

International Seminar
The rights of the child, the business sector and the international legal framework

Château de Penthes, Geneva, 14 June

This one-day seminar took place in the context of the efforts by the International Commission of Jurists (ICJ) and other organizations to assist in the implementation of General Comment No 16 of the Committee on the Rights of the Child on *State obligations regarding the impact of the business sector on children's rights*, which is the first document of its kind produced by a United Nations Treaty Body on the issue of business impacts on the rights of the child and corresponding State obligations.

Purpose and Objectives

The ICJ, in collaboration with the Committee on the Rights of the Child (Committee or CRC), hosted on 14 June 2014 an International Seminar on “The rights of the child, the business sector and the international legal framework”.

The Seminar explored some key areas where the application of General Comment No 16 (GC 16), as an instrument for better application of the Convention on the Rights of the Child (Child Rights Convention) in the context of business operations, can be particularly relevant. These are the following: the reaffirmation of the States’ duty to protect human rights, in particular the rights of the child; the guarantee of the right to a remedy and justice; the question of human rights and child rights impact assessments as a tool to prevent violations and abuses; and the elaboration of national action plans for the implementation of the Child Rights Convention.

It aimed at providing a forum for stakeholders to take stock of the areas and ways in which the application of the Child Rights Convention and GC 16 can make a clear contribution to international efforts to ensure protection and respect for child rights in the context of business operations.

Participants

The seminar was open to the participation of members of the CRC, staff of the OHCHR (Secretariat of the Committee on the Rights of the Child and Secretariat of the Working Group on the issue of human rights and transnational corporations and other business enterprises), UNICEF, ILO and NGO representatives in this domain, including BIC, CORE, IBFAN, Save the Children, CRIN, Danish Institute of Human Rights, Child Rights Connect, CIEL, FIAN International, Defence for Children International, Global Child Forum, Franciscans International and OAK Foundation.

Outlines of Main Interventions at the International Seminar on “The rights of the child, the business sector and the international legal framework”

Introduction and welcome speech

The President of the Committee, Ms. Kristen Sandberg, welcomed the participants to the seminar. Mr. Carlos Lopez, Senior Legal Advisor at the ICJ, introduced the objectives of the Seminar, stressing that the purpose of the Seminar was to understand the key contents of GC 16 and how its application could improve the protection of children’s rights.

Session 1: *The Child Rights Convention and General Comment 16’s contribution to the global discussion on business and human rights*

Moderator: Kirsten Sandberg, President of the CRC

Speakers: Marta Mauras, Ambassador, Permanent Mission of Chile to the UN, and former member of the CRC

Monica Lindvall, Save the Children, Sweden

Marta Mauras introduced GC 16 and the key elements of the CRC’s decision to move into the area of business and human rights by adopting GC 16.

In the international arena, businesses’ impact on human rights has been largely discussed. At the end of the 1990s, the then Human Rights Commission (HRC) discussed a binding instrument that was rejected. The UN Secretary General decided to appoint a special representative on this issue, namely Professor John Ruggie. In 2010, the CRC started collecting jurisprudence in the area with the help of the ICJ, who provided the CRC with cases of corporate abuses of children’s rights in a systematic way. Finally, in September 2010, the CRC approved the idea to develop a General Comment on this subject and conducted widespread consultations to this end.

In adopting the General Comment, CRC discussions firstly focused on the target audience of the document. Instead of providing guidelines to businesses, as the recently approved UN Guiding Principles on Business and Human Rights (UNGPs) had done, the CRC decided to focus on State obligations and the implementation of a framework to oblige businesses to abide by and respect children’s rights.

Unlike other General Comments, the CRC did not do an article-by-article analysis of the Child Rights Convention, but instead defined the four principles of the Convention as the basic pillars of GC 16. The CRC took an amplified position in terms of its interpretation of human rights law and used established language on the issue, i.e. governments have the obligation to respect, protect and fulfil human rights obligations. It also looked into the extraterritorial obligations of the States and at specific contexts in which violations occur.

Finally, Ms Maurás pointed to the lack of collaboration among the Treaty Bodies and Special Procedures, concretely between the CRC and the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group). Reference was also made to a suggestion regarding the inclusion in the HRC draft resolution on business and human rights of an express mention of the work done by the CRC and the need for the Working Group to collaborate with other Treaty Bodies.

Monica Lindvall introduced the Children’s Rights and Business Principles (CRBPs) and outlined the work that Save the Children, Sweden, is doing in this regard.

The issue of corporate social responsibility (CSR) has been the subject of international attention for quite some time. However, nothing had been elaborated on the issue of corporate

responsibility in the context of children's rights. Kofi Annan, as UN Secretary General, saw an opportunity for businesses to be used as a force for good and appointed a Special Representative on the issue of business and human rights. Following the approach of principled pragmatism, the Special Representative's work resulted in the formulation of a set of voluntary guidelines.

After few years of collaboration with private sector actors, Save the Children was inspired by the Global Compact principles and decided to formulate stand-alone children's rights and business principles (CRBPs). Save the Children worked and consulted with children to ensure that their views were taken into account in drafting the CRBPs. In addition, the Child Rights Convention and the ILO standards on minimum age and forced labour formed the basis of these principles.

Save the Children's presentation outlined the role of governments and the need for collaboration with the private sector. It was suggested that governments liaise with the private sector in their countries to gain momentum in the enforcement of children's rights. On the other hand, while the importance of identifying gross violations was highlighted, it was felt that naming and shaming corporations might not be the best approach to take to ensure compliance with their obligations in this regard.

Three areas were highlighted where principles can be shared: work place; market place; and community and the environment. The need for the private sector to commit to business principles on human rights and do an internal analysis to ascertain how core activities affect or impact upon child rights was also underlined. Nevertheless, in connection with GC 16, it was felt that it is imperative for governments to have national legislation in place relating to business activities and monitoring mechanisms to examine what businesses are doing in various countries. Both governments and the private sector must take children's views into account, to understand what they can do and what can be improved.

Finally, an analysis of the ten CRBPs was undertaken, highlighting the most important ideas regarding business impact on children's rights and how to redress it.

After the speakers' presentations, the floor was opened to participants for **questions and comments**.

It was pointed out that the two business and human rights resolutions in the Human Rights Council could be regarded as complementary because there are many regulatory gaps and because all current resources are only focused towards implementing the UNGPs. Further, the view that national action plans are insufficient to bridge the gaps in the sphere of business and human rights was expressed.

Concerns were also raised regarding companies' use of CRBP for 'blue washing' and the need to ensure that the said principles do not distract governments and businesses from complying with their legal obligations such as minimum ages, which are mandatory and not voluntary. In this regard, child labour has decreased between 2008 and 2012 even in the midst of the financial crisis. Furthermore, it was highlighted that social protection acts as a buffer against child labour. Parents' access to decent jobs and working conditions also helps in tackling child labour issues.

Questions were raised in relation to the fact that GC 16 refers to businesses both as profit and non-profit organizations. Moreover, GC 16 articulates home State responsibilities, which seems to be a fault line in the debate over the two resolutions currently under discussion at the HRC and which made the participants query the States' reactions on these issues.

Marta Mauras referred to the fact that the Human Rights Council was in that moment discussing two parallel resolutions on the issue of business and human rights, which many saw as not complementary, and suggested that a legally binding international instrument would materialise only if building on countries' legislation at the national level. Additionally, existing National Action Plans are not child-specific and in two to three years there may be more action plans under development that will need guidance to incorporate a children's rights aspect.

Monica Lindvall highlighted that some companies are doing very good work in this area. Companies have understood the advantages of human rights compliance and its importance in safeguarding against reputational risks. Finally, businesses also realize that governments are weak in implementing children's rights and hence express the need to also put pressure on governments to take action.

Session 2: Access to justice for children and cases of abuse by business enterprises

Moderator: Bernard Gastaud, Member of the CRC

Speakers: Renate Winter, Judge and Member of the CRC

Veronica Yates, Director, CRIN

Renate Winter expressed the view that UNGPs are a good tool for those who are willing, whereas the law is a tool against those who are not willing to comply. Securing access to justice is difficult even in a good setting. Accordingly, although research and good projects help, binding instruments are more useful e.g. ILO Conventions 138 and 182, which were applied by the Special Court for Sierra Leone in cases pertaining to the use and recruitment of child soldiers.

Examples of barriers that impede access to justice were illustrated through three examples from different regions around the world, namely Europe, Latin America and Africa. The three examples showed different barriers and hence differing levels of access to justice depending on factors such as: the country's legal framework; child rights awareness amongst parents and caregivers; enforcement measures; and resources to effectively protect and fulfil children's rights and provide appropriate reparations in the event of abuse. These examples were followed by possible solutions in order to access justice and the disadvantages when accessing States' national justice systems.

During her presentation, **Veronica Yates** pointed to the lack of legal advocacy on children's rights issues. Few States have ratified the Rights of the Child Convention and its Optional Protocol on a Communication Procedure. Furthermore, not many States have incorporated the Rights of the Child Convention at the national level. Bringing a case on behalf of the child may not be a problem in principle, but legal standing is. e.g. in Algeria, where only a child's father can bring a case.

Only few countries permit collective complaints whereby the existence of a violation is enough to bring a case without the need to demonstrate personal injury. Only some countries allow NGOs to bring cases. Moreover, legal aid is rarely available to children who want to bring cases and may often be confined to urban settings.

CRIN is undertaking research on the variations in legal systems around the world in securing access to justice for children. A selection of best practices in a utopian State will be assembled and used as a model and benchmark against which other States can be compared.

The difficulties associated with the requirement of having to exhaust domestic remedies were also raised and it was felt that such a requirement could be bypassed in situations where, from

a practical perspective, children have no remedies to exhaust and where factors such as the existence of corruption would render exhaustion of domestic remedies meaningless.

Law firms are approaching NGOs to take on strategic litigation pertaining to children's rights. In this regard, CRIN is matching lawyers with victims and with donors to facilitate such litigation. They are conducting a mapping exercise around the world on issues such as access to justice and the availability of legal representation in different countries.

After the speakers' presentations, the floor was opened to participants for **questions and comments**.

A concern was raised that some law firms only take up cases in certain regions or countries. Hence there are huge gaps in accountability and in access to justice. In this regard, questions were raised in relation to the motivation of law firms to take up such child rights cases. Moreover, it was highlighted that in jurisdictions where the legal framework is not robust, corporations can find legal loopholes.

The specific example of Belgium was mentioned, wherein a budget is given for strategic litigation, which has been used mostly for strategic litigation against the State. While the CRC and its Third Optional Protocol are good tools, strategic litigation also needs to focus on the choice of the legal forum – e.g. ECJ, ECtHR etc. – and to foresee negative decisions.

Some said that using business tools to fight children's rights violations is ineffective as there have been very minimal successful cases in this regard. On the other hand, it was pointed out that business mechanisms could create win-win situations, especially in weak legal systems.

Finally, it was also highlighted that big companies like transnational corporations with operations around the world are looking for global laws and rules to provide legal certainty. Further, smaller companies like SMEs are also looking for guidance.

Veronica Yates in her concluding remarks raised as a problem the lack of lawyers in the children's rights space. Additionally, she mentioned the importance of collective complaints to test cases and gauge most appropriate court and method.

Renate Winter emphasised the need to avoid litigation when better options are available, given the length of time taken by courts to decide cases as well as the uncertainty regarding legal outcomes especially in cases involving corporations. She suggested using business tools to fight children's rights violations and stressed the need to create win-win situations. She added that just as lawyers of transnational corporations find loopholes in their favour, similar tactics should be adopted by children's rights lawyers to find loopholes in favour of child victims.

Session 3: Human rights / child rights impact assessments

Moderator: Yasmeen Muhamad Shariff, Member of the CRC

Speakers: Susan Mathews, Human Rights Officer, OHCHR

Elana Berger, Child Rights Programme Associate, Bank Information Center

Susan Mathews started her presentation with a reminder that 2014 marked the thirtieth anniversary of the Bhopal tragedy, which is the worst industrial disaster in human history. Bhopal is a cautionary tale that represents the depraved indifference of corporations to human life.

Human Rights Impact Assessment (HRIA) is a recent phenomenon. In this regard, there is no single methodology for HRIA, which involves, *inter alia*, mainly screening, scoping, evidence gathering, publication and monitoring and consultation.

Child Rights Impact Assessment (CRIA) can ensure systematic focus on issues relating to children. These should not be subsumed into broader HRIAs, as children's rights may get marginalized within the assessment. Furthermore, CRIA suffers from the same challenges as HRIA such as issues relating to: content; divergence in terms of template; different methodologies; lack of time, money and expertise; lack of clarity on how decision-making will be influenced by the impact assessment; and problems relating to disclosure and transparency. It was also emphasised that for an impact assessment to be successful, a human rights culture needs to exist.

Moreover, it is important to acknowledge the possible 'impact assessment fatigue' that can lead to the danger of a tick-the-box phenomenon. In this regard, different existing tools were mentioned such as the UN Global Compact and NomoGaia's human rights impact assessment tools. In any case, States should make sure that children's rights, including the right of the child to be heard, are integrated in the screening process.

Coordinating impact assessments can counter impact assessment fatigue as well as clarifying the priority of child rights. Finally, it was highlighted that impact assessments are just one tool and while they are not substitutes for legislation or judicial action, they can be used as a tool to prevent harm.

Elana Berger introduced the role of the World Bank and its safeguard policies designed to prevent the World Bank's projects from causing harm.

The World Bank is one of the foremost development institutions and its policies have a significant impact on the policies and practices of other international financial institutions. The World Bank has put in place safeguard policies designed to minimize potential harm caused to people and the environment as a result of its development projects. These policies require environmental and social impact assessments to be conducted prior to project approval, although neither HRIAs nor CRIAs are currently required. As a result, the impact of such projects on children is generally not assessed and hence many projects have disproportionate negative impacts on children.

The safeguard policies are currently under review and language has been suggested to the World Bank for inclusion in these policies, which would require comprehensive child impact assessments to be undertaken as part of the due diligence completed prior to project approval. Such assessments would form part of an existing social impact assessment and would require the World Bank to specifically examine the potential unique direct and indirect impacts of projects on children.

The World Bank aims to reduce poverty, including poverty affecting children. However, the World Bank also sponsors infrastructure projects, which may have unintended negative impacts on vulnerable groups. It was highlighted that there is currently nothing in World Bank policies to prevent them from carrying out projects that have such negative impacts.

Elana Berger gave different examples of the World Bank having undertaken very poor impact assessments, e.g. in Uzbekistan where it was said that child labour was not being used for cotton picking despite NGO reports to the contrary. Further, the World Bank generally looks at direct impacts but not at indirect impacts, e.g. if the concerned project does not hire children then they do not perceive child labour to be an issue but they fail to consider that if the project is hiring parents at low wages then children may be forced to work and hence child labour could become an issue.

Moreover, she addressed the need to identify problems in advance in order to minimize their impact and provide an appropriate mitigating response, e.g. giving incentives to parents to keep their children in school when there has been disruption in schooling as a result of a World Bank project.

In this regard, the Bank Information Center (BIC) is working on a broad campaign to include child rights impact assessment in the World Bank policies on the premise that governments retain their obligations under the Convention on the Rights of the Child even when they sit on an international organization.

After the speakers' presentations the floor was opened to participants for **questions and comments**.

Issues discussed included the extraterritorial dimension of impact assessments, the special attention to vulnerable groups and differentiated impact and timing in performing CRIAs and the need for guidance by civil society. Moreover, concerns were raised about the use of conditionality clauses on investment contracts that can have a negative impact on children's rights.

Given the fact that NGOs alone may have little impact in changing World Bank practices, participants discussed the need for a common strategy involving businesses and industry sectors to approach and lobby the World Bank to include CRIAs within their revised safeguard policies. Committee members present in the room also offered to support efforts in this regard

Elana Berger commented on the need to ensure that CRIAs are not only undertaken but that such assessments are conducted well. In this regard BIC is working towards both ends. On the issue of support to the campaign Elana Berger proposed the possibility of sending letters directly to the States and not to the World Bank. Finally, she remarked that the World Bank is the only development bank whose documentation does not contain a labour clause.

Susan Mathews, in her concluding remarks, mentioned the work OHCHR is performing in this regard and the current studies on different impact assessments and possible incompatibilities.

Session 4: National action plans and strategies for the implementation of the Convention on the Rights of the Child and the issue of children and the business sector

Moderator: Hatem Kotrane, Member of the CRC

Speakers: Claire O'Brien, Senior Adviser, Danish Institute for Human Rights (DIHR)

Marilyn Croser, Director CORE Coalition UK

Claire O'Brien introduced how national actions plans on business and human rights (HRB NAPS) can be an opportunity to support the CRC. In this context, three key points were made that should be taken into account: HRB NAPs will reach a critical mass; they will neglect children's rights without dedicated guidance; and there is a need for coordinated approach (between the CRC and UN Working Group).

In the context of existing commitment to CSR plans, the European Commission invited the Member States, by mid 2012, to develop or update their own plans or national lists of priority actions to promote CSR in support of the Europe 2020 strategy, with reference to internationally recognised CSR principles and guidelines and in cooperation with enterprises and other stakeholders. In this regard, the Council of Europe also contributed to the debate in a 2013 Declaration.

In 2012, the European Network of NHRIs provided guidance to EU Member States on NAPs. The development of NAPs is also on the Working Group's agenda, with the goal to establishing the following during the course of 2014: an Open Consultation; a Road Map and Expert Workshop; a Report to the UNGA; guidance on process, content and review of NAPs; and a pilot NAP, which will be finalized in 2015.

From August 2013 until June 2014, ICAR and DIHR have convened a series of dialogues with over 280 experts and practitioners across stakeholder groups and world regions to gather input and recommendations in relation to the NAPs Project.

The ICAR and DIHR NAPs toolkit comprises a model National Action Plan (NAP) based on three key components: a model national baseline assessment; a national action plan checklist; and proposals for reporting and reviewing States' implementation of NAPs. The NAP checklist contains 24 criteria in six areas: governance and resources; stakeholder engagement; National Baseline Assessments; scope, content and priorities; transparency; and accountability and follow-up.

Finally, remarks were made on the current status of NAPs under development. In general, these plans encounter several challenges such as the need for practicality but also robustness, the decision between adopting a single NAP or several NAPs on different issues and the lack of attention to child rights in general NAP tools

Marilyn Croser introduced the UK NAP model and the gaps in its adoption process and content.

Firstly, while the process was meant to be a crosscutting governmental process, it was instead led by the Foreign Affairs Office with a consequent lack of participation by different actors, including children, through UK Children Commissioners.

The presentation exposed the limitations of the UK NAP commitment on investment agreements. The UK NAP includes the obligation to ensure that agreements for overseas investment incorporate the business responsibility to respect human rights and do not undermine the host country's abilities to meet its international obligations. Nevertheless, a lack of clarification regarding its application to UK's Bilateral Investment Agreement leaves it open for companies to continue to invoke clauses in existing bilateral investment treaties.

Further assessment was made on the risk of complacency of the UK government regarding the human rights performance of companies within the UK. The vast majority of future planned actions relate to overseas impact. The performance of companies within the UK has been largely overlooked.

Regarding access to remedies, CORE further recommended: a review of the UK's compliance with the UNGPs' provisions on access to remedies; and identification of action needed to address any gaps or deficiencies, in consultation with civil society organizations.

On the issue of children's rights, it was emphasised that children are only mentioned once in the UK NAP, in a very limited and broad manner, without accompanying implementation measures.

As a matter of priority, the UK government should devise clear goals and success criteria for each of the commitments/proposed actions set out in the current action plan in order to provide means by which progress can be tracked, measured and verified. The government should also commit to a timetable for completion of each of the action points and monitor progress. Additionally, Marilyn Croser pointed out the lack of a provision outlining the

manner in which to bring a claim in the UK in respect of overseas cases. Finally, the lack of inter-departmental policy coherence was raised as an issue of concern.

Some consequences relative to the adoption of the UK NAP were discussed. While the NAP refers to several initiatives designed to respond to the recommendations of the UNGPs regarding the importance of companies being proactive in creating more responsible supply chains, the majority of these are voluntary initiatives. Past experience shows that such initiatives have not been effective. The UK government should therefore raise supply-chain standards by incentivising and penalizing companies.

After the speakers' presentations the floor was opened to participants for **questions and comments**.

Questions were raised concerning how to require businesses to undertake reporting obligations and the role of governments in this process. In relation to the work of the DIHR, participants raised questions regarding their procedure in developing NAPs and approaching countries. Similarly, other issues raised concerned: the different nature of NAPs; the extent of DIHR involvement in the consultation process; and the existence of serious consultation processes in identifying and addressing gaps.

In her concluding remarks, **Marilyn Croser** insisted on the idea that voluntary, non-binding guidelines are only useful for companies willing to carry on their business in compliance with human rights.

While the UK NAP for the implementation of the UNGPs reflects some changes, there are weaknesses and gaps in its approach that need to be addressed. An analysis of gaps needs to be incorporated into the plan's review process. The NAP has to be treated as a working document but it needs, nevertheless, to continue to be improved, especially in its approach to children.

In her final intervention, **Claire O'Brien** emphasized DIHR's work on stimulating stakeholder dialogue. She remarked that, in her understanding, the UNGPs are not voluntary but they are derived from binding obligations. Finally, adopting NAPs for children would overload States, and hence, in the DIHR's opinion, should be considered within the HRB NAPs.