sector.

¹⁰⁷ Australia, Austria, Belgium, Canada, France, Germany, Italy, Norway, Sweden and UK

¹⁰⁸ General Comment No. 5 (2003) *General measures of implementation for the Convention on the Rights of the Child* CRC/GC/2003/5, para 37

¹⁰⁹ See SRSG Framework, A/HRC/11/13, at para. 18

rights toolkit¹¹⁰ aimed at showing how UK overseas missions can promote good conduct by UK companies.

Some kind of co-ordination mechanism needs to be adopted to ensure that a child rights based approach is integrated into all activities relating to business. NHRIs can play an important role as a catalyst for linking different departments concerned with children's rights and business. The Committee, for example, recommended that the child-focused NHRI in Angola, the National Council for Children, "advise State departments cooperating with industry and trade to develop guidelines, which ensure that corporate business respects the rights of the child and protect children¹¹¹."

2.5.8 Monitor implementation of the duty to prevent corporate violations

There are two kinds of monitoring of State obligations under the CRC: the first is the monitoring of violations committed by business (addressed above); the second is monitoring the State's progress in implementation of the CRC so that all of its provisions are respected in legislation and policy development and delivery concerning the private sector at all levels of government. Often, States believe they fulfil their obligation to undertake CRC monitoring by submitting periodic reports to the UN Committee but this is not enough¹¹² particularly since at present few governments refer to their efforts to protect children from corporate violations in their reporting.

Self-monitoring and evaluation is an obligation for Governments, but the Committee also regards as essential the independent monitoring of progress towards implementation by, for example, parliamentary committees, NGOs, academic institutions, professional associations, youth groups and NHRIs. NHRIs can play a particularly important role in monitoring and evaluating the State obligation to prevent and redress corporate violations of children's rights. More than 100 countries have established NHRIs, with 63 maintaining an 'A-level' accreditation, meaning they meet the highest standards of independence and output¹¹³. Many of them work on children's rights issues and take an increasingly pro-active role in issues regarding business and human rights.¹¹⁴ The Danish Institute for Human Rights is an example of good practice in this field. The following is an overview of some ways in which they can monitor State performance with regards to children's rights and business:

- monitor and report on child rights abuses in the business sector and support civil society in this work;

¹¹⁰ Available at: <http://www.fco.gov.uk/resources/en/pdf/3849543/bus-human-rights-tool.pdf>

¹¹¹ Concluding Observations, Angola (2010) CRC/C/AGO/CO/2-4 para 24

¹¹² Finding from *Executive Summary of a Comparative Study: Governance fit for Children To what extent have the general measures of implementation of the UNCRC been realised in five European countries* Save the Children (2011)

¹¹³For a full list of accreditations see

http://www.nhri.net/2009/Chart_of_the_Status_of_NIs_January_2010.pdf

¹¹⁴ In 2010, the biennial International Conference of NHRIs focussed on business and human rights. The outcome of this meeting was a declaration calling for more national and international monitoring of businesses' compliance with human rights law, to give advice to companies, governments, campaigners and individuals about corporate responsibility, and that NHRIs themselves have an important role to play in supporting companies and victims of potential human rights violations. More information available at: http://www.humanrightsbusiness.org/?f=nhri_working_group

- monitor and promote domestic legislation regulating the establishment and conduct of corporations to ensure it is in compliance with child rights;
- raise awareness of judicial and non-judicial remedies amongst children themselves as well as within communities and companies
- provide remedies for violations of children’s rights where NHRIs have quasi-judicial functions
- promote access to judicial and non-judicial mechanisms (such as OECD National Contact Points), company level grievance mechanisms and multi-stakeholder initiatives (such as ICMM Sustainable Development Framework, Ethical Trading Initiative, SA8000, Fair Wear Foundation, Fair Labour Association)
- conduct public inquiries and fact-finding missions
- co-operate with other NHRIs with regards to child rights violations across borders and jurisdictions
- ensure that the issue of child rights and business is integrated into their work with international human rights treaties bodies and with the UPR process.

EDUCATION, AWARENESS-RAISING AND COLLABORATION

2.5.9 Encourage a corporate culture that respects child rights

States should provide all business enterprises with clear guidance and information about their responsibility to respect child rights wherever they operate. The Committee urges States to develop clear guidelines for the business sector to protect and respect children’s rights¹¹⁵. It has also recommended that the Philippines make “international and national companies aware of and participants in the fulfilment of children’s rights”.¹¹⁶ Creating and implementing national CSR policies or guidelines which include a focus on children’s rights can be a good way for States to highlight their expectations of business to respect children’s rights.

Voluntary CSR initiatives should not be considered as a substitute for effective regulation of business in line with obligations under the CRC. However, as part of the promotion of learning, information sharing and training on children’s rights, States could encourage adherence to effective child-focussed voluntary initiatives. For example, the International Chamber of Commerce has produced a Compendium of Rules on Children and Young People and Marketing; the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism requires “compliance contracts” to be signed by participating companies¹¹⁷ and the ISO26000 contains extensive reference to children’s rights and to the CRC.

¹¹⁵ Concluding Observations, Argentina (2010), CRC/C/ARG/CO/3-4 para 29

¹¹⁶ Concluding Observations, Philippines (2009), CRC/C/PHL/CO/3-4, at Para. 22

¹¹⁷ As of November 2011, there are over 1,000 companies from 42 countries implementing the Code. http://www.thecode.org/index.php?page=6_3. They commit: To establish a corporate ethical policy against commercial sexual exploitation of children; To train the personnel in the country of origin and travel destinations; To introduce clauses in contracts with suppliers, stating a common repudiation of sexual exploitation of children; To provide information to travellers through catalogues, brochures, in-flight films, ticket-slips, websites, etc. ; To provide information to local "key persons" at destinations; and to report annually.

2.5.10 Collaborate with civil society including NGOs, the media and children

States should collaborate with various stakeholders to prevent and remedy corporate violations of child rights. The media can be encouraged to provide children with information about their rights in relation to the private sector and to raise awareness amongst businesses of their responsibility to respect child rights. States also need to ensure that children and their families have a clear understanding that business has a responsibility to respect child rights wherever they operate and encourage them to demand their rights. The Committee for example has recommended that the Nigerian government “works alongside the business sector to increase, through the school curriculum and communication programmes, the knowledge of children, parents, teachers and the public at large on environmental issues, including on the effect of oil extraction on health and livelihoods as well as of growing desertification in the North and its related effects on the health of children, such as malnutrition¹¹⁸.”

Government bodies (at national and local level) need to develop their capacity to consult with children on how business impacts on their lives. Different mechanisms such as youth councils and parliaments, school councils, working children organisations and ministerial advisory groups can be used and the experience and knowledge of Children’s Ombudsman/Commissioners for Children, NHRIs and NGOs may be sources of knowledge and inspiration in relation to ways of developing child participation focussed on the impact of the private sector. However, this does not negate the need for governments to ensure that they themselves also engage regularly and systematically with children to discuss the impact of the private sector.

¹¹⁸ Concluding Observations, Nigeria (2010) CRC/C/NGA/CO/3-4 Para 47