

**Droits de l'enfant et secteur privé:
amener les Etats et les entreprises
à remplir leurs obligations**

**Child Rights and the Business Sector:
Urging States and Private Companies
to meet their Obligations**

Droits de l'enfant et secteur privé: amener les Etats et les entreprises à remplir leurs obligations

Child Rights and the Business Sector: Urging States and Private Companies to meet their Obligations

**Acte du 17^e Séminaire international
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L'**Institut international des Droits de l'Enfant (IDE)**, fondé en 1995, est une fondation de droit privé suisse avec statut consultatif auprès d'ECOSOC, à portée internationale. Ses objectifs sont la sensibilisation aux droits de l'enfant, la formation des personnes chargées d'appliquer ces droits et l'instauration d'une culture ou d'un esprit « droits de l'enfant ». Son activité s'appuie sur la Convention des Nations-Unies relative aux droits de l'enfant (1989). Son site Internet, www.childsrightrights.org, est une mine reconnue d'informations pertinentes relatives à l'enfance.

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- La Direction du Développement et de la Coopération (DDC), Suisse
- La Loterie Romande
- La Municipalité de Sion
- La Société suisse d'utilité publique (SSUP)
- Le Centre Suisse de Compétences pour les Droits Humains (CSDH)
- La Commission Internationale de Juristes (CIJ)

Il remercie ces institutions de leur contribution.

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PRÉFACE

JEAN ZERMATTEN

Directeur, Institut international des Droits de l'Enfant, Sion

Quelles sont les relations entre le secteur des affaires et les droits de l'enfant ?

Très probablement des relations étroites !

En effet, il est communément admis que les activités industrielles et commerciales menées par le secteur des affaires touchent de nombreux aspects de la vie des enfants et peuvent avoir à la fois un impact positif et un impact négatif sur les enfants comme personnes, mais aussi sur les enfants, comme sujets de droits; et bien entendu collectivement sur les communautés où vivent les enfants et dans les Etats qui détiennent l'obligation de réglementer le secteur des affaires. En effet, ces activités peuvent causer, ou contribuer de manière significative à un grand nombre et à une large variété de violations des droits de l'enfant, empiétant ainsi sur la jouissance partielle ou totale des droits reconnus par la Convention des droits de l'enfant (CDE) ainsi que ses deux Protocoles facultatifs¹.

Cependant, les activités des entreprises industrielles et commerciales peuvent également être un catalyseur essentiel pour la société et l'économie en renforçant et faisant avancer les droits de l'enfant à travers la création d'emploi, l'innovation technologique, l'amélioration de l'éducation et l'investissement socialement responsable. De même un certain nombre d'activités qui ressortissent de la responsabilité sociale des entreprises peuvent stimuler, développer et favoriser des projets, des programmes, des initiatives qui vont améliorer le sort ou le bien-être des enfants.

Les enfants ne constituent pas un groupe unique et homogène et sont touchés de manière diverse par le secteur des affaires. En effet, dans leurs relations au monde des « affaires », ils peuvent être considérés comme consommateurs, bénéficiaires de service, employés, affectés par l'emploi de leurs parents, victimes de violations de leurs droits provoqués par des activités telles que le trafic d'enfants, l'exploitation sexuelle, le travail des enfants, la pollution environnementale causée par des entreprises ou l'acquisition de territoires qui provoquent leur déplacement forcé, parfois même par des conflits qui surgissent pour la domination d'un lieu de production ou de vente par des compagnies concurrentes...

Si l'on réfléchit en terme d'obligations, il est clair que ce sont les Etats parties à la Conven-

¹ Protocole facultatif à la Convention des droits de l'enfant sur la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants, 2000, ratifié par 161 Etats (février 2013) et Protocole facultatif à la Convention des droits de l'enfant sur l'implication des enfants dans les conflits armés, ratifié par 150 Etats (février 2013)

tion et à ses Protocoles qui se sont engagés par leur ratification à assurer la jouissance des droits à tous les enfants qui vivent sur leur juridiction, sans discrimination aucune, et qui doivent, pour reprendre la trilogie de leurs obligations, « protéger, respecter et mettre en œuvre »² les droits de l'enfant. Dès lors, si l'on parle secteur des affaires et droits de l'enfant, nous ne sommes pas dans une relation duelle, mais bien dans la relation tripartite entre l'Etat, débiteur des obligations, l'enfant, créancier de ses droits et un tiers, l'entreprise du secteur privé, dont les activités peuvent soit promouvoir l'exercice des droits, soit hélas l'entraver sérieusement.

Tous les droits énumérés dans la Convention et ses deux Protocoles sont pertinents dans ce contexte, cependant certaines activités du secteur privé ont un impact direct sur un bon nombre de prestations contenues dans la CDE, telles que, par exemple et de manière non exhaustive, l'art. 3 al.1 (l'intérêt supérieur de l'enfant), l'art. 18 al.3 (aide aux parents dans la responsabilité d'élever leurs enfants), l'art. 24 (accès à des services de santé), les art. 28 et 29 (accès à l'éducation), l'art. 32 (exploitation économique) et l'art. 37 (fourniture de services pénitentiaires).

Les entreprises et sociétés sont elles-mêmes aussi très diverses si l'on essaie de les définir selon leur nature, leur taille, leurs structures, leurs contextes opérationnels, leurs emplacements, leur appartenance et relations avec l'Etat. Dans de nombreux exemples, on voit un Etat lui-même posséder ou contrôler des sociétés ou encore déléguer certains pouvoirs et tâches spécifiques à des compagnies privées (p.ex. privatisation ou fourniture de services et de biens). Dans tous les cas, les entités du secteur des affaires, qu'elles opèrent indépendamment de l'Etat ou avec un certain degré d'implication de l'Etat, sont soumises à des réglementations générales ou spécifiques et des taxes et impôts et parfois même bénéficient de faveurs pour leur implantation, de crédits à l'exportation et d'assurance d'investissement fournis par l'Etat.

Dès lors, la grande question est de savoir comment les Etats peuvent assurer un cadre protecteur et remédier aux violations potentielles commises par l'activité de certaines entreprises? C'est un domaine assez complexe, car il y a eu peu de sensibilisation à cette question jusqu'à ce jour, malgré les Observations finales du Comité, adressées régulièrement aux Etats en ce domaine depuis quelques années, pour leur rappeler leurs devoirs.

Les grandes manœuvres onusiennes sur la question, notamment les travaux de John Ruggie entérinés par le Conseil des droits de l'Homme et connus sous le nom de « Principes directeurs relatifs aux entreprises et aux droits de l'homme : mise en œuvre du cadre de référence Protéger, respecter et réparer » des Nations Unies³, ainsi que les travaux effectués par l'Organisation de Coopération et de Développement Economiques (OCDE) dans les principes directeurs pour les entreprises multinationales, la mise en œuvre et les opérations de Global Compact des Nations Unies ont défriché la voie.

Mais aucun de ces textes ne s'est intéressé spécifiquement aux enfants; aucun n'a développé une perspective droits de l'enfant. Pourtant les enfants constituent la moitié de la planète Terre...

² Voir à ce sujet, le Commentaire Général 12 du Comité des droits économiques, sociaux et cultureux, para.15

³ A/HRC/17/31, du 21 mars 2011

Ce n'est qu'en mars 2012, qu'UNICEF, Save the Children et Global Compact ont lancé une campagne en faveur d'un document intitulé « Droits de l'enfant et Principes régissant les entreprises »⁴. Ce document reste relativement général et peu contraignant, même si plusieurs entreprises se sont intéressées au processus proposé et ont fait appel à des « compliance officers » pour les droits humains dont l'objectif est de promouvoir des pratiques respectueuses de ces droits. Néanmoins, on ne sait à ce jour que très peu de choses sur la réelle efficacité de ces politiques et de ces pratiques, tout comme sur les défis qu'il reste à relever. On a surtout l'impression que cela amène les compagnies à développer des mesures de responsabilité sociale, mais pas de véritables démarches globales de respect des droits de l'enfant.

En effet, une telle démarche doit viser d'abord les Etats et non les entreprises privées et on peut penser à plusieurs situations où les droits de l'enfant peuvent être mis en péril, comme :

- La situation où l'Etat délègue ses tâches au secteur privé (entreprises ou ONGs) et où l'Etat doit prendre toutes les mesures pour assurer la délivrance des services à tous les enfants, sur tout le territoire de manière égale (par exemple accès à l'eau, assainissement, éducation soins de santé, énergie, institutions, sécurité...). Les obligations de l'Etat ne disparaissent pas du fait de cette délégation et il est clair qu'il existe un danger sérieux que certains enfants puissent être privés de leurs droits dans de telles délégations. D'ailleurs, dans certains cas, la responsabilité propre à l'Etat est engagée par les actions d'acteurs privés agissant au nom de ou sous les instructions dudit Etat.⁵
- Le travail des enfants est particulièrement douloureux dans cette perspective, puisque dans de nombreuses situations, les entreprises du secteur formel et surtout du secteur informel utilisent des forces enfantines. Les deux domaines sensibles que sont l'agriculture et le travail domestique montrent que souvent l'Etat peine à contrôler ces activités, voire ferme les yeux sous prétexte d'activités qui profitent à l'économie familiale, oublie de fixer des âges pour entrer dans le marché du travail et n'inspectent que les grandes compagnies du secteur formel... et, dans les faits, ne protègent pas les enfants.
- Le monde globalisé des affaires pose une menace grave sur le respect des droits de l'enfant; en effet, souvent les entreprises n'opèrent pas que dans un seul pays, mais ont leur siège social dans un pays, s'approvisionnent dans un autre, fabriquent dans un troisième, sous-traitent dans un quatrième et disposent d'un réseau de filiales à compétences diverses dans plusieurs régions du monde. Qui va être tenu responsable des obligations de faire respecter les droits de l'enfant ? Ceci peut être une question facile, lorsque la relation est simple : une entreprise n'opère que dans un pays; ou extraordinairement complexe, lorsque plusieurs pays sont concernés par diverses activités d'une holding internationale... Si aucun Etat ne peut se défaire de ses obligations

⁴ http://www.unglobalcompact.org/docs/issues_doc/human_rights/CRBP/Principles_FR.pdf

⁵ Commission du Droit international des Nations Unies (ILC), Articles sur la Responsabilité de l'Etat pour fait internationalement illicite. Rapport de la Commission du Droit international du travail accompli lors de la 53^e session, A/56/10, August 2001, UN GAOR.

vis-à-vis de ses enfants, il semble important de rappeler que la responsabilité d'un Etat ne se limite pas aux enfants qui vivent sur le territoire, mais sous sa juridiction, ce qui est plus large et que la question de la responsabilité extraterritoriale se pose comme l'a prévue d'ailleurs le Protocole facultatif sur la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants. Dans ce domaine, une coopération internationale semble absolument indispensable pour que chaque Etat concerné assume ses responsabilités au titre de violation des droits de l'enfant.

Dès lors la responsabilité des Etats doit être au centre de toute action et les obligations qui en découlent doivent se concrétiser à travers les activités de législation, de politique, de mesures administratives, de régulation, etc. Dans d'autres cas, les Etats ont la responsabilité d'assurer le respect des droits de l'enfant par les acteurs privés par le biais de mesures adéquates, incluant la mise à disposition de recours dans les cas de violation.

En lisant les normes actuelles en vigueur et invoquées par les différentes parties, nous sommes devant des textes qui constituent de la « soft law »; les défis qui se posent aux entreprises du secteur privé, comme aux Etats en relation à leurs obligations de promouvoir et respecter/faire respecter les droits de l'enfant, posent la question de la pertinence de renforcer le dispositif international. Dès lors, faut-il introduire de nouveaux instruments internationaux, incluant des instruments contraignants (comme par exemple une nouvelle Convention) ?

D'autres possibilités existent par exemple, un système de labellisation pour les marchandises et les services. Faut-il faire plus ? Interpeller de manière systématique le groupe des consommateurs, dont les enfants consommateurs représentent une large proportion ?

Les travaux du séminaire international de Sion ont posé ces questions, et bien d'autres encore, et ont permis d'évaluer un certain nombre de pratiques bonnes et moins bonnes; ils ont débouché sur des recommandations concrètes. Surtout, ils ont donné l'opportunité aux participants de débattre de thématiques réelles et vécues, de cas et d'exemples et ont constitué une contribution majeure aux préparatifs et à la rédaction du Commentaire Général du Comité des Droits de l'Enfant sur « les Obligations des Etats au regard de l'impact du secteur des affaires sur les droits de l'enfant ».

Espérons que cette publication soit un prolongement utile de tous ces échanges, débats et amène les acteurs concernés à unir leurs efforts pour mieux « Respecter, Protéger et Mettre en œuvre » les droits de l'enfant ! Les enjeux sont énormes pour les plus jeunes membres de la société; les entreprises doivent être mobilisées et sensibilisées aux possibles impacts de leurs activités et les Etats doivent se souvenir des engagements qu'ils ont pris en ratifiant la Convention...

ALLOCUTIONS D'OUVERTURE

ESTHER WAEBER-KALBERMATTEN

Présidente du Conseil d'Etat du canton du Valais, Sion

Le célèbre physicien Albert Einstein a dit :

«Il n'y a pas de grandes découvertes, ni de progrès, tant qu'il existe un enfant malheureux sur la terre ».

En tant que Présidente du Conseil d'Etat, j'ai la grande joie de vous apporter le message de sympathie du Gouvernement valaisan et de vous souhaiter la bienvenue dans le cadre de ce séminaire international des droits de l'enfant, dont le thème est : « Droits de l'enfant et secteur privé - amener les Etats et les entreprises à remplir leurs obligations ».

Les droits de l'enfant sont un aspect important de mon activité de Cheffe du Département de la sécurité, des affaires sociales et de l'intégration. Le bien-être des enfants est l'une de mes grandes préoccupations et je vous remercie de tout le travail que vous effectuez pour les enfants de ce monde. C'est pourquoi, je ne peux vous cacher une certaine fierté à l'idée que l'Institut International des Droits de l'Enfants, créé en 1995, ait son siège chez nous en Valais.

Il est vraiment regrettable qu'il y ait toujours trop d'enfants malheureux dans le monde. L'UNICEF a résumé les droits des enfants en 10 droits fondamentaux. A la lecture de chacun de ces 10 droits fondamentaux retentissent les sonnettes d'alarme et nous devons constater que nous n'avons pas atteint le but. Ni en Suisse, ni en Europe et à nulle part ailleurs dans le monde.

«Il n'y a pas de grandes découvertes, ni de progrès, tant qu'il existe un enfant malheureux sur la terre ».

Depuis Einstein, de grandes découvertes et progrès ont été faits. Mais ils ont été souvent accompagnés de problèmes nouveaux et supplémentaires. Avec la création de l'Institut international des Droits de l'Enfant, il y a environ 20 ans, une étape importante a été franchie, afin d'apporter des solutions. L'IDE a déjà réalisé beaucoup de choses et une approche différente s'est instaurée dans beaucoup de domaines importants. Je tiens à vous remercier de tout cœur pour votre engagement.

Je remercie également les organisateurs, orateurs et tous les participants à ce colloque. Grâce à votre présence et à votre engagement, vous êtes tous porteurs d'espoir pour cette grande cause.

Je souhaite ainsi que, ces jours prochains, votre intuition cruciale et votre esprit visionnaire vous conduisent à prendre des mesures, qui pourront être réalisées rapidement. Que des idées révolutionnaires nous rapprochent tous des objectifs fixés.

Ou bien, selon l'adage de la célèbre pédagogue italienne, Maria Montessori :

« Ce qui concerne les enfants, concerne l'humanité ! »

Merci !

MARTIN MICHELET

Chef de la section politique des droits de l'homme, Division Sécurité humaine, Département fédéral des affaires étrangères DFAE, Berne

Le gouvernement suisse est conscient de l'importance croissante que revêt le respect des droits de l'homme par les entreprises. La responsabilité des entreprises s'accroît à mesure qu'elles se globalisent et que leur pouvoir et leurs ressources financières augmentent.

Le respect des droits de l'homme constitue un enjeu important parmi les nombreuses obligations incombant aux entreprises par rapport aux personnes, aux communautés et aux sociétés affectées par leurs activités.

Si les entreprises doivent faire ce qu'il faut pour obtenir ce que l'on pourrait appeler leur « permis social d'opérer », elles ont également un intérêt commercial direct à respecter les droits de l'homme et à éviter de contribuer à la violence et aux conflits. Une société démocratique apaisée, où les droits de l'homme sont respectés, leur offre l'environnement le plus propice et le plus stable.

Les principes directeurs de l'ONU, relatifs aux entreprises et aux droits de l'homme, qui ont été approuvés par le Conseil des droits de l'homme de l'ONU, il y a un peu plus d'un an, constituent le premier consensus international concernant les obligations des Etats et des entreprises en matière de protection des droits de l'homme. Malgré ce pas en avant prometteur, la protection des droits de l'enfant affectés par les activités des entreprises reste un sérieux défi.

Les enfants sont particulièrement vulnérables et sont affectés de diverses manières par les pratiques des entreprises. On pense en premier lieu au travail des enfants, mais les enfants souffrent aussi de la traite d'êtres humains, de l'exploitation sexuelle et, indirectement, de la situation d'emploi de leurs proches parents, de la pollution de l'environnement et des déplacements forcés.

En ce qui concerne les obligations de l'Etat suisse, nous avons bien conscience qu'il ne suffit pas de ratifier la Convention relative aux droits de l'enfant et d'accueillir favorablement les principes directeurs de l'ONU relatifs aux entreprises et aux droits de l'homme.

Bien au contraire, ce n'est là que le début d'un long cheminement en vue de réduire les effets négatifs que les activités des entreprises peuvent avoir sur le respect des droits de l'homme.

En intégrant ses obligations internationales dans son droit interne et en complétant celui-ci par des mesures politiques moins contraignantes, la Suisse s'emploie à atteindre son objectif consistant à renforcer d'une manière générale le respect des droits de l'homme susceptibles d'être affectés par les activités des entreprises et à améliorer plus spécifiquement la jouissance de ces droits par les groupes particulièrement vulnérables, comme les enfants.

C'est pourquoi la Suisse est convaincue de la nécessité de mettre en place ce que le Professeur John Ruggie, ancien représentant spécial du Secrétaire général de l'ONU chargé de la question des droits de l'homme et des sociétés transnationales et autres entreprises, a appelé un « assortiment judicieux de mesures, nationales et internationales, contraignantes et volontaires,

pour favoriser le respect des droits de l'homme par les entreprises ». C'est d'ailleurs ce que nous avons déjà fait dans une large mesure.

Certes, le travail de normalisation a considérablement progressé ces dernières années dans le domaine des entreprises et les droits de l'homme. La mise en œuvre des normes adoptées reste toutefois un défi.

Afin de poursuivre les efforts de mise en œuvre en Suisse, le Département fédéral des affaires étrangères et le Secrétariat d'Etat à l'économie ont lancé un dialogue multipartite réunissant des représentants du monde économique, d'institutions universitaires, de syndicats et d'organisations non gouvernementales dans le but d'examiner la mise en œuvre des principes directeurs de l'ONU par les acteurs suisses concernés.

Dans ce contexte, la Suisse apprécie tout particulièrement le travail du Comité de l'ONU pour les droits de l'enfant qui prépare une Observation générale sur les droits de l'enfant et les entreprises.

Il ne fait pas de doute que ces efforts contribueront efficacement à intégrer et à diffuser les droits de l'enfant dans les débats et les discours sur les droits de l'homme et les entreprises, ceci au niveau international comme national.

Dans cet esprit, j'aimerais inviter tous les participants à contribuer activement aux discussions menées ici, à Sion. Les conclusions de ces débats alimenteront utilement les travaux du Comité sur le projet d'Observation générale sur les droits de l'enfant et les entreprises, que je viens d'évoquer, ainsi que les réflexions du gouvernement suisse.

Je vous remercie de votre attention et vous souhaite un séminaire fructueux.

CARLOS LOPEZ

Course Director, Senior Legal Adviser, Business and Human Rights, International Commission of Jurists, Geneva

I have the great privilege of representing the International Commission of Jurists in this seminar for which I have been designated as course director. In both capacities, I welcome and thank you for your presence.

The subject of this seminar is timely, as said before, and likely to be very fruitful. The rights of the child are rights that public authorities should respect and ensure, but they are also rights that private persons (individuals or legal entities such as enterprises and associations) should respect and promote.

The issue of responsibilities of business enterprises vis-à-vis human rights and children's rights has achieved prominence in the international agenda, and the international community has taken important steps in recent years. These developments have been prompted by growing concerns about the negative impacts, sometimes clear abuses, of enterprises' practices on the human rights and the rights of the child in particular. In the process we have come to understand that business activities can also be, and in fact are, beneficial for the realization of rights.

The debate focusses on the old scourge of child labour and forced labour, but also on the production and commercialisation of goods and services that can be harmful to the moral and physical wellbeing of children. It focusses on what the State can do, but also on what business enterprises themselves can and should do. The final aim is to create a social, political and legal environment where abuses of the rights of the child do not occur and where all actors, government, private sector and civil society, work for the realisation of this right.

There are several approaches and instruments to achieve these aims. Each of them has a place and value, and one cannot replace the other. For very long time the prevailing understanding was that enterprise action vis-à-vis child rights was only based on good will and philanthropy. After several years of work the international community has now come to the conclusion that businesses have a responsibility, at least, to respect human rights.

But enterprises' action is not a substitute for States' action. States have also responsibilities and international obligations to protect and ensure the rights of children. Therefore, when we talk about enterprises and children's rights we should not equate the outdated understanding of Corporate Social Responsibility- CSR as a purely voluntary approach with the modern CSR concept that incorporates human rights responsibilities as part of the package. Most importantly, we should not confuse the overall CSR approach, which is led by enterprises themselves with State action in execution of its international obligations.

The vast majority of States in the world have ratified the International Convention on the Rights of the Child. The Convention requires States party to "respect and ensure" the rights of the child through a wide range of legal, policy, administrative and educational measures. In other words, the Convention requires State action that is not limited to encouraging enterprises

to behave responsibly, and not even only to create complementary regulation. State action includes by necessity legislation, monitoring and enforcement of legislation, and remedial mechanisms including a solid and independent judiciary.

To guide States party to the Convention on how to respect and ensure the rights of the child, the United Nations Committee on the Rights of the Child is in the process of elaborating a General Comment on the States obligations and the business' impacts on the rights of the child. The Committee has been established under the Convention to monitor implementation by States Party. It prepares "general comments" with a view to provide to States party with authoritative interpretation and guidance on how to implement the Convention. We warmly commend the Committee on the rights of the child for the work they are doing, which gives growing visibility to this issue and provides much needed guidance. We look forward to the General Comment and its use by States in reporting to the Committee.

Before finishing let me recall that there is an ongoing international debate on whether transnational corporations have obligations under international law not to commit serious human rights abuses such as crimes against humanity and other serious crimes. There are several cases before the courts of law in the United States of America, the most famous of which is the Kiobel case. This case concerns claims by a number of relatives of Nigerian protesters against the oil company Shell operations in their land, Ogoniland, during the 90s, who were tortured and executed by the military dictatorship security forces allegedly with the complicity of the company. The judicial determinations in this and other similar cases will no doubt contribute to clarify the international legal framework applicable to companies' actions and to enhance the possibilities that victims have to access effective remedies. It will also help us to determine to what extent we need an international legally binding instrument, beyond the Convention on the rights of the child and other human rights treaties, which will focus more explicitly on the question of enterprises and human rights. The discussion on this matter is very much open and this seminar will also address that question.

This seminar will address a wide range of approaches and instruments that enterprises and the State use to put in practice their respective responsibilities and duties. The deliberations, conclusions and recommendations of this seminar will be of great utility for the Committee on the rights of the child, the participants, the organisers, Governments and enterprises.

I thank the International Institute on the Rights of the Child that is organising and hosting this timely seminar in the person of Prof Jean Zermatten and his team, and I wish you good and fruitful work for the next three days.

Thank you.

PREMIÈRE PARTIE

LES OBLIGATIONS DES ETATS

PART I

OBLIGATIONS OF THE STATES

THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: BACKGROUND, CONTENT, KEY FEATURES, NEXT STEPS

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Résumé

Le contexte des principes directeurs en matière de business et de droits de l'enfant est lié aux allégations d'abus des droits humains axés sur les normes du lieu de travail, incluant le travail des enfants et le travail forcé. Au début, la réponse à ces allégations arriva sous la forme d'initiatives volontaires de la responsabilité sociale des entreprises, ou la RSE. Cependant lorsqu'il fallut identifier, prévenir et se charger des entreprises qui portaient atteinte aux droits humains, les approches traditionnelles se révélèrent inadéquates. De plus, contraindre les entreprises à respecter les normes internationales en matière de droits humains ne réussit pas à gagner le soutien de la plupart des gouvernements ni du milieu des affaires. Comme alternative, le cadre conceptuel des Nations Unies « Protéger, respecter et réparer » ainsi que le processus correspondant qui développe des principes directeurs, sont considérés comme une étape importante dans les efforts continus de la communauté internationale pour assurer le respect des droits humains dans le milieu des affaires, car ils clarifient les rôles et les responsabilités respectivement des Etats et des entreprises dans la manière de prévenir et d'adresser les questions des entreprises portant atteinte aux droits humains.

Zusammenfassung

Richtlinien betreffend Geschäftswelt und Kinderrechte sind verbunden mit dem mutmasslichen Missbrauch der Menschenrechte in Bezug auf die Normen am Arbeitsplatz, Kinderarbeit und Zwangsarbeit eingeschlossen. Anfänglich war die Reaktion auf diese Aussagen freiwillige Initiativen der sozialen Verantwortung der Unternehmen (SVU). Als es jedoch darum ging, Unternehmen, die die Menschenrechte verletzen, zu identifizieren, zu verständigen und zur Verantwortung zu ziehen, erwiesen sich die traditionellen Möglichkeiten als ungenügend. Die Unternehmen zu zwingen, die internationalen Normen in Bezug auf die Menschenrechte einzuhalten, wird von der Mehrheit der Regierungen und der Geschäftswelt nicht unterstützt.

Als Alternative werden der konzeptionelle Rahmen der Vereinten Nationen „schützen, achten und wiedergutmachen“ sowie der dazugehörige Prozess, der dazu Richtlinien entwickelt, als wichtiger Zwischenschritt in den fortlaufenden Bemühungen der internationalen Gemeinschaft angesehen, um die Achtung der Menschenrechte in der Geschäftswelt sicherzustellen. Denn sie klären die Rolle und die Verantwortung der Staaten und der Unternehmen, wie Fragen im Zusammenhang mit Unternehmen, die die Menschenrechte verletzen, angegangen werden sollen.

Resumen

El contexto de los principios directivos en materia de negocios y de derechos del niño está unido a las alegaciones de abusos de los derechos humanos centrado sobre las normas del lugar de trabajo, incluyendo el trabajo de los niños y el trabajo forzado. Al principio, la respuesta a estas alegaciones llegó en forma de iniciativas voluntarias de responsabilidad social empresarial, o RSE. Sin embargo, cuando fue necesario identificar, prevenir y encargarse de las empresas que afectaban los derechos humanos, los métodos tradicionales resultaron inadecuados. Además, obligar las empresas a respetar las normas internacionales en materia de derechos humanos no logra ganar el apoyo de la mayoría de los gobiernos ni de la comunidad empresarial. Como alternativa, el marco conceptual de las Naciones Unidas « proteger, respetar, remediar » así como el proceso correspondiente que desarrolla principios directivos, se consideran como una etapa importante en los esfuerzos continuos de la comunidad internacional para asegurar el respeto de los derechos humanos en el mundo de los negocios, porque aclaran los papeles y las responsabilidades respectivamente de los Estados y de las empresas en la manera de prevenir y resolver las cuestiones de las empresas que afectan los derechos humanos.

Summary

The background of the Guiding Principles on business and human rights is linked to allegations of human rights abuses centred on workplace standards, including child labour and forced labour. Initially the response to such allegations came in the form of voluntary corporate social responsibility initiatives, or CSR. But when it came to identifying, preventing and addressing business-related human rights abuses, the traditional approaches turned out to be inadequate. Moreover, binding international human rights standards on business failed to win the support of most governments and of the business community itself. As an alternative, the “Protect, Respect and Remedy” Framework and the corresponding process for developing the Guiding Principles are considered an important milestone in the on-going efforts of the international community to ensure respect for human rights in the context of business activities, as they clarify the roles and responsibilities of States and business enterprises respectively in preventing and addressing business related human rights abuse.

INTRODUCTION

In June 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles on business and human rights for the implementation of the “Protect, Respect and Remedy” Framework¹, which had been drafted and presented to the Council by the then-Special Representative of the Secretary General on business and human rights, Professor John Ruggie.² This marked the first time an intergovernmental human rights body endorsed a normative document clarifying the roles and responsibilities of States and business enterprises respectively in preventing and addressing business related human rights abuse and was an important milestone in the on-going efforts of the international community to ensure respect for human rights in the context of business activities and effectively.

BACKGROUND

How did this milestone come about? By the 1990s, many businesses that had expanded into new markets – apparel and footwear, consumer electronics, the extractive and infrastructure sectors – came in the spotlight accused of involvement in human rights abuses particularly in their overseas operations. Allegations of human rights abuses centred on workplace standards, including child labour and forced labour; communities allegedly evicted to make room for infrastructure projects; rivers allegedly polluted, thereby denying people’s livelihood or affecting their health; and protesters allegedly beaten, raped and killed by security forces protecting company assets.

Initially the response to such allegations came in the form of voluntary corporate social responsibility initiatives, or CSR. But when it came to identifying, preventing and addressing business-related human rights abuses, the traditional CSR approach turned out to be inadequate. Often such efforts were not appropriately embedded and integrated within a company’s own internal oversight and compliance system, and they would tend to be weak on external accountability.

From inside the United Nations human rights system, treaty monitoring bodies attempted to address business related human rights abuses through the lens of state-based obligations under existing UN human rights treaties³, but were limited by their respective treaty-based mandates in their ability to elaborate general principles on the roles and responsibilities, if any, of business enterprises with regard to human rights.

Other efforts at the United Nations to address the issue of business and human rights had

¹ A/HRC/RES/17/4.

² A/HRC/17/31.

³ See for an overview of treaty body commentaries relating to business activities, A/HRC/4/35/Add.1.

focused on attempts to develop international legal standards applicable to business. The last of such efforts – an initiative by the then Sub-Commission on the Promotion and Protection of Human Rights aimed at imposing binding international human rights standards on business⁴ - failed to win the support of most governments and of the business community itself.

SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON BUSINESS AND HUMAN RIGHT

To move beyond the stalemate that had resulted from the Sub-Commission's proposal, the then Commission on Human Rights in 2005 requested the UN Secretary-General to appoint a Special Representative on the issue of business and human rights.⁵

The Special Representative was requested to “identify and clarify standards of responsibility and accountability with regards to human rights” for business enterprises, and to “elaborate on the role of States in ensuring in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation”.

Then Secretary-General of the UN Kofi Annan appointed Professor Ruggie to the post and the current Secretary-General Ban Ki-moon continued the assignment.

THE “PROTECT, RESPECT AND REMEDY” FRAMEWORK

After three years of work, the UN Human Rights Council in 2008 unanimously welcomed⁶ a conceptual policy framework proposed by the Special Representative for better managing business and human rights challenges.⁷ Notably, leading voices from both business⁸ and civil society⁹ also welcomed the Framework.

The Framework rested on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, legislation, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy.

⁴ E/CN.4/Sub.2/2003/12/Rev.2.

⁵ E/CN.4/RES/2005/69.

⁶ A/HRC/RES/8/7.

⁷ A/HRC/8/5.

⁸ <http://www.reports-and-materials.org/Letter-IOE-ICC-BIAC-re-Ruggie-report-May-2008.pdf>.

⁹ <http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>

According to the Special Representative, each pillar of the Framework was an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse, and because rights and obligations need to be matched to appropriate and effective remedies when breached.¹⁰

The Council requested the Special Representative to “operationalize” the Framework – to provide concrete guidance to states, businesses and other social actors on its implementation. This “operationalization” would eventually take the form of Guiding Principles.

THE PROCESS

The process for developing the Guiding Principles was comprehensive and multi-stakeholder in nature, involving states, business representatives, civil society, trade unions and others. The Special Representative conducted 47 international consultations during his six year mandate, and oversaw extensive research efforts on a broad range of issues relating to the business and human rights agenda. An extended online consultation was conducted on the draft Guiding Principles which invited any interested organization or individual to provide comments and suggestions. The site received over 3,500 individual hits from around 115 countries and territories around the world. The Special Representative also received hundreds of comments and submissions during the course of his mandate.

In addition to the consultations, the Special Representative and his team tried themselves or encouraged others to road-test ideas before they have been put forward as Guiding Principles to make sure they would actually work on the ground.

For example, the effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities in which they operate were piloted in five different sectors, each in a different country. The workability of the Guiding Principles’ human rights due-diligence provisions was tested internally by 10 companies.¹¹ They were then discussed extensively with corporate law professionals. At one point the mandate had more than twenty corporate law firms from around the world, with expertise in 39 jurisdictions, doing pro bono research for the mandate.

¹⁰ A/HRC/17/31, paragraph 6.

¹¹ <http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31-Add1.pdf>

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

These Guiding Principles follow the three-pillar structure of the “Protect, Respect, and Remedy” Framework.

Pillar I – The State Duty to Protect

The foundational principles relating to the state duty to protect clarify that States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication. It is also stipulated that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights through their operation. The operational principles under Pillar I further elaborate on the implications of the foundational principles. This includes ensuring policy coherence, and ensuring that business focused policies and laws are consistent with the state’s human rights obligations.

At the same time as the Guiding Principles were presented, the Special Representative also issued a separate set of principles to help states and business in this area, a checklist for states and private investors on how to take into account human rights concerns when negotiating investment agreements.¹²

Pillar II – The Corporate Responsibility to Respect

Pillar II of the Guiding Principles establishes the corporate responsibility to respect human rights as the baseline expectation and global standard of responsibility for all business enterprises. The foundational principles stipulate this to mean that business enterprises should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

The responsibility to respect human rights refers to internationally recognized rights – these are understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles set out in the ILO Declaration on Fundamental Rights at Work. Not all will be relevant in all contexts; but in some contexts additional standards may need to be considered – for example, when operating in conflict affected areas, or in areas inhabited by indigenous peoples or where individuals from groups or populations may be a heightened risk of becoming vulnerable or marginalized.

The corporate responsibility to respect human rights requires that business enterprises:

¹² A/HRC/17/31, addendum 3.

- a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

The implications for how business enterprises should address these situations will vary according to whether the adverse impact arises in situation a) or b), as further elaborated in Guiding Principle 19.¹³

Pillar II provides companies with a blueprint for “knowing and showing”, how they are actually respecting human rights, in fact. In essence knowing and showing has two main elements:

1. A policy commitment by the company to respect rights that is approved by the senior management; informed by engagement with affected individuals and communities; communicated to personnel and business partners; and reflected in operational policies and procedures.
2. A human rights due diligence process to identify and address human rights risks and impacts posed by the company’s own activities and by business partners associated with those activities.

Human rights due diligence itself comprises four steps: assessing actual and potential negative impacts; integrating the findings of those impact assessments; acting upon the findings – with the company preventing or mitigating potential negative impacts and participating in the remediation of impacts that have already taken place; finally, a company should track the effectiveness of its systems and responses, and be prepared to communicate the results to impacted individuals and communities, as well as to other legitimate stakeholders, such as affected stakeholders.

What’s important is having processes in place that also enables the company to assess new risks on an on-going basis, constantly scanning what are the human rights implications of activities, and how to make sure that the company is keeping up with them, so that it can then explain the processes it has in place.

Pillar III – Access to Remedy

Pillar III of the Guiding Principles – Access to Remedy – emphasize the importance of effective remedial mechanisms when things do go wrong, which can happen even where the

¹³ See for further interpretative guidance on Pillar II issued by the Office of the UN High Commissioner for Human Rights: <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>

best intentions may be present. The foundational principle of the Access to Remedy pillar stipulates that as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy. In other words, the Access to Remedy pillar focus on ensuring that where people are harmed by business activities, there is both adequate accountability and effective redress, through judicial as well as non-judicial mechanisms.

At the heart of a system of providing remedy to victims are state-based mechanisms, such as courts, as this is an international legal obligation of states. But non-state mechanisms play a complementary role, and the Guiding Principles clarify that companies should set up or participate in operational-level grievance mechanisms as part of their due diligence and to address grievances at an early stage. Operational level could for example be the workplace or community level. The Guiding Principles outline the attributes of effective grievance mechanisms – which may be particularly important in industry sectors with large physical footprints, though their applicability is not limited to those contexts.

KEY FEATURES

The following are some of the key overarching features and implications of the Guiding Principles:

1. The Framework and Guiding Principles stipulate differentiated but complementary roles for States and business enterprises respectively with regard to human rights.
2. The Guiding Principles do not in any way detract from or undermine any existing human rights obligations that States have.
3. The Guiding Principles do not by themselves create any new legal obligations – but they elaborate on the implications of existing and practices for States and business enterprises. At the same time, the Guiding Principles do not preclude legal developments necessary for States to fully meet their duty to protect.
4. The Guiding Principles are addressed to all states and to all business enterprises, of all sizes, in every sector, and in any country.
5. The Guiding Principles explicitly stipulate that human rights cannot be offset – doing good in one aspect cannot compensate human rights harms elsewhere.

CONVERGENCE OF STANDARDS

The Guiding Principles are now a common global reference point for business and human rights and as such are reflected in a number of other international standards. All the elements

of corporate responsibility to respect have been incorporated in the updated guidelines for multinationals developed by the Organisation for Economic Co-operation and Development¹⁴, adhered to by 42 countries, including non-members. The OECD guidelines also come with a procedure for bringing complaints against companies to the participating governments.

The International Finance Corporation, the private sector arm of the World Bank, has updated its own sustainability policy and the corresponding performance standards they require clients to meet. These now explicitly reference the business responsibility to respect human rights. In turn, the IFC performance standards get tracked by some 72 private sector project lending banks worldwide, and by several national export credit agencies. Here companies' access to capital may come into play.

The corporate responsibility to respect has also been incorporated by the Social responsibility standard of the International Organization for Standardization¹⁵. Furthermore it is understood as comprising the substantive content of part of the human rights commitments companies undertake when they become a member of the UN Global Compact, the UN platform for the private sector to align business practice with key international standards and promote UN goals.¹⁶

In addition the Guiding Principles are already being taken up by individual companies, by governments, by regional bodies, and in the analysis by NGOs.

CURRENT BUSINESS AND HUMAN RIGHTS MANDATE

Following the endorsement of the Guiding Principles and the end of the Special Representative's mandate the Human Rights Council decided to establish a five member expert working group to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.¹⁷ The mandate includes promoting good practices, supporting capacity building efforts, conducting country visits and exploring options for access to remedy. The Working Group is also mandated to an annual multi-stakeholder forum to continue the dialogue between various stakeholder groups on the challenges and lessons learned in implementing the Guiding Principles.¹⁸

¹⁴ <http://www.oecd.org/investment/investmentpolicy/48004323.pdf>

¹⁵ <http://www.iso.org/iso/iso26000>

¹⁶ http://unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf

¹⁷ A/HRC/RES/17/4.

¹⁸ The first Annual Forum took place on 4-5 December 2012. All information and documents related to the 2012 can be found on the OHCHR website. <http://www.ohchr.org/EN/Issues/Business/Pages/ForumonBusinessandHR2012.aspx>

OHCHR'S ROLE

The Office of the UN High Commissioner for Human Rights welcomes the opportunities created by the greater normative clarity provided by the Guiding Principles of the roles and responsibilities of both States and business when it comes to business and human rights. As the UN's human rights advocate, OHCHR will seek to continue to provide guidance to both states and business on human rights, and work with all relevant actors to ensure the effective implementation of the Guiding Principles.

CONCLUDING REMARKS

The UN Guiding Principles constitute a key tool for governments and business on how to implement their respective responsibilities. Essentially it is about treating people with dignity. This is also the foundation for both sustainable businesses and sustainable development.

EVOLUTION OF THE INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF HUMAN AND CHILDREN'S RIGHTS IN A BUSINESS CONTEXT

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Résumé

Durant les deux dernières décennies, le changement de perceptions et les nouvelles règles qui se centrent sur les connexions entre le progrès sociétal et économique ont été conceptualisés dans le contexte des affaires en relation au discours sur les droits humains. La force motrice derrière ce développement peut être détectée par l'importance croissante que prennent les acteurs non étatique dans les processus politiques. La globalisation économique, les nouvelles technologies de l'information et la privatisation de fonctions gouvernementales contribuent aux transactions transfrontalières qui ne peuvent pas être facilement attribuées à un état ou un territoire. Cet article démontre un statut complexe et illustre les défis d'un cadre légal fragmenté et pluridimensionnel, qui est caractérisé, d'une part par le rôle prédominant des obligations étatiques de protéger des droits humains, et les codes de conduites d'un partenariat commercial non contraignant de l'autre. Il résume les développements récents en vue d'une responsabilité partagée et l'harmonisation des différentes séries du cadre « protéger, respecter et réparer » du Conseil des Droits humains des Nations Unies. Il se centre sur le rôle marginalisé que les droits de l'enfant jouent à l'intérieur de ce modèle et appelle à une approche plus inclusive afin d'implémenter de manière effective les droits de l'enfant dans un contexte des affaires. Le Commentaire général du Comité des Droits de l'enfant sur les droits de l'enfant et le monde des affaires jouera à cet égard un rôle essentiel.

Zusammenfassung

Die Auswirkungen der wirtschaftlichen Entwicklung auf die Gesellschaft wurden im Verlauf der letzten 20 Jahre neu beurteilt und führten zu einer intensiven Diskussion über Wirtschaft und Menschenrechte. Auslöser dieser Entwicklung ist die zunehmende Bedeutung nichtstaatlicher Akteure im politischen Prozess. Wirtschaftliche Globalisierung, neue Informationstechnologien und die Privatisierung öffentlicher Aufgaben fördern grenzüberschreitende wirtschaftliche Aktivitäten, die sich nicht ohne weiteres einem bestimmten Staat oder Territorium zuordnen lassen. Dieser Beitrag befasst sich mit dem komplexen Status quo und zeigt, welche Herausforderungen sich einem mehrschichtigen, fragmentierten rechtlichen Gefüge stellen, das auf der einen Seite von der primären Rolle des Staates beim Schutz von Menschenrechten geprägt

ist und sich auf der anderen mit einer Fülle von rechtlich nicht bindenden unternehmensorientierten Verhaltenskodizes konfrontiert sieht. Der Beitrag erläutert die mit dem „protect, respect and remedy-framework“ des UNO-Menschenrechtsrates eingeläutete neue Entwicklung zu einer geteilten Verantwortung und Harmonisierung der verschiedenen Regulierungsansätze. Er hebt die bislang marginalisierte Rolle der Kinderrechte in einem wirtschaftlichen Kontext hervor und fordert deren Einbezug und Konkretisierung in den zukünftigen Arbeiten. Der Kommentar des Kinderrechtsausschusses zu Kinderrechten und Wirtschaft wird dabei eine wichtige Rolle spielen.

Resumen

Durante las dos últimas décadas, el cambio de percepciones y las nuevas reglas que se centran en las conexiones entre el desarrollo económico y social fueron conceptualizadas en el contexto de negocios con relación al discurso sobre los derechos humanos. La fuerza motriz detrás de este desarrollo puede ser detectada por la importante creciente que adquieren los protagonistas no estatales en los procesos políticos. La globalización económica, las nuevas tecnologías de la información y la privatización de las funciones gubernamentales contribuyen a las transacciones transfronterizas, que no pueden asignarse fácilmente a un Estado o a un territorio. Este artículo demuestra un status quo complejo e ilustra los retos de un marco legal fragmentado y pluridimensional, que está caracterizado de una parte por el papel predominante de las obligaciones estatales de proteger los derechos humanos y los códigos de conducta de una asociación comercial no coercitiva del otro. Resume los desarrollos recientes para una responsabilidad compartida y la armonización de las diferentes series del marco « proteger, respetar y remediar » del Consejo de Derechos Humanos de las Naciones Unidas. Se centra sobre el papel marginalizado que los derechos del niño juegan en el interior de este modelo y llama a un enfoque más inclusivo con el fin de implementar de manera efectiva los derechos del niño en un contexto de negocios. La Observación General del Comité Sobre los Derechos del Niño y el mundo de los negocios jugará a este respecto un papel esencial.

Summary

During the last two decades, changing perceptions and new rules which focus on the connections between societal and economic progress have been conceptualized related to the human rights discourse in business contexts. The driving force behind this development can be recognised in the increasing importance of non-state-actors in the political process. Economic globalisation, new information technologies and privatisation of governmental functions contribute to cross border business transactions which cannot be easily attributed to a state or a territory. This article shows the complex status quo and illustrates the challenges of a fragmented multi-layered legal framework, which is characterised by the predominant role of the state's obligation to protect human rights on the one hand and the evolving of business oriented non-binding codes of conduct on the other. It outlines the recent developments towards

a shared responsibility and harmonisation of these different strings in the “protect, respect and remedy-framework” of the UN Human Rights Council. It focuses on the marginalised role, children’s rights play within this model and calls for a more inclusive approach to effectively implement children’s rights in a business context. The Committee on the Rights of the Child’s General Comment on Child Rights and Business will play an important role in this regard.

* * *

INTRODUCTION: THE COMPLEXITY OF THE ISSUE

The debate on human rights and especially children's rights in a business context is in many regards particularly challenging. First of all, it takes place in an environment that is typically characterized by an imbalance with economically powerful companies on the one side and children as some of the most vulnerable members of society on the other. From a conceptual perspective, the discussion on business and human rights involves different disciplines – economics, different areas of law, such as economic law and human rights law – which developed fairly independently from each other, resulting in a rather fragmented body of regulations.¹ Another layer of complexity lies in the fact that the debate is characterized by a variety of actors and instruments. Unlike in traditional international law, non-state actors such as businesses and non-governmental organisations play an important role. Accordingly, rules are often framed as formally non-binding or even voluntary instruments such as codes of conduct.

Whoever deals with human rights and business issues therefore faces a complex and dense web of regulations, some of a binding, others of a non-binding nature, some situated at the national, others at the international level.

The goal of this contribution is to unravel this “ball of rules” and shed light on where the debate stands today and how it could be further advanced with regard to child rights.

I. CHANGING THE RULES OF THE GAME

1. *The Business of Business is Business?*

In 1962 Nobel Prize winner Milton Friedman took a clear stand on what in his view the responsibility of business should be:

“There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”²

¹ Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations*, in: Thomas Cottier/Joost Pauwelyn/Elisabeth Bürgi (Hrsg.), *Human Rights and International Trade*, Oxford 2005 (Oxford University Press), p. 95-136

² Milton Friedman, *Capitalism and Freedom*, 1st edition 1962, Chapter VIII Social Responsibility and Labor. Emphasis by the author.

In 1974 Friedman further elaborated on his earlier statement in an interview:

“In the first place, the only entities who can have responsibilities are individuals; a business cannot have responsibilities. So the question is, do corporate executives, provided they stay within the law, have responsibilities in their business activities other than to make as much money for their stockholders as possible? And my answer to that is, no they do not.”³

Friedman’s argument has been summarized ever since with the often quoted phrase. “The business of business is business.” Yet, the “rules of the game” that Friedman referred to in 1962 seem to have substantially changed as the following examples illustrate:

In 2006, the International Employers’ Association submitted “Business proposals for effective ways of addressing dilemma situations in weak governance zones” to the then Special Representative of the UN Secretary-General for business and human rights, Professor John Ruggie. The proposal contained a statement that could hardly be in sharper contrast with Friedman’s view:

“The international business community strongly supports respect for human rights not only because it is the right thing to do, but also because protecting human rights benefits all actors in society. To flourish, both domestic and international companies require the same basic principles, government policies and national institutions to protect human rights.”⁴

This new approach which focuses on the connections between societal and economic progress has been conceptualized differently across different disciplines. In international law, business responsibility has been part of a broader debate on the fragmentation of the international legal order⁵ while the discussion in economics is focussed on the concept of corporate governance⁶ and creating shared value⁷. All these approaches have in common that they represent a change in paradigm and react to a changing environment.

³ “Milton Friedman Responds”, Interview with Milton Friedman, conducted by John McClaughry, in ChemTech (February 1974) pp. 72-78, at 72.

⁴ International Organisation of Employers (IOE), in collaboration with the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee (BIAC) to the OECD, Business proposals for effective ways of addressing dilemma situations in weak governance zones, December 2006, para. 7. Available at <http://www.reports-and-materials.org/Role-of-Business-in-Weak-Governance-Zones-Dec-2006.pdf>.

⁵ Christine Breining-Kaufmann, Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations, in: Thomas Cottier/Joost Pauwelyn/Elisabeth Bürgi (eds.), Human Rights and International Trade, Oxford 2005 (Oxford University Press), 95-136, at 97-107.

⁶ Andreas Georg Scherer, Guido Palazzo, Dirk Matten, *Globalization as a challenge for business responsibilities*, Business Ethics Quarterly, 19 (2009), 327-347.

⁷ The concept was first introduced in 2006 and significantly expanded in 2011: Michael E. Porter, Strategy and Society, The Link between Competitive Advantage and Corporate Social Responsibility, Harvard Business Review 84 (2006), 78-92; Mark R. Kramer, Michael E. Porter, Mark R. Kramer, Creating Shared Value, Harvard Business Review, 89 (2011), 62-77.

2. *Changing Perceptions and New Rules*

At the international level, responsibility of business first became an issue in the UN General Assembly after the alleged involvement of the US based multinational company ITT in the overthrow of the Allende regime in Chile in 1973.⁸ It gained new momentum in the 1990s with liberalization, technology, and innovations in corporate structure enabling businesses to operate globally to an unprecedented extent. This development contributed to an increased awareness of governance gaps which had already – in a different context – been at the heart of the debate in the 1970s: Besides the economic benefit, which many countries were able to participate in, the existing legal framework as well as existing institutions were ill suited to accommodate new actors, keep up with the speed of market expansion and address the potential negative impacts of these developments.⁹

In a system of international law that is still substantially based on the Westphalian concept of the sovereign state as the prime legal subject, regardless of their impact on people's live, multinational companies cannot be accommodated easily. During the Nuremberg Tribunals which were the first international tribunals to decide on forced labour in a business context, managers and directors of the German companies IG Farben and Krupp were charged with abusing forced labourers from concentration camps in their business activities. The Tribunals did not acknowledge legal personality of the involved companies under international law but attributed the crimes against humanity either to the German state or the involved individuals.¹⁰

Eventually, John Ruggie abandoned the traditional approach of strictly separating the realm of binding state obligations and voluntary corporate behaviour. The Protect, Respect and Remedy Framework of 2008 and the complementary Guiding Principles of 2011 were both accepted by the UN Human Rights Council.¹¹ In order to understand the current legal state of affairs, it is important to look at the driving forces behind these developments.

⁸ Intelligence Activities, Senate Resolution 21, Hearings before the Select Committee to Study Governmental Operations with Respect to Intelligence of the United States Senate, 94th Congress, 1st session, Vol. 7 Covert Action, December 4 and 5, 1975: Appendix A: Covert Action in Chile 1963-1973, pp. 158-160.

⁹ Protect, respect and remedy framework, Ruggie 2008, para. 104.

¹⁰ United Nations War Crimes Commission, Law Reports of Trials of War Crimes, Volume X, The I.G. Farben and Krupp Trials, London 1949, Case No. 57 (I.G. Farben), Case No. 58 (Krupp)

¹¹ Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011.

II. DRIVING FORCE: INCREASING THE IMPORTANCE OF NON-STATE ACTORS

1. *Political Influence of Multinational Enterprises*

The increasing political influence of multinational enterprises has been recognized as one of the key driving forces for the agenda of business and human rights. The privatisation of governmental functions, for instance in outsourcing prisons, schools and the provision of other public services to private companies raised the question whether contractors are bound by human rights. A recent example for regulating privatised governmental functions is the Montreux Protocol on Private Military and Security Firms which acknowledges the state's duty to protect human rights when entrusting private firms with security and military services.¹²

2. *Globalisation and Trade Liberalisation*

Economic globalisation allows businesses to organise their supply chain across national borders according to their needs. As a result, a company will not only face local differences and particularities but also different laws and regulations imposed on them by different states. In addition, a business may find itself confronted with violations of children's rights not because of its own actions but because of the actions of its suppliers. Outsourcing parts of the supply chain can be linked to "insourcing" human rights issues.

A second important feature often linked to globalisation is the regulatory competition between states to attract foreign investment which according to some scholars may result in a "race to the bottom" which involves the lowering of human rights related standards such as labour conditions in order to lower production costs.¹³

Generally, the business community has an interest in harmonised regulations to align the legal world with market reality so as not to hamper trade by legal obstacles. The liberalisation of international trade can be understood as the legal complement to economic globalisation. Cross border economic activities require free movement of capital, goods and people. International trade law mirrors these developments with the establishment of the World Trade Organization and a comprehensive body of international trade laws in 1994.

¹² UN General Assembly/UN Security Council, Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict, UN/A/63/467-S/2008/636, 6 October 2008.

¹³ For the different concepts see Christine Kaufmann, *Globalisation and Labour Rights*, Oxford: Hart, 2007, 232-234. In the context of the financial crisis Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, New York: Norton 2011, 264.

3. Access to Information

Today, information technology allows for news spreading at unprecedented speed around the globe. Social networks facilitate the mobilisation of consumers, workers and citizens at large.¹⁴ These new dynamics strengthen civil society's influence on decision-making, both at the national and international level. In addition, with information about cross-border issues becoming more easily available, we observe a shift of competences away from governments to international organisations.

4. Privatization of Conflicts

The number of internal conflicts is increasing around the world, with the number of internally displaced persons on the rise. Actions of international terrorist networks and international organised crime cannot be attributed to one state alone and often affect not only a particular state but the entire international community. The privatisation of security services further contributes to blurring the lines between state and private behaviour.¹⁵

III. STATUS QUO: MULTI-LAYERED LEGAL FRAMEWORK

1. Human Rights as Primary Obligation of States

The increasing role of private actors in a business and economic context has not yet been mirrored in traditional human rights law. Under current international law, human rights are still primarily state obligations; they do not generally bind private actors such as companies directly. Companies are thus not recognized general subjects of international law. Yet, changes are possible: in an amicus brief to the US Supreme Court, John Ruggie states that there may be signs of an emerging corporate responsibility for international crimes.¹⁶

As a result, the key bearers of responsibilities under international human rights law are still states and to a lesser extent individuals.

The UN human rights covenants impose a threefold set of obligations on states: a duty to respect, protect and fulfil human rights. While the duty to respect essentially requires the state

¹⁴ Douwe Korff, Social media and human rights, in: Council of Europe, Human rights and a changing media landscape, Strassburg 2012, 175-206; for the Arab Spring: Philip N. Howard/ Muzammil M. Hussain, The Role of Digital Media, *Journal of Democracy* 22:3 (2011), 35-48.

¹⁵ Simon Chesterman/Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and its Limits*, Oxford/New York: Oxford University Press 2009.

¹⁶ US Supreme Court, *Kiobel vs. Royal Dutch Petroleum*, 10-1491, Brief amici curiae of former UN Special Representative for business and human rights, Professor John Ruggie; Professor Philip Alston; and the Global Justice Clinic at NYU School of Law in support of neither party, 12 June 2012, p. 7-8.

to abstain from negatively interfering with human rights, the duty to protect and fulfil are of a positive nature as they call for concrete actions.¹⁷

It is the duty to protect which becomes most relevant with regard to business and human rights because it requires states to take the necessary measures for preventing human rights violations by third parties, including private actors such as businesses.

2. Horizontal Effects of Human Rights: What Does It Mean?

While this so called horizontal obligation is fairly undisputed as being legally binding for states, its content in a business context is less clear. There is no specific binding framework under international law for business. All we have are very few and very specific provisions such as the prohibition to trade slaves which also binds private actors. Depending on the country, companies face different or no human rights obligations at all.

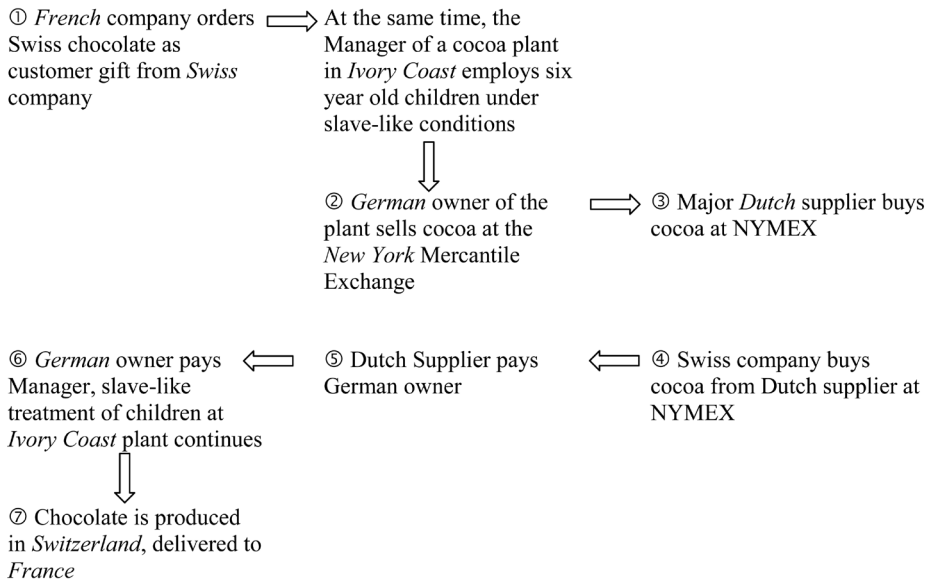
From a substantial point of view, the content of human rights in a business context requires further clarification. Companies need to know for example what the prohibition of child labour means for concluding a contract with a supplier in Asia. Does it mean that no child must be involved or does it only preclude hazardous work? There are no easy answers, particularly when child labour is involved.

An additional set of questions arises when human rights are infringed by business operations of a multinational company. Which country is in charge? Is it the country where the human rights violation took place? Is it the company's home country, where it is registered or has its headquarters? How are we addressing extraterritoriality and the principle of non-interference according to the UN Charter?

Before turning to recent developments and solutions a fictive example shall illustrate the challenges.

¹⁷ Walter Kälin/Jörg Künzli, *The Law of International Human Rights Protection*, Oxford/New York: Oxford University Press 2009, 96-98.

Layers of complexity: chocolate as a customer gift



Legal challenges:

- Is the French company responsible for the human rights violations in Ivory Coast? The Swiss producer? The Dutch supplier? The German owner?
 - Which country is responsible for protecting human rights at the plant in Ivory Coast?
 - What are the criteria?
-

IV. RESPONSES IN INTERNATIONAL LAW

1. *Traditional: Binding Human Rights Obligations for Companies (Hard Law)*

Since the 1970s all attempts of the international community to tackle the business and human rights challenge had for decades consisted in developing a binding legal framework for holding multinational enterprises accountable under international law.

Not surprisingly, these efforts were doomed to fail. The last proposal in this endeavour, the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” tried to overcome the existing conceptual limits by legally binding states only while at the same time defining precise rules which as part of the state duty to protect should have been imposed on companies.¹⁸ What was a well meant and – given the rigid framework of traditional international law – a logical approach, unfolded a whole matrix of problems: Why had only some human rights such as labour rights been included in the draft and not others? How could the sphere of influence which had to be established in order to hold companies responsible be defined?

While business associations such as the International Chamber of Commerce took a firm stand against the Draft Norms on an operational level,¹⁹ many multinational companies had started defining social policies that would include at least some human rights. When John Ruggie was entrusted with the mandate as Special Representative of the UN Secretary-General in 2005,²⁰ to essentially solve all of the remaining problems, to many observers this seemed to be a mission impossible. Despite turning and twisting concepts around for decades, the fact that the international community was not willing to accept companies as subjects of international law, which would have been a prerequisite to hold them legally accountable, had remained unchanged.

2. *Business-oriented: Voluntary Codes of Conduct*

In parallel to the UN’s struggle to develop binding norms and in reaction to other international organisations’ initiatives, in 1999 the then UN Secretary-General Kofi Annan launched the Global Compact, a voluntary initiative which was intended to involve top level business leaders and obtain their commitment for considering social values such as human rights, envi-

¹⁸ Economic, social and cultural rights: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

¹⁹ Joint views of the IOE and ICC on the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/NGO/44, 29 July 2003.

²⁰ Based on Commission on Human Rights Resolution 2005/69, 20 April 2005; Renewal of the mandate by the Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 18 June 2008.

ronmental protection and later the fight against corruption in their business operations.²¹ The Global Compact has been both a success and a disappointment. It is a success because a large number of companies signed up to the principles and local Global Compact Networks were established around the world. From the perspective of many non-governmental organisations, it has been disappointing given its lack of an efficient monitoring mechanism.

3. *“Principled Pragmatism”*

The Special Representative on business and human rights, Professor John Ruggie quickly realised that reaching a consensus on an overreaching legal concept for reconciling business and human rights was not a realistic endeavour. He therefore decided to leave the beaten track of developing new legal concepts and focused on the goal. What does the international community want to achieve? What does it mean for this goal that there is already an abundance of non-binding voluntary guidelines?

In essence, John Ruggie’s approach built on existing binding obligations for states and on the accepted ethical responsibility of companies. Substance is more important than form – or in the words of Sullivan “form follows function”.²² The result is a farewell to “legal purism” and a very warm welcome to “principled pragmatism”.²³

V. PROTECT, RESPECT AND REMEDY FRAMEWORK

1. *A Word of Caution*

Before engaging in a more detailed discussion of the Framework and the related Guiding Principles it is important to note that the essence of these instruments is rather on procedures than on substance. They do not re-define the content of human rights but instead develop a framework for implementing them in a business context. They are an important, yet only a first step on a journey that has just begun.

²¹ <http://www.unglobalcompact.org/>.

²² Louis H. Sullivan, The tall office building artistically considered, Lippincott’s Magazine 57, March 1896, 403-409, printed in: Leland M. Roth, America Builds: Source Documents in American Architecture and Planning, New York 1983, 340-346.

²³ Promotion and protection of human rights: Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, E/CN.4/2006/97, 22 February 2006, para. 81.

2. *A Three Pillar Framework*

In 2008, the Human rights council adopted the “Protect, respect and remedy framework” as a conceptual underpinning for addressing human rights in a business context.²⁴

The state duty to protect human rights builds on existing legal obligations. It requires states to prevent, investigate, redress and punish human rights abuses by private actors. State policies need to be coherent, both vertically among different levels of government such as in federal states, and horizontally among different parts of government, for instance trade and foreign affairs departments.

The second pillar refers to the corporate responsibility to respect human rights. It does not build on existing legal obligations but on perceived corporate commitment not to contribute to human rights abuses.²⁵ Business is required to act with due diligence in order to avoid infringements of business activities on human rights. This implies compliance with national laws and respect of internationally recognized human rights.

Providing access to remedy for victims of human rights violations is a shared responsibility of states and businesses. This third pillar acknowledges the fact that access to formal judicial systems may be difficult for victims. It therefore includes non-judicial mechanisms and encourages states and business to explore such avenues.

3. *Guiding Principles*

Given the rather broad nature of the framework, the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework which were unanimously adopted by the UN Human rights Council in 2011²⁶ provide further guidance to both states and businesses on the content of the three pillars. In addition, the Office of the High Commissioner for Human rights published an interpretative guide on “the corporate responsibility to respect human rights”.²⁷

²⁴ Framework (Fn 11).

²⁵ At the time of this writing, 302 companies with a human rights statement were listed on the Business and Human Rights Resource Center’s website: <http://www.business-humanrights.org/Documents/Policies>.

²⁶ Guiding Principles (Fn 11).

²⁷ The Corporate Responsibility to Respect Human Rights – an Interpretative Guide, New York/Geneva 2012.

4. *Children's Rights and the Framework*

It is surprising how little attention has been paid to children's rights in the discussion. They are neither specifically addressed in the Framework nor in the Guiding Principles. Given, the leverage that a discussion of children's rights in a business context could develop, it is regrettable that this opportunity has not yet been taken. The Children's Rights and Business Principles, a joint initiative by UNICEF, the UN Global Compact and Save the Children provide some clarification but fail to substantially advance the debate. Examples from particularly exposed industries such as the cocoa production and tourism illustrate how challenging it is to develop a children's rights policy that serves both the interest of the child and business objectives.²⁸

The Committee on the Rights of the Child reacted in two ways. It promptly started applying the Framework, for instance when it requested Australia to take measures against the violations of children's rights by mining companies.²⁹ In addition it started working on a General Comment on Child Rights and Business.³⁰

VI. THE ROAD AHEAD

1. *A Common Starting Point*

While opinions on the specifics of the new Framework may vary, it cannot be emphasised enough that for the first time in decades a consensus on a shared responsibility of states and business to implement human rights has been achieved. The fact that the Human rights council unanimously adopted the Guiding Principles together with their incorporation into other instruments such as the *OECD Guidelines for Multinational Enterprises*,³¹ the *Sustainability Framework of the International Finance Corporation*³² or the new *Corporate Social Responsibility Strategy* developed by the European Commission³³ as well as industry-led initiatives³⁴ prove that human rights and business are on the agenda of the international community.

²⁸ For the cocoa industry: Fair Labor Association, Addressing Child Labor in Nestlé's Cocoa Supply Chain in Côte d'Ivoire, Stakeholder Consultation, 26 November 2012, http://www.fairlabor.org/sites/default/files/documents/reports/nestle_cocoa_consultation.pdf; for tourism: Kuoni, Assessing human rights impacts: Kenya Pilot Project Report, November 2012, http://www.kuoni.com/docs/assessing_human_rights_impacts_0.pdf.

²⁹ Consideration of reports submitted by States parties under article 44 of the Convention, Concluding Observations: Australia, CRC/C/AUS/CO/4, 28 August 2012, para. 27.

³⁰ <http://www.business-humanrights.org/ChildrenPortal/UNCommitteeGeneralComment>.

³¹ OECD Guidelines for Multinational Enterprises, 2011 Edition, <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>

³² International Finance Corporation, Sustainability Framework: Policy on Social and Environmental Sustainability, 2012, http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_Framework.pdf?MOD=AJPERES.

³³ A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final, 25 October 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

³⁴ For example the International Code of Conduct for Private Security Service Providers 2010, <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla.Par.0001.File.tmp/INTERNATIONAL%20CODE%20OF%20CONDUCT%20dtc.pdf>; the "Thun Group" of Banks: http://www.menschenrechte.uzh.ch/index/Thun_Group_Statement_Final.pdf.

2. Filling the Framework with Content

Filling the Guiding Principles with content requires a multi-dimensional joint effort.³⁵ The UN Working Group on the Issue of Human Rights and Transnational Corporations which succeeded Professor John Ruggie, expects states to proceed in three steps: First to analyse the current state of affairs by mapping existing regulations, second to identify potential gaps or discrepancies with the Guiding Principles and third, based on steps one and two, to develop a country-specific action plan. According to the EU special representative for human rights, 19 out of 27 member states started developing action plans.³⁶

At the international level, the Working Group calls on all UN organisations to mainstream the business and human rights agenda into their activities. The OECD and the IFC may serve as role models. The UN Treaty bodies will play a particularly important role in further developing the Guiding Principles with regard to specific human rights.

With regard to the business sector, pillar two of the Framework calls for concrete steps. Businesses are expected to develop a human rights commitment, assess their activities' impact on human rights and eventually include human rights into their daily business operations (due diligence). State guidance on what is expected from the business community will contribute to more efficient business policies.

3. Conclusion

The next years will be decisive in using the General Principles' momentum to advance the implementation of human rights and children's rights. States, businesses as well as international organisations and civil society at large are equally called upon to act. We need to start with education, at home and abroad, to make human and children's rights a natural part of any business activity. States cannot delegate the issue to business but need to lead the process by setting clear standards and provide legal security. Business is called to take its responsibility seriously by developing strategies on making human rights part of daily business procedures.

The General Comment on Child Rights and Business will be an important step in this process.

³⁵ Working Group member Alexandra Guáqueta talks about a 21st Century Governance Experiment: Global Trends in the Implementation of the UN Guiding Principles on Business and Human Rights Remarks for the First UN Annual Forum on Business and Human Rights, 4 December 2012, <http://www.ohchr.org/EN/Issues/Business/Pages/StatementsduringForum.aspx>

³⁶ Presentation by Stavros Lambrinidis at the First UN Forum on Business and Human Rights, 4 December 2012, <http://www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/StavrosLambrinidis.pdf>.

RESPECT, PROTECT AND FULFIL: THE CHALLENGES FOR THE STATE IN RELATION TO BUSINESS AND CHILD RIGHTS

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Résumé

Le Comité des Droits de l'enfant a décidé de diffuser une Observation générale concernant les obligations des Etats afin de permettre aux entreprises de respecter les droits de l'enfant. Ce commentaire va se centrer sur les obligations des entreprises que la Convention ainsi que ses protocoles facultatifs imposent aux Etats les ayant ratifiés. Il va aussi aborder la portée des obligations imposées aux Etats de créer un environnement propice au respect et à la favorisation de la réalisation des droits de l'enfant par les gouvernements. L'auteur présente ces obligations et illustre par des exemples pratiques les problématiques particulièrement préoccupantes qui surgissent lorsque les Etats créent le cadre légal et institutionnel requis pour assurer le respect des droits de l'enfant dans le secteur des affaires : en fournissant un remède efficace pour le bien-être des enfants, tel que l'économie « informelle », les entreprises et leur opérations principales, les conflits ou d'autres situations d'urgence.

Zusammenfassung

Das Komitee für Kinderrechte hat entschieden, einen allgemeinen Kommentar über die Verpflichtungen der Staaten zu veröffentlichen, um den Unternehmen die Achtung der Kinderrechte zu ermöglichen. Der Kommentar wird sich auf die Verpflichtungen der Unternehmen konzentrieren, welche das Übereinkommen und die beiden Fakultativprotokolle den Staaten, die es ratifiziert haben, auferlegen. Auch die Reichweite der den Staaten auferlegten Verpflichtungen, für die Achtung und Förderung der Kinderrechte günstige Rahmenbedingungen zu schaffen, werden angesprochen. Die Autorin stellt diese Verpflichtungen vor und zeigt anhand von praktischen Beispielen die besonders beunruhigenden Probleme, die auftauchen, wenn Staaten den verlangten rechtlichen und institutionellen Rahmen schaffen, um die Achtung der Kinderrechte in der Geschäftswelt sicherzustellen: durch effiziente Massnahmen für das Wohlbefinden der Kinder, wie die „informelle“ Wirtschaft, die Unternehmen und ihre wichtigsten Abläufe, Konflikte oder andere Notsituationen.

Resumen

El Comité Sobre los Derechos del Niño decidió difundir una Observación General relativa a las obligaciones de los Estados, con el fin de permitir a las empresas de respetar los derechos del niño. Esta observación se centra sobre las obligaciones de las empresas, que la Convención así como sus protocolos opcionales imponen a los Estados que la hayan ratificado. Abordará también el alcance de las obligaciones impuestas a los Estados de crear un medio ambiente propicio al respeto y a la favorización de la realización de los derechos del niño por los gobiernos. La autora presenta estas obligaciones e ilustra con ejemplos prácticos, las problemáticas especialmente preocupantes que surgen, cuando los Estados crean el marco legal e institucional requerido para asegurar el respeto de los derechos del niño en el sector empresarial: proporcionando un remedio eficaz para el bienestar de los niños, como la economía «informal», las empresas y sus operaciones principales, los conflictos u otras situaciones de urgencia.

Summary

The Committee on the Rights of the Child has decided to issue a General Comment on State obligations to enable business to respect children's rights. It will focus on the obligations the Convention and its Optional Protocols impose upon ratifying States with regards to business, and the scope State obligations to create an enabling environment for governments to respect and advance the realisation of children's rights. The author presents these obligations and illustrates with practical examples some particularly challenging issues facing States when they are creating the legal and institutional frameworks required to ensure respect for child rights in relation to the business sector: providing effective remedy for children, such as the 'informal economy', business and their global operations and conflict and other emergency situations.

* * *

INTRODUCTION

The Convention of the Rights of the Child (CRC) and its Optional Protocols (PC) identify the private sector as an actor in child rights, with positive and negative impacts.

Given the increasing attention in international fora and its own experience in reviewing State parties reports and establishing jurisprudence, the Committee on the Rights of the Child (the Committee) has decided to issue a General Comment on State obligations to enable business to respect children's rights. The GC is being drafted and will intend to:

- guide the application by States of the CRC in relation to business, and
- contribute to the body of 'soft law' internationally available to States, companies and NGOs on human rights and business.

A General Comment (GC) is an authoritative interpretation by the Committee on any aspect of the CRC and its Ops that the Committee judges to be in need of explanation or a contemporary view.

This GC focuses on:

- what **obligations** does the Convention and its OPs impose upon ratifying States with regards to business?
- what is the **scope** of State obligations to create an enabling environment for governments to respect and advance the realisation of children's rights?

In this presentation, we will first look at the obligations on the State and their underpinning in the principles of the CRC. The second part will look at some particularly challenging issues facing States when they are creating the legal and institutional frameworks required to ensure respect for child rights in relation to the business sector: providing effective remedy for children, such as the 'informal economy', business and their global operations and conflict and other emergency situations. We will illustrate with extracts from the Committee's jurisprudence as contained in official Concluding Observations and Recommendations.

GENERAL OBLIGATIONS

Art. 2(1) of the CRC provides for the general obligation that

"States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind..."

It is the State that assumes the obligations under the Convention but in its implementation, that is, in the translation of to reality of the human rights of children all sectors of society should participate.

Thus, States parties are obliged to take all available measures to make sure children's rights are respected, protected/guaranteed and fulfilled. This requires that States take a

comprehensive view of the Convention that contains a set of interdependent and indivisible rights. Thus, for example, in the context of the business sector these obligations do not only refer to child labour, as is usually interpreted. Many other potential abuses to child rights by business need to be focused on and acted on prevent, sanction and remedy such as violence and discrimination in the workplace (of parents or children), irresponsible marketing aimed directly or indirectly at children, sex exploitation, exposure to unsafe products, environmental hazards, and many others.

The Duty to Respect

Respect can be interpreted as ‘do no harm’. In other words, States must avoid directly or indirectly interfering with or facilitating, aiding and abetting others’ interference with children’s enjoyment of their rights.

In the business context, this means that

- all business-related policy, legislation or administrative practices must conform with the CRC, and
- when a State has a production/commercial role it must act in conformity with the CRC like any business entity.

Angola, CRC/C/AGO/CO/2-4 (2010)

25. The Committee strongly recommends that the State party ensure that appropriate policies and regulations are issued with regard to the activities of the corporate business sector (whether privately or State-owned), especially the oil and diamond industry, requiring respecting and protecting the rights of children ...enable the National Council for Children to advise State departments cooperating with industry and trade to develop guidelines, which ensure that corporate business respects the rights of the child and protect children.

The Duty to Protect

Protect/Guarantee can be interpreted as ‘don’t allow’ third parties to harm children’s rights. In other words, States must:

- put in place **appropriate and reasonable measures to prevent** the occurrence of abuses,
- **investigate, punish and redress abuses** caused or contributed to by business enterprises if they occur.

Such measures include law and regulation, providing guidance to business, coordination within government and provision of child-friendly justice.

Ecuador, CRC/C/ECU/CO/4 (2010)

31. The Committee urges the State party to develop clear guidelines for the business sector to protect and respect children's rights as enshrined in the Convention, the Code on Children and Adolescents and the Constitution. The Committee recalls the 2008 (CERD/C/ECU/CO/19, para. 16) recommendation in this respect to ensure that oil companies conduct proper environmental and social assessments of impact in consultation with local communities, including indigenous communities.

The Duty to Fulfill

Fulfill or 'take positive steps'. In other words, take positive action to facilitate, promote and provide for the enjoyment of children's rights. It includes:

- Awareness raising amongst children and business
- Regulate and monitor business enterprises especially where involved in service provision for the State, and
- Ensure allocation of resources to the maximum extent (Art. 4) and, in this respect, have in place, among others, effective corporate taxation and anti-corruption measures.

El Salvador, CRC/C/SLV/CO/3-4 (2010)

59. The Committee recommends that the State party:

Take all the necessary measures to considerably increase allocation of resources to child health issues; ...urgently solve the issue of the excessive costs of medicines, notably for poor families;...

Take its human rights obligations into account when negotiating Trade Agreements, in particular as to the possible impact of commercial agreements on the full enjoyment of the child right to health;...

GENERAL PRINCIPLES OF THE CRC

All articles of the CRC are relevant to the issue of the impact of business on children's rights, therefore the GC does not examine any article in particular. The Committee takes the view that the Four Guiding Principles identified by the Committee are the foundation. All State policies, laws and actions regarding business in particular should follow these principles and test whether they have been kept.

The best interests of the child (Art 3)

This is a primary consideration regarding law and policy, including when they refer to the business sector e.g. when weighing competing priorities (economic growth vs. environmental harm detrimental to children's health).

It applies to every legislative, administrative and judicial body or institution related to business including processes of conciliation, mediation or arbitration.

Child rights impact assessment need to be developed and applied by States when appropriate.

Togo CRC/C/TGO/CO/3-4 (2012)

...providing a legislative framework requiring companies domiciled or operating in Togo to adopt measures to prevent and mitigate adverse human rights impacts of their operations in the country, including by their supply chain or associates. The inclusion of child rights indicators and parameters for reporting should be promoted and specific assessments of business impacts on child rights should be required.

Right to life, survival and development (Art 6)

Employment practices, environmental degradation arising from business activities, aggressive marketing etc. may have a negative impact on implementation of article 6.

To ensure the principle is followed, a broad range of legislative, regulatory, policy, administrative, collaborative and adjudication measures are necessary such as:

- employment conditions which assist working parents in the exercise of their parental responsibilities,
- appropriate regulation of advertising and marketing where it involves products that can harm children's health/nutrition,
- enforce internationally agreed standards e.g. WHO Framework Convention on Tobacco Control/ International Code of Marketing of Breast-milk Substitutes.

Thailand CRC/C/THA/CO/3-4 (2012)

75. ...recommends that the SP study and provide, in its next periodic report, information on the employment of children in the informal sector, such as in agriculture, tourist industry, begging and domestic service, and take measures to reinforce the labour inspection system to monitor and detect children working in these sectors. ...to amend its legislation to prohibit involvement of children in informal sectors with particular attention to vulnerable groups of children such as foreign children and children in street situations...

Right to non-discrimination (Art 2)

This means that States need to ensure that all laws, policies and programmes, including those that deal with business issues, are not intentionally or unintentionally discriminatory. It requires:

- the collection of disaggregated statistics and other information in order to identify discrimination against children in the context of business activities and operations
- to have in place processes for investigating complaints, punishing offenders and providing victims with reparation, and
- to promote knowledge and understanding of the right to non-discrimination within the business sector and including the media.

Right to be heard (Art 12)

This is the child's right to freely express views and for those views to be given due weight. It calls for consultation with children according to their evolving capacities when developing business-related law and policy that affect them e.g. those related to labour and health. Inspectorates should take into account the views of affected children.

Children have a specific right

“to be heard in any judicial and administrative proceedings affecting the child”,

a right that is reinforced by the approval of a new Optional Protocol on Communications (OPIC).

KEY CHALLENGES

The provision of remedy

There are many challenges related to the investigation, prosecution, reparation and provision of remedy when abuses to children's rights are committed by business enterprises of any kind. These include lack of legal standing, scarce knowledge, lack of trust, vast power imbalances between children and business enterprises, costs. Therefore, States need to remove barriers to access reparation and remedy e.g. provide children with information about remedies, access to legal aid, class actions, special assistance for some children.

Children are entitled to **timely** reparation for harm suffered in keeping with their evolving capacities and to medical, legal and rehabilitative support by State.

Non-judicial mechanisms can play a role if they are in conformity with the Convention and with international principles.

International assistance and cooperation is called for where and when necessary and there is a reasonable link between country and conduct (in the case of extraterritorial abuses).

The Informal Economy

Children's rights are particularly at risk from the negative impact of business activities that take place outside of the ordinary legal and institutional frameworks that regulate and protect rights - the so-called 'informal economy' e.g. children involved in informal work, parents and caregivers facing economic exploitation, products developed by or in the informal economy may be adulterated or unsafe.

States have the obligation to ensure that all business activities take place within appropriate frameworks where child rights are recognised and protected. To illustrate this, a quote follows from a young person from Argentina interviewed during a children's consultation on the draft General Comment on Child Rights and the Business Sector:

"Economic exploitation... creates lack of unity in the family, because of the few hours our parents are at home and besides because of the little money from the salary. It also can generate lack of education and opportunities in the child's life that has to work and cannot go to school."

These conditions may be exacerbated in situations of conflict, emergencies or weakened State presence.

Global Operations

Foreign investment can be a positive force for children's rights but the Committee has concerns about the accountability by multinational business for infringements that can occur both in home and host countries. It is its interpretation that obligations under the Convention are not limited to territorial boundaries (CRC and OPSC); and that furthermore States parties have obligations of international cooperation.

Legal and institutional framework for both home and host States to ensure that multinational companies comply with children's rights can include:

- ensuring coordination between arms of government with responsibility for implementation of the CRC and those responsible for trade and investment abroad,
- build capacity so that development assistance agencies and diplomatic overseas missions can integrate business issues into bilateral human rights dialogues, including child rights, with foreign governments,
- provide businesses with guidance on their responsibilities to child rights in different countries, and
- enable access to judicial and effective non-judicial mechanisms for children and their families whose rights have been abused by business enterprises extra-territorially.

For home States, an example:

Denmark, (CRC/C/DNK/4 (4 February 2011))

30. The Committee recommends that the State party provide a framework for reporting on child rights by Danish corporations, including multinational corporations headquartered in Denmark, and for the National Contact Point to address cases of non-compliance, including extraterritorially, by Danish multinational enterprises...

For host States, an example:

Cuba, CRC/C/CUB/CO/2 (3 August 2011))

21. The Committee recommends that the State party continue to be vigilant about the compliance of its national law by local and foreign corporations throughout its territory. The Committee further encourages the State party to give due consideration to experiences from around the world in the application of, inter alia, the United Nations Framework for Business and Human Rights to the operations of private and public corporations, particularly in respect of

child rights. The Committee urges the State party to ensure that children are protected from any form of economic and sexual exploitation, particularly within the tourism industry, and that those responsible for engaging children in such activities are appropriately prosecuted.

CHALLENGES AHEAD

Application of the CRC and its OPs in general is a challenge. When it comes to business and human rights, the GC will require a huge effort of dissemination, discussion among parties and application to specific contexts. The GC calls for a review or enactment of:

- Specific legislation and regulations
- Dissemination and training
- Monitoring and reporting in the public view i.e. in a transparent way.

To actually apply and continuously build to clarify obligations by States as well as business is another challenge and it needs to bring application of the CRC to a higher level.

Finally, access to remedy as an obligation will not be meaningful if it is not accessible.

The Process

The Committee will approve the GC in January 2013 and follow-up implementation thereof, keeping closely associated with the broad community of entities and individuals around the world that have collaborated in its drafting.

The Committee hopes that other Treaty Bodies will follow from the CESC Declaration and CRC General Comment on Business to define States obligations with regard to the business sector.

DÉBAT : LES OBLIGATIONS DES ETATS VIS-À-VIS DU SECTEUR PRIVÉ

VALÉRIE BERSET BIRCHER

Suppléante du chef des Affaires internationales du travail, Secrétariat d'Etat à l'Economie (SECO), Département fédéral de l'économie, Berne

Résumé

L'objectif majeur de l'auteure vise à présenter les moyens utilisés par le Secrétariat d'Etat à l'économie (SECO) afin d'améliorer la protection des droits de l'enfant dans les relations avec le secteur privé; et plus particulièrement à l'étranger. Le SECO a créé pour cela trois initiatives/programmes : 1) BETTER WORK : première résolution qui vise le secteur du textile, mise en œuvre par l'OIT¹ et la SFI² afin d'améliorer les normes du travail et la compétitivité dans les chaînes mondiales de production. 2) SCORE : deuxième initiative qui vise les PME sous-traitantes, mise en place par l'OIT qui cible l'amélioration des conditions de travail et des conditions environnementales (avec l'ONUDI³) dans les petites et moyennes entreprises. 3) Le troisième programme cible la protection des enfants contre l'exploitation sexuelle, mis en œuvre par la Fondation Suisse pour la Protection de l'Enfant en coopération avec le SECO, l'Office fédéral de la police (fedpol) et d'importants acteurs du secteur touristique ainsi que la Fédération Suisse des Agences de Voyages en lançant la campagne « Ne pas détourner le regard – www.stopchildsextourism.ch ».

Zusammenfassung

Das Hauptziel der Autorin ist, die vom Staatssekretariat für Wirtschaft (SECO) verwendeten Mittel vorzustellen, um den Schutz der Kinderrechte in Verbindung mit der Privatwirtschaft zu verbessern, insbesondere im Ausland. Das SECO hat dazu drei Initiativen/Programme entwickelt: 1) BETTER WORK: Die erste Resolution bezieht sich auf den Textilsektor, umgesetzt durch das IAO⁴ und die IFC⁵, um die Arbeitsbedingungen und die Wettbewerbsfähigkeit der internationalen Versorgungsketten zu verbessern. 2) SCORE : Die zweite Initiative betrifft die KMU und die Zulieferer, umgesetzt durch die IAO mit dem Ziel, die Arbeitsbedingungen und die Umweltbedingungen (gemeinsam mit der ONUDI⁶) in den kleinen und mittleren Unternehmen zu verbessern. 3) Das dritte Programm zielt auf den Schutz der Kinder vor

¹ Organisation internationale du travail

² Société financière internationale

³ Organisation des Nations Unies pour le développement industriel

⁴ Internationale Arbeitsorganisation

⁵ Internationale Finanz-Corporation

⁶ Organisation der Vereinten Nationen für industrielle Entwicklung

sexueller Ausbeutung ab, umgesetzt durch die Stiftung Kinderschutz Schweiz in Zusammenarbeit mit dem SECO, dem Bundesamt für Polizei (fedpol) und wichtigen Akteuren aus dem Tourismussektor sowie dem Schweizerischen Reisebüro-Verband mit der Kampagne „Nicht wegsehen – www.stopchildsextourism.ch“.

Resumen

El objetivo principal de la autora es el de presentar los medios utilizados por el Secretariado de Estado de la economía (SECO) con el fin de mejorar la protección de los derechos del niño en las relaciones con el sector privado y más concretamente al extranjero. El SECO creó para ello tres iniciativas/programas : 1) BETTER WORK : primera resolución que concierne el sector textil, implementada por la OIT⁷ y la SFI⁸, con el fin de mejorar las normas del trabajo y la competitividad en las cadenas mundiales de producción. 2) SCORE : segunda iniciativa que concierne las PME subcontratantes, implementada por la OIT cuyo objetivo es la mejora de las condiciones de trabajo y las condiciones medioambientales (con el ONUDI⁹), en las pequeñas y medianas empresas. 3) El tercer programa contempla la protección de los niños contra la explotación sexual, implementado por la Fundación Suiza para la protección del Niño en cooperación con el SECO, la Oficina federal de policía (FEDPOL) e importantes protagonistas del sector turístico, así como la Federación Suiza de Agencias de Viajes lanzando la campaña « No desviar la mirada – www.stopchildsextourism.ch ».

Summary

The author's main objective is to present the means used by the State Secretariat for Economic Affairs, (SECO), in order to heighten the protection of children's rights in relations with the private sector; and more particularly within the private sector. In order to do this, the SECO created three initiatives/programmes: 1) BETTER WORK: first resolution which targets the textile sector, implementation carried out by the ILO¹⁰ and IFC¹¹, in order to ameliorate norms pertaining to work and competitiveness in world-wide production chains. 2) SCORE: second initiative which targets subcontracting small to medium-sized businesses, established by the ILO and which aims to better the working conditions and the environmental conditions (with the UNIDO¹²) in small and middle sized businesses. 3) The third program aims towards protection of children against sexual exploitation, implemented by the Swiss Foundation for the Protection of the Child in cooperation with the SECO, the federal Office of police (fedpol) and important actors of the tourism sector, as well as the Swiss Federation of Travel Agencies by the launching of the campaign entitled “Do not turn a blind eye – www.stopchildsextourism.ch”

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⁷ Organización internacional del trabajo

⁸ Sociedad Financiera Internacional

⁹ Organización de las Naciones Unidas para el desarrollo industrial

¹⁰ International Labor Organisation

¹¹ International Finance Corporation

¹² United Nations Industrial Development Organization

Ce colloque me rappelle une citation du philosophe italien Norberto Bobbio :

« Le problème de fond relatif aux droits de l'homme, n'est aujourd'hui pas de les justifier, mais de les protéger, il n'est pas un problème théorique mais pratique. »¹³

L'objectif de mon intervention vise à présenter les moyens utilisés par le Secrétariat d'Etat à l'économie (SECO) afin d'améliorer la protection des droits de l'enfant dans les relations avec le secteur privé; et plus particulièrement à l'étranger.

Permettez-moi tout d'abord de poser le cadre de cette intervention.

Je ne m'attarderai pas sur la mise en œuvre à proprement parler de la Convention de l'ONU relative aux droits de l'enfant, ratifiée par la Suisse en 1997, qui est principalement assurée par le Département fédéral de l'intérieur. Je ne m'attarderai pas non plus sur les Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme qui ont déjà fait l'objet d'interventions. Je souligne simplement que, pour le Conseil fédéral, ces principes ne comportent aucune nouvelle obligation juridique, mais des recommandations pour aider les Etats et les entreprises à appliquer les obligations en vigueur et à assumer leurs responsabilités en matière de droits de l'homme. Ces obligations découlent notamment des conventions des Nations Unies, qui ont été ratifiées et qui sont appliquées par la Suisse.

La Confédération a lancé un dialogue multipartite, afin de réfléchir à l'application de ces principes avec des acteurs externes à l'administration (notamment des entreprises, des scientifiques et des représentants de la société civile). Ce dialogue a commencé le 16 mai 2012.

Au-delà du dialogue et des textes législatifs, ce que je souhaite vous présenter aujourd'hui, ce sont des moyens ou des solutions qui sont mis en œuvre avec le secteur privé pour améliorer les droits de l'enfant.

Je vais donc vous présenter brièvement **trois initiatives** ou programmes dans lesquels le SECO contribue à améliorer les droits de l'enfant à l'étranger, en collaborant étroitement avec le secteur privé.

La première initiative vise le **secteur du textile**. Il s'agit d'un programme appelé BETTER WORK¹⁴ mis en œuvre par l'OIT¹⁵ et la SFI¹⁶ dont un des principaux donateurs est la Suisse. Ce partenariat associe la spécialisation de l'OIT en matière de normes du travail et celle de la SFI dans le développement du secteur privé. Better Work rassemble les entreprises locales, les donneurs d'ordre ou acheteurs (grandes marques du textile), les gouvernements et les organisations d'employeurs et de travailleurs pour améliorer les normes du travail et la compétitivité dans les chaînes mondiales de production. L'amélioration de la conformité aux

¹³ Bobbio Norberto, *Sur le fondement des droits de l'homme*, in: Institut international de philosophie (éd.), *Le fondement des droits de l'homme: Actes des entretiens de l'Aquila (14-19 septembre 1964)*, Florence 1966.

¹⁴ voir www.betterwork.org

¹⁵ Organisation internationale du travail

¹⁶ Société financière internationale

normes de travail dans les chaînes d'approvisionnement internationales est une composante importante d'une stratégie de développement. La protection des droits des travailleurs aide à distribuer les bénéfices du commerce pour encourager le développement humain, social et économique. La conformité aux normes du travail peut également aider les entreprises à devenir plus compétitives grâce à différents facteurs comme l'accès à de nouveaux marchés et à de nouveaux acheteurs, ainsi que l'accès à des nouvelles sources de financement et de crédit; elle peut aussi engendrer des gains de productivité et une amélioration de la qualité. Better Work soutient les entreprises dans la mise en œuvre des normes fondamentales du travail de l'OIT et du droit national du travail. Parmi les normes internationales du travail qui nous intéressent pour ce séminaire, BW vise à faire respecter l'interdiction du travail des enfants ainsi que les pires formes de travail des enfants¹⁷. De plus, le programme a montré qu'en améliorant les conditions de travail des ouvrières des usines de textile, les éléments suivants sont améliorés : la santé et le niveau d'éducation de leurs enfants. En général, le niveau de santé et d'éducation des enfants élevés par deux parents qui travaillent est très souvent dépendant des circonstances économiques de la famille élargie ou de la communauté. C'est pour cette raison que les envois de fonds («remittances») des travailleurs jouent un rôle non négligeable pour les enfants. Au Vietnam par exemple, les femmes utilisent leur salaire pour soutenir leur famille vivant en campagne et elles envoient 25,4% de plus d'argent que les hommes. L'amélioration des conditions de travail des femmes dans le textile a donc un impact direct sur la vie de la communauté et de leurs enfants.¹⁸

La deuxième initiative **visé les PME sous-traitantes** avec le programme SCORE¹⁹. En effet, dans la chaîne de production, il ne s'agit pas toujours du premier fournisseur de la chaîne qu'il faut suivre mais souvent des sous-traitants. Ainsi, le SECO soutient un programme mis en œuvre par l'OIT qui vise l'amélioration des conditions de travail et des conditions environnementales (avec l'ONUDI²⁰) dans les petites et moyennes entreprises (PME) de différents secteurs (automobile, textile, manufacture, électronique, services etc.). Pour les droits de l'enfant, ce programme vise comme le précédent à éliminer toute forme de travail des enfants mais améliore également l'environnement autour de l'entreprise en diminuant la pollution produite par la PME. Il s'agit d'effets indirects qui ont un impact sur les enfants de la communauté. Dans ce programme également, le secteur privé est pleinement impliqué (la PME participe financièrement, les acheteurs de cette PME participent financièrement). Plusieurs grands groupes suisses sont actuellement en phase pilote de partenariat public privé avec l'OIT pour mettre en place ce programme auprès de leurs sous-traitants à l'étranger.

¹⁷ Convention n° 138 concernant l'âge minimum d'admission à l'emploi, 1973 : FF 1999 I 475 / RS 0.822.723.8; Convention n° 182 sur les pires formes de travail des enfants, 1999 : FF 2000 I 292 / RS 0.822.728.2

¹⁸ Ces données ressortent du chapitre 4.3 de l'impact assessment du programme Better Work au Vietnam.

¹⁹ <http://www.ilo.org/empent/Projects/score/lang--en/index.htm>

²⁰ Organisation des Nations Unies pour le développement industriel

La troisième initiative vise la **protection des enfants contre l'exploitation sexuelle**. En novembre 2010, la Fondation Suisse pour la Protection de l'Enfant a lancé la campagne « Ne pas détourner le regard – www.stopchildsextourism.ch », en coopération avec le SECO, l'Office fédéral de la police (fedpol) et d'importants acteurs du secteur touristique ainsi que la Fédération Suisse des Agences de Voyages. Cette campagne vise à lutter contre l'exploitation sexuelle des enfants dans les milieux touristiques. Le SECO est le centre de compétence de la Confédération pour toutes les questions de politique économique. Il s'engage aussi pour le tourisme durable et, dans ce cadre, il a apporté son soutien à la mise en œuvre d'un code de conduite pour l'industrie touristique. Ce « Code de Protection de l'enfance » ainsi que la campagne visant à protéger les enfants et les adolescents de l'exploitation sexuelle dans les milieux touristiques vous seront présentés dans une prochaine session; je n'entre ainsi pas plus dans les détails. Toutefois, je tiens à préciser qu'au moyen de ce code de conduite, les acteurs privés s'engagent à prendre des mesures pour protéger les enfants du tourisme sexuel. Cette initiative et ce code de conduite ne pourraient pas être mis en œuvre par les Etats seuls. L'implication et l'engagement du secteur privé, dès le départ, sont des éléments indispensables à une protection concrète.

Enfin, par ces trois exemples, j'espère avoir pu contribuer au débat. Plus encore à la recherche de solutions innovantes ! En effet, le SECO est convaincu que pour avoir les meilleurs effets, le secteur privé doit être associé. Il doit être un véritable partenaire. Ces trois initiatives ne seront un succès à long terme que grâce au soutien et à l'implication des entreprises. Et chaque secteur économique a ses préoccupations propres.

Avant de conclure, permettez-moi encore de dire que nous cherchons des solutions pragmatiques et convaincantes afin de pouvoir améliorer les droits des enfants. Cela passe par le soutien à des initiatives sectorielles, à des partenariats publics-privés et par d'autres mesures comme des campagnes de sensibilisation.

Je vous remercie de votre attention.

VIRGÍNIA BRÁS GOMES

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Résumé

Les Etats Parties doivent protéger les détenteurs de droits, en particuliers les plus vulnérables, de la violation de leurs droits par les acteurs commerciaux, en établissant des mesures de contrôle, de supervision et des mécanismes de responsabilités appropriées. Les politiques de développement social ont été considérées, de manière erronée, comme étant à l'opposé de la croissance économique et de compétitivité internationale. Lorsqu'un Etat se retire des prestations de service, l'auteur met le doigt sur deux problématiques importantes; les obligations Vs. les responsabilités du secteur privé ainsi qu'une compréhension plus large de l'identification des acteurs non étatiques lorsque l'on parle de droits de l'enfant. Les Directives Maastricht requièrent des Etats d'établir un cadre normatif et de réglementer, en gardant à l'esprit ses obligations de garantir la réalisation des droits économiques, sociaux et culturels sans discrimination.

Zusammenfassung

Die Vertragsstaaten müssen die Rechtssubjekte, insbesondere die Schwächsten, vor der Verletzung ihrer Rechte durch die Handelsakteure schützen, indem sie Kontroll- und Aufsichtsmaßnahmen sowie eine angemessene Rechenschaftspflicht einrichten. Die Massnahmen für Sozialentwicklung wurden fälschlicherweise als Widerspruch zu wirtschaftlichem Wachstum und internationaler Wettbewerbsfähigkeit betrachtet. Die Autorin hebt zwei wichtige Probleme hervor, wenn sich ein Staat von den Dienstleistungen zurückzieht: die Verpflichtungen gegenüber den Verantwortlichkeiten des Privatsektors sowie ein weitergehendes Verständnis der Selbstwahrnehmung der nichtstaatlichen Akteuren, wenn es um Kinderrechte geht. Die Maastricht-Richtlinien verlangen von den Staaten, einen rechtlichen Rahmen zu schaffen, während sie gleichzeitig ihre Verpflichtungen bezüglich Umsetzung der wirtschaftlichen, sozialen und kulturellen Rechte ohne Diskriminierung berücksichtigen.

Resumen

Los Estados Partes deben proteger los titulares de derechos, en particular los más vulnerables, de la violación de sus derechos por los actores comerciales, estableciendo medidas de control, de supervisión y de mecanismos de responsabilidad apropiados. Las políticas de desarrollo social fueron consideradas de manera errónea como contrarias al crecimiento económico y de la competitividad internacional. Cuando un Estado se retira de las prestaciones de servicio, la autora señala dos problemáticas importantes : las obligaciones versus las responsabilidades del sector privado así como una comprensión más amplia de la identificación de los actores no estatales cuando se habla de derechos del niño. Las directivas Maastricht

solicitan de los Estados establecer un cuadro normativo y de reglamentar, teniendo en cuenta sus obligaciones, la garantía de la realización de los derechos económicos, sociales y culturales sin discriminación.

Summary

States Parties must protect rights holders, in particular the most vulnerable, from violation of their rights by corporate actors, by establishing appropriate monitoring, supervision and accountability mechanisms. Social development policies have been mistakenly considered as being contrary to economic growth and international competitiveness. In the context of the State withdrawing from service provision, the author points two important issues, namely obligations vs responsibilities of the private sector, and a broader understanding of who the non-State actors are in relation to child rights. The Maastricht Guidelines requires States to set the enabling normative framework and to regulate, bearing in mind its obligation to guarantee fulfillment of economic, social and cultural rights without discrimination.

* * *

Many thanks to the International Institute for the Rights of the Child and to the other organizers of this Seminar for the opportunity to be here and to contribute to this discussion.

What could I bring to you today that you as child rights specialists and defenders do not already know? Probably, nothing much! But what I can try to do is to bring in the perspective of how the International Covenant on Economic, Social and Cultural Rights can help to make the discussion broader, on one hand, and to identify common entry points for the identification of obligations of States and the role (obligations or responsibilities) of the business sector, on the other.

Let me highlight a couple of issues.

Where are children a target group for the Covenant?

Generally speaking, in the implementation of the substantive rights to social security, protection for members of the family, adequate standard of living, health, education and the right to take part in cultural life.

In particular, children are a specific target group in Article 10.3 that calls for “special protection and measures of assistance to be taken on behalf of all children and young people without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law”.

So, this article establishes positive obligations by way of special protection for all children, reinforcing the non-discrimination principle in Article 2.2. of the Covenant (in relation to children from traditionally discriminated groups), because age, as an express ground for discrimination only appeared later, more precisely in 1990, in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and indicates potential violations that should be punishable by law. These are the three trends that I would like to retain in the discussion of State obligations vis-à-vis the business sector.

Let me now locate this article within the Maastricht Guidelines on the obligations of States.

- Respect (refrain from direct or indirect interference)
- Protect (prevent third parties from interfering)
- Fulfil (core obligations and progressive realization)
 - a) Provide (for those unable to do so)
 - b) Facilitate (positive measures)
 - c) Promote (education and information campaigns for public awareness)

The present backdrop for the implementation of economic, social and cultural rights offers food for thought. The crumbling of the Welfare State and the uneven sharing of costs and distribution of benefits of globalization have had a negative effect on various other trends, such as the demographic unbalance; economic setbacks, unemployment and underemployment; financial, food and climate crises; land grabbing and mega development projects with

displacement and forced evictions.

So, on one hand, individuals, families and social groups have new needs, social inequalities grow in urban, suburban and rural deprived neighbourhoods, and new risk groups are faced with social exclusion. They have little access to resources and their needs cut across sectors. On the other, the Welfare State has come under severe pressure and financial constraints leading to its philosophy being challenged and its scope, personal and material coverage and protection measures being progressively reduced.

Efforts to rethink and reorganise the role of the Government are far from being successful and States are still grappling with the need to balance long-term financial sustainability concerns with the fulfilment of their overall function of ensuring an acceptable level of protection to all their citizens, especially to the most vulnerable.

In this context, State obligations vis-à-vis the business sector assume particular relevance

Going back to the Maastricht Guidelines, respecting rights requires States to set the enabling normative framework and to regulate, bearing in mind its obligation to guarantee fulfilment of economic, social and cultural rights without discrimination. This means that laws, policies and regulations must ensure that non-Government actors, whether State-owned companies or private companies, act in conformity.

Unfortunately, social development policies have been mistakenly considered as being contrary to economic growth and international competitiveness and the establishment of social safety nets absolutely necessary to cushion the unwanted or unexpected effects of globalization on poor persons, families and communities, has not been considered a national and international political priority and therefore not made an essential part of this normative framework.

The protect dimension is probably the most relevant because it is the most difficult to carry out bearing in mind

“that the human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. The advent of economic globalization in particular, has meant that States and other global actors exert considerable influence on the realization of economic, social and cultural rights across the world”¹.

States Parties must effectively protect rights holders, in particular the most vulnerable, from violation of their rights by corporate actors, by establishing appropriate monitoring, supervision and accountability mechanisms. We all know that in these days of weakening of the decision making power of nation states, either due to the failure of governments or an overall unfavorable economic and development environment, and of the myriad options open to transnational corporations to carry out their activities at national and extra territorial levels,

¹ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights adopted in September 2011

and to settle disputes, the co-relation of power is very unbalanced. However, under the general obligation to protect, all States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially.²

For example, with respect to children, in addition to positive obligations to implement public policies, States also need to monitor and supervise so as to duly sanction situations of child labour whether explicit and on national territory or as a result of business practices of transnational corporations or business enterprises in other countries or of free trade agreements and special economic zones where supervision is often weak or totally absent.

The core obligation of States, of ensuring access to victims of violations to remedies of a judicial and non-judicial nature, is of particular importance. We know how difficult that can sometimes be because of the different forms of constitution, organization, power and accountability sharing of TNC's and private companies but that is one area where States need to strengthen their intervention capacity.

In order to fulfill rights, States need the contribution and pro-active support of private actors. I think here we should consider two issues.

The first one is of a general nature – obligations vs responsibilities of the private sector (is it just a terminological difference or is it the reflection of the lack of clarity on what exactly is expected from the private sector as a contribution to the fulfill dimension)?

The second point is a broader understanding of who the non-State actors are in relation to child rights, specially as a result of privatisation and decentralization. Is it only the commercial for-profit sector? Or is it also the non-profit sector?

In some of our countries, the State is delegating provision of services for all age groups, including children, to the non-profit sector.

In fact, increasingly, the State is withdrawing from service provision and passing on the responsibility to private non-profit providers for services for children, whether childcare services broadly speaking, as a space for the harmonious development of a child and a tool for the reconciliation of professional and family life for men and women, but still much more for women, or services for children deprived of a nurturing family environment or with risk behaviours.

This delegation of responsibilities is often part of an agreement in which the State provides financial, technical and training support, and the service providers agree to comply with minimum standards and guarantee availability of a number of places for children from disadvantaged backgrounds and, in the case of placement services, for children and young people identified by Government services as being in need of immediate care. Though with non-profit objectives, such services definitely come under the supervision of the State, particularly when considering the fulfil obligation and need to be subjected to on-going supervision so as to

² ibidem

assess any breach of conformity with the obligation to ensure the enjoyment of rights.

We have come a long way since the understanding of corporate social responsibility as voluntary and business-driven. In more recent times, a more socially oriented concept of corporate social responsibility has been invoked by Governments and the private sector in relations to children's rights. Buzz words like partnership, networking, community involvement, responsible business conduct, social reporting, social audits, social accountability, business ethics and accountability, and social undertaking have been used and, at times, misused, to set boundaries and promote so-called "innovatory" approaches.

It is a commendable effort, but far from enough. We need to move on and take bolder steps in moving the argument to a human rights framework. The Statement of the Committee on Economic, Social and Cultural Rights, on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, adopted in July 2011, from which I have drawn for this presentation, is a clarification in the right direction.

Bottom line, States have the obligation to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of business activities carried out by state-owned or private enterprises. On their side, companies must demonstrate due diligence in not impeding or negatively affecting the enjoyment of the Covenant rights. It is not enough not to be charged with human rights violations; the call is for them to contribute towards the fulfilment of these rights.

I am sure the General Comment on which the Committee of the Rights of the Child has embarked will be a major step forward and we are all looking forward to it. Being the first to deal specifically with the issue of child rights and the business sector, it will certainly set the tone.

CHANTAL PEYER

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Résumé

« Le premier devoir du gouvernement est de protéger les faibles contre les puissants. » Un aperçu des travaux de John Ruggie, Représentant spécial du Secrétaire général de l'ONU pour la question des droits de l'homme et des sociétés transnationales et autres entreprises, fait état des obligations des Etats comme la trilogie de « protéger, respecter, réparer ». L'auteure nous présente également quatre exemples de gouvernements qui visent à mieux protéger les droits humains, y compris les droits des enfants, contre les abus commis par les entreprises : le California Act, le Dood-Franck Act, les devoirs des membres du conseil d'administration et les politiques d'achats publics. Ces exemples sont caractéristiques de l'évolution en cours et montrent que dans un monde où l'économie s'est globalisée, il faut également globaliser le droit. Le rôle de l'Etat, à cet égard, est primordial.

Zusammenfassung

Die oberste Pflicht einer Regierung ist es, die Schwachen vor den Mächtigen zu schützen. Eine Übersicht über die Arbeiten von John Ruggie, UN-Sonderbeauftragter für Menschenrechte und multinationale Unternehmen und andere Wirtschaftsunternehmen, fasst die Verpflichtungen der Staaten als Trilogie aus „schützen, respektieren, wiedergutmachen“ zusammen. Die Autorin stellt uns ausserdem vier Beispiele von Regierungen vor, die das Ziel verfolgen, die Menschenrechte, einschliesslich der Kinderrechte, besser gegen Missbrauch durch Firmen zu schützen: California Act, Dood-Franck Act, die Pflichten der Mitglieder des Verwaltungsrats und die öffentliche Auftragsvergabe. Diese Beispiele sind typisch für die derzeitige Entwicklung und zeigen, dass in einer Welt mit einer globalisierten Wirtschaft auch das Recht globalisiert werden muss. Die Rolle des Staates ist in dieser Hinsicht entscheidend.

Resumen

« El primer deber del gobierno es el de proteger los débiles contra los potentes ». Un esquema de los trabajos de John Ruggie, representante especial de la Secretaría General de la ONU en cuestión de Derechos Humanos y de las sociedades transnacionales y otras empresas, describe las obligaciones de los Estados con la trilogía de « proteger, respetar, remediar ». La autora nos presenta igualmente cuatro ejemplos de gobiernos encaminados a proteger mejor los derechos humanos, incluyendo los derechos de los niños, contra los abusos cometidos por las empresas : el California Act, el Dood-Franck Act, los deberes de los miembros del consejo de administración y las políticas de compras públicas. Estos ejemplos son característicos de la evolución en curso e indican que en un mundo en donde la economía se globalizó, es necesario globalizar también el derecho. El papel del estado, a este respecto, es primordial.

Summary

« The first duty of the government is to protect the weak against the powerful. » An overview of the work by John Ruggie, the Special Representative of the Secretary General of the UN on the question of human rights and transnational and other businesses, refers to the obligations of the States as a trilogy of « protect, respect, repair ». The author also presents four examples of governments which aim to better protect human rights, including children's rights, against abuses committed by businesses: The California Act, the Dood-Franck Act, the duties of the members of the management board and public procurement policies. These examples are characteristic of the evolutions which are under way, and indicate that in a world where the economy is globalized, it is also necessary to globalize the law. The role of the State, in this regard, is paramount.

* * *

Richard Howitt, le rapporteur de l'Union européenne pour la responsabilité sociale des entreprises aime à rappeler que dans le code d'Hammurabi, le plus ancien exemple de loi connu des historiens, il est écrit que

« le premier devoir du gouvernement est de protéger les faibles – ‘the powerless’ - contre les puissants. »

Cette maxime s'applique bien au domaine des enfants. En effet, ceux-ci ont peu de pouvoir, mais ils ont des droits. Et il est du devoir des Etats de protéger ces droits contre les abus que peuvent commettre des tiers.

LES TRAVAUX DE JOHN RUGGIE ET LES DROITS DES ENFANTS

Ce devoir de protection est au cœur des travaux qui ont été menés de 2005 à 2011 par John Ruggie, représentant spécial du secrétaire général des Nations Unies pour la question des droits de l'homme et des sociétés transnationales et autres entreprises. Le cadre de référence que Ruggie a élaboré - intitulé « protéger, respecter, réparer » - et qui a été adopté à l'unanimité par le Conseil des droits de l'homme en juin 2011 officialise un changement de paradigme. A trois égards. *Premièrement*, Ruggie attribue un rôle central aux Etats dans la prévention des violations des droits humains, y compris les droits des enfants, par les entreprises. Jusque-là, la responsabilité sociale des entreprises était vue comme relevant de l'initiative volontaire du secteur privé. Ruggie souligne que dans un monde globalisé, le respect des droits humains doit également se globaliser. Et que l'Etat a donc un rôle pro-actif à jouer. *Deuxièmement*, John Ruggie souligne que toutes les entreprises sont tenues de respecter les droits humains, partout dans le monde, non seulement dans le cadre de leurs propres activités, mais également dans le cadre de leurs relations commerciales. Au cours des quinze dernières années certaines entreprises ont accordé une place importante à la responsabilité sociale. D'autres ont ignoré le sujet. Le cadre des Nations-unies affirme que la responsabilité sociale n'est plus une option, mais une nécessité, pour tous les acteurs économiques. *Troisièmement*, John Ruggie rappelle que les droits humains ne se limitent pas aux droits du travail et aux conventions de l'Organisation internationale du travail (OIT), mais couvrent l'ensemble des droits humains énoncés dans la Charte internationale des droits de l'homme¹.

¹ La Charte internationale des droits de l'homme se compose de la Déclaration universelle des droits de l'homme et des principaux instruments par lesquels elle a été codifiée : le Pacte international relatif aux droits civils et politiques et le Pacte international relatif aux droits économiques, sociaux et culturels, auxquels s'ajoutent les principes concernant les droits fondamentaux dans les huit conventions maîtresses de l'OIT, tels qu'énoncés dans la Déclaration relative aux principes et droits fondamentaux au travail.

L'ETAT DOIT AGIR

Pour que l'Etat mette en œuvre son devoir de protection des droits humains et des droits des enfants, John Ruggie préconise un

« assortiment judicieux (smart mix) de mesures contraignantes et volontaires² ».

Au niveau des mesures contraignantes, il réaffirme que les Etats doivent

« appliquer des lois tendant à exiger des entreprises qu'elles respectent les droits de l'homme, ou qui ont cet effet, et, périodiquement, d'évaluer la validité de ces lois et de combler les éventuelles lacunes » (Principe directeur 3 a).

Il parle également de l'Etat comme acteur économique qui consomme des biens (achats publics) ou co-finance les activités d'entreprises privées (garantie contre les risques à l'exportation ou crédit d'investissements) : dans ces domaines, les gouvernements devraient tenir compte des politiques de droits humains des entreprises avant de délier leur bourse. Au niveau des mesures de soutien ou d'incitation aux entreprises, enfin, Ruggie souligne que les gouvernements doivent

« fournir des orientations effectives aux entreprises sur la manière de respecter les droits de l'homme dans toutes leurs activités » (Principe directeur 3c)

L'UNION EUROPÉENNE ET LES PRINCIPES RUGGIE

L'Union européenne a rapidement intégré les travaux de John Ruggie dans ses visions politiques. En octobre 2011 déjà, dans sa communication sur la Responsabilité sociale des entreprises (RSE)³ elle renonce à la notion de « base volontaire » qui était en vigueur jusque-là et reprend la terminologie de Ruggie sur la « responsabilité » des entreprises de respecter les droits humains. La communication de l'Union européenne redéfinit également les rôles et responsabilités complémentaires des Etats et des entreprises, en affirmant que si

« la RSE doit se développer sous l'impulsion des entreprises »,

² Principe directeur 3.

³ Commission Européenne, Responsabilité sociale des entreprises : une nouvelle stratégie de l'UE pour la période 2011-2014, 25.10.2011 ; http://ec.europa.eu/enterprise/newsroom/caf/_getdocument.cfm?doc_id=7010

les autorités publiques ont un rôle à jouer pour encourager, responsabiliser, voire réguler les entreprises. Cela en

« combinant intelligemment des mesures politiques facultatives et, le cas échéant, des dispositions réglementaires complémentaires. »

VERS DE NOUVELLES CONDITIONS-CADRES: QUELQUES EXEMPLES

Ces changements de paradigme appuient un renforcement du politique et encouragent le débat pour trouver de nouvelles solutions dans ce domaine. D'ailleurs, depuis trois ans différentes lois indiquent que les gouvernements nationaux explorent de nouvelles pistes pour mieux protéger les droits humains, y inclus les droits de enfants, contre des abus commis par des entreprises. Quatre exemples sont particulièrement intéressants à cet égard : le California Act, le Dood-Franck Act, les devoirs des membres du conseil d'administration et les politiques d'achats publics.

a) Le California Transparency in supply chain Act

L'objectif de cette loi qui a été adoptée par l'Etat de Californie en 2010 est de lutter contre le trafic d'êtres humains et l'esclavage. Cet objectif est poursuivi non par le biais de l'interdiction, mais par le biais de la transparence. Ainsi depuis le 1er janvier 2012, toutes les entreprises en Californie dont le chiffre d'affaire annuel dépasse 100 millions de dollars sont obligées de publier sur une page internet quelles sont les activités qu'elles mènent pour éradiquer le trafic d'être humains et l'esclavage dans leur chaîne d'approvisionnement. La directive donne des détails précis sur le type d'informations qu'une société doit publier, à savoir⁴ si l'entreprise engage des experts externes pour évaluer les risques de trafic d'être humains et d'esclavage dans ses relations commerciales; si des audits indépendants et non annoncés sont effectués dans les usines des fournisseurs; si des mesures sont prises lorsque des employés ou fournisseurs ne font pas respecter ces standards ou encore si des formations internes sont organisées sur ces thèmes.

⁴ Voir par exemple: "The 2010 California Transparency in supply chain Act. A Basic Guide for FLA Affiliates".

b) Le Dodd Frank Act

Un autre exemple récent aux Etats-Unis est l'article 1502 du Dodd Frank Act. Cette loi repose sur une logique similaire au California Transparency Act: il s'agit d'une loi contraignante qui tente de concilier la liberté commerciale - l'interdiction d'interdire - et l'exigence des consommateurs pour des produits plus éthiques. La loi vise à diminuer l'importation aux Etats-Unis de « minerais de la guerre », c'est-à-dire de minerais issus de zones de conflits comme le Kivu, en République Démocratique du Congo. Le problème de ces minerais et de leur impact désastreux sur les conditions de vie des enfants – enfants soldats, viols, déplacements de population, orphelins par milliers, etc. - a été largement documenté depuis une dizaine d'année. De même qu'a été documentée la complicité de nombreuses entreprises occidentales dans ce commerce tâché de sang. Pour répondre à ce problème, le Dodd Frank Act exige que toutes les entreprises qui importent aux Etats-Unis deviennent plus transparentes quant à leur achat de tantale, d'or, de tin et de tungstène. La loi exige que les entreprises indiquent de quels pays viennent les minéraux qui sont utilisés pour fabriquer leurs produits. Si des minerais viennent de pays à risques, alors le Dodd Frank Act exige qu'un processus de diligence soit mené, afin de savoir si les minerais utilisés financent la guerre. Les entreprises devront publier sur un site internet les résultats de cette enquête. Et elles devront faire auditer leurs rapports de diligence de façon externe. Enfin, si une entreprise déclare qu'elle n'utilise pas de minerais issus des régions de conflits, elle doit détailler par quel processus et enquête elle est parvenue à cette conclusion.

c) Les devoirs des membres des conseils d'administration

En Grande-Bretagne, un devoir de diligence des membres du Conseil d'administration en matière environnementale et sociale a été introduit en 2006 déjà, dans le cadre de la révision du « Company Act ». De facto le texte stipule que lorsqu'il veille au succès de l'entreprise, le conseil d'administration doit prendre en compte l'impact des activités de l'entreprise sur les communautés et l'environnement. En novembre 2012, ce texte a été amendé par une référence aux droits humains. Cela signifie que si le conseil d'administration ne veille pas à ce que l'entreprise ait une politique crédible en matière de droits humains, de communautés ou d'environnement, alors il peut être accusé par ses actionnaires de ne pas veiller au succès de l'entreprise. Cet exemple révèle une évolution importante: la violation des droits humains, y compris les droits de l'enfant, est désormais considérée comme pouvant aller à l'encontre des intérêts économiques de l'entreprise. Le constat semble cynique, pourtant il est réel: jusqu'ici le droit commercial passait le plus souvent sous silence l'intérêt de la société ou de l'environnement. Seul comptait le développement de l'entreprise et du porte-feuille des actionnaires. Le chemin pour un réel changement dans ce domaine est encore long, mais la voie est ouverte. Et il est clair qu'une responsabilité accrue des organes de direction en matière de droits humains peut faire progresser de façon importante le travail de l'entreprise dans ce domaine.

d) Les politiques d'achats publics

Aujourd'hui de plus en plus de pays intègrent des critères sociaux dans leur politique d'achats publics. Il y a dix ans, cela aurait été politiquement impensable. En Suisse par exemple, la nouvelle ordonnance sur les marchés publics, qui a été adoptée par le Conseil Fédéral le 18 novembre 2009, stipule que le respect des Conventions de base de l'Organisation Internationale du Travail (OIT) est désormais une condition de participation aux marchés publics :

« Art. 7, al. 2 2 Si la prestation est exécutée à l'étranger, le soumissionnaire respecte au moins les conventions fondamentales de l'Organisation internationale du travail mentionnées à l'annexe 2a.⁵ ».

Concrètement cela signifie qu'une entreprise qui recourt – de façon directe ou indirecte - au travail des enfants ou au travail forcé, par exemple, n'a pas le droit de vendre ses produits au gouvernement. Dans la pratique actuelle, les abus qui conduisent à une exclusion d'un marché restent limités aux droits fondamentaux du travail. Toutefois les acteurs les plus progressistes se mettent à réfléchir à la prise en compte d'autres droits humains comme critère d'adjudication des marchés publics. Les droits des enfants devraient être faire partie intégrante de cette réflexion.

CONCLUSION

Ces différents exemples sont caractéristiques de l'évolution en cours : désormais légiférer pour obliger les entreprises à plus de transparence et à plus de responsabilité en matière de droits humains et des enfants n'est plus un tabou. Certaines lois peuvent avoir un impact direct sur les droits des enfants comme dans le cas des minerais de la guerre ou de l'esclavage moderne. Parfois leur effet est plus indirect, comme dans le cas des politiques d'achats publics ou dans les réformes du droit commercial. Tous ces exemples cependant montrent que dans un monde où l'économie s'est globalisée, il faut également globaliser le droit. Et que le rôle de l'Etat à cet égard est primordial.

⁵ Ordonnance sur les marchés publics, 2009.

DEUXIÈME PARTIE

LE RÔLE DES ENTREPRISES PRIVÉES

PART II

THE ROLE OF THE PRIVATE COMPANIES

RESPONSIBILITY OF COMPANIES TOWARDS CHILDREN'S RIGHTS: PREVENTING CHILD SEX TOURISM - THE CODE OF CONDUCT FOR THE PROTECTION OF CHILDREN FROM SEXUAL EXPLOITATION IN TRAVEL AND TOURISM

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Résumé

Parmi les domaines de responsabilité des entreprises envers les droits de l'enfant, le secteur du voyage et du tourisme revêt une importance primordiale depuis que la prostitution infantile a atteint des proportions alarmantes. L'exploitation sexuelle des enfants est une combinaison regrettable de communautés extrêmement appauvries, d'un manque d'opportunités salariales pour les familles et d'un échec de protection des enfants de la part des autorités locales de destinations touristiques. L'industrie du tourisme, qui a considérablement augmenté ces deux dernières décennies, a de grandes responsabilités envers la protection des enfants. ECPAT ainsi que beaucoup d'autres organisations œuvrant pour la protection des enfants, les gouvernements et le secteur privé ont travaillé ensemble et ont adopté un Code de Conduite afin de préserver la sécurité des enfants dans le contexte du tourisme. C'est un exemple qui démontre d'une collaboration particulièrement réussie, et dans laquelle le secteur du tourisme a réalisé l'ampleur de leur intérêt dans la protection des enfants. Cet exemple représente un pas dans la bonne direction.

Zusammenfassung

Seit die Kinderprostitution allarmierende Ausmasse erreicht hat, nimmt der Reise- und Tourismussektor innerhalb der Zuständigkeitsbereiche der Unternehmen gegenüber den Kinderrechten eine entscheidende Rolle ein. Sexuelle Ausbeutung von Kindern entsteht aus einer bedauernswerten Mischung von stark verarmten Gesellschaften, fehlenden Einkommensmö-

¹ The Swiss Foundation for Child Protection is a Swiss children's rights organization that is active since 30 years in the protection of children from any form of physical or mental violence or exploitation. ECPAT Switzerland is a specialised unit at the foundation that focuses on the protection of children from sexual exploitation and from child trafficking.

glichkeiten für die Familien und gescheitertem Schutz der Kinder durch die lokalen Behörden der Tourismusdestinationen. Die Tourismusindustrie, die in den letzten zwei Jahrzehnten beträchtlich gewachsen ist, hat eine bedeutende Verantwortung für den Schutz der Kinder. ECPAT sowie wie viele andere Organisationen, die sich für den Schutz der Kinder einsetzen, die Regierungen und der Privatsektor haben zusammengearbeitet und einen Verhaltenskodex verabschiedet, um die Sicherheit der Kinder rund um den Tourismus bewahren. Das ist ein Beispiel für eine aussergewöhnlich erfolgreiche Zusammenarbeit, bei der der Tourismussektor das Ausmass seines Interesses am Schutz der Kinder realisiert hat. Dieses Beispiel ist ein Schritt in die richtige Richtung.

Resumen

Entre los aspectos de responsabilidad de las empresas hacia los derechos del niño, el sector de viajes y turismo reviste una importancia primordial desde que la prostitución infantil alcanzó proporciones alarmantes. La explotación sexual de los niños es una combinación deplorable de las comunidades extremadamente empobrecidas, de una falta de oportunidades salariales para las familias y de un fracaso de protección de los niños por parte de las autoridades locales en las destinaciones turísticas. La industria del turismo, que ha aumentado considerablemente estas dos ultimas décadas, tiene grandes responsabilidades hacia la protección de los niños. La ECPAT así como muchas otras organizaciones que trabajan por la protección de los niños, los gobiernos y el sector privado han trabajado juntos y adoptaron un Código de Conducta, con el fin de preservar la seguridad de los niños en el contexto del turismo. Es un ejemplo que demuestra una colaboración especialmente exitosa y en la cual el sector del turismo realizó la amplitud de su interés en la protección de los niños. Este ejemplo representa un paso en la buena dirección.

Summary

Among the areas of corporate responsibility towards children's rights, the travel and tourism sector is of particular importance as child prostitution has reached alarming proportions. Sexual exploitation of children is a sad combination of extremely impoverished communities, lack of income opportunities for families, and a failure to protect children by local authorities at travel destinations. The tourism industry, which has increased tremendously in the past two decades, has a great responsibility towards the protection of children. ECPAT and many other child protection organizations, governments and the private sector worked together and adopted a Code of Conduct to keep children safe in the context of tourism. This is an example of a particularly successful collaboration in which the tourism sector understood their stake in protecting children and an important step in the right direction.

The responsibility of companies towards children's rights is a very important area and completes the government responsibility to protect children and fully implement the UN Convention on the Rights of the Child.

One particular area of responsibility falls into the protection of children from sexual exploitation in the context of travel and tourism.

In the early 1990s, researchers at a tourism consultation in Thailand first exposed the degree to which child prostitution was increasing in many Asian countries. Child rights organizations were outraged and led a huge campaign against this form of sexual exploitation of children. The campaign "End Child Prostitution in Asian Tourism" was later transformed into ECPAT which is the acronym of "End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes". Today ECPAT International is a worldwide network that counts over 80 organizations in 75 countries and the fight against the sexual exploitation of children in tourism is sadly still a very important part of its work.²

ECPAT and many other child protection organizations, governments and the private sector worked together and adopted a Code of Conduct to keep children safe in the context of tourism. In relation to the responsibility of the private sector towards children's rights this is an example of a particularly successful collaboration in which the tourism sector understood their stake in protecting children.

Child exploitation in tourism is sadly still a very big concern. It must be understood in the context of Child prostitution, Child trafficking and Child pornography. Vulnerable children most at risk are children who live in extreme poverty, children working or living on the streets and children that have been trafficked (either sold or abducted). It is very difficult to say how many girls and boys are victims of sexual exploitation. Due to the sensitive and illegal nature of child sex tourism data collection is highly complex.

Child sex tourism affects many countries across the globe. Extreme poverty and a suddenly booming tourism industry are a dangerous combination for local communities. Worldwide the tourism sector is the business sector that has most increased over the past two decades offering new business opportunities – legal and illegal ones.

This shows that the tourism industry has a great responsibility towards the protection of children. The travel and tourism sector cannot be held responsible for causing the sexual exploitation of children. It is a sad combination of extremely impoverished communities, lack of income opportunities for families, a failure to protect children by local authorities at travel destinations. Yet, (child) sex tourists book holiday offers through tour operators and from travel agencies. Child sex tourists make use of tourism facilities like hotels, bars, and nightclubs. Therefore, the tourism industry is an important stakeholder in the protection of children from child sex tourism.

² www.ecpat.net; http://www.ecpat.net/EI/Ecpat_history.asp.

The tourism industry and many governments have understood their stake in protecting children. In 1999 the World Tourism Organization UNWTO adopted the Global Code of Ethics for Tourism. At the same time, ECPAT Sweden drafted The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism.

This special Tourism Child Protection Code is an industry driven tourism initiative co-funded by the Swiss Government – The Swiss State Secretariat for Economic Affairs (SECO) and by the tourism private sector and is supported by the ECPAT International network.

This Code of Conduct is an international tool for the prevention of child sex tourism and is supported by the private sector. The Code Organization is an organization that was established to oversee the code implementation. The secretariat is in Bangkok, Thailand. To date over 1000 companies have signed The Code of Conduct. The Code of Conduct was initially developed for tour operators but has been adapted for Tourism Federations, travel agencies, airlines, hotels and bars.

Unfortunately, the introduction of a Code of Conduct cannot eliminate child sex tourism, but it is an important step in the right direction and a major support from the private sector.

This is a remarkable collaboration between child rights organizations, governments and the business sector. The Code was even ahead of its time – a broader recognition of corporate responsibility and obligations followed over a decade later. In 2011 the United Nations Human Rights Council endorsed the Guiding Principles for Business and Human Rights (the BHR Guidelines).³ Though it is not a legally binding document this endorsement recognized global standards of practice applicable to governments and businesses regarding business activity and human rights.⁴

In Switzerland a sensitization campaign against child sex tourism called “Don’t Look Away – www.stopchildsextourism.ch” is led by ECPAT Switzerland, SECO, the Federal Police and the travel and tourism industry.⁵ In order to ensure children’s rights it is key that all stakeholders work together. States and private companies must meet their obligations.

³ <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/Guiding-Principles>; UNICEF Innocenti Research Centre, *Assessing The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism: Discussion Paper* (22.02.2012), p. 33; Guiding Principles for Business and Human Rights: Implementing the United Nations «Protect, Respect and Remedy» Framework, available for download at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>.

⁴ UNICEF Innocenti Research Centre, *Assessing The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism: Discussion Paper* (22.02.2012), p. 33.

⁵ www.stopchildsextourism.ch.

Matthias Leisinger, Vice President Corporate Social Responsibility with Kuoni Travel Holding Ltd., whose company was an early adopter of the Tourism Child Protection Code, emphasises, that a great strength of this Code of Conduct is that it was developed for a specific business sector – the travel and tourism sector - and consists of six very basic criteria. These are:

1. To establish an ethical policy regarding commercial sexual exploitation of children
2. To train the personnel in the country of origin and travel destinations
3. To introduce a clause in contracts with suppliers, stating a common repudiation of commercial sexual exploitation of children (introduction of a clause in contracts and a breaking clause for non-compliance)
4. To provide information to travellers by means of catalogues, brochures, in-flight films, ticket-slips, home pages, etc.
5. To provide information to local «key persons» at the destinations
6. To report annually

(In Switzerland the annual reporting and monitoring is overseen by ECPAT Switzerland)

This simplicity of the criteria allows their company to fully use the Tourism Child Protection Code as a Corporate Social Responsibility tool. Kuoni continues to work with ECPAT Switzerland and mainstreams child rights into their business activities. A very important area in fulfilling the Code of Conduct and improving child protection safeguards is staff training. Kuoni continues to organise trainings on the prevention of child sex tourism for their staff in Switzerland and at tourism destinations in Asia and Africa.

PRESENTATION BY RIGHTS AND ACCOUNTABILITY IN DEVELOPMENT CHILDREN'S RIGHTS AND MINING - DEMOCRATIC REPUBLIC OF CONGO

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Résumé

Les violations des droits humains dans la République Démocratique du Congo sont étroitement liées à l'absence de réglementation et de responsabilité du domaine des ressources naturelles, en particulier dans l'extraction minière réalisée par les enfants. Après un panorama du contexte et de la nature de la pauvreté qui composent au Congo un facteur prioritaire et qui pousse les enfants et les adolescents dans l'exploitation minière, l'auteur présente les conditions extrêmement dangereuses dans les sites miniers artisanaux à Katanga. En plus des lourdes charges de travail, l'absence de soins médicaux, l'exploitation et les punitions arbitraires qui sont communes, les métaux lourds posent de graves problèmes de santé, de déplacements involontaires majeurs et des renvois forcés qui s'ajoutent à l'image effroyable de la violation des droits de l'enfant en RDC.

Zusammenfassung

Die Verletzungen der Menschenrechte in der Demokratischen Republik Kongo hängen eng damit zusammen, dass auf dem Gebiet der natürlichen Ressourcen eine Regelung fehlt und keine Verantwortung übernommen wird, insbesondere bei Bergbauarbeiten durch Kinder. Nach einem Überblick über die Hintergründe und die Formen der Armut, die in Kongo ein wesentlicher Faktor sind und die Kinder und die Jugendlichen in den Bergbau bringen, stellt die Autorin die extrem gefährlichen Bedingungen in den Bergbaugebieten in Katanga vor. Starke Arbeitsbelastung, Mangel an medizinischer Versorgung, Ausbeutung und weitverbreitete willkürliche Bestrafungen, schwere Gesundheitsschäden durch die Schwermetalle, unfreiwillige Umsiedlungen und zwangsweise Rückführungen fügen sich zu einem entsetzlichen Bild der Verletzungen der Kinderrechte in der DR Kongo zusammen.

Resumen

Las violaciones de los derechos humanos en la República Democrática del Congo están estrechamente ligadas a la ausencia de reglamentación y de responsabilidad en el ámbito de los recursos naturales, en particular en la extracción minera realizada por los niños. Después de una análisis del contexto y de la naturaleza de pobreza que forman en el Congo un factor prioritario que obliga a los niños y los adolescentes a trabajar en la explotación minera, la autora presenta las condiciones extremadamente peligrosas en los lugares mineros artesanales de Katanga. Además de las pesadas cargas de trabajo, la ausencia de cuidados médicos, la explotación y los castigos arbitrarios comunes, los metales pesados provocan graves problemas de salud, desplazamientos involuntarios mayores y expulsiones forzadas que se añaden a la terrible imagen de la violación de los derechos del niño en RDC.

Summary

Violations of human rights in the Democratic Republic of Congo are closely linked to the absence of regulation and responsibility in the sector of natural resources, particularly in mineral extraction done by children. After an overview of the context and nature of poverty that in Congo is the overriding factor that pushes children and adolescents into mining, the author presents the extremely hazardous conditions in artisanal mining sites in Katanga. Besides heavy loads of work and the absence of medical care, exploitation and arbitrary punishments are commonplace, the heavy metals pose many health problems and significant involuntary displacement and forced evictions add to the appalling picture of children's rights violations in DRC. The international community must work with companies that operate in or source minerals from the DRC to ensure that children are kept out of the mines and the global mineral supply chain.

* * *

The DRC is extremely rich in natural resources, yet this wealth has not benefited the vast majority of its citizens. On the contrary, according to the United Nations,

“[t]he abundance of natural resources in the DRC and the absence of regulation and responsibility in this sector have created a particular dynamic that has clearly contributed directly to widespread violations of human rights and international humanitarian law.”¹

In such a context, even in relatively stable parts of the country, the dangers from mineral extraction to the life, survival and development of children are heightened. The mining sector dominates the DRC's formal economy but children's rights are assailed both by the expansion of industrial-scale mining and by the scale of unregulated artisanal mining. Approximately half of the DRC's population of 70 million people is below the age of 15 years and as many as 800,000 – 1 million children are estimated to be involved in mining.² The mining sector is vitally important for the reconstruction of the DRC but the fact that it is failing to improve significantly children's lives should be a matter of concern to mining companies and traders involved in the mineral supply chain.³ Rights and Accountability in Development (RAID) has been conducting research into the mining sector in the DRC for many years and has visited many different mine sites and interviewed hundreds of artisanal miners and their families as well as government officials and managers and employees of international mining companies.⁴

Before examining the impact of mining on children it is useful to have an overview of the context and nature of poverty in the Congo. The impact upon development of the wars in the DRC and the country's uncertain post-war transition has been catastrophic. The consequences on children's survival and development are severe. In its 2010 Human Development Report, the United Nations Development Programme ranks DRC 168th out of 169 countries in terms of its development, and DRC is one of only three countries with a lower Human Development

¹ United Nations Office of the High Commissioner for Human Rights 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' Geneva June 2010, paragraph 776. At http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf

² Multiple Indicator Cluster Survey (MICS-2010) p. 19 and PACT Congo Women in Artisanal Mining in the Democratic Republic of the Congo. At <http://www.pactworld.org/galleries/default-file/Women%20in%20Artisanal%20Mining%20in%20the%20DRC.pdf>

³ DRC has ratified ILO No. 138 Convention on the Minimum Age for employment, specifying a threshold of 14 years. The Labour Code enacted in 2002 raised this limit to 16 years old. Light and salubrious work can nevertheless be entrusted to workers from the age of 15, with parental authorization and derogation from the Labour Inspection (Art. 38). Work is strictly forbidden under the age of 15 (Art.133).

⁴ In 2012 RAID collaborated with Amnesty International in a research project looking at Chinese mining companies in Katanga. Some of the material in this article draws on those research findings. Publication of the Amnesty International report is scheduled for April 2013.

Index (HDI) today than in 1970.⁵ The 2006 International Monetary Fund and World Bank-backed Poverty Reduction and Growth Strategy Paper (PRGSP) describes poverty in DRC as ‘a generalized, chronic, mass phenomenon.’⁶ The incidence of poverty (71 percent of DRC’s population falls below the poverty line, living on less than \$US1 per day), its depth (the extent to which the ‘average poor’ falls below the poverty line) and its severity (the degree of inequality suffered by the poorest) are all extremely high by comparison with the other countries of central Africa.⁷ According to the PRGSP, ‘[t]he education, health, water supply, and sanitation sectors, as well as social security, are in an advanced state of deterioration and loss.’⁸ The health sector is falling short of meeting the Millennium Development Goals ‘to an unprecedented degree’.⁹ Annual per capita expenditure on health is the lowest in the world at just \$17.¹⁰ A fifth of children die before reaching their fifth birthday.¹¹ 4.2 million children under age 5 suffer from malnutrition in DRC.¹² In the early 1990s, just under a third of the population was undernourished; in 2004 – 2006, this had risen to three quarters of the population.¹³ Only 22 per cent of the population have access to drinking water.¹⁴ Less than 10% of waste water is hygienically evacuated and 80 per cent of the instances of disease are attributable to poor environmental conditions.¹⁵ The transport system in DRC is described in the PRGSP as being in a ‘disastrous situation’ with ‘the impassibility if not to say the disappearance of most secondary and tertiary roads’.¹⁶ Congolese villages ‘are in the throes of a self-perpetuating

⁵ United Nations Development Programme, *Human Development Report 2010*, Human development statistical tables, Table 1 – Human Development Index and its components, p. 146, available at: <http://hdr.undp.org/en/media/HDR_2010_EN_Tables.pdf>. See also Overview, p. 3, available at: <http://hdr.undp.org/en/media/HDR_2010_EN_Overview.pdf>.

⁶ *Democratic Republic of Congo: Poverty Reduction and Growth Strategy Paper* [hereafter PRGSP], June 2006, pp. 10 – 11, available at: <<http://www.imf.org/external/pubs/ft/scr/2007/cr07330.pdf>>.

⁷ PRGSP, paragraph 58, p. 22. See also, IMF, ‘Democratic Republic of the Congo: Poverty Reduction Strategy Paper Progress Report,’ IMF Country Report No. 10/328, October 2010, Table 1. Progress toward Millennium Development Goals in the DRC, p. 54, available at: <<http://www.imf.org/external/pubs/ft/scr/2010/cr10328.pdf>>. For more information on the poverty indicators, see <http://siteresources.worldbank.org/PGLP/Resources/povertymanual_ch4.pdf>.

⁸ PRGSP., paragraph 135, p. 38.

⁹ *Ibid.*, paragraph 142, p. 39.

¹⁰ Figure for 2007. See *Human Development Report 2010*, Table 14 – Health, Expenditure on health per capita (PPP US\$), p. 200, available at: <http://hdr.undp.org/en/media/HDR_2010_EN_Tables.pdf>.

¹¹ *Ibid.* The under five mortality rate in 2008 was 199 per 1000 live births.

¹² PRGSP, paragraph 143, p. 40.

¹³ See *Human Development Report 2010*, Table 8 – Human Security, Prevalence of undernourishment (% of total population), p. 175, available at: <http://hdr.undp.org/en/media/HDR_2010_EN_Tables.pdf>.

¹⁴ PRGSP, paragraph 150, p. 41.

¹⁵ The MICS 2 survey indicates that the rate of hygienic evacuation of waste water was 9.1 percent in 2001. See PRGSP, paragraph 152, p. 42.

¹⁶ PRGSP, paragraphs 119 and 116 respectively, pp. 35 – 36.

process of destruction', with 76 per cent of households considered 'extremely overcrowded'; the PRGSP predicted that there would be 5,211,288 shanties throughout the country by 2010.¹⁷ According to the same document, '[t]he breakdown in living conditions is associated with the successive wars which struck in the eastern part of DRC in particular, and with the population migrations which ensued.'¹⁸ At the beginning of 2013, over 2 million people were still internally displaced, in addition to over 185,000 refugees and asylum seekers in DRC from other countries in the region and just over 44,000 returning refugees.¹⁹

Katanga province, a territory the size of France, is home to some of the richest deposits of copper and cobalt in the world but also has the highest number of primary school age children in the DRC, who have never had access to education. It is also the province with one of the highest incidence of under-five mortality (184 per thousand).²⁰ According to the 2010 Multiple Indicator Cluster Survey, approximately 25 per cent of children do not attend primary school, and 42 per cent of children between ages 5 to 14 are engaged in some kind of labour.²¹ The number of children currently working in the mines in southern Katanga is estimated at 40,000, about one third of the total number of workers. Poverty is the overriding factor that pushes children and adolescents into mining. Children are involved in a range of activities including digging, crushing, grinding and washing ore. Younger children and girls are usually engaged in support services and petty trade.

Mining is a form of work that is dangerous to children in every way. Firstly, the conditions on artisanal mining sites in Katanga are extremely hazardous: the terrain is rough and there are unfenced pits and stagnant pools of water everywhere. Boys aged between 14-18 years of age work in the quarries exposed to harmful dust and the older boys will descend the shafts and tunnels to dig for ore, in some sites the pits are over 100 metres in depth (the Mining Code stipulates 30 metres as the maximum allowed). The pits and tunnels are not usually banked or shored up with struts, which means there is a constant risk of landslide and rock falls. The risk of such accidents increases during the rainy season. Furthermore, these tunnels lack proper ventilation which can often lead to death by asphyxiation. A small bicycle-operated pump is often the only method of ventilation. In April 2012, the BBC filmed youths clearly below the DRC's minimum legal age (18 years) and children, some as young as 10 years old,

¹⁷ *Ibid.*, paragraphs 153 – 155, pp. 42 – 43.

¹⁸ *Ibid.*, paragraph 157, p. 43.

¹⁹ United Nations High Commission for Refugees (UNHCR), *2010 UNHCR country operations profile – Democratic Republic of the Congo, Statistical Snapshot* (as at January 2012), available at: <http://www.unhcr.org/pages/49e45c366.html>

²⁰ Katanga's under five mortality rate is 184 per 1000 live births (MICS 2010)

²¹ DRC Ministry of Planning, National Institute of Statistics in collaboration with UNICEF *Multiple Indicator Cluster Survey* (MICS 2010), Summary Report. May 2011

working in dangerous mineshafts at Tilwezembe, near the town of Kolwezi.²² Artisanal miners working there reported an accident that occurred in September 2011 which left four miners dead from asphyxiation and another 12 miners injured. One family lost two adolescent sons in the incident.²³

Secondly, there is no first aid available at these mine sites and at most the injured are taken to nearby hospitals, where treatment is limited. RAID has met a number of young men who started working as artisanal miners when they were 14 years old, whose limbs were crushed by falling rocks and have been abandoned to their fate in dirty and ill-equipped hospitals. When a death occurs the cooperative that organises the artisanal miners may arrange and pay for the funeral. But, according to artisanal miners, the bodies of many victims of these accidents are frequently disposed of in the bush and the families are never officially informed. There are no proper records or incident reports kept of the numbers of artisanal miners who are killed, injured or maimed.

Thirdly, exploitation and arbitrary punishments are commonplace. The artisanal mine sites are guarded by private security guards and the Congolese mine police. They are mostly concerned about preventing miners from removing minerals from the site and selling them to another company or trading house. Anyone suspected of stealing minerals is liable to be severely beaten, held in a lock-up on the site (usually an old metal container) for three or four days or taken to the nearest police station, where they may be held without charge until they can raise money to pay 'a fine'. Artisanal miners – men and boys – are exploited in situations of debt bondage by businessmen and supply dealers from whom they acquire cash advances, tools, food, and other provisions at inflated prices, and to whom they must sell the mined minerals at prices below the market value. On 21 November 2012, artisanal miners marched in protest to the mining town of Likasi to complain about conditions on the Kawama mine site under the control of Mattadore, a Congolese company. Their chief complaint was that the company was undervaluing the value of the minerals they had extracted.²⁴ Artisanal miners are also subject to numerous informal taxes to enable them to enter and transport minerals from mine sites. The only public officials permitted on mine sites are representatives of the Mining Department and SAESSCAM (*Service d'Assistance et d'Encadrement d'Artisanal et Small Scale Mining*, government agency for small-scale and artisanal mining), which issue a certificate confirming that the minerals have been produced artisanally. This certificate must accompany the minerals to the place of sale (trading centres). It clarifies that no taxes or fees are to be paid at the mine site or at the pit.²⁵ But payments in cash or in minerals continue to

²² 'Billionaires behaving badly?' Panorama, BBC1, 16 April 2012, 8:30 pm

²³ Interviews in Tilwezembe village with artisanal miners April 2012

²⁴ Compte rendu de la réunion tenue par SAESSCAM/Likasi avec la Coopérative CMKK et le Comité des Creuseurs de Kawama, jeudi 22 novembre 2012

²⁵ Province of Katanga, Note Circulaire no. 2631 sur les mesures d'encadrement des activités minières pendant cette période de crise financière internationale

be extorted by various government agents such as SAESSCAM, the intelligence services, the mine police and army who erect informal road blocks on roads leading to the quarries and mine sites.

Fourthly, in the overcrowded mining camps, there is almost no attempt to provide healthy living conditions. Artisanal miners and their families live crammed together in tents made from sacking or plastic sheets without adequate sanitation. In many camps drinking water is scarce and of poor quality and the residents often have to pay exorbitant prices for jerry cans of water from local traders. There is widespread abuse of alcohol and drugs among the artisanal miners. All of this contributes to reduced life expectancy, higher infant mortality rates and higher rates of illnesses such as HIV, diarrhoea, hepatitis, respiratory disorders and malaria.

Finally, in mining camps although some women run small businesses like restaurants or shops, many turn to prostitution. The squalid, over-crowded living conditions and the absence of basic amenities creates a highly-charged atmosphere in which sexual and gender-based violence is an everyday occurrence. Amnesty International, for example, was told that in Kawama camp young girls when they near puberty are abducted and raped and then forced into prostitution.²⁶

Apart from the appalling work and living conditions for artisanal miners and their families, mining processes have serious effects on the population as a whole and in particular on children. The heavy metals which are so plentiful in the district of Kolwezi – such as lead, cobalt, uranium, molybdenum, wolfram, tungsten, nickel and cadmium – pose many health problems. A health survey carried out in 2007 by researchers from the University of Lubumbashi (the Paraclisis Research Group) found that the rivers where residents of the villages surrounding Kolwezi go to bathe, clean plates and clothes were totally polluted by the minerals that artisanal miners washed upstream.

“In Kolwezi there were alarming rates of stillbirths, miscarriages and the birth of deformed babies. These cases are most common with women exposed continuously to highly radioactive substances such as uranium, copper and cobalt. Out of 350 children surveyed by Paraclisis Research suffering from respiratory problems, 41 per cent had parents who worked as artisanal miners and frequently accompanied their parents to the mine sites.”²⁷

Mining is taking place and has taken place over many years in Katanga without regard to effective environmental protection. Mine tailings and waste dumps are decaying and may suffer catastrophic failure, posing significant pollution dangers to water courses and agricul-

²⁶ Interviews in Kawama April 2012

²⁷ Rachel Perks 'Addressing The Security of Artisanal Mining Women In Katanga and Oriental Provinces' Pact Inc. 2008. At <http://www.pactworld.org/galleries/default-file/Post%20Conflict%20Transtion,%20Mining,%20and%20Women-Final.pdf>

tural soils. Acid mine drainage in many areas is polluting water supplies and rivers.²⁸ The local communities derive much of their protein from eating fish. On a number of occasions mining companies have been accused of dumping toxic effluent in the upstream catchment areas, which has polluted the water supply and poisoned fish.²⁹ In Katanga mining activities have not only scarred the landscape but also caused land surface loss in drinking water sources and generated groundwater and surface water pollution. Mining activity releases harmful dust into the atmosphere and ore processing contributes further to airborne pollutants. According to UNEP, 'dust particles of less than 10 micrometre particles were found to be relatively rich in cobalt and lead, and as such are a potential major source of human exposure'. UNEP's bio-monitoring study in Katanga's Copperbelt region has identified substantial exposure to several metals especially in children: 'Urinary cobalt concentration in the sampled population is the highest recorded for a general population.'³⁰

According to the US Environmental Protection Agency (EPA) chronic exposure to cobalt by inhalation in humans results in effects on the respiratory system, such as respiratory irritation, wheezing, asthma, decreased lung function, pneumonia, and fibrosis. Other effects noted by the EPA in humans from inhalation exposure to cobalt include cardiac effects, such as functional effects on the ventricles and enlargement of the heart, congestion of the liver, kidneys, and conjunctiva, and immunological effects that include cobalt sensitization, which can precipitate an asthmatic attack in sensitized individuals. Gastrointestinal effects (nausea, vomiting, and diarrhoea), effects on the blood, liver injury, and allergic dermatitis have also been reported in humans from oral exposure to cobalt.³¹ Many such symptoms have been detected in children who live in the Kampemba commune in Lubumbashi, which is next to a large copper and cobalt refinery.³² Before commencing operations, under the mining regulations, companies are obliged to prepare an environmental impact assessment (EIA) and an environmental management plan (*Plan de Gestion Environnementale du Projet* - PGEP). The Mining Code requires mining companies to produce an annual report and the Department for the Protection of the Environment of the Ministry of Mines (DPEM) to carry out a biennial environmental audit and inspections. But, the rules are easily circumvented and these documents even if they have been produced are not usually made public.³³

²⁸ United Nations Environment Programme (UNEP) Water Issues in the Democratic Republic of the Congo: Challenges and Opportunities. A Technical Report' UNEP, Nairobi January 2011 p. 33

²⁹ ACIDH 'Mémoire de l'ACIDH Adressé à M. le Gouverneur de la Province du Katanga sur la Décimation des Poissons et Autres Espèces Végétales de la Rivière Kafubu au Début du Mois d'Avril 2011' 27 mai 2011

³⁰ UNEP 'The DRC Post Conflict Environmental Assessment' p. 32.

³¹ US Environmental Protection Agency Air Toxics Website Cobalt Compounds. At <http://www.epa.gov/ttn/atw/hlthef/cobalt.html>

³² Jean Pierre Okenda Lohese, Fabien Mayani, Dhanis Rukan, Esperance Yav et Grace Tshoma Numbi 'Republique Democratique du Congo: 10 Ans des Profondes Reformes Minières, 10 Ans de Declin des Politiques Environnementales Et des Droits Humains' Carter Center Décembre, 2011

³³ Code Minier article 69F and Règlement Minier article 451

According to the United Nations 76 per cent of conflicts in Katanga Province are related to disputes over land.³⁴ The most frequent and most violent clashes have been when police and companies have attempted to remove creuseurs (the name used for artisanal miners) from mining sites and surrounding areas. There is no accurate record of the numbers of people who have been forcibly relocated over this period but it is in the tens of thousands. Further significant involuntary displacement and forced evictions seem inevitable with the expansion of industrial-scale mining and the Congolese government's policy of reducing artisanal mining for copper and cobalt. Until the end of 2008 the World Bank estimated that over 80 per cent of cobalt came from artisanal miners.³⁵ Since then industrial scale production has increased and the supply from artisanal miners may be closer to 60 per cent about a third of the world's cobalt supply.³⁶ In the absence of alternative means of earning a livelihood artisanal miners take enormous risks to enter large mining concessions often at night to dig for minerals. Although many companies try to discourage illegal miners by peaceful means such as confiscating the minerals, more violent methods are also used. As industrial-scale mining in Katanga increases, the availability of replacement land available to traditional and other displaced communities is diminishing. This is already a source of considerable friction.

In November 2009, the *Compagnie Minière du Sud Katanga* (CMSK), which operates the Luiswishi mine in the Democratic Republic of the Congo (DRC), supported and participated in the demolition of hundreds of houses in the villages of Kawama, in the vicinity of the mine. More than 500 homes were crushed by bulldozers belonging to CMSK and several people were injured. Entreprise Générale Malta Forrest (EGMF), a subsidiary of the Belgian group, GEORGE FORREST INTERNATIONAL (GFI), had a 60 per cent shareholding in the CMSK joint venture. In September 2012, just before the mediation was due to start, GFI announced that it had sold back its shares in CMSK to GECAMINES (the Congolese state-owned mining company). The company denies all responsibility for the demolitions and other human rights abuses. According to GFI its mine had been invaded by artisanal miners ('creuseurs') and that it was the Congolese authorities who authorised and carried out the evictions.³⁷ The violent evictions and demolitions were apparently part of a campaign by CMSK to clamp down on alleged illegal mining by *creuseurs* inside the Luiswishi concession. However, the brick houses and other buildings that were demolished on the 24 November 2009 did not belong to illegal *creuseurs* but to families who made their living mostly from farming or selling charcoal. As a result of this incident, a number of people were seriously injured and at least two children

³⁴ UNEP 'Democratic Republic of the Congo: Post-Conflict Environmental Assessment' 2011, p. 58

³⁵ World Bank 'Democratic Republic of the Congo - Growth with Governance in the Mining Sector' 2008 p. 57

³⁶ Nicolas Tsurukawa, Siddharth Prakash and Andreas Manhart *Social impacts of artisanal cobalt mining in Katanga, Democratic Republic of the Congo* Öko-Institut e.V. Freiburg 2011 p 58

³⁷ GROUPE FORREST INTERNATIONAL S.A. (GFI) Press Release Wavre, Lubumbashi, 5 February 2013

died. About 500 families were left without shelter at the start of the rainy season.³⁸ Three years on many families are dispersed, the children have been taken out of school because parents can no longer afford the fees and they still live in temporary shelters because they have not been allowed by the authorities to rebuild their homes.

The difficulties for companies working in conflict-affected and high risk areas have been recognized by the international community and diverse bodies, including the United Nations³⁹ and the Organization for Economic Cooperation and Development (OECD)⁴⁰, have produced guidance aimed at ensuring that companies are aware of measures that should be taken to respect human rights and avoid engaging in corrupt practices. But for the most part these documents pay only limited attention to the rights of the child. In the Democratic Republic of the Congo (DRC), political instability, weak institutions, grave deficiencies in the administration of justice, rampant corruption and severe human rights violations, present particular challenges for companies.

It is a sobering to reflect that the cobalt of an average notebook is associated with nearly three minutes of child labour and an average hybrid vehicle with 104 minutes.⁴¹ In the absence of other job opportunities and given the high level of poverty in Katanga it is inevitable that people will continue to be prepared to dig for cobalt despite the unsafe working conditions and related health hazards. The international community must work with companies that operate in or source minerals from the DRC to ensure that children are kept out of the mines and the global mineral supply chain. This means ensuring that conditions for adult artisanal miners significantly improve so that they receive proper remuneration for their labour and that the mine sites operate according to the highest possible safety standards. All companies should respect environmental laws and regulations even in the absence of effective enforcement by the Congolese government.

³⁸ RAID, FIDH and ACIDH 'NGOs 'Complain to Belgian National Contact Point for the OECD Guidelines for Multinational Enterprises About George Forrest International's Illegal Demolition of Houses in the DR Congo' 4 April 2012

³⁹ United Nations 'Guiding Principles on Business and Human Rights' June 2011 (A/HRC/17/31) warns about the risk of gross human rights abuses in conflict affected areas (Principle 7). There is a fleeting reference to children's rights in the commentary (see paragraph 12).

⁴⁰ OECD (2011) *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High Risk Areas* refers to the need for companies sourcing minerals from artisanal sources to ensure that they do not tolerate, profit from or assist in the worst forms of child labour (Annex II)

⁴¹ Öko-Institut e.V. Freiburg 2011 p 58

WHAT IS THE PROCESS IN A PRIVATE COMPANY TOWARD MORE RESPONSIBILITY? POSSIBLE EFFECTS TOWARD PROMOTION OF CHILDREN'S RIGHTS? THE PERSPECTIVES OF CIVIL SOCIETY AND COMPANIES

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Résumé

Les registres du programme Aviva « de la rue à l'école », qui comprennent 23 partenariats, sont impressionnants. Des investissements énormes ont aidé 500'000 enfants grâce à une prise de conscience, de la prévention, des programmes d'aide, de santé de bien-être, des lieux sûrs, l'éducation et la formation. L'auteur appelle à davantage de participation de la part du secteur privé lorsque l'on parle du respect et de la promotion des droits des enfants en situation de rue. Aviva fut la seule entreprise impliquée dans une journée de session du Conseil des droits humains des Nations-Unies dédiée aux enfants des rues. Lors de cette session, la décision d'adopter une résolution onusienne sur les enfants des rues a été prise. Cette dernière a commencé par une étude sur la promotion et la protection des droits des enfants en situation de rue, qui elle-même reçut le soutien d'Aviva. L'auteur souligne que l'entreprise souhaite agir en soutien aux côtés des Etats et des experts des ONGs dans le but de susciter des discussions fertiles entre les acteurs du secteur public, du secteur tertiaire et du secteur privé à propos de la stratégie à adopter avec qui et comment.

Zusammenfassung

Die Einträge des Programms Aviva „Street to School“, das 23 Partnerschaften hat, sind eindrucklich. Bedeutende Investitionen haben 500'000 Kindern dank einer Bewusstwerdung, Prävention, Hilfs-, Gesundheitsprogrammen, Wohlbefinden, sicheren Rückzugsorten, Erziehung und Bildung geholfen. Der Autor ruft den Privatsektor zu mehr Teilnahme auf, wenn es um Achtung und Förderung der Rechte der Strassenkinder geht. Aviva war das einzige Unternehmen, das an einem Sitzungstag des UN-Menschenrechtsrats zum Thema der Strassenkinder, einbezogen war. Bei dieser Sitzung wurde die Entscheidung getroffen, eine UN-Resolution betreffend Strassenkinder zu verabschieden. Diese hat mit einer Studie über die Förderung und den Schutz der Rechte von Strassenkindern angefangen, die von Aviva unterstützt wurde. Der Autor betont, dass das Unternehmen gemeinsam mit den Staaten und UN-Experten sowie

zu ihrer Unterstützung tätig sein möchte, um fruchtbare Diskussionen über die anzunehmende Strategie zwischen den Akteuren des öffentlichen Sektors, des Dienstleistungssektors und des Privatsektors anzuregen.

Resumen

Los registros del programa AVIVA “Street to School” (de la calle a la escuela), que incluían 23 asociaciones, son impresionantes. Inversiones enormes han ayudado 500.000 niños gracias a una toma de conciencia, de prevención, de programas de ayuda, de salud, de bienestar, de lugares seguros, de educación y de formación. El autor llama a una mayor participación de parte del sector privado, cuando se habla de respeto y de la promoción de los derechos de los niños en situación de calle. Aviva fue la única empresa implicada en una jornada de sesión del Consejo de Derechos Humanos de las Naciones Unidas dedicada a los niños en situación de calle. En esta sesión, se tomó la decisión de adoptar una resolución de la ONU para los niños en situación de calle. Esta última comenzó por un estudio sobre la promoción y la protección de los derechos de los niños en situación de calle, que recibió ella misma el apoyo de Aviva. El autor destaca que la empresa desea actuar apoyando a los Estados y expertos de ONGs con el fin de incitar discusiones fértiles entre los protagonistas de los sectores público, terciario y privado con el propósito de adoptar una estrategia adecuada.

Summary

The records of Aviva’s programme Street to School, with 23 partnerships, are impressive. Huge investment helped half a million children through awareness and prevention, outreach, health and wellbeing, safe places, education and training. The author calls for more participation of the private sector when it comes to the respecting and promoting the rights of street children. Aviva was the only corporate involved in a UN Human Rights Council full-day session dedicated to street children, where the decision was made to adopt a UN Resolution on Street Children which started with a study on the promotion and protection of street children’s rights also supported by Aviva. The author stresses that the company wants to act in support of, and alongside states and NGO experts, in order to foster fertile conversations between public sector, third sector and private sector actors about who is best to play what part and how.

* * *

Here at this important international child rights conference we must recognise that there is a group of people, some of the most maligned people in our society, often deemed too dangerous to trust. Their vast potential risks going unfulfilled because of a poverty of our imagination regarding ways to engage them meaningfully in our societies. Yet there are vital actors in our communities – Yes – Business does have a role to play!

You might, quite rightly be asking - What are Aviva doing here?

Case study provided via slides regarding Aviva's Street to School (S2S) Initiative see Aviva's CR Report for more details - <http://www.aviva.com/corporate-responsibility>

In summary (from previous CR Report and recent updates – new CR Report out April 2013)

Our Street to School programme is championing the rights of street children around the world. Accounting for over 50%1 of our cash community investment, we are committing resources, time and talent to support our charity partners to help get children and young people off the street and into education or training. We are recognising the unrecognised.

By 2011 we had formed 23 partnerships including many leading charities and other smaller pioneers, which we are working alongside, providing funding and employee volunteering whilst we learn more about how to make the biggest difference.

Working with the Consortium for Street Children (CSC) we are raising awareness of the plight of street children around the world. Our sponsorship of the 'State of the World's Street Children' report by CSC will help non-governmental organisations and other experts to do more, by focusing research and effort where it is needed most, and its executive summary provides an excellent introduction to

2011 milestones

Aviva was the only corporate involved in a UN Human Rights Council full-day session dedicated to street children, where the decision was made to adopt a UN Resolution on Street Children. The resolution included an invitation for the Office of the High Commissioner for Human Rights to carry out a study on the promotion and protection of street children's rights, which was completed with support from Aviva. The findings were presented to the UN Rights Council in March 2012.

In 2011 we sponsored the first ever International Day for Street Children. Aviva employees across the world joined in celebrations with street children in Morocco, Uganda, Ethiopia, Guatemala and India, school children in the UK and Ireland, and 60 global members of the Consortium for Street Children.

We launched the Aviva Child Safeguarding Guidance and Code of Conduct in 2011. The guidance and code, which were drafted with the support of our strategic charity partners and other experts, will now be rolled out to other regions.

By the end of 2012

- ***S2S has increased employee engagement and pride - 70% of UK employees saying S2S makes them proud to work for Aviva and our employees have delivered >41,000 hours of S2S volunteering.***
- *We have invested over £11.3m and helped c520,000 children thorough:*
 - *Awareness and prevention – helping children understand the dangers of the street and how to manage the issues that drive them there. 18% of children impacted.*
 - *Outreach – contacting and connecting children with support services. 7% of children impacted.*
 - *Health and wellbeing – providing access to vaccinations and counselling. 4% of children impacted.*
 - *Safe places – helping children to find a safe place to stay. 5% of children impacted.*
 - *Education and training – helping children to access life skills, vocational or formal education or training. 66% of children impacted.*
- *S2S is engaging consumer and opinion former audiences and differentiating - Public awareness of S2S in UK is c10% vs. Insurance competition at 2% and **S2S makes 61% of EU stakeholders / 41% personal finance journalists more favorable to Aviva***
- *S2S cause related marketing is proved to deliver low cost brand differentiation and stronger relationships - **those aware of S2S in the UK are 20% more likely to ‘highly recommend’ Aviva***
- *Significant media reach and value have been generated to support Aviva’s corporate reputation and brand franchise - **media reach where captured of >300m people with a value of >£7m***

To create this kind of Shared value is not easy – access to the insight and opportunities where one can humbly bring our strengths to bear within a wider system of change is scarce.

When I was out at the HRC debate on SC I was proud to be perhaps the only rep from a corporate – but also very sad.

It does seems to be a bit of a blind spot on all sides – yes I understand sensitivities involved but with turnover outstripping many GDP’s and an often radical impact on the lived lives of billions of people - the private sector is already involved in the lives of these children - surely we should all be eager for that involvement to be more informed and more positive when it comes to the rights of street children. The private sector should be round the table and I really welcome the study’s validation of that.

Earlier this year I was speaking at the launch of the CRBPI – a fantastically simple framework for broader CR implementation to which we brought the voice of SC.

Also been able to reflect on the principals and the b=guidance to consider the issues within

our core operations – Already got a safe guarding code of conduct, looked at the issues re our investments e.g. landmines and cluster munitions etc and thinking to about our people policies (I work from home 3days a week), our advertising and our products that help people protect their families such as the >3m lives we insure amongst the rural poor in India as the largest micro life provider on the Indian sub continent.

But there's much more to do and the CRBPI can help us do this systematically, comprehensively and consistently. They also help create a non competitive space for collaboration much needed in these agendas.

Similarly – I think that the OHCHR report can provide a unique and much needed framework for understanding the context and most appropriate approaches to protecting and promoting the rights of street children.

This is very helpful – to have the experts from all sectors convened and encouraged to embrace the complexity then to help us lay folk take account of it - but then go beyond it to find simple meaningful actions that we can do together to make a difference.

Not an isolated and therefore often ineffectual difference but difference that is correctly related to and sequenced with what others are doing so that the sum of our actions for street children form more than the sum of their parts – so it feels like we are a TEAM.

We have no interest in duplicating current state provision or confusing the development of a robust system for the future - we want to act in support of, and alongside States and ngo experts. If there were specific and aligned laws, policies and practices, for example around birth registration and child protection, as outlined in the report, this would make the channelling of business contribution much easier.

In the new paradigms of corporate responsibility and sustainability this is what is required. Not businesses 'owning' agendas, but businesses understanding their current and potential impacts on these issues - issues that radically effect the sustainability of the societies within which try to run successful businesses.

This report, used as a framework to guide the alignment of business activity in its uk and global communities could significantly increase the depth, breadth and sustainability of what we as business are causing in our communities when it comes to perhaps the most marginalised and vulnerable members of that community.

Now, If this similar and aligned approach were taken by others – States, state departments(such as DIFD), UN agencies, NGO's etc then we may find that the 'herding cats' experience of creating integrated understanding and action on issues like this may become a lot easier, with less energy and resource dissipated by the complexity and more of it channelled into sustainable change – that's really why we wanted to sponsor this study – to create a consistent framework for understanding and action.

So it is my hope that this report enables difficult but fertile conversations between public sector, third sector and private sector actors about who is best to play what part and how. We are already using the insights to take our S2S programme forward –

- We are continuing our commitment to stigma busting around street involvement with our marketing and advocacy activity that recognises the right of all children to fulfil their potential – IDOSC - CSC
- Last year we launched our Child protection code of conduct for all employees and as a minimum expectation of any one we partner with from the public or civil sector
- We are conducting participatory research in our projects to help make sure we don't act for children without children - Disseminating early next year.
- And we continue in our efforts to encourage and enable the 3 sectors to sit down together, at a regional and sub regional level, to plan and deliver the implementation of these vital recommendations

“We aren't here to save the world, but we are committed to being part of the solution not the problem”.

I don't think you'd find many businesses who would disagree with that statement but sadly the moments of clarity on how to turn that good will to action are rare. I believe this study is one of those rare moments for our agenda with street children- and I hope together we can seize it.

Thank you.

EXTRATERRITORIAL JURISDICTION

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Résumé

L'auteur aborde le rôle de l'Etat concernant le respect des droits de l'enfant auprès des compagnies internationales dans un contexte complexe de juridiction. Les problèmes sont nombreux lorsque l'on va au-delà du concept de territorialité. Il y a de nombreux obstacles à l'application du droit national de l'Etat d'accueil auprès des entreprises et à la manière d'imposer le respect des droits humains, spécifiquement auprès des économies émergentes. Les compagnies se doivent de prendre leurs responsabilités en cas de la violation des droits de l'homme, également dans les processus de négociation et dans les jeux de pouvoir. Les obligations des Etats en matière de droits de l'homme au-delà de leurs frontières ont été reconnues par le Commentaire général numéro 14 concernant le droit de jouir des normes de santé les plus élevées possibles, rédigé par le Comité des Droits économiques, sociaux et culturels des Nations Unies. Cependant, les principes proposés par J. Ruggie (protéger, respecter et réparer), appliqués à l'extraterritorialité, ne provoquent pas le même niveau de controverses. La compétence extraterritoriale relative au tourisme sexuel est l'un des rares domaines qui est réglementé par une législation pénale internationale.

Zusammenfassung

Die Autorin spricht die Rolle des Staates im Bezug auf die Kinderrechte bei internationalen Unternehmen im Zusammenhang mit komplexer Gerichtsbarkeit an. Wenn es über das Territorialitätsgrundsatz hinausgeht, treten zahlreiche Probleme auf. Der Umsetzung des nationalen Rechtes des Gastlandes gegenüber Unternehmen und der Menschenrechtsbeobachtung stehen zahlreiche Hindernisse im Weg, insbesondere in aufstrebenden Wirtschaften. Die Unternehmen müssen ihre Verantwortung bei Menschenrechtsverletzungen übernehmen, auch in den Verhandlungsprozessen und den Machtspielen. Dass die Verpflichtungen der Staaten im Bereich Menschenrechte über ihre Grenzen hinausgehen, wurde im allgemeinen Kommentar Nr. 14 zum Recht auf ein Höchstmass an Gesundheit vom UN-Ausschuss für wirtschaftliche, soziale und kulturelle Rechte anerkannt. Die von J. Ruggie vorgeschlagenen Grundsätze (schützen, respektieren, wiedergutmachen), angewendet auf die Extraterritorialität, lösen jedoch nicht dieselben Kontroversen aus. Die extraterritorialen Zuständigkeiten in Bezug auf Sextourismus sind eines der wenigen Gebiete, die durch ein internationales Strafrecht geregelt sind.

Resumen

El autor aborda el papel del Estado relativo al respeto de los derechos del niño ante las empresas internacionales en un contexto complejo de jurisdicción. Los problemas son numerosos cuando se va más allá del concepto de territorialidad. Hay muchos obstáculos en la aplicación del derecho nacional del Estado de recepción en relación con las empresas y en la manera de imponer una observación de los derechos humanos, específicamente con respecto a las economías emergentes. Las empresas se sienten en el deber de asumir sus responsabilidades hacia la violación de los derechos humanos, igualmente en los procesos de negociación y en los juegos de poder. Las obligaciones de los Estados en materia de derechos humanos más allá de sus fronteras fueron reconocidas por la Observación General No. 14 relativa al derecho al disfrute del más alto nivel posible de salud, redactado por el Pacto Internacional de Derechos Económicos, Sociales y Culturales de las Naciones Unidas. Sin embargo, los principios propuestos por J. Ruggie (proteger, respetar y remediar), aplicados a la extraterritorialidad, no causan el mismo nivel de controversias. Las competencias extraterritoriales relativas al turismo sexual son uno de los raros aspectos que son regulados por una legislación penal internacional.

Summary

The role of the state is discussed about children's rights in the context of companies operating internationally as complex questions of jurisdiction arise. Moving beyond territoriality is fraught with problems. There are numerous obstacles to enforce the host state's national laws on companies and compel human rights observance, especially in emerging economies. The responsibility of business enterprises in human rights abuses is engaged, also in the process of bargaining power. Human rights obligations of states beyond their borders have been recognized by the UN Committee on Economic, Social and Cultural Rights' General Comment 14 on the right to highest attainable standard of health. However, the "Ruggie" principles (protect, respect and remedy), applied to extraterritoriality, do not cause the same level of controversy. Extraterritorial jurisdiction over sex tourism is one of the rare areas to be governed by international criminal law.

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Any discussion about business and children's rights in particular and human rights in general irrevocably necessitates a discussion of the role of States. Especially when a company or group of companies operates across different boundaries, complex questions of jurisdiction may arise. In these cases, a distinction between host and home state is often made.

'Home' state refers to the state where the company or group of companies is domiciled whereas 'host' state refers to a state (other than the home state) where the company or group of companies has operations, investments, important sources of supplies or constituent companies.

That 'host' states should regulate the activities of transnational corporations and their subsidiaries and ensure that human rights are not violated by these entities is not a matter of contention as such. In theory, the host state should be able to enforce its national laws on companies and compel human rights observance. In practice, however, a number of obstacles may block this road to utopia. First and foremost, the ideal scenario necessitates a host state that is itself looking out for the best interests of its people, including children. Sometimes, especially in emerging economies that do not have adequate institutions to guarantee democracy and governance, governments may be rent-seeking and violate of human rights. Under such conditions, business enterprises may become complicit in human rights abuses by engaging with such a government. On the other hand, even if the 'host state' is not a violator as such, the lack of bargaining power or other international legal obligations stemming for instance from bilateral investment treaties may prevent this state from exercising its full authority vis-à-vis a transnational business enterprise. For instance, almost all countries in the world have ratified the UN Convention on the Rights of the Child (CRC), which calls for the prevention of the economic exploitation of the child but the use of very young child laborers in the supply chains of large apparel or mining companies continues.

The case of 'home' state regulation, and hence extraterritoriality, is much more controversial. In theory, the 'home' state may have in its national legislation possibilities for holding TNCs accountable for their wrongdoings abroad. Such is the case of the now famous Alien Tort Statute of 1789 in the United States. Alleged human rights and children's rights abuses that have taken place outside the United States can be and have been brought before US domestic courts. Where there is no national legislation to allow for an automatic appraisal of human rights accountability claims, the predicament becomes more apparent.

Human rights obligations of states beyond their borders have been recognized by the UN Committee on Economic, Social and Cultural Rights' General Comment 14 on the right to highest attainable standard of health. General Comment 14 states that

"States parties have to respect the enjoyment of the right to health in other countries, and to *prevent third parties from violating* the right in other countries, if they are *able to influence* these third parties by way of *legal or political* means, in accordance with the Charter of the United Nations and applicable international law."

Because territoriality -that States have the right to regulate events occurring and persons present in its territory- is perhaps the sole uncontested basis for jurisdiction, moving beyond territoriality is fraught with problems. In some cases, direct extraterritorial jurisdiction may be exercised and yet in others “domestic measures with extraterritorial implications” may be employed. Direct extraterritorial jurisdiction means that jurisdiction is directly exercised over actors or conduct overseas whereas domestic measures with extraterritorial implications may involve measures that are applied territorially with the intent of having effects extraterritorially.

The 2010 Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other business enterprises, Professor John Ruggie on “Further steps towards the operationalization of the “protect, respect and remedy framework” developed the distinction further by constructing an extraterritoriality matrix. This matrix consists of two rows, namely direct extraterritorial jurisdiction and domestic regulation with extraterritorial implications, and three columns, which lay out the different options in applying these two types of jurisdiction: public policy, regulation and enforcement actions.

Public Policies (CSR and public procurement policies, export credit agency criteria, consular support, etc.) + Direct Extraterritorial Jurisdiction	Regulation (corporate law, etc.) + Direct Extraterritorial Jurisdiction	Enforcement actions (adjudication of breaches and enforcement of judicial and executive decisions) + Direct Extraterritorial Jurisdiction
Public Policies (CSR and public procurement policies, export credit agency criteria, consular support, etc.) + Domestic regulation with extraterritorial implications	Regulation (corporate law, etc.) + Domestic regulation with extraterritorial implications	Enforcement actions (adjudication of breaches and enforcement of judicial and executive decisions) + Domestic regulation with extraterritorial implications

The report contends that not all of different options for exercising extraterritoriality are likely to cause the same level of controversy. For instance, the use of domestic measures with extraterritorial implications may be less controversial than the use of direct extraterritorial jurisdiction as such.

In this respect, “parent-based” measures maybe employed as “domestic regulation with extraterritorial implications” by placing obligations and requirements on domestic companies to regulate or influence the behavior of foreign private actors in other jurisdictions. For instance, requiring parent companies in a State’s territory to report on or take steps to ensure the observance of children’s rights in its entire chain, including itself and its foreign subsidiaries, would be the use of domestic regulation with extraterritorial implications through either public policies or regulation depending on how the requirement is designed.

On the other hand, direct extraterritorial jurisdiction is already exercised in different domains, including international criminal law, securities law, anti-corruption, anti-trust and international environmental law, where its use conferred upon states by certain treaties or customary international law. For instance, treaties governing specific areas such as the UN Convention Against Corruption or the OECD Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions have extraterritorial jurisdictional reach. Apart from these cases, there is no general obligation in international law to exercise extraterritorial jurisdiction and no generally binding treaty that governs this exercise.

In cases where direct extraterritorial jurisdiction may be used, there is general consensus that “reasonableness” is a requirement. In fact, the limits on the exercise of extraterritorial jurisdiction are by and large based on concerns of interference with the domestic affairs and national sovereignty of another State.

The exercise of extraterritorial as an obligation exists only in the case of serious international crimes of genocide, war crimes, crimes against humanity, torture and forced disappearances, on the basis of treaty law (Geneva Conventions of 1949 and Additional Protocol of 1977, Convention Against Torture of 1984, International Convention for the Protection of all Persons from Enforced Disappearance of 2006, the Genocide Convention of 1948). Over this limited list of serious international crimes, States have an obligation to establish their jurisdiction wherever these crimes may be committed, whoever the victims or the perpetrators might be. This is an obligation to exercise adjudicative and prescriptive jurisdiction. This obligation to prosecute international crimes concerns natural persons. Direct criminal liability of corporate entities, on the other hand, is not recognized by all States. Furthermore, even when aut dedere aut judicare requirements are explicit in the law, extradition can only be applied in the case of natural persons and not legal persons such as corporate entities.

There is a lot of discussion in the academia about whether there should be an obligation for States to exercise extraterritorial jurisdiction to protect human rights and children’s rights when they are under threat from private actors in third States, when they have links with the private actor or influence over these actors.

ON WHAT GROUNDS CAN NON-OBLIGATIONAL EXTRATERRITORIAL JURISDICTION BE EXERCISED?

The basis for exercising non-obligational extraterritorial jurisdiction may be found in a State's domestic laws, international treaties as well as customary international law.

The grounds for this exercise include:

- **“Universality”**: A state may exercise jurisdiction over international crimes regardless of the nationality of the perpetrators or the victims or where the crimes occurred
- **“Nationality”**: if the victim or violator is a national
 - **Active Personality Principle**: A State's legislation applies to the conduct of its nationals beyond its territory when these nationals are offenders, more readily recognized under international law
 - **Passive Personality Principle**: A State seeks to protect its national abroad by adopting extraterritorial jurisdiction
- **“Effects”**: if the activities have a direct and foreseeable effect on or in national territory

There are of course problems attached to the exercise of extraterritorial jurisdiction over transnational corporations. Beyond the 'Home' state and 'host' state divide, there may be issues related to the way the corporation is set up. The corporation may be set up in different ways:

- Corporation might have an office or branch at the 'host' State: the link with the 'home' State is clear and direct.
- The parent corporation might have a subsidiary, a separate entity under the laws of the 'host' State that is controlled by the parent corporation: the link with the 'home' State may depend on the internal rules of the corporation or the domestic laws in the 'home' State.
- Corporation might have local partners, such as suppliers or contractors in the 'host' State: Questions of supply and value-chain arise and there is indirect links.

To hold parent companies accountable for the acts of their subsidiaries, “piercing the corporate veil” may be necessary. Piercing the corporate veil means establishing that the subsidiary is completely controlled by the parent company in terms of its decisions and functioning and that there exists no “corporate” veil to shield the parent company from the acts of its subsidiaries.

Also, it might be difficult to determine the nationality of the corporation if the 'home' State is looking to exercise extraterritorial jurisdiction based on the Active Personality Principle. The nationality could be determined through a company's place of incorporation, as is done generally. Yet in other cases, the nationality of its management or ownership structure might come into play. Again, depending on how the company is incorporated, there may be subsidiaries that are part of the parent company or completely separate entities set up in the 'host' States.

TURNING OUR ATTENTION TO THE SPECIFIC AREA OF CHILDREN'S RIGHTS...

There is a particular area within children's rights that has been brought within the domain of extraterritorial jurisdiction, not through international human rights law but through international criminal law. Many countries have unilaterally established extraterritorial jurisdiction over the abuse of children abroad or as it is more commonly referred to, sex tourism. Examples include the UK Sexual Offences Act of 2003, which establishes extraterritorial jurisdiction over sexual offences against children and the US "Protect Act" of 2003, which criminalizes not only the commission of these offenses but the intent as well. While the Protect Act does not expressly criminalize related corporate activity, it makes "arranging, inducing or facilitation" the travel of a person with knowledge of this person's intent to commit criminal acts (sexual abuse of children) at the destination an offense.

Optional Protocol to The Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography requires under Article 3

"Each State Party to ensure that the offenses of sexual abuse of children abroad, the abuse of children to produce images or footage, the sale of a child or his/her organs are as a minimum... 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 Optional Protocol also makes these offenses "extraditable" offenses and extends jurisdiction on the basis of both passive personality principle (when the victim is a national of that State) and active personality principle (when the offender is a national of that State).

Home state's use of extraterritorial jurisdiction against natural persons to combat sexual abuse of children abroad or through abuse images of children ('child pornography') is not contested and may even be encouraged. For instance, the Final Declaration of Justice and Interior Ministers of the G8 Summit in 2007 recalled that

"many of the destination countries lack[ed] adequate legislation or resources to vigorously address this problem within their own borders" and that "therefore, action by the home countries, including G8 State, [was] essential to effectively protecting children around the world".

The application of extraterritorial jurisdiction to companies is permitted for example under the US Protect Act for aiding, abetting and facilitating the foreign exploitation of children and under the Australian Crimes (Child Sex Tourism) Amendment Act 1994 for "encouraging conduct" that is an offence under the legislation and carrying out acts with the intention of "benefiting" (including financially) from the abuse of children overseas. The Australian Act extends not only to Australian incorporated companies but also to those that carry on their

activities principally in Australia.

Beyond the areas like abuse of children abroad (sex tourism), abuse images of children (child pornography) and sale of children that are governed by international criminal law in addition to the children's rights regime, the exercise of extraterritorial jurisdiction for the protection of children's rights is fraught with the same complex questions that govern the exercise of extraterritorial jurisdiction in human rights cases in general. Of course, to bring up one controversial point, if the CRC is assumed at any point in the future to have acquired customary international law standing, we may be having a different conversation altogether.

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Résumé

L'auteur pose d'abord la question juridique de la possibilité pour un Etat d'établir des lois extraterritoriales et il définit les compétences territoriale, personnelle, réelle et universelle. Il estime que les travaux de John Ruggie autorisent le principe de la compétence universelle, mais que l'extraterritorialité pose de nombreux problèmes d'application. Il estime qu'une réflexion sur une Convention internationale permettant l'incrimination de certains comportements délictueux des entreprises ou des dirigeants pourrait éclairer le débat. Une autre piste est de mieux se servir des instruments multilatéraux existants ou en construction; une autre aussi, celle de lever les obstacles procéduraux rencontrés dans la mise en œuvre de la responsabilité pénale devant les juridictions internes. Enfin, il propose de réfléchir à des clauses spécifiques visant la protection des enfants.

Zusammenfassung

Der Autor stellt zunächst die juristische Frage, ob ein Staat extraterritoriale Gesetze erstellen kann, und definiert territoriale, persönliche, reale und universelle Zuständigkeiten. Er ist der Ansicht, dass die Arbeiten von John Ruggie das Prinzip der universellen Zuständigkeit zulassen, dass aber die Extraterritorialität zahlreiche Umsetzungsprobleme mit sich bringt. Er meint, dass die Reflexion über ein internationales Übereinkommen, durch das gewisse strafbare Verhaltensweisen von Unternehmen oder Führungskräften angeklagt werden könnten, die Debatte beleben könnte. Es ist auch möglich, die vorhandenen oder entstehenden multilateralen Instrumente besser zu nutzen, oder die Verfahrenshemmnisse bei der Umsetzung der strafrechtlichen Verantwortung in der nationalen Rechtsordnung aufzuheben. Schliesslich schlägt er vor, über spezifische Bestimmungen zum Schutz der Kinder nachzudenken.

Resumen

El autor plantea en primer lugar la cuestión jurídica de la posibilidad de un Estado de establecer leyes extraterritoriales y define las competencias territoriales, personales, reales y universales. Estima que los trabajos de John Ruggie autorizan el principio de la competencia universal, pero que la extraterritorialidad pone numerosos problemas de aplicación. Considera que una reflexión sobre un Convenio internacional que permita la incriminación de ciertos comportamientos delictivos de las empresas o de los dirigentes podría aclarar el debate. Otra pista es la de servirse mejor de los instrumentos multilaterales existentes o en construcción; otra también, la de suprimir los obstáculos procesales encontrados en la implementación de la responsabilidad penal ante los órganos jurisdiccionales internos. Finalmente, propone

reflexionar sobre las cláusulas específicas destinadas a la protección de los niños.

Summary

The author poses the legal question on the possibility of a State to establish extraterritorial laws, and he defines territorial, personal, real and universal competencies. He considers that the work by John Ruggie allows for the principal of universal competency, but that extraterritoriality poses numerous problems concerning implementation. He considers that further reasoning on the International Convention permitting the incrimination of certain criminal behaviors of businesses or executives could go towards informing upon the debate. Another course of action is to make better use of the existent multilateral instruments or those still under construction; another course is to raise the procedural obstacles met within the implementation of the criminal responsibility before domestic courts. Finally, he calls on the public to reflect on specific clauses aimed at child protection.

* * *

Le titre qui a été donné à mon intervention et celle de Mme Erdem est assez énigmatique : « Compétences extraterritoriales ».

L'avantage est qu'il laisse aux orateurs une large marge d'interprétation. Je vous propose de traiter devant vous deux questions : celle, juridique, de la possibilité pour un Etat d'établir des lois extraterritoriales, et celle politique des moyens par lesquels on peut donner une dimension extraterritoriale à des instruments non juridiques qui peuvent s'avérer efficaces.

Commençons par la question de la **pertinence d'élaborer des lois nationales à effets extraterritoriaux**. Car c'est bien de cela qu'il s'agit : projeter au delà des frontières pour lesquelles il a été conçu, du droit national. L'extraterritorialité est une

« [s]ituation dans laquelle les compétences d'un Etat (législatives, exécutives ou juridictionnelles) régissent des rapports de droit situés en dehors du territoire dudit Etat »,

dit le Dictionnaire de droit international public, du Pr Salmon.

Le professeur Hervé Ascencio, qui a été l'expert français collaborant aux travaux du représentant Spécial du SGNU pour les droits de l'Homme et les entreprises sur l'extraterritorialité, rappelle que des

« règles coutumières et conventionnelles internationales ont établi des titres de compétences étatiques extraterritoriales.

- la compétence territoriale, lorsque la situation est localisée en tout ou en partie sur le territoire de l'Etat;
- la compétence personnelle, lorsque l'auteur (compétence personnelle dite active) ou la victime (compétence personnelle dite passive) a la nationalité de l'Etat;
- la compétence réelle, dite encore « de service public », lorsque la situation porte atteinte à un intérêt fondamental de l'Etat;
- la compétence universelle, lorsqu'il s'agit de défendre des valeurs universelles, en l'absence des liens de rattachement classiques correspondant aux autres titres de compétence. »

Concernant la compétence personnelle, dit encore le professeur Ascencio,

« la loi pénale française est applicable à un très grand nombre d'infractions commises à l'étranger par un Français ou contre un Français – personne physique ou morale. Lorsque l'auteur a la nationalité française, l'extraterritorialité concerne toutes les infractions relevant de la catégorie des « crimes » et, sous condition de double-incrimination, les infractions relevant de la catégorie des « délits » ».

C'est ainsi que le crime de pédophilie ne souffre pas de limite géographique pour le juge français. Il en va ainsi dans de nombreux pays.

La « compétence réelle ou de service public » est plus diversement mise en pratique. Un Etat peut considérer ou non que ses lois réprimant des crimes graves sont applicables à toute personne foulant son sol ou ayant un rapport quelconque avec son économie. Les Etats-Unis ont adopté récemment des lois qui vont très loin dans ce sens sur le thème de la lutte anti corruption : les lois Sarbane-Oxley et Dodd-Frank. Depuis quelques dizaines d'années, une très vieille loi américaine adoptée à une date qui est chère à mon pays, 1789, l'Alien Tort Claim Act, conçue pour traiter la cas des crimes commis par des diplomates étrangers, est utilisée pour poursuivre les crimes graves dans le domaine des droits de l'Homme par des entreprises de toutes nationalités dès lors qu'elles ont un rapport quelconque avec le sol américain. Comme il s'agit d'une loi du registre civil, toutes les affaires fondées sur cette loi ATCA ont été jusqu'ici conclues par des transactions financières. Une unique affaire est parvenue, récemment, jusqu'à la Cour Suprême, le cas Kiobel relatif à l'assassinat d'un défenseur de l'environnement au Nigéria. On craint toutefois que la Cour Suprême ne considère que les tribunaux américains qui ont jusqu'ici accepté d'instruire l'affaire ne se voient objecter le principe du forum non conveniens, c'est à dire que l'affaire aurait dû être jugée au Nigéria.

La « compétence universelle » mise en œuvre très largement, comme en Belgique ou en Grande Bretagne, a été l'objet de révisions à la baisse du fait des problèmes politiques qu'elle soulevait. Cela ne veut pas dire que la « compétence universelle » n'existe plus. L'incrimination en France de personnes suspectées d'avoir participé au génocide des Tutsi au Rwanda est la preuve du contraire. Le professeur Ascencio précise que

« la compétence universelle, telle qu'elle est conçue en droit français, correspond aux cas où une convention à laquelle la France est partie ou un acte de l'Union européenne lui donne compétence (art. 689 du code de procédure pénale). Si la présence en France de l'auteur est toujours requise (art. 689-1), il suffit que l'une des personnes soupçonnées soit présente pour justifier l'ouverture de poursuites; la compétence peut donc s'étendre à la participation d'autres personnes aux mêmes faits. Le législateur a ajouté à ces cas une compétence universelle pour les crimes entrant dans la compétence des tribunaux pénaux internationaux ad hoc pour l'ex-Yougoslavie et le Rwanda, avec également une condition de présence de l'auteur ou du complice sur le sol français ».

EST-IL OPPORTUN DE LANCER UNE OFFENSIVE POUR ÉLABORER DE NOUVELLES LOIS À EFFET EXTRATERRITORIAL POUR LA PROTECTION DES DROITS DE L'ENFANT ?

Le principe de la « compétence universelle » pour la défense de valeurs universelles l'autorise. La question a été abondamment explorée pendant les travaux de John Ruggie. Le professeur Ascencio a fait observer :

« L'extraterritorialité pose de nombreux problèmes à la fois juridiques et pratiques. L'un des plus complexes consiste à déterminer à partir de quel moment une situation est localisée sur un territoire donné, alors que les techniques modernes de communications, la structure transnationale de certaines entreprises, la mondialisation économique et financière gommant les frontières. »

Ceci ne veut pas dire qu'il n'y ait rien à faire. Le professeur Ascencio suggère **de réfléchir à une convention internationale permettant l'incrimination pénale de certains comportements délictueux des entreprises et/ou de leurs dirigeants**. Les violations de droits de l'enfant se caractérisant par le travail en bas âge, le travail pénible, le travail forcé, l'esclavage, les mauvais traitements, la mise en danger par l'absence de protection, le harcèlement, pourraient figurer parmi la liste. J'ajoute que la protection de l'enfant me semble justifier une convention précise quant aux sanctions, à l'instar de ce qui existe déjà en matière de lutte contre la corruption.

UNE AUTRE PISTE, COMME JE L'AI ANNONCÉ, EST DE MIEUX SE SERVIR D'INSTRUMENTS MULTILATÉRAUX EXISTANTS OU EN CONSTRUCTION

A l'instar de ce qui existe en droit bancaire pour lutter contre le blanchiment avec le Comité de Bâle, le professeur Ascencio suggère de réfléchir à l'organisation de coopérations en matière d'échange international d'informations. Il propose

« la constitution d'un réseau de régulateurs publics nationaux dans le domaine du respect des droits de l'homme (remplaçons par « enfant ») par les entreprises. Ce réseau pourrait s'appuyer sur les commissions nationales consultatives des droits de l'homme, ou encore sur les points de contact nationaux établis par l'OCDE. »

Comme vous le savez les « **Points de Contact Nationaux** » ont été créés à l'occasion de la révision des Principes directeurs de l'OCDE pour les multinationales opérée en 2001 afin, notamment de traiter par la médiation des plaintes qui leur seraient adressées à propos de comportements non conformes aux Principes observés par des entreprises de pays adhérant à ces derniers en quelque endroit du monde que ce soit. Onze ans plus tard, lors de la révision suivante, il a été décidé de faire fonctionner davantage en réseau l'ensemble des 43 PCN. Notez bien que 43 est un nombre très supérieur à celui des membres de l'OCDE : une dizaine de pays non membres ont décidé d'adhérer aux Principes directeurs, en particulier des pays en développement.

Or l'observation de la façon dont certains PCN ont traité les plaintes reçues signale la construction progressive d'une sorte de jurisprudence développant une extraterritorialité prometteuse.

Ainsi, en conclusion de sa Déclaration finale concernant l'entreprise « Aker Kvaerner » le PCN norvégien affirmait-il :

« The norms that are quoted in OECD's Guidelines for Multinational Enterprises, Chap.2 point 2 are international, and therefore have equal relevance and weight in all countries ».

Le PCN français, dans une déclaration finale du mois dernier à propos d'un importateur de coton qui se fournissait partiellement en Ouzbékistan, a affirmé :

« Le PCN rappelle qu'en toutes circonstances, le travail des enfants et l'emploi forcé sur les champs de coton en Ouzbékistan constituent une violation flagrante et caractérisée des Principes directeurs de l'OCDE. De manière générale, le PCN rappelle également que le commerce de produits résultant de l'emploi forcé d'enfants, où qu'il se déroule, constitue une violation flagrante et caractérisée des Principes directeurs de l'OCDE. »

Et la médiation a abouti à un engagement public de l'entreprise DEVCOT de ne plus se fournir dans ce pays.

Or, la nouvelle formulation du règlement intérieur du PCN, directement dérivée de la révision des Principes directeurs, annonce que

« Les décisions du PCN, qui peuvent prendre la forme de communiqués de presse, sont rendues publiques en tout état de cause par la direction générale du Trésor. Elles peuvent être spécifiquement adressées aux organismes publics concernés. »

Au risque d'opprobre public attaché à une mise au pilori sur le site internet du ministère de l'économie s'ajoute la menace voilée de suggérer aux banques publiques et organismes d'assurance de crédit export de black lister l'entreprise coupable.

La recommandation que je ferais, ayant personnellement l'expérience d'être un membre du PCN français depuis 4 ans, c'est que les ONG s'intéressant aux droits de l'enfant n'hésitent pas à présenter des plaintes relatives non seulement aux filiales mais aussi aux filières d'approvisionnement des pays adhérant aux principes de l'OCDE.

Une seconde idée a été exprimée par le professeur Ascencio dans le rapport qu'il a transmis au professeur Ruggie, en décembre 2010.

« Il conviendrait d'insister sur la **levée des obstacles procéduraux** rencontrés dans la mise en œuvre de la responsabilité pénale devant les juridictions internes, notamment lorsqu'ils sont le fait des ministères publics. A cette fin, la création d'un organe international de contrôle pourrait être justifiée. A tout le moins, il pourrait être recommandé aux organes internationaux créés par les conventions en vigueur d'accentuer leur contrôle en ce domaine. »

Le Comité des droits de l'enfant et le nouveau Groupe d'experts sur les droits de l'Homme et les entreprises pourraient s'atteler à cette tâche.

Le professeur ajoute :

« Un titre de compétence subsidiaire fondé sur le **déni de justice** pourrait être mis en œuvre, s'il est établi que l'Etat ou les Etats compétents pour connaître des actes dommageables de la filiale sont dans l'incapacité ou n'ont pas la volonté de mener à bien un procès. On relèvera que ce critère de l'incapacité ou de l'absence de volonté de l'Etat existe déjà, en matière pénale, dans le statut de la Cour pénale internationale, en tant qu'exception au principe de complémentarité. Il pourrait également être retenu en matière civile. Le forum necessitatis retenu pour les obligations alimentaires dans le droit de l'Union européenne y fait d'ailleurs penser. »

Or les obligations alimentaires concernent au premier chef les enfants. La brèche est donc déjà ouverte pour un élargissement de la reconnaissance d'un déni de justice préjudiciable aux droits de l'enfant. Je précise que la France a officiellement soutenu cette proposition dans le cadre de la révision du règlement européen Bruxelles I. Sans succès.

Une troisième suggestion concerne plus spécifiquement les pays de l'Union européenne. La 3e communication de la Commission européenne sur la RSE, publiée en octobre 2011, annonçait de façon sibylline et jargonneuse :

« **La Commission fera des propositions importantes dans le domaine du commerce et du développement.** S'il y a lieu, elle proposera également d'aborder les questions de RSE dans le cadre d'un dialogue institutionnalisé avec les pays et régions partenaires.(...) La Commission a l'intention de déterminer les moyens d'inciter les entreprises à avoir un comportement responsable dans le cadre de ses futures initiatives visant à favoriser une reprise et une croissance plus inclusives et durables dans les pays tiers. »

D'ores et déjà des clauses RSE ont été introduites dans quelques accords commerciaux de l'UE. Nous pourrions réfléchir à ce que pourraient être des **clauses visant spécifiquement à la protection des droits de l'enfant**, notamment en établissant un lien avec la réforme des services de protection de l'enfance et de la justice pour enfant, établissements pénitentiaires compris. Une forme originale d'extraterritorialité, me direz-vous ? Soyons créatifs.

De même, alors que, dans cette même communication, la Commission a annoncé qu'elle entend bâtir d'ici à 2013 une politique faisant de l'Europe un territoire exemplaire pour la mise en œuvre des Principes directeurs des Nations Unies pour les droits de l'Homme et les entreprises, je suggère que le Comité des droits de l'enfant propose sa **collaboration pour construire, à l'intérieur de cette politique, un corpus ciblé sur la protection des enfants.**

Une dernière suggestion concernera les initiatives qui, dans un grand nombre de pays, s'efforcent d'encadrer la présence sur les médias audiovisuels de contenus violents et incitant à

la violence afin d'en protéger l'enfance. Le sujet est aussi sensible que difficile. Pour travailler depuis quelque deux ans avec les principaux médias français qui ont, spontanément, constitué un groupe de réflexion sur leurs pratiques de RSE, je peux vous assurer que la question de leur responsabilité au regard des enfants est un véritable souci pour les acteurs du « paysage audiovisuel ». Or ils constatent rencontrer des difficultés à identifier des interlocuteurs. **Aider les collectifs de médias qui se constituent ainsi dans un certain nombre de pays dans leurs efforts de construction de codes de conduite**, c'est-à-dire des normes de soft law adéquates à leurs métiers, me semble une autre piste à explorer. Car l'enjeu n'est pas mince, comme nous le rappelle une actualité où abondent les faits divers sanglants ayant pour cadre les écoles ou les sorties d'école.

Telles sont quelques idées que je voulais partager avec vous. Le thème de l'extraterritorialité est vaste et je suis loin d'en avoir fait le tour. Vous ouvrez, avec ce séminaire, un chantier aussi passionnant que nécessaire, auquel mon pays, la France est prêt à s'associer.

Je terminerai par une mise en garde : ne pensons pas, en privilégiant la réflexion sur l'extraterritorialité, **que les violations des droits de l'enfant par les entreprises sont le seul fait des entreprises non-européennes**. On m'a rapporté un fait qui donne à penser : Une entreprise européenne très engagée sur la RSE s'est rendue compte un jour que, parmi les employés d'une société à laquelle elle soustrait depuis des années le ménage de ses locaux, une personne venait, tôt le matin et tard le soir, les horaires de son travail, avec des enfants en bas âge. Comme la rémunération de cette personne ne lui permettait pas de payer les soins de baby-sitters, elle n'avait pas trouvé d'autre solution que de les prendre avec elle sur son lieu de travail. Ces enfants étaient, en conséquence, privés de leur quota de sommeil et inhalaient quotidiennement des produits toxiques.

THE CHILD AS CONSUMER OR AS WORKER?

JANET VOÛTE

Vice President Public Affairs, Nestlé, Vevey

Résumé

Nestlé est présent dans presque tous les pays du monde. La priorité de la compagnie est d'être la première société mondiale de nutrition, de santé et de bien-être, en aidant à améliorer la qualité de vie de ses consommateurs et en leur apportant les meilleurs produits et les plus appropriés. Nestlé est convaincu qu'en vue de prospérer la compagnie doit se projeter sur le long-terme et s'ancrer dans un ensemble de valeurs, en créant également des valeurs pour la société, conformément aux lois nationales, aux standards internationaux ainsi que conformément à ses propres principes de conduite qui se basent sur 10 principes du Pacte mondial des Nations Unies. L'auteur expose les droits de l'enfant présents dans la « chaîne de valeur » de Nestlé, en abordant les questions du travail et les questions concernant le consommateur, en soulignant la transparence croissante de l'entreprise dans la manière d'adresser ces questions.

Zusammenfassung

Nestlé ist weltweit in fast allen Ländern vertreten. Das Unternehmen strebt prioritär an, weltweit die Nummer eins in Ernährung, Gesundheit und Wohlbefinden zu sein. Nestlé will die Lebensqualität seiner Verbraucher verbessern, indem das Unternehmen ihnen die besten Produkte anbietet. Ein Unternehmen, das auf langfristigen Erfolg abzielt, muss Werte für sich und die Gesellschaft schaffen. Diese müssen im Einklang mit den nationalen Gesetzen, den internationalen Standards und seinen eigenen Unternehmensgrundsätzen sein, die sich ihrerseits auf die 10 Grundsätze des globalen Pakts der Vereinten Nationen stützen. Die Autorin stellt die Rolle der Kinderrechte in der Wertschöpfungskette von Nestlé vor. Sie geht Themen rund um Arbeit und Verbraucher an und unterstreicht die wachsende Transparenz des Unternehmens im Umgang mit diesen Fragen.

Resumen

Nestlé está presente en casi todos los países del mundo. La prioridad de la compañía es la de ser la primera sociedad mundial de nutrición, salud y bienestar, que ayuda a mejorar la calidad de vida de sus consumidores aportándoles los mejores productos y los más pertinentes. Nestlé está convencido que con el fin de hacer prosperar la compañía, debe proyectarse a largo plazo y afianzarse en un conjunto de valores, creando también valores para la sociedad, de acuerdo con las leyes nacionales, con las normas internacionales así como de conformidad con sus propios principios de conducta, basados sobre los 10 principios del Pacto Mundial de las Naciones Unidas. La autora expone los derechos del niño presentes en la cadena de valores de Nestlé, abordando las cuestiones del trabajo y las cuestiones que se refieren al consumidor, destacando la transparencia creciente de la empresa en la manera de dirigir estos aspectos.

Summary

Nestlé operates in almost every country in the world. The company's priority is to be the leading Nutrition, Health and Wellness Company, helping to enhance the quality of life of their consumers by bringing the best and most relevant products to people. Nestlé is convinced that in order to prosper, the company must take a long-term view framed in the right set of values, creating also value for society, in compliance with national laws, international standards and its own Corporate Business Principles which are based on the UN Global Compact's 10 Principles. The author presents children's rights in Nestlé's "value chain" in terms of both labour issues as well as consumer issues, showing the increased transparency of the company in how it addresses these issues.

* * *

I am very grateful for the opportunity to join you and to discuss children's rights and the role of the business sector. I have spent 10 years in public health, and I have had the privilege of serving in an NGO, in a UN agency, and now with Nestlé. This does give a certain perspective on some of the challenges that we face, and I am convinced that the only way forward is to work together and not separately.

Before sharing with you our efforts to address children's rights in our value chain, I would like to introduce our company to those who don't know us. Nestlé, with its headquarters in Vevey, Switzerland, was founded in 1866. We employ around 328,000 people and have operations in almost every country in the world, producing 2,000+ global and local brands and selling 1 billion products sold around the world every day.

Our company's priority is to be the leading Nutrition, Health and Wellness Company, helping to enhance the quality of life of our consumers by bringing the best and most relevant products to people, wherever they are, whatever their needs, throughout their lives.

CREATING SHARED VALUE

At Nestlé, we have a fundamental conviction that for a company like ours to prosper, we must take a long-term view framed in the right set of values. At the same time as focusing on creating value for our shareholders, our work must create value for society, such as our employees, families and communities, suppliers, and distributors. This is what ensures the long-term sustainability of a company. Creating Shared Value also builds trust and credibility in the society in which the business operates.

We recognise that our position in society brings both and opportunities and responsibilities: to do business in compliance with national laws, international standards and our own Corporate Business Principles; and in ways that help protect the environment for future generations. Thus, our commitments to sustainability and compliance form the foundations on which we build our actions in Creating Shared Value.

NESTLÉ CORPORATE BUSINESS PRINCIPLES

Our Corporate Business Principles, which are actually based on the UN Global Compact's 10 Principles, have been made available in over 50 languages to all our employees.

Children's rights are embedded in a consumer aspect of our business principles and we have specific references to human rights and labour practices, including child labour.

I would like to provide you some insight into our efforts to address children's rights in our "value chain" in terms of both labour issues as well as consumer issues. This is not to say that we have solved the problem. But we have taken steps to address the problem and are being increasingly transparent in how we address these issues.

RESPONSIBLE SOURCING

We have made substantial commitments on child labour in our agricultural supply chain, particularly focusing on the cocoa supply chain in Côte d'Ivoire.

Nestlé has a commitment on Child Labour in Agriculture Supply Chains which states that:

“Nestlé is against all forms of exploitation of children, and is firmly committed to actions to eradicate child labour from its agricultural supply chains, in line with our commitments in the Nestlé Corporate Business Principles.

Nestlé recognises that in addition to individual actions, companies, together with Governments, and with the help of NGOs need to work together to create the conditions that will prevent and eliminate the occurrence of child labour. Nestlé is committed to work with all relevant stakeholders to help address child labour.”

In addition, our Nestlé Supplier Code regarding child labour states that:

“The use of child labour by the supplier is strictly prohibited. Child labour refers to work that is mentally, physically, socially morally dangerous or harmful for children or improperly interferes with their schooling needs.”

We have a Responsible Sourcing Programme where we work directly with over 680,000 farmers. One of the areas where we were able to do this very successfully is in dairy. We have a number of examples demonstrating how effectively we have been able to positively contribute to the communities we source milk from – in terms of their standard of living, health, education, women's empowerment and education.

We are now focusing on how to move from working directly with over 680,000 farmers to the next level of the complex supply chain involving over 5 million people. We are aiming to tackle this through our Responsible Sourcing Traceability Programme.

CERTIFICATIONS, AUDITS AND RISKS

We have a number of controls in place to make sure that our direct and indirect suppliers comply with these requirements. Responsible sourcing audits are conducted by external auditors against our direct supplier. The main commodities we source locally are certified (including on child labour) through external partners such as UTZ, Fairtrade and Rainforest Alliance. We also have verification processes in place for specific commodities such as coffee (4C – The Common Code for the Coffee Community) and dairy (RISE - Response-Inducing Sustainability Evaluation).

Certification is actually an excellent way to start to make the change in the supply chain but unfortunately, it doesn't solve the whole problem. By certifying only one part of the supply chain, we leave out other farmers that are not part of the chain? These are difficult problems to solve with no quick fixes.

The most important step has been the work that Professor John Ruggie undertook in clarifying the respective roles of States and companies in the field of business and human rights. The corporate responsibility to respect human rights clearly shows that companies need to move from "naming and shaming" to "knowing and showing".

ADDRESSING CHILD LABOUR IN CÔTE D'IVOIRE

Child labour has no place in our supply chain. We are against all forms of exploitation of children, and are firmly committed to actions to tackle the issue of child labour in agricultural supply chains, in line with our commitments in our Corporate Business Principles. This is one of the main reasons why we decided to become an affiliate member of the Fair Labor Association (FLA). The FLA did a very thorough assessment of the situation in the cocoa supply chain in Côte d'Ivoire. There is a massive problem of child labour. It is there, it is challenging and it is complex, largely because of the multi-tiered aspect of the supply chain.

Nestlé has decided to "know and show" the challenges and opportunities involved in the cocoa supply chain. We published the report of the FLA and released an action plan addressing each of their 11 recommendations. We realise that we cannot fix farmers' incomes alone as a company, we cannot fix schooling alone as a company, but to change things and make a difference on the ground, we need to be able to gather all relevant stakeholders around the table.

We have embedded our work with the Fair Labor Association into the Nestlé Cocoa Plan, and now, elimination of child labour is at the centre of the Plan.

We are working with the International Cocoa Initiative, the World Cocoa Foundation, the government of the Côte d'Ivoire and many other local stakeholders, and will be reporting publicly on our progress. This is a multiple approach, which focuses on farmer income, distribution of high-yield plantlets to farmers, elimination of child labour and sustainable supply chains. As you can see, there are many aspects of the programme, which we hope will achieve exactly what we all desire, over a period of time.

HUMAN RIGHTS IMPACTS ASSESSMENTS

We carry out in-country human rights impact assessments that cover our own operations and our supply chain, and include extensive children's rights compliance indicators. In addition to this, every year we carry out a human rights risk evaluation at the corporate level across

Nestlé facilities, our primary suppliers, as well as upstream suppliers, assessing more than 40 human rights indicators, including the risk of use of child labour.

We do not do this alone. In addition to our collaboration with organisations for audit and certification purposes, we partner with some of the best experts on human and labour rights, such as the Danish Institute for Human Rights and the Fair Labor Association.

We work with the Danish Institute for Human Rights to assess actual and potential human rights impacts in our factories and through our supply chains. To do this, we apply a 360-degree approach covering 6 functional areas:

- Human resources
- Safety, health and environment
- Products and marketing
- Security arrangements
- Legal and government affairs
- Procurement and supply chain

Together with the Danish Institute for Human Rights, we assessed our operations in Colombia in 2010, in Angola, Nigeria, and Sri Lanka in 2011, and Kazakhstan, the Russian Federation, and Uzbekistan in 2012. The Danish Institute then drafts a report and makes recommendations on how to address identified gaps so that we can steadily improve our performance on the ground.

Beyond the actual assessment of impacts and the action plans resulting from this process, this process enables us to engage on human rights issues with a range of stakeholders, including employees, contractors, suppliers, consumers as well as local communities and NGOs. There is a need for human rights education both internally and externally, and an organisation like the Danish Institute helps us with this aspect.

CARE AUDIT PROGRAMME

Our CARE Audit programme (Compliance Assessment of Human Resources, Occupational Health & Safety, Environment and Business Integrity) was introduced in 2005 to monitor our support for international conventions and the social elements of the Nestlé Corporate Business Principles, as well as compliance with local laws. The audits, which take place every three years and are performed by three leading independent auditors, focus on compliance in the following areas: human rights and labour practices, business integrity, safety and health, environmental sustainability, and security.

We have extended CARE to cover all Nestlé employees and all sites owned or operated by Nestlé, with 1687 CARE audits carried out since 2005.

RESPONSIBLE ADVERTISING TO CHILDREN

The protection of children from the marketing of products with a high content of public-sensitive ingredients such as fat, sugar or salt is not only important to organisations like the World Health Organisation (WHO), but also to the food and beverage industry.

Nestlé has committed to contribute to the fight against non-communicable diseases by voluntarily adopting the 2004 WHO Global Strategy on Diet, Physical Activity and Health. This commitment was formalised in 2008 when our CEO together with other members of the International Food and Beverage Alliance (IFBA) made five commitments to the Director General of the WHO.

We committed to:

- Reformulate products and develop new products that support the goals of improving diets
- Provide clear fact-based nutrition information
- Restrict how and what we advertise to children
- Promote balanced diets and physical activity
- Support public-private partnerships

Through IFBA, we publicly report on our progress on the five commitments, which is sent to the Director General of the WHO for review annually.

Our commitments around responsible advertising to children are very specific: no advertising or marketing activity should be directed to children below 6 years of age and advertising for children between the ages of 6 and 12 is restricted to products with a nutritional profile (including limits for such ingredients as sugar, salt and fat), which helps children achieve a healthy balanced diet.

In addition, Nestle has signed voluntary local pledges on the marketing of foods to children covering almost 50 countries globally. These pledges are delivering results: for instance the 2012 third-party monitoring report of the EU Pledge shows a 73% decline in advertising of products that do not meet EU Pledge companies' nutritional criteria in programmes targeted at children.

THE WHO INTERNATIONAL CODE OF MARKETING OF BREAST-MILK SUBSTITUTES

The WHO Code recommends to WHO Member States

“to protect and promote breastfeeding; to ensure the proper use of breast-milk substitutes, when these are necessary, on the basis of adequate information and through appropriate marketing and distribution.”

Nestlé has a public commitment to the WHO recommendation and is working to protect and promote exclusive breastfeeding for the first six months of life, followed by the introduction of complementary foods with continued breastfeeding for as long as possible. We have policies that are based on the WHO Code as well as a strong global management system in place to ensure compliance with our policies.

These include:

- Training, testing and compensation on WHO Code knowledge for all relevant personnel
- Extensive management systems across all our operations
- Internal audits carried out in approximately 20 countries each year as well as external audits performed by Bureau Veritas
- Whistle blowing procedures available to all employees
- Investigation of concerns raised internally or externally
- Internal and external reporting on compliance

These measures serve as a feedback loop to continually improve our processes and reiterate our commitment to transparency.

In the area of the responsible marketing of breast-milk substitutes there is now a socially responsible investment index called FTSE4Good. FTSE4Good has specific criteria on the responsible marketing of breast-milk substitutes and has given this contentious area an opportunity to make some progress. Nestlé has submitted all of its policies, procedures, has welcomed external auditors appointed by FTSE into its countries of operation –India and Zambia in 2011 and Laos and Morocco in 2012. Nestlé is the first and, so far, only infant formula manufacturer to be included in the FSTE4Good responsible index.

CONCLUSION

We are looking at a world where business should play a role, where we have to report transparently, where we have to monitor and evaluate – based on what stakeholders consider as critical. We make a considerable effort to submit data on our progress to organisations such as the FSTE4Good as well as to a new index called the Access to Nutrition Index. We report on our actions and performance in Creating Shared Value, sustainability and compliance to Global Reporting Initiative (GRI) A+ standards.

We firmly believe that the best way forward is active and continuous stakeholder engagement. Thus, we engage with external stakeholders on all issues that are relevant to them, and frankly, of equal relevance to our business.

We are committed to being transparent. We are taking an honest look at the real debt of some of these challenges around children's rights and would like to be part of the solution.

Thank you.

ALINE CLERC

Responsable alimentation et agriculture, Fédération romande des Consommateurs, Lausanne

Résumé

L'auteure nous présente les résultats d'enquêtes de terrain que la Fédération romande des consommateurs a conduites dans le domaine du marketing alimentaire. Comment attirer les enfants, les parents à acheter certains produits ? Quel est l'élément déclencheur qui va inciter les enfants et les parents à plébisciter un produit plutôt qu'un autre ? Les enfants vont être attirés par le visuel, les images, les éventuels cadeaux alors que les parents sont d'avantage captivés par les arguments santé et les images de bonheur familial que l'on peut trouver sur certains emballages. L'aspect budget est évidemment essentiel dans le choix final du produit. Des recommandations ont été publiées en 2008 pour encourager les Etats à pratiquer un marketing responsable par le biais de pledges (déclaration commune par un groupe d'entreprises s'engageant à mettre en place des pratiques marketings responsables). L'auteure termine par des recommandations pour aider les parents dans la promotion d'une alimentation saine pour leurs enfants.

Zusammenfassung

Die Autorin stellt die Ergebnisse von Umfragen der *Fédération romande des consommateurs* im Bereich Lebensmittelmarketing vor. Wie können Kinder und Eltern dazu gebracht werden, gewisse Produkte zu kaufen? Was ist der Auslöser, der Kinder und Eltern dazu bringt, eher ein Produkt als ein anderes zu wählen? Die Kinder werden vom Visuellen, den Bildern, möglichen Geschenken angezogen, während sich die Eltern eher von Argumenten im Bereich Gesundheit und von Bildern glücklicher Familien auf gewissen Packungen überzeugen lassen. Der finanzielle Aspekt ist in der endgültigen Wahl des Produkts wesentlich. 2008 wurden Empfehlungen veröffentlicht, um die Staaten zu ermutigen, durch sogenannte Pledges ein verantwortungsvolles Marketing zu betreiben (gemeinsame Erklärung einer Gruppe von Unternehmen, verantwortungsvolle Marketingstrategien zu verfolgen). Die Autorin schliesst mit Empfehlungen für die Eltern zur Förderung einer gesunden Ernährung ihrer Kinder.

Resumen

La autora nos presenta los resultados de las encuestas sobre el terreno que la Federación suiza francófona de consumidores condujo en el ámbito de la comercialización alimentaria. ¿Cómo

atraer los niños y los padres a comprar ciertos productos? ¿Cuál es el elemento desencadenante que va a estimular a los niños y a los padres a preferir un producto más que otro? Los niños estarán atraídos por el visual, las imágenes, los posibles regalos, mientras que los padres están más cautivados por los argumentos salud y las imágenes de bienestar familiar

que se pueden encontrar en ciertos embalajes. El aspecto presupuesto es obviamente esencial en la elección final del producto. En el 2008 fueron publicadas algunas recomendaciones para incitar a los Estados a practicar una comercialización responsable a través de compromisos (declaración común de un grupo de empresas que se comprometen a establecer prácticas de comercio responsables). La autora finaliza con las recomendaciones para ayudar a los padres en la promoción de una alimentación sana para sus hijos.

Summary

The author presents results from field-work research conducted by the Federation of consumers of western-Switzerland in the field of food marketing. How does one bring children and parents to buy certain products? What is the triggering element which incites children and their parents to favor one product over another? While children are attracted by the visual effect, the images, and the eventual free prizes, parents are captivated by alleged health benefits and images of familial bliss which can be found on some packagings. The budgetary aspect obviously plays an essential role in the final choice of the product. Recommendations were published in 2008, encouraging States to practice responsible marketing by means of pledges (common declaration by a group of businesses who commit to the implementation of responsible marketing practices). The author concludes by emitting recommendations aimed at helping parents to promote healthy eating habits for their children.

* * *

Je vais vous présenter les résultats d'enquêtes de terrain que la *Fédération romande des consommateurs* a conduites dans le domaine du marketing alimentaire. Il s'agit d'un exposé pratique focalisé sur un seul aspect.

LA FÉDÉRATION ROMANDE DES CONSOMMATEURS

En bref, la *Fédération romande des consommateurs* (ci-après FRC) est une association de consommateurs qui a été créée il y a plus de 50 ans. Historiquement, cette association a été créée par des féministes en vue d'obtenir le droit de vote des femmes en Suisse; en 1959 il n'y avait pas encore de droit de vote pour les femmes en Suisse. L'association voulait montrer que les femmes avaient aussi le pouvoir et qu'il était temps de leur donner non seulement le pouvoir d'acheter les denrées quotidiennes, mais aussi le pouvoir de décider au niveau politique. Depuis ce temps-là, le nom a aussi changé, de *Fédération romande des consommatrices*, en *Fédération romande des consommateurs* et l'association s'intéresse à tous les champs de la consommation. Elle est reliée internationalement à beaucoup de partenaires, spécialement en Europe via toutes les autres associations de consommateurs d'Europe, mais aussi au niveau mondial via l'association *Consumer International*, qui regroupe 220 organisations dans 120 pays et qui est active également dans le domaine du marketing alimentaire.

L'ENFANT CONSOMMATEUR

Si l'on prend le thème : « l'enfant en tant que consommateur ou travailleur ? », il est clair qu'une association de consommateurs est active sur ces différents plans. Je ne vais pas détailler toutes les actions ou enquêtes que nous avons effectuées dans le domaine du travail des enfants, qui sont parfois exploités pour produire les biens de consommation. Cependant, pour information, la FRC suit également ce secteur, notamment en organisant des enquêtes internationales *CSR Corporate and Social Responsibility*. La FRC s'est ainsi penchée, ces dernières années, sur le problème de la filière du cacao, des bananes ou de l'huile de palme.

Mon exposé se focalisera sur l'enfant cible du marketing alimentaire même s'il n'y a pas que dans le domaine alimentaire que l'enfant est ciblé en tant que consommateur. A notre permanence conseil, où les consommateurs viennent nous présenter leurs problèmes quotidiens, les cas d'enfants qui se sont retrouvés à acheter des produits ou des services sans même se rendre compte qu'ils les avaient achetés sont nombreux. Le dernier numéro de FRC Mieux choisir, notre magazine, présente le cas d'enfants qui jouent à des jeux gratuits sur des nouveaux moyens de communication (tablettes ou smartphones) et qui se retrouvent avec des actes d'achat conclus pour des produits virtuels dans ces jeux prétendument gratuits. Le tout est facturé via la carte de crédit des parents; si les appareils sont mal configurés et les codes

d'accès entrés automatiquement, les enfants peuvent se retrouver à avoir réellement acheté des marchandises virtuelles dans le cadre de ces jeux. Une fillette de 6 ans a consommé pour CHF 3'000.- en 4 jours. Un de ces jeux est adapté de la série américaine « *les Simpson* » où les joueurs peuvent acheter des « *doughnuts* » virtuels; cela soulage le porte-monnaie des parents, mais au moins sans impact sur la santé des enfants vu qu'il s'agit de friandises virtuelles.

Au niveau de l'enfant consommateur, il est clair que les parents sont les premiers responsables des achats, mais diverses études, en tous cas européennes, ont montré que les enfants influencent très souvent les achats des parents. Une étude belge a trouvé que 71% des enfants de 4 à 6 ans prescrivaient déjà l'achat de certaines céréales à leurs parents. Les enfants plus âgés ou qui ont déjà de l'argent de poche sont très nombreux à s'acheter des snacks, des friandises, des bonbons, des biscuits. Dès l'âge de 8 ans, les enfants qui accompagnent leurs parents lors des achats placent spontanément certaines marchandises dans le caddie à commissions. Face au constat que l'obésité est en phase de devenir un problème de santé publique mondiale, le fait que les enfants puissent choisir eux-mêmes des aliments ou influencent l'achat d'aliments pose la question de quels aliments sont choisis par les enfants. En Suisse, à peu près 1 enfant sur 5 est en surpoids ou obèse, c'est un chiffre qui se retrouve dans tous les pays développés et parfois d'une manière encore plus prégnante dans certains pays « émergents », dans lesquels les habitudes de consommation et d'alimentation changent rapidement. Le Mexique a par exemple des graves problèmes d'obésité liés à des changements d'habitudes alimentaires assez rapides.

MARKETING OU COMMENT FAIRE REMARQUER SON PRODUIT

Le marketing connaît plusieurs techniques pour faire parler d'un produit et le faire remarquer. Il y a bien sûr les médias, la publicité, l'affichage sur tous les camions de publicité possibles, la télévision, les annonces dans les journaux, les nouveaux médias. La présence lors d'événements rassembleurs : manifestations sportives, festivals. La présence sur le lieu de vente; il est toujours intéressant de se faire remarquer sur le lieu de vente, vu qu'un nombre important d'achats se décident à cet endroit. Enfin, dans les lieux de ventes, l'emballage est particulièrement intéressant pour faire remarquer le produit.

ENQUÊTES DE LA FRC

Je vais vous présenter plus en détails deux études que nous avons menées ces deux dernières années à propos du marketing. La première concerne l'ensemble du marketing sur le lieu de vente, via les emballages ou le placement des produits et la deuxième concerne l'étude des publicités diffusées à la télévision.

1. *Marketing par l'emballage*

Comment essayer d'attirer soit les enfants, soit les parents pour qu'ils achètent certains produits, par exemple des paquets de céréales qui utilisent des héros de dessins animés, des mascottes ou des figurines connues des enfants pour susciter la sympathie et la reconnaissance ?

Cas assez classique: l'utilisation d'un personnage de film d'animation pour enfants sortant plus ou moins en même temps. Le film bénéficie d'efforts de promotion et de marketing et le produit à vendre va utiliser le personnage en question pour essayer de vendre le produit. Dans ce cas-là, il y a encore fréquemment une technique supplémentaire par le biais de cartes à jouer qui se trouvent dans l'emballage et qui vont susciter le désir des enfants. Autre exemple plus classique: un emballage simplement attractif, qui fait envie aux enfants. Le domaine des céréales pour petit-déjeuner est spécialement investi par des efforts de marketing ciblant les enfants à l'aide de ces diverses techniques : utilisation de personnages connus (héros de dessins animés, de films ou sport); ajout de cadeaux (figurines ou cartes à collectionner).

Les enfants sont aussi au cœur de l'attention des parents. Les arguments « santé » fleurissent sur les produits pour enfants, des arguments plutôt destinés aux parents pour les encourager ou leur donner bonne conscience en achetant certains types de produits. 3 exemples de ce type d'affirmation :

- une céréale « complète », qui sous-entend qu'elle est riche en fibres alimentaires qui ont un bénéfice sur la santé. Ce que cette affirmation ne dit pas, c'est que ces céréales sont très sucrées et qu'elles contiennent même parfois moins de fibres que d'autres produits concurrents qui n'affichent pas l'argument « céréales complètes » ou « fibres alimentaires »,
- « calcium/blé » : le calcium, c'est bon pour les os, le blé a un impact sain. C'est pour du fromage fondu que l'on peut prendre avec des petits bâtonnets de céréales. Ce que l'emballage ne dit pas, c'est que dans cette préparation à base de fromage fondu sont encore mélangés passablement d'adjouvants comme des sels de fonte, qui en font un produit très salé et gras.
- argument « sans colorant et sans conservateur » : on essaie de rassurer les consommateurs en disant: mon produit ne contient pas de ça. Ce que le produit omet de mentionner, c'est que les ingrédients principaux sont le sucre et les graisses, ce qui en fait un produit peu recommandé, surtout consommé en grande quantité.

Pour les parents toujours : le marketing par l'emballage avec des photos de familles heureuses qui respirent le bonheur. C'est l'aspiration de tout parent par rapport aux enfants, cela joue aussi sur une certaine culpabilisation : on travaille, on ne passe pas assez de temps avec les enfants, ce produit-là nous fait plaisir et nous donne de bons messages.

La *Fédération romande des consommateurs* a mené une enquête à l'été 2011 dans 14 supermarchés de Suisse romande pour essayer de recenser tous les emballages ou tous les

produits qui s'adressaient aux familles, soit enfants et parents. Il fallait traquer :

- a) pour les enfants :
 - tous les dessins-animés amusants
 - les images de stars
 - les cadeaux cachés
 - les jeux, avec mention de codes à l'intérieur du paquet pour accéder à des jeux sur Internet;
- b) pour les parents :
 - les arguments santé
 - les photos de bonheur familial que l'on peut retrouver sur des emballages.

Résultats

Quels sont les produits qui tentent de parvenir dans le caddie des enfants ou de la famille?

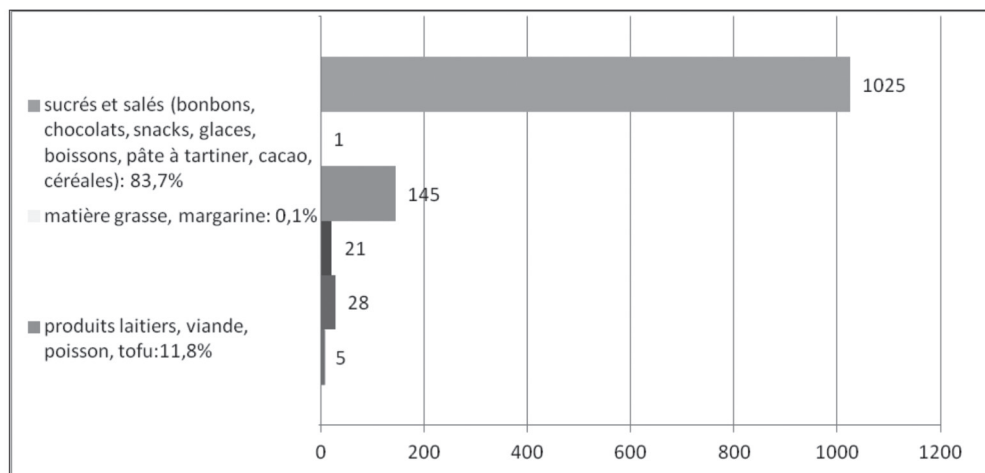
Nous avons fait une comparaison avec la pyramide alimentaire de la société suisse de nutrition, qui synthétise les recommandations nutritionnelles. Soit à la base: des aliments à consommer sans modération et tout en haut: les aliments « plaisir », à consommer en petite quantité.



Depuis la base :

1. boissons
2. fruits et légumes
3. céréales (si possible complètes)
4. protéines : produits laitiers, viande, poisson, œufs
5. matières grasses (si possible de bonne qualité)
6. friandises et snacks sucrés ou salés

Nous avons essayé de voir dans quelle mesure les produits mis en évidence pour les enfants dans les supermarchés s'inscrivaient dans cette pyramide alimentaire. On voit que les produits les plus représentés sont ceux de l'étage supérieur de la pyramide. La pyramide est complètement inversée, les produits dont on fait la promotion auprès des enfants sont issus du dernier étage de la pyramide (friandises et snacks), auxquels il faut ajouter les céréales de petit-déjeuner contenant jusqu'à 1/3 de sucre voir même plus pour certaines marques. A ce titre elles ne peuvent pas entrer dans l'étage des céréales. Pour les produits laitiers et le fromage il y a un effort de marketing, mais après pour tout ce qui se trouve dans les produits céréaliers et légumes c'est très modeste. Les parents se retrouvent donc à devoir respecter cette pyramide alimentaire, mais dans les magasins, ce qui fait envie c'est ce qui se trouve dans la mauvaise partie de la pyramide.



Placement

Dans les magasins, quels sont les produits qui se trouvent à portée de main des enfants, c'est-à-dire des produits qu'ils peuvent choisir eux-mêmes et mettre dans le caddie?

- 85% : des produits laitiers sucrés
- 82% : des chocolats pour enfant
- 77% : des céréales pour enfants
- 76% : des emballages de cacao sucrés

Plus des $\frac{3}{4}$ de ces produits sont en libre accès pour les mains des enfants. Les marques les plus recensées dans ces pratiques de marketing pour les enfants sont, par ordre d'importance :

- Nestlé
- Haribo
- Ferrero (Nutela & Kinder)
- Migros
- Kellogg's
- Casino Famili (marque de distributeurs)
- Jamadu Coop (marque de distributeurs)
- Bel (fromages)
- Danone
- Suchard
- Lilibiggs
- Coop
- Frisco
- Casino
- Zweifel.

Au niveau du **budget**, une analyse a été faite entre les différences de prix pour les produits qui proposent des cadeaux et ceux qui n'en proposent pas. Par exemple, dans le cadre des chips salées on voit que le prix des chips avec un jouet est deux fois plus élevé que le prix des chips sans jouet. Ces cadeaux qui sont présentés comme étant gratuits ont bien évidemment un coût que les parents vont payer en les achetant.

Le résultat des courses, comme un hard discount l'exprime très bien dans sa publicité : « Les mamans ne disent jamais non, c'est simple comme ALDI ». Même les chaînes de distribution intègrent ce message et savent que les enfants ont un pouvoir d'influence certain sur les achats effectués par les parents.

Démarches entreprises ces dernières années pour essayer d'avoir un marketing plus responsable à destination des enfants

En 2008, *Consumer international*, en collaboration avec *International Obesity Task Force* et *Association for the Study of Obesity* a publié des recommandations en faveur d'un code relatif à la commercialisation des produits alimentaires et des boissons non alcoolisées destinées aux enfants. Suite à cette démarche, l'OMS a édicté ses propres recommandations sur le sujet en conseillant aux Etats d'encourager les pratiques marketing responsables. Cet aspect du « surmarketing » pour des produits nutritionnellement peu conseillés a donc été identifié au niveau international et les Etats sont encouragés à mettre en place des stratégies. Les entreprises ont aussi pris conscience de cet aspect et depuis 2008 elles se sont engagées, en tout cas au niveau européen et aussi dans d'autres pays du monde, par le biais de *pledges* (déclaration commune par un groupe d'entreprises s'engageant à mettre en place des pratiques marketing responsables). Nestlé fait partie des *pledges* au niveau Suisse, européen et international. Au sein de ces *pledges*, chaque entreprise prend un engagement individuel et se fixe des limites. Certaines entreprises vont plus loin que l'engagement commun par exemple en renonçant totalement à la publicité pour les enfants en âge préscolaire ou en dessous de 6 ans.

2. Publicité télévisée

Pour évaluer la situation publicitaire à la télévision, la FRC a lancé en 2011 l'enquête KIWI 2 (abréviation allemande pour *Kinderwerbung im Fernsehen*). Cette dernière fait suite à la première étude KIWI réalisée en 2006. Cinq semaines de télévision ont été examinées sur les six chaînes nationales suisses, ce qui représente plus de 12'000 publicités, analysée dans 671 heures d'émission.

Résultats

Pendant les heures où les enfants sont présents devant la télévision (soit toutes les émissions pour enfants, mais aussi, selon les statistiques de la TV Suisse, les heures où les enfants sont présents devant la TV avec leurs parents, c'est-à-dire par exemple en début de soirée entre 18h00 et 20h00), près d'un quart des publicités diffusées concernent des denrées alimentaires, soit une moyenne de 18,5 publicités par heure. Si un enfant regarde la TV une heure par jour, il va absorber 40 heures de publicités en une année, soit environ une semaine et demi d'école. Si l'on reporte le contenu des publicités dans une assiette on aurait ainsi :

- + de 50% pour du fast-food ou des repas tout préparés
- 30% de friandises et de snack divers
- 12% de produits laitiers

- 3% de féculents
- 3.8% de fruits et légumes, poissons, viande et boissons non-sucrées.

La principale évolution depuis 2006 concerne les **boissons sucrées** qui totalisaient près de 14% des spots publicitaires et qui sont tombées à moins de 2%. Est-ce l'effet des *pledges* ? On sait notamment que Pepsi a rejoint le *pledge* et n'a pas du tout diffusé de spot pendant les cinq semaines d'enquête. Ou est-ce que cela change quand il y a des événements sportifs, comme par exemple les jeux olympique ? Cela mériterait d'être approfondi. Pour le reste, pas trop de changements.

Concernant l'**analyse des marques**, on voit que *McDonald* a totalisé près de 50% des publicités qui sont passées pendant les heures sélectionnées. Viennent ensuite : *Nestlé*, *Kellogg's*, *Bel*, *Migros*, *Ferrero*, de la publicité pour le fromage suisse et le reste est assez modeste. Il faut signaler que parmi ces entreprises-là, *Nestlé* et *Kellogg's* sont membres des *pledges* donc se sont engagés à limiter leur publicité. Cela ne veut pas dire qu'ils renoncent à toute publicité, mais qu'ils s'autorisent seulement des publicités qui correspondent à des critères nutritionnels précis. On pourrait faire une recommandation aux entreprises qui s'engagent dans ces *pledges*, car chaque entreprise est libre de fixer elle-même ce qu'elle considère comme un critère nutritionnel sain, par ex. la taille d'une portion. Celle-ci peut varier entre 150 et 200 calories, En Angleterre, une démarche différente existe: c'est la *Food Standard Agency* qui fixe les standards nutritionnels valables pour toutes les entreprises par rapport à ce que l'on considère comme un aliment sain.

McDonald, à l'époque où l'étude a été menée, n'avait pas rejoint les *pledges*. Ils les ont rejoints début 2012, mais leurs pratiques de publicité sont tout de même assez discutables parce que l'immense majorité des publicités *McDonald* sont diffusées pendant les heures pour enfants. Il faut savoir que c'est à ce moment-là de la journée que le coût de diffusion des publicités est le plus faible à la TV. Un exemple de spot qui vante le « *happy meal* » : la presque totalité du spot est occupée par la présentation de la boîte avec les jouets qu'elle contient et juste à la fin on présente la composition du menu : un hamburger, des bâtonnets de légumes et de l'eau. Le menu est à choix. La question est: est-ce que les enfants intègrent cette composition du menu avec légumes et eau au lieu des frites et d'une boisson sucrée ? Quand la question a été posée à *McDonald* concrètement concernant la proportion des « *happy meal* » version « légumes et eau » vendus, *McDonald* n'a pas souhaité répondre.

Pour la suite, en termes de marketing, c'est aux parents d'assumer la principale responsabilité concernant l'éducation des enfants. Cependant, nous demandons que la collectivité fasse des efforts pour aider ces derniers dans la promotion d'une alimentation saine auprès de leurs enfants. Notamment par :

- l'éducation à la consommation, notamment apprendre à décrypter les publicités,
- améliorer le marketing responsable : renforcement significatif des *pledges* notamment en ayant les mêmes critères nutritionnels pour toutes les entreprises; définir clairement

les produits qui se vantent d'être bons pour la santé,

- diminuer la teneur en graisse et en sucre des aliments transformés. A ce propos, Nestlé vient d'annoncer hier qu'ils allaient diminuer la quantité en sel et en sucre de leurs céréales. La FRC salue cette démarche, qui était implicitement la reconnaissance qu'elles sont actuellement un peu trop sucrées,
- enfin, nous aimerions que les magasins soient agencés de manière à ce que les choix les plus sains soient mis en avant et facilités et que les aliments que l'on devrait consommer avec modération ne soient plus si facilement accessibles.

GLOBALISATION, FUNDAMENTAL RIGHTS AND CHILD LABOUR: THE CHILD AS WORKER AND CONSUMER

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Résumé

Tous les enfants sont des consommateurs et plus de 300 millions d'entre eux sont aussi des travailleurs, parmi ceux-ci 115 millions sont engagés dans les pires formes du travail des enfants. Les enfants qui sont des consommateurs dans les pays du Nord peuvent être porte-parole en vue d'un changement, mais leur impact sur la production est peu clair. Les enfants des pays en développement sont également consommateurs mais marginalisés par la pauvreté, l'exclusion sociale et d'autres discriminations liées au genre ou à d'autres facteurs. La Convention 138 de l'OIT concernant l'âge minimum de l'entrée dans le monde du travail et la Convention 182 concernant les pires formes de travail des enfants ont été ratifiées par une grande majorité des pays, mais malgré les progrès accomplis, ceux-ci ont dramatiquement ralenti ces dernières années. Ainsi, la Conférence mondiale sur le travail des enfants tenue à la Haye en 2010 a proposé une feuille de route afin de répondre aux défis et Objectif du Développement du Millénaire, qui demande également l'élimination des pires formes de travail des enfants. Cependant, une attention insuffisante dans la manière de traiter les causes source du problème mine les solutions durables. L'OIT œuvre pour que la subsistance des familles par un travail décent soit au cœur de la stratégie contre le travail des enfants. Des démarches et processus bottom-up et top-down sont nécessaires afin de mettre un terme au travail des enfants.

Zusammenfassung

Alle Kinder sind Konsumenten und über 300 Millionen sind auch Arbeitnehmer, davon werden 115 Millionen zu schlimmsten Formen von Kinderarbeit gezwungen. Kinder, die in den nördlichen Ländern Konsumenten sind, können sich für Veränderung stark machen, die Auswirkungen auf die Produktion sind jedoch unklar. Die Kinder in Entwicklungsländern sind ebenfalls Konsumenten, jedoch durch die Armut, soziale Ausgrenzung und andere Diskrimi-

nierungen im Zusammenhang mit dem Geschlecht oder anderen Faktoren ausgeschlossen. Das Übereinkommen 138 der IAO über das Mindestalter für die Zulassung zur Beschäftigung und das Übereinkommen 182 über die schlimmsten Formen der Kinderarbeit wurden von einer Mehrheit der Länder ratifiziert. Trotz der erreichten Fortschritte, haben diese jedoch in den letzten Jahren dramatisch nachgelassen. So hat die Weltkonferenz zur Kinderarbeit in den Haag im Jahr 2010 einen Fahrplan vorgeschlagen, um auf die Herausforderungen und das Millenniums-Entwicklungsziel, das ebenfalls die Abschaffung der schlimmsten Formen der Kinderarbeit verlangt, einzugehen. Den Ursachen des Problems werden jedoch nur ungenügend Aufmerksamkeit geschenkt und damit werden langfristige Lösungen verhindert. Das IAO setzt sich dafür ein, dass der Lebensunterhalt der Familien durch eine würdige Arbeit im Herzen der Strategie gegen Kinderarbeit ist. Um der Kinderarbeit ein Ende zu setzen, sind *bottom-up* und *top-down* Vorgehen notwendig.

Resumen

Todos los niños son consumidores y más de 300 millones de ellos son también trabajadores, entre estos, 115 millones son sometidos a las peores formas de trabajo infantil. Los niños consumidores de los países del Norte pueden ser portavoces del cambio, pero su impacto sobre la producción es poco clara. Los niños de los países en vía de desarrollo son también consumidores pero marginalizados por la pobreza, la exclusión social y otras discriminaciones ligadas al género o a otros factores. El Convenio 138 de la OIT que concierne la edad mínima de admisión al empleo y el Convenio 182 relativo a las peores formas de trabajo infantil, fueron ratificados por una gran mayoría de países, pero a pesar de los progresos realizados, estos han retrasado dramáticamente estos últimos años. Así pues, la Conferencia Mundial sobre el Trabajo Infantil celebrada en la Haya en 2010, propuso un plan elaborado con el fin de responder a los desafíos y los Objetivos de Desarrollo del Milenio, que pide también la eliminación de las peores formas de trabajo infantil de los niños. Sin embargo, una atención insuficiente en la manera de dirigir las causas fuentes del problema deteriora las soluciones durables. La OIT trabaja para que la subsistencia de las familias por un trabajo decente esté en el centro de la estrategia contra el trabajo infantil. Las gestiones y procesos *bottom-up* y *top-down* son necesarias con el fin de poner un término al trabajo infantil.

Summary

All children are consumers and over 300 million of them are also workers, with 115 million of those in the worst forms of child labour. Children who are consumers in the North can be a voice for change, but their impact on production is not clear. Children in the developing world are also consumers but marginalised by poverty and social exclusion and other discriminations linked to gender, and other factors. The ILO Convention 138 on minimum age for entry into employment and Convention 182 on the worst forms of child labour have been ratified by a vast majority of countries, and progress has been made but has slowed dramatically in recent

years. Thus, the Global Child Labour Conference in The Hague in 2010 proposed a Road Map to respond to the challenge, and the Millenium Development Goal also called for the elimination of the worst forms of child labour. However, insufficient attention to addressing the root causes undermines sustainable remedies. The ILO advocates that family livelihoods for decent work must be at the heart of the strategy against child labour. Bottom-up as well as top-down processes to stop child labour are needed.

* * *

In fifteen years of working on child labour, I've worked extensively in Latin America and West Africa. A couple of weeks ago, the BBC News ran a piece about the price of Ivorian cocoa – the price paid to the small farmer, not the price you or I pay for chocolate here in Switzerland. The farmer complained that the low price prevented him from sending his children to school – and him and them from eating chocolate. Do you remember those images, now 15 years ago, of children stitching footballs in Pakistan? Their work was hard and hazardous, they weren't in school and, even if they had some free time for recreation, they could never dream of buying one of the footballs they spent their childhood manufacturing. Among the products Hubert Dubois traced in his recent film about child labour was mica: the little girls scavenging for mica shards in the forests of Bihar would never be able to afford the luxury face-cream for which the mica they scavenged is indispensable.

So, when asked to speak about the child as worker or consumer, I thought why "or"? All children are consumers – some, unfortunately, at the most minimal level and with no money of their own. Many millions are excluded from being consumers of public services – even though those may be services, such as education, to which they have a human rights entitlement.

And over 300 million of them are also workers. About 90 million are in legitimate youth employment (not enough of course, as we know from the Arab Spring). But 215 million children between the ages of 5 and 17 are still in work defined as child labour, with 115 million of those in its worst forms: hazardous work, forced labour, commercial sexual exploitation and illicit activities such as drug trafficking or begging. 153 million are aged from 5 to 14 years. Sixty per cent of child labour is in agriculture. And two thirds of child labourers perform unpaid family work.

So, I'd like to talk about children as workers and consumers. Sure, I'll touch on those many children in the Global North who can afford to consume goods - including products made by child labourers in the Global South (not forgetting that there are many in the Global North, including hundreds of thousands in US agriculture, producing food consumed by other kids). IPEC's SCREAM Programme – Supporting Child Rights through Education, the Arts and the Media – is used to educate children in the North and South about their rights, about child labour and to help them develop their voice for social justice. Kids who are consumers in the North can be a voice for change, though I would be interested to hear again from company colleagues what influence consumer campaigns have on their business practice in global value chains – it doesn't yet appear to have had any systemic effect on the production of cotton or cocoa, for example. But I'd like to concentrate on the child in the developing world whose role (and the role of her family) as a consumer is marginalised by poverty and social exclusion. It is not just the patent suffering and social exclusion that is cause for concern: grossly inequitable distribution of wealth in global value chains is a significant factor in dampening consumer demand in developing countries and thus a brake on economic growth. It is linked, in part to the insufficient development, including by MNEs, of value added activity in the producer country.

Everyone in the worldwide movement against child labour has probably heard of or met a child of nine or ten years old, who has said

“I was at school. It was a long walk and Mum and Dad had trouble finding the money for my uniform and books. But I liked it. And then Mum fell ill and Dad had an accident in the field, so I had to go back to work”.

Let's unpack that child's difficulties. Sociologists call this “multiple whammy” “intersectionality”. First, let's say the child is a girl. She's benefited from the expansion in primary education for girls, but her brothers still had priority in the family. Her family is landless migrants from a minority which suffers discrimination in the labour market and has migrated due to conflict. Let's say they work in agriculture: they don't have work all year round and, when they do, the landlord sacks and evicts anyone who joins the rural workers' union. The parents are indebted to a labour broker, while the landlord holds their identity documents as a “deposit” to make sure they don't leave before the end of their - completely undocumented - contract. Labour inspection either doesn't cover their sector, or doesn't cover the informal economy, or doesn't have resources to do so even if the law says it should. And now that little girl is back in the fields, carrying heavy loads, working long hours in extreme heat and, sometimes, using a pesticide spray.

Though, fortunately, trafficking for forced labour - indicated here by the debt to the labour broker and the retention of documents by the landlord - is faced by only a minority of the world's child labourers (though still six million of them), that child is not unique. But just hold that image: the child in the village, no longer at school but back in child labour in agriculture; her parents have lost their meagre income; there is no social protection floor against such economic shocks; their right to freedom of association is denied and the rule of law is absent.

A global legal framework defines child labour: especially ILO Conventions 138 on minimum age for entry into employment and Convention 182 on the worst forms of child labour. Now, with 163 ratifications of Convention 138 and 175 ratifications of Convention 182 from the ILO's 185 member States, there is clear global consensus on those definitions: child labour is work of children under the age of 18 when they are engaged in worst forms of child labour; and, though their work may not be hazardous, of those who are under the relevant minimum age for work. There is deafening global consensus too about the right of the child to a decent basic education to age 14 or 15 - that child labour will be not be eliminated until we achieve education for all and that we won't keep every child in school until we eliminate child labour.

Progress has been made. Between 2004 and 2008, child labour of girls fell by 15 per cent; and child labour of children under the age of 15 fell by ten per cent, with a 31 per cent reduction in hazardous child labour. But the overall rate of decline has slowed dramatically, from ten per cent between 2000 and 2004, to just three percent from 2004 to 2008. There has been a 20 per cent increase in child labour of those aged 15, 16 and 17, affecting boys especially - by

definition that means they are engaged in a worst form of child labour, mainly in hazardous work. And, while Latin America and Asia have continued to make - in some countries very significant - progress, in sub-Saharan Africa the numbers and the incidence have increased overall. Unless we accelerate and upscale our action, we will not reach the global target of the elimination of worst forms of child labour by 2016.

It would help if the last few countries were to ratify Convention 182 and if those industrialised market economy countries that have still not ratified Convention 138 did so. We need fall to sign up to the global commitment, in part to allay the fears of protectionism in the G77, but also because child labour is a global challenge and needs to be met in rich and poor countries alike. That is evidenced by the continuing reports of trafficking of children into Europe and North America for the purposes of sexual and other labour exploitation - not least in agriculture and domestic service.

That global slowdown and the negative trend in numerous countries in Africa have concentrated minds. The Global Child Labour Conference in The Hague in 2010 proposed a Road Map to respond to the challenge. The ILO Governing Body incorporated the Road Map into its Global Action Plan. Moreover, the MDG review Summit that year called for

“...appropriate steps to assist one another in the elimination of the worst forms of child labour, strengthening child protection systems and combating trafficking in children through, inter alia, enhanced international cooperation and assistance, including support for social and economic development, poverty eradication programmes and universal education”.

Let's return to our child in the village. Perhaps her situation also tells us what more we need to do. Perhaps she was a beneficiary of a project that helped her and other children get out of child labour. But the project is over and the government has made insufficient provision to make sure they can stay in school. Sustainability was not ensured and other, untargted children in the community were left working. Worldwide, there are still 215 million to go.

And there is the wider context. Insufficient attention to addressing the root causes of her predicament has also undermined sustainability and left her vulnerable. The ILO has long advocated that family livelihoods for decent work must be at the heart of our strategy against child labour. This child's fundamental human rights - and those of her parents - are inalienable and indivisible. This year, the ILO Conference examined how the four areas of fundamental rights: the freedom to organise and bargain collectively, and freedom from forced labour, child labour and discrimination were mutually inter-dependent and mutually reinforcing. It was, indeed, a response to the “intersectionality” of the denial of rights that causes poverty, social exclusion and disempowerment and it understands those rights both as human rights at work and as enabling rights.

If we want to dig out the root causes of child labour - because poverty and social exclusion are both causes and consequences of child labour, reproduced generation on generation

– then we have to go beyond temporary relief. Even education provision alone is not enough. Imagine the struggle against child labour as a three legged stool. One leg is public policy, legislation and provisions directed specifically at prohibiting child labour and withdrawing children at risk. Another is education for all. The third is decent work for adults and youth, providing families with sustainable livelihoods – work that is safe, secure and provides for adequate social protection against illness, unemployment and for dignified retirement. The stool requires all three legs if it is to stand.

And child labour doesn't take place in the corridors of ministries of labour or in the offices of NGOs. It takes place in workplaces, primarily in the various sectors of the informal economy and especially in agriculture: precisely those parts of the economy in which the rule of law and structures for social dialogue are absent or weak – where work is unregulated and workers largely unprotected. That is why the ILO and its International Programme on the Elimination of child Labour pursue an integrated and rights-based decent work and education response. Without law, citizens remain unprotected. Without free trade unions and effective employers' organizations, there is no vehicle for social dialogue for decent public policy and social protection; for collective bargaining to ensure safe working conditions and a fairer redistribution of wealth that permits working people to be consumers of goods and services; for collective voice to demand that governments provide the services to which all citizens and their children are entitled. And without decent work and increasing formalisation of informal enterprises, the national tax base is insufficient to pay for the infrastructure and services required to meet the needs of the people and of a growing economy.

That may sound grandiose, but at the village level it means inclusiveness – seeking to create child-labour free communities in which every child is in school; where good vocational training is available for girls and boy; where skills and sustainable enterprises can develop; where necessary infrastructure and public services are present; where the community has ownership of the struggle against child labour. At the heart lies empowerment through collective voice.

In the Global North, much attention turns to the minority of children who work in global supply chains that provide goods to consumers. It is right that multinational enterprises should intervene to make their value chains child labour free. That requires, not “the kindness of strangers”, nor costly though often cosmetic and, as we have seen most recently and most tragically, ineffective “social auditing”. It requires a rights based approach in which the working families whose children are in child labour are not recipients of paternalism and charity, but free to organise to be agents of change. That is why enterprises which wish to be socially responsible should also promote mature labour relations in their operations and supply chains and should not advocate against them through systems of what Stiglitz calls “regulatory capture”.

IPEC already works with several MNEs to combat child labour in their supply chains and ensure their business practice matches their ethical codes. We are happy to do more of that and we are always on the lookout for those that would like to go beyond their immediate business interests and support our broader work - for example to continue and broaden the

work of SCREAM. ILO-IPEC also provides expert technical assistance to the Child Labour Platform of the Labour Working Group of the UN Global Compact. The Platform brings together businesses and trade unions to exchange experiences in tackling child labour, to identify innovative interventions that can lead to sustained progress, and catalyse collective action. It is cross-sectoral and seeks to involve multinational and small and medium enterprises in dialogue about what works, how to build effective alliances – including with governments and social partners – and how to achieve scale and sustainable results. But most child labour is not in global value chains. 66 per cent is in unpaid family work and only 21 per cent is in paid employment. Our little girl was one of the 60 per cent of child labourers working in agriculture, but wasn't growing cocoa, cotton, tobacco or sugar for the global economy. She was growing manioc and maize for the local market. Her little sister had just started work as a domestic servant for a landowner in a neighbouring village. Her older brother works in a leather tannery.

That doesn't mean, of course, that no child labourer working in the informal economy, urban or rural, is linked to the formal economy and to global value chains. Far from it: where child labour does enter supply chains which are in large part chains in the formal economy, the child's labour is almost always conducted in an informal enterprise. So when the Ruggie Principles and the ILO's Tripartite Declaration on Multinational Enterprises and Social Policy look beyond the immediate business activities of an MNE to the wider impact of its activities in communities in which its value chain operates, they do so with good reason. Good corporate citizenship requires respect for fundamental rights at work and the promotion of decent work in the core activities of the business but also where its business has impact and exercises influence. When an MNE demands a tax-break as a condition of inward investment, does it contribute to the funding of core services – health, education, clean water – which every child has a right to consume? When it uses its power in the market to suppress farm-gate prices or wage costs, does it contribute to alleviating the family poverty that keeps kids out of school, and keeps the family – adults and children, from being consumers of more than the most basic essentials?

Farmers in Cote d'Ivoire are already starting to grow rubber instead of cocoa because the price they receive for their cocoa is insufficient for an adequate livelihood. And that is where the social justice argument meets the business argument. Sustainable businesses require secure supplies of materials and consumers who can afford to buy their products. In a global economy, there are choices to be made. Perhaps the global economic and financial crisis has made the choices all the more stark. Rights based development should indeed entail growth and greater productivity. But if, despite that, the inequality in and between nations continues to grow, then the business outlook in the real economy that makes real things that people need and want to consume looks pretty grim.

For sure, we need a stronger global response to child labour and greater international solidarity based on mutual respect as ILO Convention 182 demands. Yes, as a matter of urgency, global enterprises should engage in dialogue with their social counterparts and should address

their own responsibilities – which extend also to preventing, mitigating or remediating adverse impacts to which they are linked through business relationships. And yes, we need good law. But if we are seeking social justice for a fair globalisation, based on rights, freedom and empowerment, we also need to build a movement against child labour that is bottom up as well as top down. It has to reach the village and the barrio if governments and elites are to be held to account.

And wouldn't it be nice if that girl in the village could eat a chocolate bar after her school football match and perhaps, after she has taken a shower, even afford to apply some moisturiser cream? The question is whether those holding the reins of the global economy will allow her to be at school rather than at work and to become a consumer, or not.

Thank you.

TROISIÈME PARTIE

NOUVEAUX OUTILS DANS LA PROMOTION DES DROITS DE L'ENFANT

PART III

NEW TOOLS FOR THE PROMOTION OF CHILDREN'S RIGHTS

DROITS DE L'ENFANT ET SECTEUR PRIVÉ : EXISTE-T-IL UN BESOIN DE CONVENTION CONTRAIGNANTE ?*

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Résumé

L'auteur répond à la question « Droits de l'enfant et secteur privé : existe-t-il un besoin de convention contraignante ? » par un « non ». Sa réponse est justifiée par la transcription de la problématique : Parlons-nous d'un traité international et sur quel sujet ? Quand nous parlons de « besoin » à quoi nous référons-nous ? Voulons-nous dire que le traité est nécessaire, qu'il est approprié, ou bien encore opportun ? Essayer de réglementer les obligations des entreprises privées dans le domaine des droits de l'homme par le biais d'un traité est quelque chose d'inacceptable pour une majorité d'États. Les entreprises privées ne sont pas soumises au droit international. Elles sont soumises au droit interne, au droit national de chaque Etat. Et c'est dans ce contexte, dans le cadre du droit interne de l'État, que doivent être établis les droits et devoirs des sociétés privées.

Zusammenfassung

Der Autor beantwortet die Frage „Kinderrechte und Privatwirtschaft: Gibt es ein Bedürfnis für ein verbindliches Übereinkommen?“ mit „Nein“. Seine Antwort rechtfertigt er mit der Ausführung der Problematik: Geht es um einen internationalen Vertrag und um welches Thema handelt es sich? Auf was bezieht sich „Bedürfnis“? Bedeutet es, dass der Vertrag notwendig, angemessen oder vielmehr angebracht ist? Der Versuch, die Verpflichtungen der privaten Unternehmen im Bereich der Menschenrechte durch einen Vertrag zu regeln, ist für eine Mehrheit der Staaten inakzeptabel. Die privaten Unternehmen sind dem Völkerrecht nicht unterstellt. Sie sind dem innerstaatlichen Recht unterworfen, dem nationalen Recht jedes Staates. In diesem Umfeld, im Rahmen des innerstaatlichen Rechts des jeweiligen Staates, müssen die Rechte und Pflichten privater Gesellschaften festgelegt werden.

* Les points de vue exposés dans ce travail sont personnels et ne représentent pas les vues du Comité des Droits de l'Enfant

Resumen

El autor responde a la pregunta « Derechos del niño y sector privado: ¿existe una necesidad de convenio vinculante? » con un « no ». Su respuesta se justifica por la transcripción de la problemática: ¿Hablamos de un tratado internacional y sobre qué sujeto? ¿Cuando hablamos de « necesidad » a quién nos referimos? ¿Queremos decir que el tratado es necesario, que es apropiado o mejor todavía es oportuno? Intentar regular las obligaciones de las empresas privadas en el ámbito de los derechos humanos a través de un tratado es algo inaceptable para una mayoría de Estados. Las empresas privadas no están sometidas al derecho internacional. Estas están sometidas al derecho interno, o al derecho nacional de cada Estado. Y es en este contexto, en el marco del derecho interno del Estado, que deben establecerse los derechos y los deberes de las sociedades privadas.

Summary

The author responds to the question “Child rights and the private sector: is there a need for a binding convention?” with a “no”. His answer is justified by the following transcription of the problem formulation: Are we talking about an international treaty, and on what subject? When we speak of “need”, to what are we referring to? Do we mean to say that the treaty is necessary, or that it is appropriate, or that it is opportune? The idea of attempting to regulate obligations of private businesses in the domain of human rights by means of a treaty is something that is unacceptable in a majority of states. Private businesses are not subject to international law. They are regimented under internal law, the national law of each country. And it is within this context, within the framework of internal State law, that the laws and obligations of private businesses must be established.

* * *

I. INTRODUCTION

La question qui m'a été posée par les organisateurs de ce Colloque sur les Droits de l'enfant et le secteur privé m'a paru facile à répondre par un « non ».

Mais bien sûr, il ne suffit pas de dire « non » à une interrogation. Il faut justifier cette réponse. Mais avant de le faire, je voudrais faire une confession : je ne suis pas sûr de ma réponse. Ce travail se présente dans le cadre d'un colloque international et ce sont là mes premières conclusions. Ces dernières sont donc soumises à débat.

En tout cas, pour que la réponse soit appropriée, il faudrait tout d'abord délimiter correctement la question.

Le titre est en soi problématique. Dans la question : « Droits de l'enfant et secteur privé : existe-t-il un besoin de convention contraignante ? », se présente un élément plus ou moins clair, et deux autres pas tout à fait clairs.

Nous parlons d'« une convention contraignante ». C'est l'élément le plus clair. Il s'agit d'un traité international, d'un acte juridique international à caractère conventionnel qui établit des droits et obligations juridiques pour les entités qui en deviennent parties.

Ce point paraît clair. Mais le reste de la question n'est plus aussi clair :

- Premièrement: parlons-nous d'un traité sur quel sujet ?
- Deuxièmement, quand nous disons « besoin », à quoi nous référons-nous ? Voulons-nous dire que le traité est nécessaire, qu'il est approprié, ou bien encore opportun ?

Dans les parties suivantes de ce travail je tenterai d'éclaircir la signification de ces termes, dans le but de répondre à la question sur la base d'arguments solides.

II. UN TRAITÉ SUR QUOI ?

Pour la première question, je pense qu'il y a deux hypothèses possibles : soit un traité sur les obligations des États à garantir et protéger les droits de l'enfant des conséquences dommageables des activités du secteur privé; soit un traité qui prévoit pour les entreprises des obligations en matière de droits de l'homme en général et de droits de l'enfant en particulier.

Mais, à mon avis, cette dernière possibilité est difficile à retenir.

Un échec bien connu est celui des *Normes sur la Responsabilité en matière de Droits de l'homme des Société Transnationales et autres Entreprises*¹, élaborées par la Sous-Commission des Nations Unies pour la Protection et la Promotion des Droits de l'homme en 2003, et refusées par la grande majorité des gouvernements qui s'opposèrent à son adoption, fondamentalement parce que le projet de normes imputait aux entreprises des obligations juridiques internationales.

¹ C.f.: E/CN.4/Sub.2/2003/12/Rev.2 du 26 août 2003

Un traité est un accord international qui établit des droits et obligations entre ses signataires, qui sont des États. Essayer de réglementer les obligations des entreprises privées dans le domaine des droits de l'homme par le biais d'un traité est quelque chose d'inacceptable pour une majorité d'États. Les entreprises privées ne sont pas soumises au droit international. Elles sont soumises au droit interne, au droit national de chaque Etat. Et c'est dans ce contexte, dans le cadre du droit interne de l'État, que doivent être établis les droits et devoirs des sociétés privées.

Ce qui peut être et est effectivement établi par traité, c'est l'obligation de l'État à veiller à ce que les entreprises privées respectent les droits de l'homme sur le territoire national et en dehors de celui-ci.

Il est vrai que dans les principes de John Ruggie², il y a une tentative claire de définir les normes en matière de droits applicables aux sociétés, multinationales comprises. Mais cela ne signifie pas qu'on a établi des normes internationales avec des obligations internationales pour les entreprises; mais qu'on a déterminé, en vertu du droit international des droits de l'homme, les actions ou opérations des entreprises qui peuvent affecter les droits de l'homme afin de mieux identifier les obligations des États à prévenir, protéger et garantir les droits de l'homme ainsi qu'à réparer les cas d'éventuelles violations de ces droits.

Un autre exemple de texte international qui essaye d'établir des obligations aux entreprises privées se trouve dans les *Principes directeurs de l'OCDE à l'intention des entreprises multinationales*³, mis à jour et adoptés par les 42 pays y adhérents le 25 mai 2011 lors de la Réunion ministérielle du 50^e anniversaire de l'OCDE. Mais, même s'ils constituent, peut-être, le plus complet des instruments qui existent aujourd'hui concernant la responsabilité des entreprises, nous nous trouvons de nouveau face à un texte où ce sont les gouvernements des Etats qui s'engagent à encourager les entreprises opérant sur leur territoire à respecter les principes partout où elles exercent leurs activités.

Ainsi, je retiens la première hypothèse : « le besoin [ou non] d'un traité sur les obligations des Etats à protéger les Droits de l'enfant dans le monde des affaires » ou, en autres mots, « le besoin [ou pas] d'un traité sur les obligations des Etats en matière de droits de l'enfant face aux activités du secteur privé ».

² Principes directeurs relatifs aux entreprises et aux droits de l'homme: mise en œuvre du cadre de référence «protéger, respecter et réparer» des Nations Unies (A/HRC/17/31, du 21 mars 2011)

³ <http://www.oecd.org/fr/daf/investissementinternational/principesdirecteurspourlesentreprisesmultinationales/>

III. SENS DU TERME « BESOIN »

La deuxième question que je posais pour répondre à l'interrogation principale était : quand nous disons « besoin », voulons-nous dire que le traité est nécessaire, qu'il est approprié, ou bien encore opportun ?

Pour éclaircir le sens du terme il faut que nous définissions au préalable ces concepts.

A) Concept de traité « nécessaire »

La définition du mot « nécessaire » dans le dictionnaire de la langue française est la suivante: ce qui est obligatoire, indispensable, qui doit être fait, qui s'impose. En accord avec cette définition, nous pouvons dire qu'un traité international est nécessaire dans les cas suivants :

- c) si l'on considère que les Etats devraient réglementer une chose qui n'est pas encore réglementée parce qu'issue d'un champ nouveau; ou
- d) quand il existe des directives, des recommandations, des principes à caractère non « contraignant » et que nous voulons que ce « droit mou » (*'soft law'*) devienne du « droit dur » (*'hard law'*) par un acte juridique « contraignant » comme un traité; ou, enfin,
- e) lorsque la matière elle-même est régie par le droit international comme une question à caractère « contraignant » mais que nous voulons changer ces règles par une réglementation différente.

Si nous n'avons aucune norme de quelque sorte que ce soit, si nous n'avons que du *soft law*, mais pas de *hard law*, ou si l'on veut changer les normes qui régissent une matière, il est indispensable, il s'impose, il est « nécessaire » de conclure un traité.

B) Concept de traité « approprié »

La définition du mot « approprié » dans le dictionnaire est : ce qui convient à quelque chose, qui est convenable à son objet, qui est adéquat.

Conformément à cette définition, nous pouvons dire qu'un traité international est approprié :

- a) lorsque les règles relatives à un sujet donné sont dispersées dans divers textes et qu'il serait pratique de les codifier en un seul texte; ou
- b) lorsque le droit existant, malgré ses règles de *hard law*, n'est pas clair et que nombre de ses dispositions nécessitent une interprétation qui n'est pas pacifique.
- c) Concept de traité « opportun »

Enfin, la définition d'« opportun » est : ce qui convient en temps, aux lieux, et aux circonstances, qui survient à propos.

Nous pouvons dire qu'un traité international est opportun lorsque nous sommes à un moment où les États sont sensibilisés à l'élaboration d'un traité dans ce domaine, et qu'il existe une conjoncture politique favorable, lors de la négociation du texte, à la réalisation des objectifs souhaités. Il y a ainsi de fortes probabilités que le traité négocié soit ratifié dans un délai raisonnable et entre en vigueur.

Dans tous les cas, le caractère opportun ne perdure que si la situation post-traitée est meilleure que la situation prétraitée.

Avec cette délimitation conceptuelle, ma réponse commence à être plus précise : à mon avis, un traité sur les obligations des États concernant le respect des droits de l'enfant par les activités du secteur privé n'est pas nécessaire, il pourrait être approprié, mais en tout cas pas opportun.

Bien sur, je dois expliquer cette affirmation que je suis sûr que certains trouveront audacieuse. Réponse dont je ne suis pas complètement sûr.

IV. UN TRAITÉ SUR LES OBLIGATIONS DES ETATS EN MATIÈRE DE DROITS DE L'ENFANT FACE AUX ACTIVITÉS DU SECTEUR PRIVÉ N'EST PAS NÉCESSAIRE

Il existe un grand nombre d'obligations pour les États qui se réfèrent au secteur privé et à la garantie du respect des droits de l'enfant, de leur protection et de la réparation des violations.

Ainsi, il est bien connu l'article 2 de la Convention relative aux droits de l'enfant qui établit l'obligation des États d'assurer la mise en œuvre de tous les droits énoncés dans la Convention et à tout enfant relevant de leur juridiction. Cette obligation de « garantir » les droits énoncés dans la Convention est différente d'une autre obligation établie dans l'article 2, celle de « respecter » les droits. Les Etats, en plus de « respecter » les droits de l'enfant, doivent « garantir » que ces droits soient respectés par tous ceux qui se trouvent sous sa juridiction.

L'obligation de « garantir » les droits de l'enfant que la Convention énonce en termes généraux dans l'article 2, se concrétise et se décline tout au long de la Convention en diverses obligations spécifiques.

Ainsi, par exemple, il y a l'obligation concrète de garantir que toutes les décisions qui concernent les enfants, et prises par des « institutions privées » de protection sociale, aient comme considération primordiale l'intérêt supérieur de l'enfant (article 3.1 de la Convention); mais aussi l'obligation d'assurer à l'enfant la protection et les soins nécessaires à son bien-être, notamment en veillant à ce que les institutions, services et établissements (publics ou privés) qui ont la charge ou la protection des enfants soient conformes aux normes fixées par les autorités compétentes (article 3, paragraphes 2 et 3 de la Convention); ou l'obligation de prendre

« toutes les mesures législatives, administratives et autres (...) pour mettre en œuvre les droits reconnus dans la (...) Convention »

(art. 4) (mise en œuvre qui implique non seulement que l'Etat respecte les droits de l'enfant, mais aussi qu'il en garantisse le respect par les individus et acteurs privés de la société). Il en est de même de l'obligation de l'Etat de garantir à l'enfant qui est capable de discernement le droit d'exprimer librement son opinion sur toute question l'intéressant, les opinions de l'enfant étant dûment prises en considération eu égard à son âge et à son degré de maturité (art. 12) (et sans faire distinction entre la mise en exécution de la question par un organisme privé ou public); ou l'obligation de l'Etat de protéger par la loi les immixtions arbitraires ou illégales dans la vie privée de l'enfant, sa famille, son domicile ou sa correspondance, ou portant d'atteintes illégales à son honneur et à sa réputation (art. 16); ou les obligations des Etats concernant les activités des médias de communication et l'accès à l'information, (art. 17), ou à l'égard des entités impliquées dans le processus d'adoption (art. 21) ou dans les activités récréatives, (art. 31), etc.

À toutes ces obligations précises de l'Etat mentionnées dans la Convention, il faut ajouter celles qui sont plus explicitement formulées dans le Protocole facultatif concernant la vente d'enfants, la prostitution des enfants et la pornographie mettant en scène des enfants. Ce dernier oblige non seulement l'Etat à poursuivre en justice toute entreprise qui enfreint les règles, mais aussi de

« prendre les mesures qui s'imposent, afin d'établir la responsabilité des personnes morales pour les infractions visées à l'article 3 »;

et d'adopter

« les mesures nécessaires pour établir sa compétence aux fins de connaître des infractions du Protocole »

et afin d'éviter toute impunité au bénéfice de l'auteur du crime.

De même, le *Protocole facultatif concernant l'implication d'enfants dans les conflits armés* établit l'obligation de l'Etat à

« prendre toutes les mesures possibles pour empêcher l'enrôlement et l'utilisation »

par des groupes armés non étatiques, y compris les entreprises privées de sécurité et de défense,

« des personnes âgées de moins de 18 ans, notamment les mesures d'ordre juridique nécessaires pour interdire et sanctionner pénalement ces pratiques ».

Ainsi, un grand nombre d'obligations explicites de l'Etat dont la finalité est de s'assurer

que le secteur privé respecte les droits de l'enfant sont juridiquement consacrés.

À côté de ces obligations explicites, nous trouvons un ensemble d'obligations dérivées de l'obligation de respecter, protéger et mettre en œuvre les droits de l'enfant en ce qui concerne les activités et les opérations des acteurs privés. Cet ensemble d'obligations découle de la « diligence due », qui s'impose à l'État s'il veut que les droits de l'enfant soient respectés et protégés.

En conclusion, il y a des règles régissant les obligations de l'État à faire respecter les droits de l'enfant par le secteur privé. Ce sont des normes de *hard law*. Ce ne sont pas de simples recommandations. Il s'agit d'obligations explicites et implicites de l'État qui impliquent sa responsabilité internationale en cas de manquement. Et il ne semble pas que les Etats cherchent à changer cette réglementation juridique.

Conformément au concept de « nécessité » dont nous avons parlé, il est facile de déduire de ces affirmations qu'un nouveau traité énonçant ces obligations n'est pas nécessaire.

V. UN TRAITÉ SUR LES OBLIGATIONS DES ETATS EN MATIÈRE DE DROITS DE L'ENFANT FACE AUX ACTIVITÉS DU SECTEUR PRIVÉ POURRAIT ÊTRE APPROPRIÉ

Mais nous avons dit que c'est une chose que d'être nécessaire et c'en est une autre que d'être « approprié ». Serait-il approprié de mettre en place un traité où toutes les obligations seraient explicites et claires ?

Ici, je dois avouer qu'il est facile de pencher pour une réponse affirmative. Bien qu'il y ait des références explicites aux obligations des États en matière de contrôle des activités privées, le fait est qu'il n'y a pas de références explicites couvrant tous les secteurs et tous les problèmes réels ou potentiels.

D'autre part, les références implicites laissent une marge d'appréciation et de discussion très grande en termes d'interprétation. Beaucoup de ces obligations ont été extraites par le Comité en raisonnant par analogie. C'est le cas, par exemple, des obligations des entreprises privées de sécurité et de défense, pour lesquelles le Comité invoque la mise en œuvre par les États des dites « Règles de Montreux »⁴, mais pour lesquelles nous devons reconnaître que ni les sociétés de sécurité et de défense ne sont explicitement mentionnés dans l'OPAC (donc par analogie, l'article 4 est invoqué), ni les « Règles de Montreux » ne sont du *hard law* dans leur intégralité (même si la plupart d'entre elles recueille des normes de droit international général appliquées par analogie à ce type d'entreprises privées).

Tout ceci a pour effet que fréquemment quelques États discutent l'interprétation donnée

⁴ Document de Montreux sur les obligations juridiques pertinentes et les bonnes pratiques pour les États en ce qui concerne les opérations des entreprises militaires et de sécurité privées pendant les conflits armés (disponible sur : <http://www.icrc.org/fre/resources/documents/publication/p0996.htm>)

par le Comité des droits de l'enfant à certaines de ces obligations implicites découlant des règles contenues dans la Convention.

Si maintenant nous nous concentrons sur les obligations dérivées de la diligence due, le caractère approprié d'un traité est encore plus fondé. Comme il est bien connu, le texte fondamental invoqué en ce qui concerne les obligations de l'Etat découlant du principe de la diligence due en matière de garantie du respect des droits de l'homme par des entreprises privées est l'arrêt du 29 Juillet 1988 de la Cour Interaméricaine des Droits de l'homme⁵, dans laquelle le paragraphe 172 dispose que: un acte illicite qui viole les droits de l'homme et qui n'est pas directement imputable à un Etat, par exemple, étant l'œuvre d'un individu (dans notre cas, une entreprise privée) ou dans l'impossibilité d'identifier l'auteur de la transgression, peut engager la responsabilité internationale de l'Etat, non pour l'acte en soi, mais en raison du manque de diligence due pour prévenir la violation ou y répondre comme l'exige la Convention.

Mais comme le précise la Cour dans le même arrêt, les obligations de prévenir, d'enquêter et de remédier découlant de la diligence due ne sont pas des obligations de résultat mais des obligations de comportement, de sorte que « le manquement de l'État n'est pas juste prouvé par un droit violé », mais il faut aussi prouver que l'État n'a pas agi avec la diligence due. Autrement dit, le devoir légal de l'État est d'empêcher « raisonnablement » les violations des droits de l'homme et d'enquêter « sérieusement », « avec les moyens à sa disposition » sur les violations commises dans le cadre de sa juridiction, afin d'identifier les responsables, leur imposer les sanctions appropriées et assurer aux victimes une réparation adéquate. Mais s'il a agi « raisonnablement » et « sérieusement », « avec les moyens à sa disposition » et qu'une entreprise privée a violé les droits de l'homme d'un individu (dans notre cas, un enfant), l'État n'a pas violé son obligation de diligence due, ni a engagé sa responsabilité.

Cela a conduit à des interprétations très discutables et très discutées pour savoir quand il est question ou non de violation du principe de diligence due. Dès lors un grand nombre d'auteurs et certaines jurisprudences exigent que :

- a) il existe des preuves selon lesquelles l'Etat connaissait à l'avance le risque élevé de l'activité exercée par l'individu et n'a pas pris des mesures efficaces pour protéger les victimes potentielles; ou
- b) une liste de victimes présentant des caractéristiques similaires a été enregistrée sans que l'Etat n'ait pris des mesures efficaces pour les protéger;

Après toutes ces considérations nous pouvons nous prononcer, sans aucun doute, en faveur du caractère approprié d'une convention où est spécifié, clarifié et systématisé les obligations des États à garantir la protection effective des droits de l'enfant par des acteurs privés en général et le secteur des affaires en particulier.

⁵ CIDH, 29 juillet 1988, Vélasquez Rodriguez c. Honduras, série C N°4

Une spécification, clarification et systématisation des obligations de prévention, d'enquête et de garantie d'une réparation due aux victimes, adaptées à la réalité du monde des entreprises privées dans le contexte de la mondialisation.

VI. UN TRAITÉ SUR LES OBLIGATIONS DES ETATS EN MATIÈRE DE DROITS DE L'ENFANT FACE AUX ACTIVITÉS DU SECTEUR PRIVÉ N'EST PAS OPPORTUN

Ayant démontré que le traité n'est pas nécessaire mais plutôt approprié, il nous reste à analyser si un tel traité serait opportun.

La notion d'opportunité est plus politique que juridique. Au sens strict est qualifié d'opportun ce qui se fait ou se produit à un moment convenable. Pour la conclusion d'un traité, nous pouvons considérer comme opportun tout moment où les chances d'atteindre les objectifs recherchés durant la négociation du texte sont certaines et avérées, où il y a des chances que le traité négocié soit ratifié dans un délai raisonnable et entre en vigueur et qu'une fois entré en vigueur, la situation qui en résulte est meilleure qu'elle ne l'était avant l'existence du traité.

Même si je reconnais que mes arguments sont discutables, à mon avis :

- a) En premier lieu, nous ne vivons pas le meilleur moment historique pour négocier un traité de cette nature;
- b) En second lieu, si nous arrivions finalement à négocier un traité instituant ces obligations de protection des droits de l'enfant par les entreprises privées d'une manière ferme et précise, peu d'États le ratifieraient au vu du risque de voir les entreprises abandonner leur territoire en raison de restrictions à leur liberté, et
- c) En troisième lieu, même si le traité a un nombre suffisant de ratifications pour entrer en vigueur, il n'atteindra cependant pas une ratification aussi universelle que celle de la Convention des droits de l'enfant, ce qui provoquera un manque de protection plus grand que celui qui existe à l'heure actuelle.

Sur quoi est-ce que je base ces affirmations ? Permettez-moi d'expliquer le raisonnement sur lequel je fonde ce point de vue.

Dans le domaine du commerce international et de ce qui est appelé le « marché mondial », les quinze dernières années se sont caractérisées par la « déréglementation » plutôt que par la « régulation ». Depuis l'entrée en vigueur du GATT 94 et de l'OMC, la nécessité de laisser les marchés s'autoréguler est devenue un principe fondamental tout comme réduire la réglementation étatique des marchés et des entreprises, au motif que cette réglementation empêche la libre concurrence et crée des obstacles au marché mondial, et que la croissance économique est basée sur l'élimination de toute considération autre qu'économique dans les règles de concurrence.

Nous avons vu les longues et infructueuses discussions au sein de l'OMC quant à savoir si elle doit ou non prendre en considération les normes environnementales comme limite au libre-échange; nous avons vu comment le dit « dumping social » n'a pas été pris en considération dans les règles du commerce international (ladite directive « Bolkestein » de l'Union européenne étant un des exemples les plus connus).

Il est clair que le résultat de cette politique a été la crise profonde, d'abord financière puis économique, dont nous souffrons dans le monde entier et en particulier dans les pays qui ont le plus déréglementé leur économie. Mais au lieu de penser que les prescriptions économiques de ces dernières années sont celles qui ont conduit à cette crise, les solutions que nous apportent les gourous économiques ne se dirigent pas précisément vers une plus grande régulation des marchés afin d'accroître le respect des droits de l'homme, de l'environnement ou les conditions de travail. Bien au contraire, on entend encore plus d'appels à une plus grande déréglementation.

Dans ce cadre, sincèrement, je pense que ce n'est pas le moment le plus opportun pour que les États entament des négociations sur un traité visant à clarifier leurs obligations de réglementer et contrôler les activités des entreprises afin qu'elles respectent, protègent et garantissent les droits de l'enfant. Je suis très préoccupé par les possibles dérives du contenu de ces négociations vers plus de déréglementation. Je dois admettre que j'ai plus de peur que d'espoir sur l'issue de ces négociations.

Mais si, finalement, un traité venait à être négocié, grâce à la pression de la société civile et des experts, et si, effectivement, un texte précisant et clarifiant les obligations des États à veiller à ce que le secteur privé respecte les droits de l'enfant est élaboré, est-ce qu'il est raisonnable de penser que les États s'empresseraient de ratifier au plus vite un tel document ? Est-ce qu'on peut penser que nous obtiendrions dans un délai relativement raisonnable une ratification quasi universelle comme celle de la Convention des droits de l'enfant ? Ou, au contraire, n'est-il pas raisonnable de penser que les gouvernements des États souffrant davantage de la crise économique, accablés par la recherche de solutions, seraient réticents à ratifier le traité, espérant ne pas éloigner encore plus les investisseurs étrangers de leur territoire, alors même que les gouvernements des États qui supportent mieux la crise seraient également réticents à la ratification pour éviter que les entreprises situées sur leur territoire ne délocalisent vers des États n'ayant pas ratifié le traité ?

Dès lors si un nombre suffisant d'États le ratifient pour en permettre l'entrée en vigueur, il est probable que les États non parties au traité allèguent que, n'ayant pas signé le traité, aucune obligation ne les concerne. L'effet bénéfique du traité serait substantiellement limité.

Nous avons démontré que les obligations des États existent déjà. Qu'elles apparaissent explicitement ou implicitement dans la Convention et dans ses protocoles, ainsi que dans d'autres séries de traités (comme ceux de l'OIT) et dans les règles générales du droit international. Mais l'existence d'un traité spécifique en la matière, même s'il se présente en principe comme un traité codificateur du droit existant, reste une grande opportunité pour que l'État récalcitrant à s'acquitter des dites obligations et affirme qu'il n'a aucune obligation envers le

traité qu'il n'a pas signé mais qu'il a exclusivement les obligations explicites de la Convention et de ses protocoles.

Probablement la situation serait pire qu'actuellement. Aujourd'hui, nous trouvons des États qui contestent l'interprétation extensive de la Convention au sujet du secteur privé, mais avec des arguments juridiques nous pouvons réfuter leur position et démontrer l'existence de leurs obligations. D'une part, la jurisprudence a progressé dans la reconnaissance de l'existence des obligations des États, et d'autre part, les organes des traités, à travers leur activité de contrôle, dialoguent avec les États afin de les convaincre et de les guider dans la réalisation de ces obligations. Mais s'il existe un traité spécifique, les tribunaux comme les organes des traités auront des difficultés à donner des arguments juridiques pour imposer ces obligations aux États non parties.

VII. CONCLUSION : IL Y A DES ALTERNATIVES

En conclusion, un traité sur les obligations des États en matière de droits de l'enfant face aux activités du secteur privé peut être approprié, mais il n'est ni nécessaire ni opportun.

Je suis sûr que beaucoup de lecteurs de ce travail penseront que les arguments que j'ai donnés pour expliquer la « non-opportunité » du traité le rendent encore plus approprié.

Dans un monde avec un marché toujours plus déréglementé, où il y a peu de place dans la régulation de l'activité économique aux arguments qui ne sont pas strictement économique, où les droits de l'homme, la protection de l'environnement, les arguments sociaux sont laissés dans le domaine de la politique et sont exclus du champ de l'économie, il semble plus approprié que jamais de voir naître un texte juridique précisant et renforçant les obligations de l'État par rapport aux entreprises privées afin de garantir qu'elles respectent les droits de l'homme dans toutes leurs activités.

De plus, je suis certain que d'autres lecteurs en sont venus à penser que ces arguments rendent le traité non seulement approprié, sinon « nécessaire », contrairement à ce qui a été affirmé précédemment.

Je dois reconnaître la contradiction apparente de mon raisonnement. Mais, sans écarter la convenance d'un traité à un autre moment, à mon avis il y a d'autres moyens plus efficaces et efficaces d'atteindre le même résultat et qui ne nous posent pas les mêmes problèmes qu'un traité à l'heure actuelle.

Je pense tout d'abord au recours à la *soft law*. Les déclarations, les recommandations, les guides de conduite, les actes d'interprétation, la formulation de principes tirés de l'interprétation des normes en vigueur, etc.

C'est dans cette ligne que s'inscrit le projet d'observation générale du Comité des droits de l'enfant au sujet des entreprises privées et des droits de l'enfant.⁶ De même, nous devons noter les travaux, d'abord de l'ancien Rapporteur spécial John Ruggie et actuellement du Groupe de Travail du Conseil des droits de l'homme de l'ONU sur les sociétés privées et les droits de l'homme.⁷ En outre, les résolutions du Conseil des droits de l'homme sur lesquelles, compte tenu de leur caractère non contraignant, les États négocient avec plus de souplesse, sont un ajout à cette tendance de soft law.

À mon avis, au moment actuel, il est plus opportun (et tout aussi approprié) qu'un traité de clarifier les obligations des États en la matière à travers cette technique de soft law, car elle facilite un accord général sur un point : les obligations « contraignantes » de l'État existent déjà. L'enjeu est de les préciser et de les adapter à toutes les facettes et activités dans lesquelles le secteur privé peut affecter les droits de l'enfant.

Parallèlement à cette activité de précision et de délimitation des obligations, je trouve qu'il est également fondamental de faire un travail de promotion dans le monde de l'entreprise. Je pense à la question des labels et des certifications pour la promotion des droits de l'enfant, et à d'autres systèmes de promotion des droits de l'homme. Sans doute, à côté du bâton, il faut montrer la carotte aux entreprises privées pour arriver au but que nous cherchons tous : que les acteurs privés respectent les droits de l'enfant.

⁶ Au moment d'écrire ces lignes, le commentaire général n'a toujours pas été approuvé par le Comité des droits de l'enfant. Nonobstant, il est prévu d'être approuvé pour le mois de janvier 2013 et toute la documentation se trouve sur le site internet du Comité (<http://www2.ohchr.org/english/bodies/crc/index.htm>)

⁷ Même une fois approuvées par le Conseil des droits de l'homme, les dispositions de ces principes directeurs n'en demeureront pas plus contraignantes. Il serait toutefois faux d'en déduire qu'elles sont de fait insignifiantes. Bien au contraire : ces principes bénéficient déjà aujourd'hui d'un haut degré d'acceptation dans les milieux politiques et économiques.

IMPLEMENTATION OF THE CHILDREN'S RIGHTS AND BUSINESS PRINCIPLES

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Résumé

UNICEF reconnaît que la collaboration avec le secteur des entreprises devient de plus en plus un élément important en vue d'un changement positif pour les enfants. L'auteur se centre sur l'application des principes régissant les entreprises dans le domaine des droits de l'enfant, sur la manière dont ils peuvent apporter une valeur ajoutée au secteur des entreprises. Son premier principe invite les compagnies à s'engager dans un processus de « diligence raisonnable » afin de déterminer des actions et prendre en vue la protection et le soutien aux droits de l'enfant dans leurs activités commerciales. Ce processus consiste en l'évaluation de l'impact sur les droits de l'enfant, l'intégration d'actions qui se basent sur cette analyse, le contrôle et l'établissement d'indicateurs de performance pour ces actions, le fait de rapporter et de communiquer ces performances et processus auprès des intervenants internes et externes. UNICEF, accompagné d'organisations partenaires, est actuellement en train de développer une « boîte à outil de conseils » à l'intention des compagnies afin d'aider au soutien et à l'implémentation de ces principes et d'intégrer à la fois les droits de l'enfant aux activités, politiques et processus commerciaux. L'auteur présente certains de ces outils et leur utilité pour les entreprises qui cherchent à se centrer durablement sur les droits de l'enfant dans leur travail.

Zusammenfassung

UNICEF anerkennt, dass die Zusammenarbeit mit den Unternehmen für eine positive Veränderung zugunsten der Kinder immer wichtiger wird. Der Autor konzentriert sich auf die Implementierung der Grundsätze in den Unternehmen betreffend Kinderrechte und darauf, wie diese den Unternehmen einen Mehrwert bringen können. Sein erster Grundsatz lädt die Gesellschaften ein, sich für ein vernünftiges Prüfungsverfahren zu verpflichten, um Massnahmen festzulegen und den Schutz und die Unterstützung der Kinderrechte in ihren Geschäftstätigkeiten anzugehen. Dieser Prozess besteht in der Auswertung der Wirkung auf die Kinderrechte, der Aufnahme von Massnahmen aufgrund dieser Analyse, der Kontrolle und der Erstellung von Leistungsindikatoren für diese Massnahmen, der Berichterstattung und Kommunikation dieser Leistungen und Prüfung gegenüber den internen und externen Beteiligten. UNICEF entwickelt zurzeit gemeinsam mit Partnerorganisationen eine Box mit

Ratschlägen für Unternehmen zur Unterstützung der Umsetzung dieser Grundsätze und zur Integration der Kinderrechte in die Tätigkeiten, die Politik und die Abläufe der Unternehmen. Der Autor stellt einige dieser Hilfsmittel vor und präsentiert ihre Nützlichkeit für Unternehmen, die sich in ihrer Arbeit langfristig auf die Kinderrechte konzentrieren wollen.

Resumen

UNICEF reconoce que la colaboración con el sector empresarial se convierte en un elemento cada vez más importante en vista de un cambio positivo para los niños. El autor se centra sobre la implementación de los principios que regulan las empresas en el ámbito de los derechos del niño, en la manera en que pueden aportar un valor añadido al sector de las empresas. Su primer principio invita a las empresas a comprometerse en un proceso de diligencia razonable con el fin de determinar acciones y tener en cuenta la protección y el apoyo a los derechos del niño en sus actividades comerciales. Este proceso consiste en la evaluación del impacto sobre los derechos del niño, la integración de acciones que se basa en este análisis, el control y el establecimiento de indicadores de rendimiento para estas acciones, el hecho de reportar y de comunicar estos resultados y el proceso para los participantes internos y externos. UNICEF acompañada de las organizaciones colaboradoras, está actualmente desarrollando una « caja de herramientas de consejos » para las empresas con el fin de ayudar a sostener la implementación de estos principios y de integrar al mismo tiempo los derechos del niño a las actividades políticas y a los procesos comerciales. El autor presenta algunas de estas herramientas y su utilidad para las empresas que pretenden centrarse de manera durable sobre los derechos del niño en su trabajo.

Summary

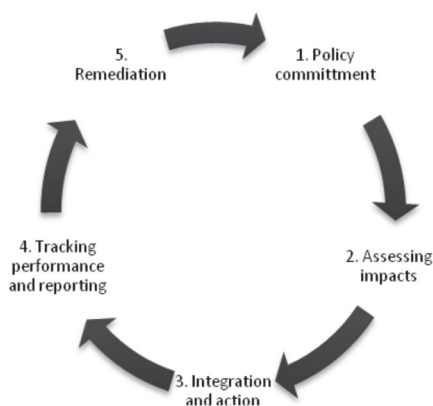
UNICEF increasingly recognizes that collaboration with the corporate sector is an important element of bringing about positive change for children. The author focuses on implementing the Children's Rights and Business Principles (CRBP) and how it can bring added value to the corporate sector. Its first principle invites companies to engage in a due diligence process to determine and take action to protect and support children's rights in their business activities. This process consists of a child rights impact assessment, integration of actions based on the impact analysis, monitoring and setting performance indicators for the actions and reporting and communicating performance and processes to external and internal stakeholders. UNICEF together with partner organisations is currently in the process of developing a guidance toolkit for companies to help support the implementation of the CRBP and to integrate children's rights into business operations, policies and processes. The author presents some of the tools and how they can be useful for companies seeking to focus on children's rights in their sustainability work.

INTRODUCTION

First of all I wanted to extend my thanks to the organizers for inviting UNICEF to be part of this important seminar on child rights and business. This is an area of work that UNICEF finds of great importance, and there is an increasing recognition within the organisation that collaboration with the corporate sector is an important element of bringing about positive change for children. This is also why my intervention today will complement that of my colleague from Save the Children and focus on implementing the Children's Rights and Business Principles and how that can bring added value to the corporate sector.

Principle one of the Children's Rights and Business Principles (CRBP) invites companies to engage in a due diligence process to determine and take action to protect and support children's rights in their business activities. This implementation guidance is derived directly from the UN Guiding Principles on Business and Human Rights. It proposes a due diligence process consisting of a child rights impact assessment, integration of actions based on the impact analysis, monitoring and setting performance indicators for the actions and reporting and communicating performance and processes to external and internal stakeholders. The due diligence process informs and supports the company policies and remedies which should be clearly set, described and communicated.

The implementation process based on CRBP can be mapped into the framework described below:



Indeed, the Children's Rights and Business Principles are a very practical framework, highlighting not only elements of corporate respect for children's rights, but also how companies can support children's rights through their work. As a result, a company seeking to engage in the realm of human rights has a great entry point through the Children's Rights and Business Principles.

UNICEF together with partner organisations is currently in the process of developing a guidance toolkit for companies to help support the implementation of the CRBP and to integrate children's rights into business operations, policies and processes. The toolkit consists of a set of documents that map children's rights to the wider scope of human rights and provide specific thematic guidance for the CRBP implementation process. The tools will be made available during the course of 2012 and 2013 and will then be tested by companies on a pilot basis. I would like to take this opportunity to speak about some of the tools and how they can be useful for companies seeking to focus on children's rights in their sustainability work.

3. *Policy commitment*

Tool: Integrating children's rights in company policies

This tool provides guidance to companies and industry associations on drafting company policies and standards so as to ensure they are in line with the Children's Rights and Business Principles. This includes guidance for companies to incorporate children's rights into existing human rights policies, supply chain code or company code of conduct. An important element of the company policy and approaches constitute their key stakeholder framework. For these purposes, Save the Children and UNICEF will be crafting a tool focusing on participation of children as a key stakeholder into the company due diligence process will be developed.

4. *Assessing impacts*

Tool: Children's Rights Assessment/Checklist

This tool will help companies assess the company's impact on children's rights. The checklist is contextualized within the broader human rights framework and can be used in conjunction with a human rights impact/compliance assessment or as a stand-alone tool for in-depth child rights impact analysis. The Danish Institute for Human Rights (DIHR) is a partner in the development of this tool, based on the DIHR's methodology for Human Rights Compliance Assessment. This tool builds on the Children's Rights and Business Principles and will allow companies to review their impact on children's rights as part of their due diligence process. The checklist is an essential step for companies in deciding on what issues and concerns related to children's rights that needs to be acted upon.

5. *Integration and actions*

Tool: UNICEF CSR Workbook for companies: Children are Everybody's Business

The UNICEF Workbook *Children are Everyone's Business* is co-authored by a group of internal and external child rights experts and is mapped around workplace, marketplace and community. It provides practical suggestions and guidance on how companies can address child rights impact and implement actions based on their key areas of risk and opportunity.

6. *Tracking performance and reporting*

Tool: Child rights reporting guidance

Research has been carried out focusing on the existing reporting frameworks and the extent to which the corporate sector reports on child rights issues in their sustainability reporting. This research will be issued as an advocacy tool. Building on the impact assessment tool, reporting guidance will be made available to allow companies to integrate actions taken with respect to children's rights into their overall sustainability reporting. UNICEF child rights reporting guidance will be linked to the impact assessment tool and will also be mapped to existing areas and indicators of the Global Reporting Initiative (GRI) core indicator framework. It is important to note that the GRI reporting framework is currently being updated.

7. *Remedies*

The Committee on the Rights of the Child is currently finalizing the General Comment on Child Rights and the Business Sector. Once this has been finalized, it will be opportune to work on more detailed guidance on how the General Comment can be implemented in collaboration with Government. Within this, there will also be an opportunity to develop guidance on child rights related remedies or grievance processes.

Other tools

In addition to the above-mentioned tools, there will be a range of thematic tools that are currently under discussion, including in the areas of:

- Family-friendly workplace
- Child-friendly banking products
- Child protection code of conduct
- Young people
- Marketing to/with children
- Migrating working parents and children's rights

CONCLUSION

In conclusion, I wanted to point out that not all companies would implement all of these tools and there may also be segments within a tool that is more important than another. What a company would be expected to address are those issues that are most material to their business, some of which may in fact pose significant risk to the business. The added value for a company

to take on a children's rights focus include that those businesses will be recognized through an enhanced business image as compared to competitors. In addition, a CSR approach focused on children's rights may attract ethically conscious customers and build customer loyalty, and may also motivate and retain staff. This quite aside from the fact that it is the right thing to do, and what would be expected through the company responsibility to respect and support children's rights.

MATTIAS FORSBERG

Manager, Child Rights and Business, Save the Children Sweden, Stockholm

Résumé

La responsabilité sociale des entreprises commence à ne plus être uniquement perçue comme un concept philanthropique, s'introduisant à la salle du Conseil, car un plus haut niveau de recherche et de prise de conscience est requis par les entreprises elles-mêmes concernant l'impact de leurs activités commerciales. Save the Children a débuté un dialogue avec UN Global Compact et UNICEF afin de traiter ces problématiques et le manque de cadre global relatif à la manière d'aborder le rôle du secteur privé envers les droits de l'enfant. Afin d'obtenir des résultats probants et de trouver des moyens durables pour de l'amélioration de la vie des enfants, il est primordial de s'adresser à tous les acteurs de la société : les organismes publics, la société civile et en particulier le secteur privé. Les outils, les directives et le dialogue ouvert avec les acteurs intéressés du secteur privé sont nécessaires. Le secteur privé en coopération avec d'autres acteurs œuvrant pour les droits de l'enfant peuvent, grâce à leur sphère d'influence apporter du changement, même influencer un gouvernement et faire ainsi une énorme différence dans la vie des enfants. L'auteur présente *Children's Rights and Business Principles* ainsi que d'autres bonnes pratiques.

Zusammenfassung

Die gesellschaftliche Verantwortung der Unternehmen wird nicht mehr ausschliesslich als philanthropisches Konzept wahrgenommen und findet Eintritt in den Ratssaal. Allerdings braucht es von den Unternehmen ein höheres Niveau bezüglich Recherche und Bewusstwerdung über die Auswirkungen ihrer Handelstätigkeiten. *Save the Children* ist mit *UN Global Compact* und UNICEF in einen Dialog getreten, um diese Probleme sowie der Mangel eines globalen Rahmens zu der Rolle des Privatsektors gegenüber den Kinderrechten anzugehen. Um überzeugende Ergebnisse zu erzielen und dauerhafte Mittel zu finden im Hinblick auf die Verbesserung des Lebens der Kinder, ist es entscheidend, sich an alle Akteure der Gesellschaft zu wenden: die öffentlichen Stellen, die Zivilgesellschaft und insbesondere der Privatsektor. Die Hilfsmittel, Richtlinien und der offene Dialog mit interessierten Akteuren des Privatsektors, zum Erhalt ihrer Unterstützung, sind notwendig. Der Privatsektor kann in Zusammenarbeit mit anderen Akteuren, die sich für die Kinderrechte einsetzen, dank seinem Wirkungsbereich Veränderungen herbeiführen und sogar die Regierung beeinflussen und damit einen wichtigen Unterschied im Leben der Kinder machen. Der Autor stellt *Children's Rights and Business Principles* sowie weitere Beispiele für die gute Praxis vor.

Resumen

La responsabilidad social corporativa comienza a ser percibida no únicamente como un concepto filantrópico, introduciéndose en la administración del Consejo. Sin embargo, las mismas empresas solicitan un más alto nivel de investigación y toma de conciencia, en lo concerniente al impacto de sus actividades comerciales. *Save the Children* comenzó un diálogo con UN Global Compact y UNICEF, con el fin de dirigir estas problemáticas así como la falta de un marco global relativo a la manera de abordar el papel del sector privado hacia los derechos del niño. Con el fin de obtener resultados convincentes y de encontrar medio duraderos para mejorar la vida de los niños, es primordial interpelar a todos los actores de la sociedad: los organismos públicos, la sociedad civil y en particular el sector privado. Son necesarios las herramientas, las directivas y el diálogo abierto con los actores interesados del sector privado, obteniendo al mismo tiempo su apoyo. El sector privado en cooperación con otros protagonistas que trabajan para los derechos del niño pueden, gracias a su esfera de influencia aportar un cambio, inclusive influenciar un gobierno y hacer así una enorme diferencia en la vida de los niños. El autor presenta *Children's Rights and Business Principles* así como otras buenas prácticas.

Summary

Corporate Social Responsibility is starting to move from philanthropy into the board rooms but a higher level of research and awareness is required on the impact of business activities by corporations themselves. *Save the Children* entered into a dialogue with *UN Global Compact* and UNICEF to address this issue and the lack of a comprehensive framework for how to approach the role of the private sector for children's rights. To achieve results and find sustainable ways to improve the lives of children, it is important to address all actors in society: public actors, civil society and not least the private sector. Tools, guidelines and direct dialogue with and support to interested actors in the private sector are needed. The private sector together with other actors working on child rights can make changes within their sphere of influence as well as influence governments and thus make an enormous difference in the lives of children. The author presents *Children's Rights and Business Principles* and related good practices.

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Corporate Social Responsibility is today high on the agenda. Internationally, it is a topic widely discussed among international organizations, NGOs, governments and individuals. Most importantly, CSR is increasingly becoming an important topic for businesses. As future employees, customers and business partners, the child perspective is important for the sustainability of any long-term future plans. CSR is finally starting to move from philanthropy into the board rooms.

What place children's rights take in the CSR agenda has varied greatly. Child labour has been an obvious point of departure, where many businesses have started incorporating children's rights into their agenda. Sometimes this has been combined with supporting projects for children carried out by NGOs like Save the Children or others. This is certainly a start and much has been done, but looking at the issues more broadly, it becomes evident that children are affected in many ways, directly and indirectly, by the activities of the private sector, both positively and negatively. Also, working on child rights has become more complicated with globalisation where responsibilities and accountability does not automatically and obviously belong to one actor. Hence, a higher level of research and awareness is required on the impact of business activities by corporations themselves.

A few years ago, my General Secretary Mrs. Elisabeth Dahlin entered into a dialogue with UN Global Compact and UNICEF to address this issue and the lack of a comprehensive framework for how to approach the role of the private sector for children's rights. All agreed that although there are numerous initiatives, standards and principles in place, there was a need for comprehensive set of principles to guide companies on the full range of actions they can take in the workplace, marketplace and community to respect and support children's rights.

So why does a child rights organization embark on a process to develop child rights principles for the corporate sector? First and foremost we want to achieve results and find sustainable ways to improve the lives of children. For this, it is important to address all actors in society – public actors, civil society and not least the private sector. Engaging in a result-oriented way with all these actors requires not only answering the question why, but also how. Thus, forwarding the Children's Rights and Business Principles requires not only advocacy, awareness raising and lobbying, but also tools, guidelines and direct dialogue with and support to interested actors in the private sector.

As organizations – both Save the Children and UNICEF has been working in the child rights field for many years. Save the Children started already in 1919 and is today present in more than 120 countries with tens of thousands of staff reaching some 125 million children. To continue promoting children's rights, we have to put the best interest of the child on top of the agenda for all decision makers. Governments and the UN of course have an influence. They are bound by the Convention of the Rights of the Child to do their utmost.

But there are other key actors that can affect substantial and long-lasting change in the lives of children. If you look at the 150 largest economies in the world – almost 60% of them are corporations. It is clear that the private sector together with other actors working on child

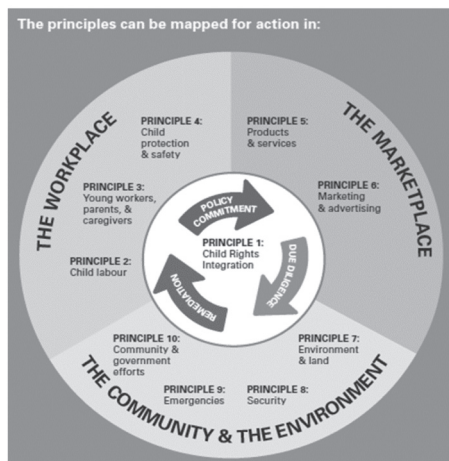
rights can make changes within their sphere of influence as well as influence governments and thus make an enormous difference in the lives of children.

Save the Children has been collaborating for almost 20 years with businesses on child rights. Best known is our groundbreaking partnership with IKEA, the Swedish furniture chain. These partnerships have taught us that companies sometimes have more possibilities to promote change than governments do. And that they in their own right can promote the agenda and do it quickly. We learn from companies. Business pushes us in the NGO-world to be innovative and more result-orientated. Results can be achieved not only through watch-dog activities, but also through positive and constructive engagement.

The Children's Rights and Business Principles is not about fundraising, and not about initiating new legislation. It is about joining forces with all actors in society to unite and work to enforce change for children. There is a clear rationale:

The Universal Declaration on Human Rights clearly calls on all actors of society to engage in issues promoting child rights. The Convention on the Right of the Child definitely sees a role for governments but for other key actors too. The Guiding Principles on Business and Human Rights have created a solid platform in defining the roles of government and other actors. Other standards such as the International labour standards are of course a point of departure as well.

The first principle is the over-arching principle. It calls upon all actors to meet their responsibilities to respect children's rights and to commit to supporting the human rights of children. It is about establishing an accessible grievance channel within the company to handle this. Policy commitment, due diligence and remediation. The following 9 principles address the influence of businesses on children's rights broadly, divided into 3 parts: the workplace, the market and the community. This shows the holistic approach and is crucial for making the issues relevant for all businesses.



Businesses often tell us that they want to promote child rights, that they meet challenges, and that they want to not only avoid clear breaches of children's rights, but that they also want to contribute positively. Demands are increasing from shareholders, Board of directors, CEOs, and also increasingly from employees to engage in social issues. However, they often ask what can be done, how things can be done, and if we can help them do it. Children's rights are high on today's CSR-agenda and this unique set of Children's Rights and Business Principles is a vital framework for companies moving forward in their ambition to improve and affect positive change in the lives of children all over the world. Our ambition with this initiative has been to develop a hands-on tool that can really support big or small companies in promoting child rights within their sphere of influence.

UNICEF has developed a fantastic handbook on how corporates can work with the principles. Save the Children are ready to assist companies in their work in developing their Children's rights efforts. For this, we have for example teamed up with Accenture to develop hands-on implementation-tools that we are currently testing with companies. With other tools and guidelines there is a battery of concrete tools covering many aspects of business activities ready to be used, and more are being developed. Our goals at Save the Children are to have the principles is not to create more work for companies, but rather to integrate the Principles into already existing reporting tools such as UN Global Compact, GRI, ISO etc. We want to promote awareness among key actors in the private sector such as investors, branch organizations, business networks etc., work with individual companies on implementing child rights in their core business so as to generate good examples, and to build our own capacity to be a relevant partner for businesses on child rights in their operations. However, ownership by the private sector is still central in all of this work, and we aspire to create a genuine partnership between our sector and the private sector.

The process of drafting and finalizing the Children's Rights and Business Principles was inclusive. We made consultations in 11 countries, involving 600 representatives from business, governments and civil society over nearly 2 years. Contributions were made on-line through an excellent partnership with the Business & Human Rights Resource Centres Child-rights portal. 2,000 children from 9 different countries, mainly in the developing world, was consulted – child participation being key in this process. A young person in Peru said during these consultations:

Do not take advantage of us.

We ask you to be responsible.

Do not support us because you feel pity for us.

Instead – support us because we deserve it.

We purchase your products and services.

But we ask you to invest in our development.

We do not want gifts – we want you to be responsible.

RELEVANCE OF LABELS AND CERTIFICATIONS WITH REGARD TO THE PROMOTION OF CHILD RIGHTS

MARIE AND GILLES CONCORDEL

Tutator Foundation, Nyon

Résumé

Le monde des affaires ne se soucie pas spontanément des enfants. Le grand public a par contre le pouvoir d'influencer les compagnies. Les individus ont le pouvoir d'acheter des produits fabriqués par des compagnies qui respectent les droits de l'enfant, de boycotter celles qui ne le font pas, et d'investir dans les entreprises respectueuses. Les individus peuvent également élire des gouvernements qui vont se battre pour le respect des droits des enfants et choisir un conseil d'administration qui va faire progresser l'entreprise dans la bonne direction du respect des droits de l'enfant. Le défi reste d'aider les directeurs généraux à prendre les bonnes décisions et à faire en sorte que le respect des droits de l'enfant soit conforme avec la mission et les objectifs de la société. Satisfaire les parties prenantes devrait motiver les entreprises à respecter les droits de l'enfant. Les auteurs proposent un processus de certification qui fournirait un « tableau de bord » contenant les informations nécessaires à une prise de décisions éclairée.

Zusammenfassung

Die Geschäftswelt sorgt sich nicht spontan um die Kinder. Die breite Öffentlichkeit hat hingegen die Macht, Unternehmen zu beeinflussen. Einzelpersonen haben die Macht, Produkte zu kaufen, die von Gesellschaften hergestellt wurden, die die Kinderrechte einhalten, und jene zu boykottieren, die es nicht tun, sowie in verantwortungsbewusste Unternehmen zu investieren. Einzelpersonen können ausserdem Regierungen wählen, die sich für die Achtung der Kinderrechte einsetzen und einen Verwaltungsrat wählen, der das Unternehmen in die richtige Richtung lenkt. Die Herausforderung liegt darin, die Generaldirektoren darin zu unterstützen, die richtigen Entscheidungen zu treffen, und dafür zu sorgen, dass die Achtung der Kinderrechte im Einklang mit der Aufgabe und den Zielen der Gesellschaft ist. Alle Beteiligten zufriedenzustellen, soll die Unternehmen ermutigen, die Kinderrechte zu respektieren. Die Autoren schlagen ein Zertifizierungssystem vor, das eine „Übersicht“ mit den für eine aufgeklärte Entscheidung notwendigen Informationen liefert.

Resumen

El mundo de los negocios no se preocupa espontáneamente de los niños. La opinión pública tiene por el contrario el poder de influenciar las empresas. Los individuos tienen el poder de comprar productos fabricados por las empresas que respetan los derechos del niño, de boicotear las que no lo hacen y de invertir en las empresas que respetan. Los individuos pueden también elegir gobiernos que van a luchar por el respeto de los derechos del niño, y escoger un consejo de administración que hará progresar la empresa en la dirección correcta del respeto de los derechos del niño. Permanece el reto de ayudar a los directores generales para tomar las buenas decisiones y procurar que el respeto de los derechos del niño sea coherente con la misión y los objetivos de la sociedad. Satisfacer las partes involucradas debería motivar las empresas a respetar los derechos del niño. Los autores proponen un proceso de certificación que proporcionaría un « plan de acción » que contenga las informaciones necesarias para una toma de decisiones transparente.

Summary

The business sector does not spontaneously care for children. The general public actually has the power to influence companies. People have the power to buy products made by companies that respect child rights and boycott those made by companies that don't, and invest in those good companies. People can also elect governments that will fight for the rights of children, and pick a corporate board that will drive the company to respect child rights. The challenge is to help CEOs do the right thing and make it such that respecting child rights becomes consistent with the company's mission. Pleasing stakeholders should motivate companies to respect child rights. The authors propose a certification process that would provide a "Dashboard" with the necessary information to make informed decisions.

* * *

INTRODUCTION

Having the privilege of being acquainted with both Worlds, we hope to be able to integrate the business viewpoint (our background) and the humanitarian viewpoint (our current focus).

Inevitably, we'll make one or the other side cringe along the way, but we don't want Political Correctness to hide the forest and mislead us into quick and dirty decisions. We need to face reality. So, we'll be a bit provocative!

The Purpose of a Car

Let me start by talking about an important invention: the automobile.

A car was conceived to carry people and goods, NOT to pay attention to rules and to pedestrians: this is for you, the driver, to handle.

If you get arrested for speeding, try to explain to the cop that it's not your fault but that of the car...

For that purpose, you are provided with a **steering wheel and pedals**. It is your responsibility to control the car, obey the rules and be respectful of others.

Now, in order to help you do that, there is a **dashboard** that informs you on the status of the car: speed, brakes, etc.

Without the steering wheel and the dashboard, you could not control your car and the result would be terrible!

THE PURPOSE OF A BUSINESS IS TO THRIVE. DEAL WITH IT!

Economic Development is an integral part of the quality of life we are enjoying. When we say "quality of life" we are not just talking about luxury; we are talking health, security, education, shelter, etc. Business's success brought it to us, in the form of goods and services, employment, investment opportunities.

Now, a company's mission is to survive and flourish. **It has no soul...** Darwin's principle directly applies here. Companies that don't get it and sway away from that purpose simply cease to exist. Therefore, the Boards' and the Management Teams' mission is to do what it takes for the company to **THRIVE!** There aren't two ways about it... Inasmuch as we wish we lived in a World where businesses would spontaneously care for children, **that's not the real World.**

As a CEO, there are only 6 types of people that are relevant to me: **my stakeholders**; that is, my customers, my employees, my suppliers, my investors, the local community and the authorities. And my key goal is to **satisfy those that will help my business thrive.** Sure enough, when times are particularly easy, my management team might indulge in some gra-

tuitous good behavior purely out of their good heart, but in normal times (and even more so when times get tough), the priority returns to survival and to thriving.

It is not the role of the company to behave well. Its mission is to create value, which will in turn benefit all of us, the General Public.

This is by no means a message of pessimism, just a healthy dose of realism!

WE, THE GENERAL PUBLIC, HAVE THE POWER TO INFLUENCE THEM

Indeed, there are solutions: we just need to look for them at the right place, **take the World as it is, NOT as we wish it were**. In fact, blaming companies for misbehaving vis-à-vis child rights is an attempt by the powers that be to exonerate themselves from guilt.

And those with the power are... Us! We are the stakeholders!

We have a wallet. With it (well, with its contents), we can:

- Buy products made by companies that respect child rights and boycott those made by companies that don't
- Invest in those good companies.
- We also have ballots. With them, we can:
- Elect governments that will fight for the rights of children
- Pick a corporate board that will drive the company to respect child rights.

All of us here have the power to make companies respect child rights.

We all know of some people that blame this or that sports-shoe maker for exploiting children in their factories in poor countries. Now, if these same people do go and buy these very shoes, don't they disqualify themselves from having an opinion on this matter? The very people who have the power to fix these terrible situations end up condoning them, out of pure personal interest...

Let me venture that most of these companies' CEOs would also love to respect child rights... but they simply can't! It is just not part of their mission. Let's see how we can help them do the right thing and make it such that respecting child rights becomes consistent with the company's mission!

IN FACT, THE STAKEHOLDERS DO CARE ABOUT CHILD RIGHTS!

First of all, we would like to show you that pleasing its stakeholders should motivate companies to respect child rights. Indeed, each of these stakeholders does care for these rights. Here are some examples of how:

- Customers: Quality and safety of products and services, Use of children in communi-

cation, Unfair targeting of children in marketing campaigns

- Employees: Protection for young workers, Support for parents and caregivers
- Suppliers: Fair and responsible practices, Sustainability
- Investors: Sustainability, Image of “good citizen”
- Local Community: Environmental impact, Safety
- Authorities: Respect and promotion of child protection laws

This shows that making the business thrive isn’t incompatible with respecting child rights. In fact, it is very consistent with it.

Let us, as stakeholders of these companies, make sure that the companies’ officers hear that message loud and clear and thus steer the companies in the right direction.

WE ARE ALL IN THE DRIVER’S SEAT

Remember how we need a steering wheel and a dashboard to make sure that our car heads in the right direction?

We, the **General Public are in the driver’s seat** of the businesses. We need a Steering Wheel and a Dashboard as well!

Steering Wheel: The Civil Society, by federating us and giving us a voice, provides us with levers in order to drive the companies in the right direction.

- This way, we are all able to express to companies what we expect of them. (Consumer groups, lobbying groups, Internet campaigns...)
- As a matter of fact, **companies like this kind of feedback**: without it how could they effectively determine what course of action will please us? They would be left always second-guessing us...

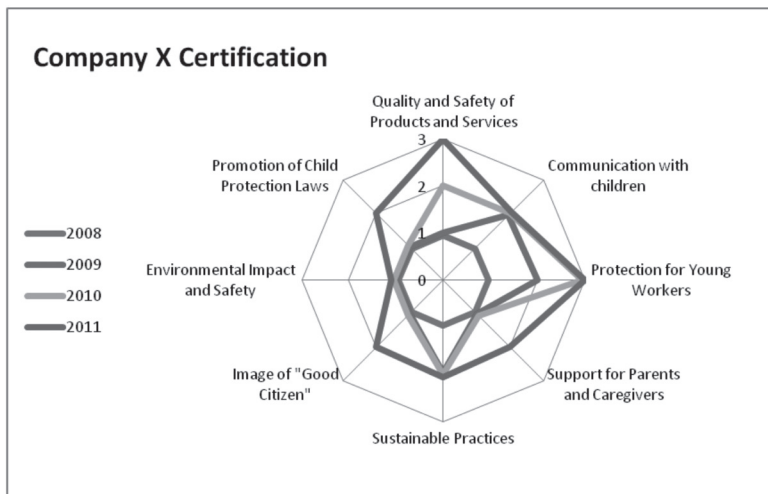
The Certification/labels will provide us with a “**Dashboard**”

- This will give us the necessary information to make informed decisions with our wallet and our ballots. This is essential!
- Here again, **companies will welcome these certifications** as a means to communicate on their efforts and get their efforts’ worth of reward.

In general, companies don’t mind additional rules as long as they are equitable.

Sure enough, they will grumble, but that is their way of checking that this is not just a whim, of making sure that it is worth putting efforts on this.

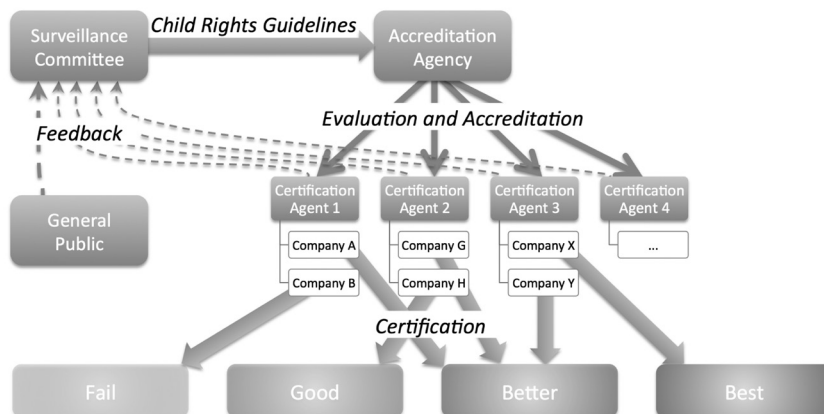
DASHBOARD



One simply cannot boil the performance of a company on their respect of child rights down to just one number, let alone a pass/fail grade. In order to get a fair assessment of a company's performance on that front and in order to motivate businesses to improve their behavior, we need to offer:

- A multi-dimensional evaluation. This way we'll get a complete view of the situation and companies will be able to identify which aspects require their attention and not waste their efforts on less impact-producing measures
- A set of levels of compliance (not just pass/fail) for each dimension. Indeed, it is important to offer to companies an opportunity to improve over time and for us to be able to gauge this progress.
- Long-term or recurring evaluation, in order to monitor a company's progress.

CERTIFICATION PROCESS: IT'S WHAT PRODUCES THE DASHBOARD



A Certification system will include a number of Certification Agents whose mission will be to assess the performance of companies on child rights and to give each company a set of grades.

Of course, it is crucial to make sure that these Certification Agents be competent and trusted, both by the companies being evaluated as well as by the general public. For that purpose, an Accreditation Agency needs to evaluate these Certification Agents on a regular basis and to grant/revoke their status when needed.

The Accreditation Agency receives rules and guidelines from a Surveillance Committee, whose purpose is to maintain these guidelines. In order to accomplish that, this committee will take into account the information it will receive from the various Certification Agents and will attempt to capture the evolution of the World we live in, in order to make these guidelines evolve over time. Indeed, how can we believe that what we will be producing today will still apply untouched in 10 years?

WHAT ARE THE KEY QUALITIES OF SUCH DASHBOARD?

Every scientist will tell you that a good measuring instrument must meet three important criteria: that of validity, of consistency and of sensitivity. Here too, our dashboard must be up to par:

- Validity, in the eyes of the General Public as well as in the eyes of the companies being certified. Indeed, companies are more likely to submit themselves to this process if

they trust that their performance will be objectively measured. This requires a trustworthy Accreditation Agency that will in turn accredit Certification Agents. Also, the dimensions that are measured have to be objectively quantifiable. Subjectivity is not an option.

- Consistency, across very diverse cultural and geographical backgrounds. If the impression of unfairness or bias creeps in, the whole process will be put in question in short order.
- Sensitivity, both in terms of distinction between aspects being measured and ability to measure progress. Short of having the right level of sensitivity, we could let some bad behaviors be masked by others and go unnoticed.

ADDITIONAL FEATURES TO PROMOTE GOOD BEHAVIOR

Multi-level Certification

A pass/fail certification wouldn't work. Indeed, either:

- We would set the bar too high and a number of companies would soon deem the certification unreachable and would give up, or
- We would set it too low and we would thus defeat the purpose because we wouldn't be pushing companies to improve on their respect of child rights.
- It would be harder to measure at what point they are.

Having a multi-level evaluation will provide a path towards excellence for companies and will give a motivation to the companies' officers to improve.

Criteria mapped onto the company's key roles

In order to improve its record on the respect of child rights, the company will want to include child rights performance into the evaluation of its senior staff. If I am a VP in a corporation and if my performance evaluation and my pay raise depend on how well I am doing my part in respecting child rights, I will be motivated to improve on that front. All the more so that there are well identified goals that fall straight into my responsibility... This way, I won't have the opportunity of "passing the bucket" and claiming that this is the responsibility of my fellow management team member. So, it is essential to formulate these indicators such that they fall within each senior officer's court. Since making each stakeholder happy is typically the responsibility of one officer, the mapping can start here.

Stakeholder	Company Officer
Customers	VP of Sales & Marketing
Employees	VP of Human Resources
Suppliers	VP of Procurement
Investors	Chief Financial Officer
Local Community	Chief Operating Officer
Authorities	General Counsel

Domino Effect

Let's imagine for a minute that the rules are such that my company will only get the "Best certification" if all my suppliers have at least the "Better certification". I will be very motivated to apply the necessary pressure onto my suppliers to improve their score! This will in turn motivate them to improve their child rights record as well as to put pressure on their suppliers to get the "Good" level that is required for them to gain access to that "Better" level...

REMAINING CHALLENGES

Of course, we are not claiming to have all the answers; these are just some key requirements for an effective certification system.

Beyond these important features, it will be equally critical to work on the following aspects:

Beware of poor proxies and of mission drift

Given the challenge of finding indicators that can be objectively measured, it will be tempting to pick some that are easy to evaluate and see them as a proxy for what we really want to measure. The natural consequence of this is an inevitable mission drift, where we cease to focus on what matters and focus instead on the indicator.

Who hasn't heard of that NGO whose mission was to bring water to a village? They picked the number of wells they had dug as an indicator of how well they were doing, which would seem to be nicely correlated with the goal. Next thing you know, they were digging wells left

and right in an area where it was easy to dig and the water table wasn't too deep; and they scored well on their indicator. Well it turned out that area was not accessible by the villagers because of security concerns, so those wonderful wells couldn't be used and had no impact on the well being of the village...

We have to be very vigilant and guard ourselves against that syndrome.

Objectivity and Fairness

We all live on a planet with widely diverse contexts and cultures. How can we integrate this diversity while being fair? One-size-fits-all isn't likely to fit anybody, so we will need to include "corrective factors" to take into account the diversity of contexts. Say, in a country where families are so poor that most children work several hours every week, we can't blame a company for following the local practices, but we can encourage it to offer decent working conditions and hours to these kids.

Affordability

This certification process will entail costs. While large corporations will be able to afford that cost, how can we design this in such a way that smaller companies can also have access to it? How do we promote this certification with them to make them aware of it and put it within their financial reach? Does this entail mandate by the government? State subsidies? Corporate sponsorships?

CONCLUSION

Indeed the picture isn't what we would like it to be. Companies do and will continue to focus on thriving, and child rights will be heeded only inasmuch as they have a positive impact on the corporate bottom line. The good news is that at the end of the day, it is in their best interest to respect these rights. These mechanisms will raise their awareness of that reality and help them improve their behavior on that front!

A VIEW FROM THE BUSINESS AND TRADE UNION SECTORS: WHAT BUSINESS NEEDS?

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Résumé

Les Etats sont responsables de l'application des droits humains. Néanmoins, beaucoup d'Etats ne remplissent pas leurs obligations internationales concernant les droits de l'enfant, tel que l'illustre la question des pires formes de travail des enfants. Les enfants sont particulièrement affectés par le travail forcé dans plusieurs contextes, dont celui du travail domestique, de mendicité forcée, du recrutement forcé auprès de l'armée nationale ou auprès de groupes armés illégaux. Ainsi, dans la plupart des cas, les entreprises n'ont pas de contact direct ou de relation avec ces enfants. De plus, ces enfants sont difficilement identifiables par les entreprises puisqu'ils ne sont d'aucune façon enregistrés. Malgré cette situation, les compagnies s'engagent dans la lutte contre les pires formes de travail des enfants pour un bon nombre de raisons, dont des raisons économiques. L'auteur présente le monde des affaires comme ne faisant pas partie du problème mais de la solution et comme nécessitant d'être pleinement impliqué et considéré dans le développement et la mise en œuvre de politiques, programmes, initiatives ayant rapport aux droits de l'enfant. Des commentaires critiques ont été édictés sur la première proposition d'Observation générale proposée par le Comité des Droits de l'enfant à propos des obligations des Etats parties envers le secteur des affaires et sur ses impacts sur les droits de l'enfant.

Zusammenfassung

Die Staaten sind für die Implementierung der Menschenrechte verantwortlich. Trotzdem erfüllen viele Staaten ihre internationalen Verpflichtungen betreffend Kinderrechte nicht, wie es die Frage der schlimmsten Formen der Kinderarbeit zeigt. Kinder sind von der Zwangsarbeit in verschiedenen Zusammenhängen besonders betroffen, darunter Hausarbeit, Zwangsbettelei, Zwangsrekrutierung in die nationale Armee oder durch illegale bewaffnete Gruppen. In den meisten Fällen haben die Unternehmen keinen direkten Kontakt zu den Kindern. Ausserdem ist es für die Unternehmen schwierig, die Kinder auszumachen, da sie nirgends registriert sind. Trotzdem engagieren sich die Unternehmen aus diversen Gründen für die Bekämpfung der schlimmsten Formen der Kinderarbeit, unter anderem aus wirtschaftlichen. Nach dem Autor ist die Geschäftswelt nicht Teil des Problems, sondern der Lösung. Sie muss laut ihm in die Entwicklung und Implementierung von Massnahmen, Programmen und Initiativen

rund um die Kinderrechte einbezogen und berücksichtigt werden. Über den ersten Vorschlag des allgemeinen Kommentars des Komitees für Kinderrechte wurden kritische Kommentare erlassen. Sie betrafen die Verpflichtungen der Vertragsstaaten gegenüber der Geschäftswelt und deren Auswirkungen auf die Kinderrechte.

Resumen

Los Estados son responsables de la implementación de los derechos humanos. Sin embargo, muchos Estados no cumplen sus obligaciones relativas a los Derechos del niño, el ejemplo más claro son las peores formas de trabajo infantil. Los niños son especialmente afectados por el trabajo forzado en diferentes contextos, como el trabajo doméstico, la mendicidad forzada, el reclutamiento forzado ante el ejército nacional o ante grupos armados ilegales. Por lo tanto, en la mayoría de los casos, las empresas no tienen contacto directo o relación con estos niños. Además, estos niños son identificados difícilmente por las empresas, porque no están registrados de ninguna manera. A pesar de esta situación, las empresas se comprometen en la lucha contra las peores formas de trabajo infantil por un buen número de razones, sobre todo económicas. El autor presenta el mundo de los negocios como una solución y no un problema y que necesita estar plenamente implicado y considerado en el desarrollo y la implementación de las políticas, los programas e iniciativas que tengan relación con los derechos del niño. Se decretaron algunos comentarios críticos sobre la primera proposición de la Observación General propuesta por el Comité Sobre los Derechos del Niño, a propósito de las obligaciones de los Estados partes hacia el sector empresarial y sobre el impacto sobre los derechos del niño.

Summary

States are responsible for the implementation of human rights. However, many states do not fulfil their international obligations with regard to child rights, like is illustrated on the question of the worst forms of child labour. Children are particularly affected by forced labour in the context of domestic work, forced begging and forced recruitment to national armed forces or illegal armed groups. Thus, in the vast majority of cases, companies have no direct contact or societal relationship with these children. Moreover, these children are very difficult for companies to identify and to have contact with, since they are not registered in any way. Despite this situation, companies engage in combating the worst forms of child labour for a number of reasons, including economic reasons. The author presents business as being not part of the problem but part of the solution and as needing to be fully and closely involved in the development and implementation of policies, programmes and initiatives with regard to Child Rights. Critical comments are made on the first draft of the General Comment made by Committee on the Rights of the Child on States' Obligations towards business sector and its impacts on children rights.

CONTEXT

Human rights covenants are conventions under international law and therefore agreements between states. This means that in the very first instance states are responsible for implementation of human rights. The promulgation of human rights does not automatically create valid law, which has to be framed by individual states. States must implement their self-imposed obligation in national legislation. This is especially true for the rights of the Child. When you look at the Convention on the Rights of the Child for instance, the vast majority of the provisions, as for instance the right for registration, family reunification, the issue of adoption as well as meeting the needs of disabled children, are rights states have to transpose through rules in the areas of family law, social law...

The real world, however, looks very different. Too many states do not fulfil their international obligations with regard to child rights. This becomes exemplary clear on the question of the worst forms of child labour. Although 175 states have ratified ILO Convention 182, which requires that

“each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour”,

according to the ILO more than 115 million children around the world work under conditions which fall into the worst forms of child labour.

According to the ILO, most of these work in the informal economy, domestic work and agriculture. Around 5.7 million children are in forced and bonded labour. Children are particularly affected by forced labour in the context of domestic work, forced begging and forced recruitment to national armed forces or illegal armed groups. Thus, in the vast majority of cases, companies have no direct contact or societal relationship with these children. Moreover, these children are very difficult for companies to identify and to have contact with, since they are not registered in any way.

Despite this situation, companies are very actively engaged in combating the worst forms of child labour. They do this not only for ethical reasons. There are also strong economic reasons: cases of child labour in the supply chain can lead to an enormous loss of reputation for a company, even if the company has no knowledge of and cannot influence the situation – as is usually the case. Moreover, in the medium term, children who do not go to school have no value as skilled workers on the labour market. Lastly, in the long term, child labour undermines the development of societies, which limits the business activity of companies.

SO, WHAT DOES BUSINESS NEED TO SUPPORT CHILD RIGHTS?

First and foremost business needs a stable and clear legal environment in which international human rights obligations and the convention of the rights of the child implemented and properly enforced by the state. This is the most important provision. If the state does its duties and companies can be sure that by complying with national legislation they are meeting their obligations, the biggest obstacle is removed.

Secondly, companies need support. Before we are looking into what kind of support, we have to distinguish between transnational businesses and purely local SMEs, like the local corner shop. For the latter one the main issue is to understand and to comply with national legislation. States should disseminate information on child rights legislation and compliance steps. Then companies can fulfill their “respect” responsibility, but they should not have to try and guess what rights the state will protect and work on this assumption.

With regard to the UN Guiding Principles, being it generally or specifically regarding child rights, a first important step would be to disseminate the Guiding Principles as widely as possible. Thus, their translation into a wide range of languages is of utmost importance. Sufficient funding for translation should be made available to be able to provide as many constituents and stakeholders as possible with a language version which with they are familiar.

According to the UN Guiding Principles on Business and Human Rights, companies should analyse the impacts of their business activity in relation to human rights through a due diligence process. Companies often find it difficult to meet the first requirement which is collecting accurate and relevant information on the target regions of their investments. In addition, companies also need support on specific detailed questions relating to, for instance, implementation of particular social standards in certain regions. The ILO therefore set up a helpdesk in spring 2009 to which companies and social partners can turn with questions relating to implementation of ILO standards. The many approaches to this helpdesk demonstrate that companies often need support for implementation of fundamental values and standards on the ground in particular regions. The need on the part of companies is a given, but the services made available by policymakers and international organisations are still too limited. This is particularly the case in relation to small and medium-sized enterprises. It is important not to underestimate the international business operations of SMEs: middle-ranking companies have long been very active at international level. And it is precisely these companies that need support. The main problem is that there is not an easy accessible tool with country-specific information. Business has stressed this problem again and again and has asked for such a “helpdesk” in the consultations on the UN Guiding Principles, on the up-date of the OECD guidelines and also in the run-up to the EU Commission CSR communication. If you want to facilitate human rights risk assessments of companies with transnational business activities you need such “one-stop-shop” approach. It won’t work otherwise.

Furthermore, there are still many questions open what due diligence actually mean.

Although the UN Guiding Principles concede that human rights due diligence will “vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations”, it is still a huge challenge for many company. There are instances that companies hired consultants to conduct a human rights assessment and were then informed about the fact that the company would not adhere to specific International Labour standards. But what does that mean? Independently of the fact that International Labour Standards anyway are addressed to states and not to companies, there is the other issue of the relevance of the individual Labour Standard. Germany, for instance, has ratified only 73 ILO Conventions out of 188 ILO Conventions. Companies should apply to the other? Thus, we are still pretty much learning how to do meaningful due diligence without ending up in a bureaucratic process which will paralyze business activities. A company, for instance, which did a human rights impact assessment for only one of its mine, needed 18-month for it to do. The assessment included a desk-based study and review of over 700 secondary documents, 189 individual interviews, nine group interviews with 84 participants, eight informal discussions, and 10 focus groups with 95 participants. In parallel, a review of corporate policy and management systems was conducted. This kind of extensive assessments won't be possible as normal procedure, otherwise it will harm business.

There are several initiatives to facilitate the exchange of experience on this issue and to support companies to get a better grip on these issues. The IOE for instance produced an employers' guide on the UN Guiding Principles, runs seminars and webinars and gives direct advice to companies. But all together, it needs more of these initiatives.

Thirdly, companies need certainty when it comes to the implementation of the UN Guiding Principles, being it generally as well as specifically with regards to child rights. Many different actors want to implement the Guiding principles at the moment. It is of utmost importance that these different initiatives are in line with the Guiding Principles. Otherwise, confusion will be created on the side of business as well as on the side of stakeholders what the responsibility to respect actually means. Thus, the business' responsibilities should not be reinterpreted or redefined for different topics and issues by different UN agencies and other actors.

Fourthly, business needs partners for cooperation. Just take again the example of child labour. Just to squeeze children out of production branches without helping to offer new prospects will not help the children in question. While consumers may not want to support child labour, in reality the children will have to work in alternative, often worse occupations. It is therefore necessary not to take hasty decisions but to develop comprehensive strategies both to address the fundamental problems for the phenomenon of child labour in the medium to long term, as well as to help the children in question in the short term. For that companies need partners, like NGOs or development agencies, which constructively help them to solve the problem.

Fifthly, Business is not part of the problem, but part of the solution and needs to be fully and closely involved in the development and implementation of policies, programmes and

initiatives with regard to Child Rights. Allow me in this context also some comments on the initiative by the Committee on the Rights of the Child to give guidance to State Parties for implementation of the Convention on the Rights of the Child. The IOE had made it very clear that it welcomes and supports the initiative by the Committee to give guidance to State Parties for implementation of the Convention on the Rights of the Child. Children are especially vulnerable and States must pay particular attention to their rights. However, business has serious concerns about the first draft because:

- it starts from the unfounded and unacceptable assumption that businesses are more likely than not to be involved in violations of child rights;
- it is still too focused on multinational enterprises;
- it does not elaborate sufficiently on the main question: how to support states which fail to implement their international human rights obligations.

In order to ensure that the General Comment is helpful, relevant and brings real added value, and that the General Comment is widely accepted, we believe that further consultations on the different drafts are very necessary. We therefore urge the Committee to have further consultations on the draft.

Child labour and weak implementation of the UN Convention of the Rights of the Child is very much linked to poverty. Unfortunately, the thousands of billion dollars of development aid in the last 50 years have not changed much. What has become pretty clear in the last decades is that only with the development of the private sector you will bring people out of poverty and enable them to have a decent living. As the former UN Secretary General Kofi Annan stated, “it is the absence of broad based business activity, not its presence that condemns much of humanity to suffering”. Thus, in order to address the root causes of the problem, much more has to be done to create environments, in which companies can be set up and grow and create jobs in the formal economy.

DWIGHT JUSTICE

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Résumé

Le cadre de référence des Nations unies « protéger, respecter et remédier » relatifs aux entreprises et aux droits humains ainsi que ses principes directeurs sont particulièrement pertinents pour la création, part le Comité des Droits de l'enfant, d'un Commentaire général concernant les droits de l'enfant et le monde des affaires qui éviterait le mélange de concepts distincts créés par la responsabilité sociale des entreprises (RSE). La RSE réunit la croissance durable des entreprises au développement durable, la philanthropie à la responsabilité. Les programmes basés sur la notion de « responsabilité partagée » deviennent en effet peu onéreux et se révèle une alternative plus simple à la « réhabilitation », qui inclurait dans le cas d'un enfant travailleur une compensation par des entreprises spécifiques auprès de familles spécifiques. Il est rappelé que l'officialisation des relations de travail, l'application des lois concernant le travail et l'augmentation des revenus pour les familles sont une des conséquences des interventions syndicales.

Zusammenfassung

Der Referenzrahmen der Vereinten Nationen „schützen, achten und wiedergutmachen“ für die Unternehmen und in Bezug auf die Menschenrechte sowie seine Leitlinien sind besonders nützlich für die Schaffung eines allgemeinen Kommentars über die Kinderrechte und die Geschäftswelt durch das Komitee für Kinderrechte. Dadurch würde die Vermischung von verschiedenen Konzepten durch die unternehmerische Gesellschaftsverantwortung (CSR) vermieden. Die SCR verbindet nachhaltiges Wachstum der Unternehmen mit nachhaltiger Entwicklung, Philanthropie mit Verantwortung. Die auf den Begriff „geteilte Verantwortung“ aufgebauten Programme sind nicht teuer und sind eine einfachere Alternative zur „Wiedergutmachung“, die bei einem arbeitenden Kind eine Kompensation durch die betroffenen Unternehmen an die betroffene Familien vorsieht. Es wird daran erinnert, dass die Bekanntmachung der Arbeitsbeziehungen, die Anwendung der Gesetze betreffend Arbeit und die Erhöhung der Einkommen für die Familien die Folgen von gewerkschaftlichen Verfahren sind.

Resumen

El marco de referencia de las Naciones Unidas « proteger, respetar y remediar » relativo a las empresas y a los derechos humanos, así como sus principios directivos, son particularmente pertinentes para la creación parte del Comité Sobre los Derechos del Niño, de una Observación General relativa a los derechos del niño y el mundo de los negocios que evitaría la mezcla de conceptos específicos creados para la responsabilidad social de las empresas (RSE). La RSE reúne el crecimiento duradero de las empresas al desarrollo sostenible, la filantropía a la

responsabilidad. Los programas basados sobre la noción de « responsabilidad compartida » resultan en efecto poco costosos y se revelan una alternativa más simple a la « rehabilitación », que incluiría en el caso de un niño trabajador, una compensación de parte de las empresas específicas ante las familias específicas. Se recuerda que la oficialización de las relaciones laborales, la aplicación de las leyes relativas al trabajo y el aumento de las rentas para las familias, son una de las consecuencias de las intervenciones sindicales.

Summary

The UN “Protect, Respect and Remedy” Framework for Business and Human rights and its Guiding Principles is especially relevant for the development by the Committee on the Rights of the Child of a General Comment on Child Rights and the Business Sector that would avoid conflation of distinct concepts that Corporate Social Responsibility has created. CSR conflates the sustainability of the enterprise with sustainable development, and philanthropy with responsibility. Programmes based on the notions of “shared responsibility” become, in effect, a low cost and easier alternative to remediation which would in the case of child labour involve compensation by specific enterprises to specific families. It is recalled that the formalisation of work relationships, the application of labour laws, and the greater income for families are a consequence of trade union action.

* * *

Although I fully appreciate the range of child rights that is the subject of this meeting I intend to focus my remarks on child Labour. If there were more time I would explain why I believe child labour to be the most salient child right with respect to business behaviour.

The abuses of the industrial revolution that gave rise to the trade union movement included child labour. The elimination of child labour was among the earliest objectives of trade unions and this proceeded child labour laws. Indeed, trade unions played an important role in bringing about child labour laws and the elimination of child labour continues to receive high priority by trade unions in many countries and internationally.

There are two relationships worth noting at the outset – the relationship between trade unions and child labour and the relationship between trade unions and business behaviour. For a variety of reasons, stronger trade unions mean less child labour. These reasons include the formalisation of work relationships, the application of labour laws, and the greater income for families that are a consequence of trade union action. More broadly, trade unions and collective bargaining are the most important private means to increase the positive social impact and to reduce the negative social impact of business activities. There is, then, a relationship between trade unions and responsible business behaviour. Both of these relationships involving trade unions should inform public policy with respect to business behaviour and child rights.

Before I go any further I want to respond to some things that have been said during this meeting. Trade unions are representative organisations and for this reason we can be sensitive to claims over representatively. Article 12 of the Convention on the Rights of the Child establishes the right of the child to express his or her views freely in all matters affecting the child. This provision is important and necessary for many reasons including the recognition that humans must be permitted to defend themselves and to assert their interests. Moreover, the views of the child are often needed to ascertain the best interests of the child for example in judicial proceedings or in situations where the family is not functioning as it should.

Unfortunately organisations or interests seeking to shape public policy use interviews with children as a means of adding authority to their own views. For instance, interests who want to justify child labour do so by claiming that this is what the children concerned want. There is no possibility of representative structures for children that would be needed to give credible authority to organisations seeking to influence public policy based on the views of children. Indeed, the use of interviews with children for this purpose is neither legitimate nor credible and is not what Article 12 is about.

What I want to discuss is the UN “Protect, Respect and Remedy” Framework for Business and Human rights and its Guiding Principles. This framework is especially relevant today as this meeting is related to the development by the Committee on the Rights of the Child of a General Comment on Child Rights and the Business Sector. The General Comment concerns the state obligations under the treaty. The UN Framework clarifies the distinction between the state duty to protect and the business responsibility to respect human rights and this should be reflected in the General Comment.

My concern is that the UN Framework and the Guiding Principles are being mischaracterised and are being retrofitted to existing Corporate Social Responsibility (CSR) initiatives without an appreciation of how profoundly the UN Framework and Guiding Principles challenge the conventional wisdom of today's notion of CSR. Just how profound this challenge is can be evidenced by the fact that the UN Framework and its Guiding Principles contributed to the EU decision to change its definition of CSR. The new EU definition is now more in line with how the word "responsibility" is widely understood. Responsibility is being accountable for the consequences of one's actions. Social responsibility, then, is about being accountable to society for the impacts of your activities on society.

The conventional wisdom of CSR stresses the "business case" – often with some very weak arguments – such as "employee retention". These arguments are not appropriate for human rights where the focus must be on the rights-holder and not on the company. The business case is not harmless. Basing public policy on something that is not true is a bad idea. In certain places, and for some activities, there is a business case for child labour and other human rights abuses. Reducing everything to a "bottom line" overlooks too much. It gives business people little credit for wanting to "do the right thing" or for recognizing that they have a broader stake in society. A really big problem with stressing the "business case" is that it sends a message that there is no need to respect human rights where the business case is not strong.

The CSR focus on what is good for the company is especially inappropriate with respect to human rights. Human Rights policy must focus on the adverse impacts of the business enterprise on others and on remedy for the victims of human rights abuse. CSR conflates the sustainability of the enterprise with sustainable development. While there will be convergence of interests between a business enterprise and the interest of society in sustainable development, the respective interests will not always be the same. In some areas there may be no convergence. It is important, therefore, to remember that these two "sustainabilities" are not the same.

CSR has promoted other conflations of distinct concepts that are better kept separate. One conflation is between philanthropy and responsibility. The UN Framework and its Guiding Principles clarify the human rights responsibilities for all businesses in all situations. Philanthropy and charity are not considered responsibilities in this sense and indeed are considered outside of the scope of the framework. This does not mean that philanthropy is not important however but only that it should not be equated with responsibility.

Assuming responsibility for adverse impacts of a company's activities on human rights on one hand, and making contributions to a broader societal good, in this case the eradication of child labour, on the other hand, are different. Sometimes organisations seeking to attract financial support for child labour programmes overlook the implications of the Guiding Principles for business behaviour. The stress placed on the complex nature of the problem of child labour and the need to address the "root causes" through "multi-stakeholder approaches" can blur both the state duty and the business responsibility. Sometimes Company support for these programmes is treated as a form of remedy or worse, as recognition of a "shared responsibility".

There are no “carbon offsets” for adverse impacts on human rights. Remedy, to be remedy, must be based on a link between the business enterprise whose activity created the adverse impact and the victim. Moreover, where compensation is due it must be commensurate with the damage done to be considered remedy Programmes based on the notions of “shared responsibility” become, in effect, a low cost and easier alternative to remediation which would in the case of child labour involve compensation by specific enterprises to specific families.

The UN Framework and its Guiding Principles distinguish the state duty from the business responsibility and go on to clarify what creates the responsibility of any enterprise in any situation. Although there are “shared values” (hopefully increasing with the growing interest in human rights), it is at least a misunderstanding to promote the idea that there are “shared responsibilities”. The UN Framework is clear that the failure of governments to protect human rights does not get business enterprises off the hook. Nor does the behaviour of other business enterprises change the responsibility of a business enterprise for the adverse human rights impacts of its activities.

Due diligence does not play much of a role in these philanthropic multi-stakeholder programmes. Little is said about what would constitute genuine due diligence with respect to child labour. Due diligence is more than just “doing no harm”. The concept of due diligence set forth in the Guiding Principles requires positive on-going action by the business enterprise to identify, prevent, mitigate and address adverse human rights impacts. The key word in due diligence is “due”. Due diligence with respect to child labour would have to be commensurate with the risk of the human rights abuse that is child labour.

It is regrettable that there is no time to deal with the controversial issues surrounding the auditing/ certification of labour practices. Although the current practices involving private workplace inspection are losing credibility, it is difficult to see how due diligence for abusive labour practices in the supply chain can avoid efforts to understand what is actually going on.

I have mentioned two of the three ways that business enterprises meet their human rights responsibilities set out in by Principle No. 15 of Guiding Principles – a due diligence process and through remediation of any adverse impacts they cause or to which they contribute. The first way is by making a policy commitment to meet their responsibility to respect human rights. Even here there is reason for concern with respect to child labour.

A Policy commitment should not be used to redefine responsibility, although some do. With respect to child labour there are two common ways in which public company policy commitments redefine responsibilities so that they seem less than they really are.

One way is for the policy commitment to limit responsibility to the “worst forms of child labour”. ILO Convention No. 182 on the worst forms of child labour addresses the priorities of governments and was never intended and does not alter the responsibilities for the negative impacts on human rights caused by the activities of business enterprises.

Another way that policy commitments redefine the responsibility of business enterprises with respect to such issues as child labour is through limits based on business relationships.

This usually involves defining responsibility in relation to the “first tier” of the supply chain. The idea behind this is that there must be a relationship between the leverage of a business enterprises and its responsibility. The Guiding Principles are clear that leverage is not a determinant of responsibility although it can be a factor in determining how responsibility could be addressed.

Business enterprises should “shed no tiers” with respect to their responsibility. A “tier” is an easily manipulated relationship. Instead enterprises should review their business relationships. If leverage is insufficient to address their adverse human rights impacts, then it may be that due diligence was inadequate. It may be that the business enterprise should shorten its supply chain – that is to reduce the number of tiers.

The abuse of child labour mainly takes place in informal economic activity. Due diligence for child labour should involve, among other things, taking measures to ensure that business activities take place within the appropriate legal framework. Not all business relationships will be conducive to the respect of human rights. That fact creates a responsibility.

QUATRIÈME PARTIE

RAPPORTS D'ATELIERS, RECOMMANDATIONS ET SYNTHÈSE

PART IV

WORKSHOPS REPORTS, RECOMMENDATIONS AND SYNTHESIS

WORKSHOPS REPORTS AND RECOMMENDATIONS

WORKSHOP 1: GOVERNMENTS: THE DUTY TO PROTECT UNDER THE CRC: HOW TO ENSURE HARMONIOUS CHILD DEVELOPMENT IN A BUSINESS ENVIRONMENT?

Recommendations

1. include Human Rights Education in national curricula (schools, universities, business schools etc.)
2. elaborate a set of minimum standards of children's right in the business sector to create a common understand on state and business level for the prosecution of children's rights violations > ex.: What is "bad conditions"? Which "type of adoption" should be prosecuted? What is "economic exploitation"?
3. regulate publicity/advertisement of business on a state level > this could be for example in form of a long lasting partnership between state, media, publicity agencies and business actors for example awareness raising, sensitisation for families
4. state duty to protect should focus on the 4 basic principles of the CRC > children should be able to express views on rights violations in the business sector
5. give specific consideration to groups of children that are more vulnerable than others (girls, children in poverty, indigenous children, children with disabilities, domestic workers) > different types of state support for those cases
6. state mechanisms and interstate cooperation to ensure access to justice and remedies are needed, e.g. child ombudsman, child protection district offices, interstate cooperation for prosecution, investigation for all children's rights violations in the context of the business sector
7. difficulties at international level cannot be solved by legislation at national level > we need a legal framework at international level defining
 - the human rights obligations of businesses
 - the obligations of states to ensure that businesses respect human rights

General Feedback concerning the seminar

- we should include innovative legislation of states in the discussion > a state representative sharing innovative approaches would have been fruitful for the seminar
- we should address governments in developing and developed countries to improve the situation for all children worldwide

WORKSHOP 2: CIVIL SOCIETY INITIATIVES: PRACTICAL ISSUES

Recommendations

The working group has decided to make recommendations to States, to the Companies and Civil Society

To States

R1: We remind States to comply with their commitments to fully implement the CRC particularly to set up and /or strengthen independent monitoring mechanism, to ensure that those are operational and to legislate to prevent and prohibit child exploitation

R2: We recommend States to ensure and facilitate verification by civil society that remedial actions undertaken in response to corporate-related human rights abuses and which involve the well-being of children are consistent with their obligations under CRC and are in the best interest of the child

To Companies

R3: We recommend companies to adopt and apply a code of conduct, including the business relationships, consistent with international standards on child rights, understand and disclose where their business operations cause risk to children, take steps to address those risks and transparently evaluate their policies and results

For Civil Society

R4: We recommend civil society to provide human and financial assistance and empower children who are victims of violation of one of their rights, to undertake legal procedures in order to obtain remediation of the material and moral damage

R5: We recommend that civil society establish a platform to bring practitioners in the area of Child Rights together with investors and organizations that work in the field of investment, in order to:

1. facilitate exchange of information on issues of child rights
2. apply pressure on and cooperate with corporations and States as appropriate
3. raise awareness amongst people working for or with children

An extensive context-based research should be gathered or undertaken when child rights programming linked to companies' activities is implemented, whether by a company itself or in partnership with other actors.

WORKSHOP 3: EXTRA TERRITORIAL JURISDICTION

Recommendations

1. To urge member States to exert their legislative competence to provide for extraterritorial jurisdiction in their national legal framework as a complementary measure, in case host States are not willing or able to exercise their national jurisdiction

- a) Direct Extraterritorial Jurisdiction based on territoriality and personality should be restricted to serious violations of the Convention and its Optional Protocols
- b) Extraterritorial Administration may entail measures by the Executive branch of the government of the home State such as trade measures, conditionality for financial investments or preferences, access to justice: judicial cooperation in the mutual recognition of judgments.
- c) Other Extraterritorial Tools and Measures may include: Labels, certifications, licensing, monitoring and oversight (name & shame), analysis, reporting and disclosure (know & show), Children's Rights Impact Assessments, Codes of Conduct, Incentivizing/rewarding business for good practices, children's rights awareness-raising.

2. To remind States parties that all States parties have a duty to remedy the victims, under the CRC and under the right to compensation principles enshrined in domestic laws of States

This may entail engaging in international and/or bilateral cooperation with a view to providing possibility to victims to execute judgments concerning reparation or compensation in one of the countries where the enterprise has its seat or assets.

3. To ensure that child victims can address the Committee under Optional Protocol 3 for redress not only if a member State has failed to exercise its national jurisdiction but also its extraterritorial jurisdiction

It is important to stress that the interpretation of the Convention includes the admissibility of a child's claim even in cases of complementary jurisdiction.

4. To encourage States to agree on international standards concerning licensing, certification, public procurement, permits, etc. that are in compliance with the CRC and its Optional Protocols

- a) For instance, by requiring Children's Rights Risk and Impact Assessments and their continuous monitoring especially in cases when foreseeable risks are high. (Invite State to also engage employer's associations and trade unions in the monitoring, akin to the ILO approach)
- b) Or by requiring companies to set up Codes of Conducts which might entail for instance, that companies will not purchase supplies produced using child labor

5. To include in the list of possible tools the creation of an alternative court to tackle grave and consistent violations of children's rights either by natural or legal persons

As an example for such an alternative court, the Russells Court could be taken into consideration because of its high impact and value in informing the population about violations and rights.

WORKSHOP 4: IMPLEMENTATION OF THE OBLIGATIONS: DIFFERENT INSTRUMENTS: CODE OF CONDUCTS, GUIDING PRINCIPLES, CERTIFICATIONS...

Recommendations

1. All States have a non-derogable duty to implement all provisions of the Convention, including by all actors.
2. Business enterprises need to ensure human rights as part of their core business, engaging their top leadership, all staff and the entirety of their value chain. A particular focus on child rights is required for which due diligence processes by the companies must be established, both in term of inputs and consequences of the business activities. States have to carry out impact assessments to identify legal gaps, risks of violations to child rights and introduce measures as appropriate.
3. The General Comment by the CRC Committee should recommend to states to require companies of a certain size (to be defined by the state) including all TNCs to carry out public reporting.
4. Multilateral Development Banks made up of States Parties, such as the World Bank and regional banks, should require that environmental and social impact assessments for proposed projects include a child rights assessment. Loans for projects which are found to be likely to have significant negative impacts on child rights should be funded only where comprehensive plans to mitigate these impacts are put into place. The Banks must then monitor compliance with these plans.
5. States parties should ensure that children that have been victims of human rights vio-

lations by business and enterprises have immediate and effective access to remedy. Judicial and non-judicial measures should be considered and established by law.

SYNTHESIS

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This wrap up intends to do not a summary of the rich debates of the last three days, and not even present a list of recommendations or findings. It certainly does not aspire to reflect consensus of any kind among the participants. It simply highlights the main trends and issues that came out of the debates and can be good material for further work

THE CHANGING “RULES OF THE GAME”- SOME ASSUMPTIONS

At the outset of the seminar it was said that the “rules of the game” were changing. Following this metaphor in relation to children’s rights and business operations, we should ask who are the players in this game? And where do they play? Which are the rules that should be respected and in what sense are they changing? And crucially, what do we do when the rules are not respected?

To respond to the first question, we should say that we all are the players: States, enterprises, civil society, (trade unions, NGOs, consumers, investors, etc.) have a role, distinct but complementary. The main role and responsibilities are of course those of business enterprises themselves, but States have also a primary duty to respect, protect and fulfil rights. We all play in an increasingly global marketplace, but our roles go beyond action as actors in the market. The realisation of human rights goes beyond what happens in markets.

Rules of the game are evolving today. Those rules should be respected. Today it is clearly understood that children’s rights also generate responsibilities and duties for private actors such as business enterprises.

BUSINESS ENTERPRISES’ RESPONSIBILITIES AND DUTIES

The days when it was assumed enterprises have making profit as their only objective are (nearly) over. While they remain as economic actors whose main objective is to create profit it is now widely accepted and required that they do so in a manner that respects the environment and social and human rights.

There is a clear and positive evolution in the field that needs to keep pace and become entrenched in laws and enforceable mechanisms to prevent or mitigate the risks of involution. The rules, for both State and enterprises, also need to achieve more precision and relevance for specific groups such as children and context/industries such as marketing of food and beverages.

The changing or emerging rules should acquire more precision and strength in relation in particular to children. The international rights and principles applicable to children under the Convention generate a stronger level of responsibilities and duties for private actors. This is based on the realisation that children have particular characteristics and position in society. It can thus be said that business have to put in place a stringent level of due diligence to avoid infringing child rights.

STATES OBLIGATIONS

Many States are struggling to face and deal with the rapid growth and flux of information, trade and finances across frontiers. In many cases, classic State instruments have become obsolete or others need adaptation, but there is also need for the creation of more appropriate instruments and methods.

But this growing pace of globalisation was made possible in the first place by States' practices and policies of deregulation and privatisation of functions and tasks, in an effort to facilitate trade and economic growth. It can be assumed that States who created or permitted this state of affairs still keep the means of changing course and adopting different new strategies. Under international law, and human rights law, States keep the legitimacy to protect and fulfil rights, including through regulation and other means.

States often act through international institutions and organisations created to facilitate or make possible cooperation and the achievement of common objectives. The perspective of the rights of the child, and the urgent need to protect them must become part of the policies and operations of those global institutions of governance.

Given that most of the issues that arise are linked to the global operations of enterprises through complex webs of subsidiaries, contractors and suppliers, or other business partners, the rules about State jurisdiction to regulate with effects outside of their territory are also evolving. This is illustrated by the recently approved Maastricht Principles on Extraterritorial Obligations of States in relation to Economic, Social and Cultural Rights.

DO WE NEED MORE RULES?

During the seminar a special segment was dedicated to the debate about whether or not a new international treaty would be necessary, possible and/or convenient. The response to the

question is mixed, and will probably remain so for the immediate future. It should nevertheless be clear that the debate about an international treaty in the area of business and human rights transcends the sphere of the rights of the child. For instance, the United Nations Human Rights Council is currently considering the possibility of a treaty on private security companies, and Ambassador Doucin explained to us in this seminar the proposals formulated by Prof Asencio on the issue of extraterritorial jurisdiction.

In any event, more rules and standards do not need to come only from a legally binding source such as an international treaty. It may also come from soft law instruments that may clarify the content and meaning of old rules in the current circumstances and provide more concrete guidance for its application. This is indeed the objective behind the current work by the Committee on the Rights of the Child in elaborating a General Comment on the States' obligations and business impact on the rights of the child.

In this context, it should be noted that the Guiding Principles on Business and Human Rights, adopted by the Human Rights Council, represent only the minimum common denominator for all and there is nothing that may prevent further efforts to create new rules that go beyond or higher than that threshold. This is indeed the position taken by the Human Rights Council in a resolution adopted in September 2012.

Further clarification and development of rules applicable in this field may also come from jurisprudence, national and international. The forthcoming ruling by the US Supreme Court on the *Kiobel vs Shell* case may have an important impact on the notion of whether or not corporations have international law obligations.

BEST PRACTICES AND INSTRUMENTS

One of the speakers was right in observing that we have so far shown "poverty of imagination to engage the players". It is indeed crucial to engage all players without confusing responsibilities and levels of engagement. Engaging each player means using the right tools for each one.

Businesses usually have Codes of Conduct, and carry out processes of due diligence, have policies regarding their suppliers, relations with communities, etc. While due diligence is a common practice by businesses, integrating a human rights component into it is not so common yet. Integrating human rights into due diligence processes will allow business enterprises to move beyond philanthropy. In any case, the first characteristic of responsible business is compliance with the law, which usually prescribes respect and protection of the rights of the child. The law may also explicitly require enterprises some form of due diligence, and there are currently proposals for States' legislation requiring some form of human rights due diligence.

States' usual tools include legislation, policies and programmes with their corresponding budgetary allocations. Taxation, public spending and investment and financing are usually the

subject of legislation or policy making. The Draft General Comment by the Committee on the Rights of the Child recommends that States carry out: Child rights impact assessments, legally require child rights due diligence from companies, and impose a range of legal liability on companies and their directors, as well as providing easier access to justice to victims of corporate abuse.

Funding, through national or international banks, is a crucial element for the feasibility of most business and investment initiatives all over the world. States usually put in place policies and programmes to promote national investment and trade with other nations. Ensuring that public funding and political support only supports businesses that are respectful of the rights of the child is also another important tool for States.

THE MISSING LINK

Remedies, in particular judicial remedies and reparations, are usually the missing link in most debates. International human rights treaties provide for the right to a remedy and for access to justice and fair trial. The Committee on the rights of the child has established that States Party to the Convention is also required to provide remedies and justice for children whose rights have been violated. This is an obligation for the State, which acts internally through public agencies and institutions such as the judiciary and ministries. Private grievance mechanisms are not part of this set of remedies and justice that States are required to provide.

Companies have internal grievance mechanisms, whether required by law or not, and in many cases these are useful as preventative mechanisms that will allow, through direct negotiation, the resolution of emerging controversies. However, in no case can these internal mechanisms replace or prevent the functioning and necessity of public remedial and justice mechanisms.

Another important aspect of remedies and justice is the international dimension of State accountability. International tribunals and monitoring mechanisms in the area of human rights are scarce and frequently underfunded or sometimes at risk. In the area of the rights of the child, the new Optional Protocol for the Convention on the rights of the Child, which will allow individual communications for violations to the Committee, will soon add an important mechanism of accountability of State's action and protection of the rights of the child.

Cet ouvrage :
« Droits de l'enfant et secteur privé :
amener les Etats et les entreprises à remplir leurs obligations »
sera accessible sur le site :

www.childsrights.org
Octobre 2014

This book:
« Child Rights and the Business Sector:
Urging States and Private Companies to meet their Obligations »
will be available on our Website:

www.childsrights.org
October 2014