

**Submission on the General Comment by the
UN Committee on the Rights of the Child
Regarding Child Rights and the Business
Sector – First Draft –**

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24 August 2012

The Castan Centre welcomes the Draft General Comment on Child Rights and the Business Sector (the Draft Comment) as an important step on the way towards redressing the prevailing governance gap with respect to the business sector and child rights.¹ The Draft Comment is timely in light of the recent sustained attention given to the subject of business and human rights by the UN Human Rights Council and in particular its endorsement of the Framework and Guiding Principles on business and human rights delivered by the United Nations Special Representative on Business and Human Rights, Professor John Ruggie (the SRSG)² and the establishment of a Working Group to continue the SRSG's agenda.³

The development of a Draft Comment specifically on Child Rights and the Business Sector by the Committee on the Rights of the Child (the CRC) complements those efforts. It does so by elaborating the obligations of states parties arising from the Convention on the Rights of the Child and its Optional Protocols (the Convention) and in light of the CRC's specific expertise. We agree in that respect with the previous submission of Human Rights Watch (HRW) that, while the UN Framework and Guiding Principles provide an overall international policy framework with respect to business and human rights as well as practical guidance for implementation by States and companies, there are key issues effecting the realisation of child rights that require further elaboration. As HRW states, these include extraterritorial obligations, the need for effective regulation, the right to remedy, and the need for accountability.⁴ It is therefore very welcome that the CRC is developing this General Comment to attend that gap.

Further, while the UN Framework and Guiding Principles provide the policy platform against which the CRC should and has successfully sought to align the Draft Comment, the CRC should not feel hampered in clarifying obligations that may go beyond those stated in those documents. Neither the Framework nor the Guiding Principles were intended, nor purport, to constitute a conclusive statement of existing obligations related to the business sector under international human rights law. For example, the Castan Centre has previously submitted that the Guiding Principles fall short of properly articulating the status of home state obligations to regulate the

¹ On the dynamics of the governance gap, see: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 9 February 2007, paras. 3-4 and 82; Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, paras. 3-4 and 11-16 (the UN Framework).

² The UN Framework, above note 1; Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 21 March 2011 (the UN Guiding Principles). Both of these documents were endorsed by the UN Human Rights Council: HRC Res. 8/7, 18 June 2008; HRC Res. 17/4, 6 July 2011.

³ As a follow up to the SRSG's mandate the Human Rights Council have established a Working Group on business and human rights whose work is largely directed towards the implementation of the Guiding Principles: see HRC Res. 17/4, 6 July 2011, para. 6.

⁴ Human Rights Watch, *Submission to the Committee on the Rights of the Child on Child Rights and the Business Sector*, April 2012, at 1-2, available online at <http://www2.ohchr.org/english/bodies/crc/SubmissionsCRCBusinessSector.htm> (last accessed 24 August 2012).

extraterritorial activities of businesses domiciled in their territories and the extent of corporate legal duties under international human rights law.⁵

The need for a fuller elaboration of obligations and responsibilities of states and companies, and the practical steps needed to fulfil those obligations, is welcome particularly with respect to child rights. Children are among the most vulnerable groups in society and are particularly impacted by the activities of businesses in a variety of ways. We support the approach of the Committee in framing the Draft Comment in terms not only of the most directly relevant provisions of the Convention but as a guide to states for implementation of the Convention as a whole in the business sector (see paragraph 3). This is not only consistent with the SRSG's approach⁶ but, as articulated in the Draft Comment, reflects the reality that children can be adversely affected by business in both direct ways (for example as child labourers or victims of trafficking) and indirect ways (for example as a group particularly vulnerable to the effects of pollution in their environments and to the impacts of tax-evasion and corruption upon state resources to progressively realise rights).

While the Draft Comment is hence particularly welcome in the field of child rights, we hope this Comment will serve to encourage other treaty bodies to follow suit and provide fuller elaborations of the relationship between other categories of rights and rights holders and the business sector.

In light of the above, our specific recommendations are as follows.

Paragraphs 12 – 14: The duty to protect – The current reference to states parties taking appropriate and reasonable measures to protect against infringements of child rights by third parties in the business sector is somewhat weak. This section should be strengthened to state clearly that the core of the state duty to protect is to fully regulate, monitor and to enforce regulation of the business sector with respect to child rights.

In paragraph 12 the uses of the term 'should' should be replaced with the word 'must'. As currently drafted, the Draft Comment implies state measures to investigate, punish and redress child rights abuses caused or contributed to by business enterprises are optional, rather than mandatory. Use of language suggesting that such action is encouraged rather than mandated falls short of the existing obligations of states in terms of their duty to protect against abuses of child rights across the entire business sector.

This is particularly important as, by way of contrast, the Draft Comment makes clear in mandatory language the duty of states parties to regulate and monitor business enterprises involved in service provision essential to the enjoyment of child rights (see paragraph 16 – state duty to fulfil). We agree with the CRC that the privatisation

⁵ Castan Centre for Human Rights Law, *Submission to the Secretary General's Special Representative on Business and Human Rights on Proposed Guiding Principles for Business and Human Rights*, January 2011, available online at <http://www.law.monash.edu.au/castancentre/publications/cc-submission-business-human-rights-principles.pdf> (last accessed 24 August 2012).

⁶ See for example the UN Framework, above note 1, at paras. 6 and 51-53.

of such services require heightened obligations to monitor private actors. We also commend the clarification (contained in paragraph 9) that privatised service delivery is one of the situations in which states can be held directly responsible for business infringements of child rights. However the implication currently, reading paragraphs 12 and 16 together, is that the duty to regulate, monitor and ensure the application of the right to non-discrimination is particular to privatised service delivery. Rather, the Convention requires states to regulate, monitor, and require the right to non-discrimination be applied across the business sector as a whole in order to satisfy its duty to protect.

Furthermore, it should be made clearer in paragraph 12 that States have a duty to regulate business enterprises within their jurisdiction to ensure that the rights of children under the Covenant are protected by law in the context of business operation and that there are sufficient monitoring and enforcement mechanisms to ensure compliance with those laws. The present wording (“take appropriate and reasonable measures”) does not make the responsibility for regulation sufficiently clear to States parties. Paragraph 12 should be amended to make clear reference to such a responsibility.

Paragraphs 15-17: The duty to fulfil: We commend the Committee for speaking to the obligation of states to address tax evasion, corruption and mismanagement of government revenues from business as directly related to the state duty to fulfil child rights under the Convention (paragraph 17). The Committee may wish to make reference here (or in paragraph 6 of the Draft Comment) to the key international instruments that relate to measures on these topics, such as the OECD Anti-Bribery Convention and the United Nations Convention against Corruption, the latter of which has 161 states parties. For example the final sentence of paragraph 17 might be modified to begin: ‘In addition to any existing obligations under anti-bribery and corruption instruments to which they are party, states parties should....’. The Committee might also wish to encourage states that have not yet signed or ratified these treaties to do so as a measure towards the realisation of child rights.

Paragraphs 18 – 22: Obligations in the Context of Business’ Global Operations: The Castan Centre welcomes the inclusion of a part dedicated to the particular issues arising from transnational business operations and clarifying home state obligations to regulate business entities operating abroad, as a fundamental step towards redressing the prevailing governance gap.

In paragraph 19, the Draft Comment rightly speaks to the particular challenges to child victims in obtaining a remedy for violations in the context of global business operations. Within this part the CRC might consider adding some acknowledgement of the broader problem of a governance gap with respect to many (particularly large) transnational business activities. This gap is due to the rise in power and rights of transnational corporations being unmatched by developments in governance.⁷ As it stands, the Draft Comment does acknowledge the risk of insufficient host state regulation in conflict situations (see paragraph 22). While such a risk of under-regulation is certainly heightened in conflict contexts, it is by no means limited to such scenarios.

⁷ See notes corresponding to footnote 1 above.

The CRC should consider adding to the list of ‘torture, enforced disappearance and apartheid’ found in paragraph 20 the full gamut of international crimes which extend also to war crimes, crimes against humanity and genocide.

Paragraph 22 highlights the importance of extra-territorial regulation. The Castan Centre strongly endorses this position.

In paragraph 22, use of the word ‘should’ with respect to the obligation of host states to adequately regulate transnational corporations operating within their borders should be replaced with the word ‘must’.

Further, paragraph 22 should clarify that the obligation of states to protect child rights from abuse by business enterprises operating extra-territorially does not require any reasonable link to the state where the violation constitutes a crime under international law. This would be consistent with the underlying principles of universal jurisdiction for international crimes, the particular status of such crimes as violations against the international community as a whole and the increasing practice of states to enact such regulation with respect to business. Similarly paragraph 60 (on Remedial Measures) should clarify that no link to a jurisdiction is needed in cases where the alleged violations also constitute international crimes.

Paragraph 25: We welcome the statement on the extension of state obligations under the Convention to their capacities as members of international organisations.

Paragraph 31: The phrases “alternative care” and “social welfare bodies” in paragraph 31 imply child-minding, foster care and similar services. It should be remembered that private companies are also involved in running prisons and immigration detention centres in some States, and that the rights of children incarcerated in such institutions are especially vulnerable to violation. We believe that the particular sensitivity of those issues warrants an additional paragraph, or at least an additional sentence in paragraph 31.

Paragraph 43: We welcome the statement on the need to incorporate child rights considerations into business agreements between states or states and transnational corporations. The proliferation of investment agreements that hamper state capacities with respect to their human rights obligations is a significant factor in the creation of governance gaps with respect to business activities and human rights. This practice must be addressed by states as a matter of urgency.

As not all business agreements will have foreseeable ramifications for child rights, the CRC might clarify that this obligation could be met not only through including/removing clauses specific to child rights but alternatively through the inclusion of clauses/ removal of obstacles directed to human rights more broadly. It should be clarified that it is a mandatory component of a state’s duties under the Convention not to ‘contract away’ its ability to meet obligations with respect to child rights, either intentionally or unintentionally.

There are specific challenges to less resourced host states with respect to negotiating with transnational corporations or foreign states over business

investment agreements. The CRC might therefore consider encouraging the sharing of information among states and the strengthening of transparency initiatives around the contents of investment treaties, business agreements and other foreign investment agreements. This would better enable such states to meet their obligations not to contract out of human rights. Likewise, the CRC might encourage technical assistance to less-resourced host states in undertaking investment related agreements.

Paragraphs 49 - 52: Child rights due diligence for business: The CRC might consider referencing the *Voluntary Principles on Security and Human Rights* with respect to what must be contained in corporate due diligence reporting with respect to operations in conflict zones. These principles make clear that such reporting must include, among other things, a risk assessment of security partners. In general, the CRC should consider recommending that all due diligence assessments must extend to consider risks associated with security and other business partners.

Further, the CRC should consider adding to those circumstances in which child rights due diligence should be mandatory so as to include activities and sectors where there is a foreseeable risk of significant environmental impacts, where relationships with security partners are likely, and where the financial implications of the project are significant for the home or host state – either in terms of potential state revenues generated or the level of state funding to be provided. This would align with the position advanced in the Draft Comment that child rights can be significantly impacted by a wide range of business activities.

Finally it should be made clear with respect to all due diligence assessments that this process may on occasion lead states and business actors to conclude that a particular project cannot go ahead or receive public funding, because the human rights risks are too great, or simply cannot be foreseeably mitigated.

The obligations of business in relation to child rights: The Castan Centre agrees that the Draft Comment should be directed primarily towards the obligations of states parties. However, there could be some benefit in the inclusion of a part specifically addressing business actors and other non-state actors. This part could elaborate on the obligations and responsibilities of businesses in relation to child rights and provide practical guidance on how to achieve these. We note that there are precedents for directly addressing the obligations of non-state actors in recent General Comments issued by the Committee on Economic, Social and Cultural Rights.⁸

In this respect we concur with the suggestions made by Human Rights Watch in its submission to the Committee on the earlier Annotated Outline of the General Comment on what a part of this kind might include.⁹

⁸ See for example, CESCR, General Comment 14, paras. 63-65; CESCR, General Comment 15, para. 60; CESCR, General Comment 17, paras. 55-57; CESCR, General Comment 18, paras. 52-54; CESCR, General Comment 19, paras. 82-84.

⁹ Human Rights Watch, above note 4, at 3-4.

We thank the CRC for the opportunity to comment on the Draft Comment. We are available to answer queries, if necessary, via email at castan.centre@monash.edu