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# The Responsibility of Transnational Corporations in the Realization of Children's Rights

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## The Responsibility of Transnational Corporations in the Realization of Children's Rights

Isabel Mota Borges<sup>1</sup>

### Abstract

Transnational Corporations (TNCs), especially those operating in developing countries, have enormous socio-economic power—sometimes more than states. Many TNCs seek poor and unregulated markets, employing cheap, underage and fragile children, so they can create an economic competitive advantage and meet increasing international marketing demands. While many of them bring business and prosperity to a region, the damages can outweigh these benefits they perpetuate when behaving irresponsibly - occasionally irreparably - detrimentally impacting on children's enjoyment of civil, political, economic, social, and cultural rights. The problem is exacerbated when national governments are unable or unwilling to regulate TNCs' operations. It shall be argued that despite the private legal status of TNCs, they are subjected to human rights obligations because some forms of exploitative child labor has become universally condemned and thus possess *jus cogens* status. The analysis shows that there is no deficiency within international human right standards regarding child labor and these maybe interpreted as giving direct obligations to TNCs to respect, protect and fulfill children's rights. The rising numbers of exploitative child labor, however, raises serious doubts about the effectiveness of those standards to adequately regulate powerful TNCs, which are not limited to concepts of territorial sovereignty. The results of the research depicts the desperate need for a renewed international legal framework going beyond soft law approaches, to clearly define legal obligations and methods to enforce responsibilities on: TNCs; states; other non-state actors; and the child

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itself, which is key to ensuring effective protection and fulfillment of children’s rights.<sup>2</sup>

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2. See Jordan Paust, Article, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L 801, 802-820 (2002).

## I. Human Rights and Transnational Corporations

Whether one recognizes businesses as an essential factor for a country's economic prosperity or focuses upon the damages that they may cause (for example, by exploiting child laborers) in the world today, Transnational Corporations (TNCs) are powerful entities scattered throughout the globe.<sup>3</sup> The 300 largest corporations account for roughly one-quarter of the world's productive assets.<sup>4</sup> For example, one automobile company's sales in a single year are greater than the gross national product of 178 countries, including Malaysia, Norway, Saudi Arabia, and South Africa.<sup>5</sup> [TNCs] . . . are involved in seventy percent of world trade.<sup>6</sup> TNCs directly employ ninety million people (of whom some twenty million live in developing countries) and produce twenty-five percent of the world's gross product.<sup>7</sup>

Therefore, TNCs have substantial economic power that can be used against smaller, developing countries. TNCs are not only powerful economic entities, but they are mobile, have the capacity to evade national legislation and enforcement and because of the ease with which they can relocate they use their influence to pressure national governments to turn a blind eye to their abuses.<sup>8</sup> Today, TNCs "operate in more countries than ever before, and increasingly in sociopolitical contexts that pose entirely novel human rights challenges for them."<sup>9</sup>

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3. Andrew Clapham, *Human Rights Obligations of Non-State Actors* European University Institute, XV/I, THE COLLECTED COURSES OF EUROPEAN LAW, 31, (2006) (stating that Transnational Corporations are "usually a single legal corporation operating in more than one country, with headquarters and legal status incorporated in the national law of the home state.).
  4. David Weissbrodt, Symposium, *Keynote Address: International Standard-Setting on The Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT'L. 373, 375 (2008).
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. John Gerard Ruggie, *Current Development, Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L. 819, 823 (2007). This is particularly true of the extractive sector. For my 2006 report, I conducted a review of sixty-five NGO publications alleging significant corporate-related human rights abuses over the previous five years or so. Oil, gas, and mining accounted for two-thirds of the total. Virtually all

Child labor is a human rights issue; therefore, individuals and corporations are both capable of violating international human rights and by inference children's rights -or example: the right to life (including the right to enjoy life), the right to education, and freedom from torture and cruelty.<sup>10</sup> Violations of such rights lead to inhuman or degrading treatment and, therefore, interfere with other prescribed rights such as: freedom from forced or slave labor; freedom from arbitrary detention or deprivation of security of the person; freedom to enjoy property; freedom from deprivation of or injury to health, enjoyment of a clean and healthy environment; and freedom from discrimination.<sup>11</sup> On the contrary, TNCs can bring massive benefits to the developing countries in which they invest; for example, through new medicines and technologies—which can enable the enjoyment of the right to health or the right to education.<sup>12</sup> These benefits, however, can be outweighed by the damages they perpetuate when behaving irresponsibly – occasionally irreparably - detrimentally impacting on the enjoyment of civil, political, economic and social rights.<sup>13</sup> While states have the primary responsibility to respect, protect and fulfill these human rights, it is increasingly recognized that companies [due to their power] have the responsibility to respect the human rights that are enshrined in international treaties and conventions, moving beyond mere voluntary ethical commitments of corporate accountability towards “a legal obligation to uphold international [child labor] standards”<sup>14</sup> As Andrew Clapham rightly asserts, “If international law is to be effective in protecting human rights [of children], everyone should be prohibited from assisting governments in violating those principles, or indeed prohibited from violating such principles themselves.”<sup>15</sup> Some commentators have highlighted that there are a num-

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cases took place in low-income countries, of which nearly two-thirds either had recently emerged from conflict or were still immersed in it. Moreover, all but two of the countries fell below the global average for the “rule of law” developed by the World Bank. *See* Interim Report, *supra* note 19, paras. 24-30.

10. Paust, *supra* note 2, at 819.

11. *Id.*

12. Sarah Joseph, LIABILITY OF MULTINATIONAL CORPORATIONS 613 (2008). New medicines include antiretroviral drugs.

13. *Id.*

14. Gerard Oonk, *Child Labour, Trade Relations and Corporate Social Responsibility* 6 STOP CHILD LABOR (2004).

15. Clapham, *supra* note 3, at 31.

ber of strong views, which oppose the extension of human rights responsibilities to TNCs.<sup>16</sup>

Firstly, corporations are in business and their only social accountability should be towards their shareholders.<sup>17</sup> Secondly, positive duties to observe human rights are the responsibility of the state, thus even if TNCs have some economic influence, only states have the capacity to protect civil and political rights.<sup>18</sup> Thirdly, the extension of human rights obligations to businesses may create competitive disadvantages, therefore, losing business opportunities between those that obey and those that ignore “free rider” international standards.<sup>19</sup> Furthermore, “it is impossible to invest in TNCs sufficient international legal personality to bear the obligations, as much as exercise rights.”<sup>20</sup>

The legal subjectivity of TNCs has long been a center of debate amongst academia, and while historically authors rarely ever suggested that businesses had an international legal personality, the participation of private corporations in the international scene allied with the globalization of their operations and the evidence of exploitation of child laborers has molded new perceptions. Thus, “[t]he question of legal personality is rendered uninteresting altogether, as [TNCs] are in fact important participants in the evolution of international law, whereas the law itself can be slow to respond to this reality.”<sup>21</sup> Accordingly, “a suggestion that responsibilities cannot be attached to [] TNCs because of lack of personality cannot be withheld.”<sup>22</sup> Rather than focusing on personality of corporations one should focus on the rights and obligations of such entities.<sup>23</sup>

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16. *Id.*

17. *Id.*

18. David Kinley & Junk Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 933-35 (2004).

19. Peter T. Muchlinski, *MULTINATIONAL ENTERPRISES & THE LAW*, (Oxford Univ. Press, (2d ed. 2007).

20. Kinley & Tadaki *supra* note 18, at 947.

21. Viljam Engstrom, WHO IS RESPONSIBLE FOR CORPORATE HUMAN RIGHTS VIOLATIONS? 310 (Institute for Human Rights 2002).

22. *Id.*

23. See Andrew Clapham, *Human Rights Obligations of Non-State Actors European University Institute*, XV/I, THE COLLECTED COURSES OF EUROPEAN LAW, 31(2006).

There are numerous advantages for TNCs to adopt a human rights policy and behave responsibly.<sup>24</sup> It enhances their trademark value, protects their reputation with regards to the wider consumer, it reduces the risk of strikes and protests, it attracts and retains a higher quality workforce, increases job satisfaction, and ultimately because it is “the right thing to do.”<sup>25</sup>

Although changing company policies may not bring in the short term high profitability, in the long term staying “ahead of the game” will bring them increased profits and attract investment.<sup>26</sup> In addition, due to their global nature, TNCs can promote the protection of human rights because they have the capacity to reach across borders and allow people—who probably would not otherwise do so—work together.<sup>27</sup> TNCs may also be an indirect “conflict mediator” in countries with high levels of violence simply because they can bring economic development to the local population (provided that this does not lead to resentment and increased violence).<sup>28</sup>

It shall be argued that despite the private legal status of TNCs, they are subject to human rights obligations because some forms of exploitative child labor have become universally condemned and, therefore, possess *jus cogens* status.<sup>29</sup> The first part of the analysis shows that there is no deficiency within international human right standards—treaty and non-treaty based—regarding child labor and these may be interpreted as giving direct obligations to TNCs to respect, protect, and fulfill children’s rights.<sup>30</sup> The rising numbers of exploitative child labor, however, raises serious doubts about the effectiveness of those standards to adequately regulate powerful TNCs, which are, by definition, not limited to concepts of territorial sovereignty.<sup>31</sup> The results of the research outline and the desperate need for a renewed international legal framework going beyond soft law approaches to clearly define legal obligations and methods to enforce

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24. *Id.*

25. *Id.*

26. See Clapham, *supra* note 23.

27. *Id.*

28. David Weissbrodt, Symposium, *Keynote Address: International Standard-Setting on The Human Rights Responsibilities of Businesses*, 26 BERKELEY J. INT’L. 373, 374 (2008).

29. *Id.*

30. Weissbrodt, *supra* note 28, at 379-81.

31. *Id.* at 390.

responsibilities on TNCs; and where the role of the state, other non-state actors, and the child itself are also key to ensuring effective protection and fulfillment of children's rights.<sup>32</sup> The article starts by portraying the definition, as well as the main types of exploitative forms of child labor.

## II. Defining Child Labor

The term "child labor" means different things to different people.<sup>33</sup> There is no universally accepted definition of child labor and even the definition outlined below varies according to different countries and cultures.<sup>34</sup> Children can engage in work in a variety of forms and are subjected to various environments; however, age limits vary according to the activity being carried out and location.<sup>35</sup> Many societies, particularly poor, rural ones, do not condemn child labor even at the early ages of eight or nine years.<sup>36</sup> Many do not even consider an eight or nine year old apprentice a child.<sup>37</sup> This is due to a difference in conception or definition of "childhood".

When the image of a child changes, their rights also change.<sup>38</sup> The different social constructs of childhood throughout history have given us an evolutionary linear view of childhood ranging from "mini-adults" to "rights-holders".<sup>39</sup> This view generally considers the twentieth century as the "Century of the Child".<sup>40</sup> The emphasis on education and schooling for children (and not working), as a distinct phase in life formally appeared on the 1919 ILO Convention No.5 – Minimum age, Industry.<sup>41</sup>

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32. *Id.*

33. Christopher Kern, *Child Labor: The International Law and Corporate Impact*, 27 Syracuse J. Int. L. & Com. 177-78. (2000).

34. *Id.*

35. Christian Grootaert, *Child Labor: A review*, 38 (1995).

36. *Id.* at 3.

37. *Id.* at 38.

38. F. Humbert., *THE CHALLENGE OF CHILD LABOR IN INTERNATIONAL LAW* 14(Cambridge Univ. Press. 14 2009).

39. *Id.* at 15.

40. *Id.*

41. ILO convention (1919) available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:CON,en,C005,/Document](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C005,/Document).

The sense of protection of the child appeared in the 1959 Declaration of the Rights of the Child.<sup>42</sup> However, it is in the Convention of the Rights of the Child's<sup>43</sup> (hereinafter "CRC") new concept of protecting the best interests of the child, best reflected in Article 3.<sup>44</sup> As stated in Article 3: "the child is now considered as a subject rather than an object of rights and duties."<sup>45</sup>

Despite the definition given by CRC even within the Convention the concept of childhood is not really universal.<sup>46</sup> The Preamble of the Convention acknowledges that the conceptualization of childhood should take into account cultural and traditional values,<sup>47</sup> "linking the international definition of childhood to the national law on majority, the CRC attempts to accommodate the existing cultural and religious diversities reflected in different age limits".<sup>48</sup> As there are no unanimously agreed definition of childhood, there are also no consensus on the rights linked with the notion of childhood and what types of child labor should be eradicated.<sup>49</sup>

International organizations, such as ILO and the UNICEF as well as legal commentators, refer to a continuum (which in reality is a two-tiered conception) when connecting children and work.<sup>50</sup> On one side there is "child work" which is "beneficial" and that enhances a child's physical, mental, social well being that does not interfere with a child's rest, education, and recreational activities.<sup>51</sup> This includes the concept of "light work" such as work which is not hazardous and that does not exceed fourteen hours a week. On the other hand, there is "child labor" which is manly "exploitative".<sup>52</sup> For ex-

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42. Declaration of the Rights of a Child (1959), *available at* <http://www.cirp.org/library/ethics/UN-declaration>.

43. Convention on the Rights of the Child (1989) *available at* <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

44. *Id.*, at art. 3.

45. Humbert, *supra* note 35, at 16.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 17.

50. *Id.* at 18.

51. *Id.*

52. *Id.* Defines exploitative child labor as work "carried out full-time at too early age; too many hours are spent on working; it exerts undue physical, social or psychological stress; it includes work and life on the streets in bad conditions; inadequate pay, too much responsibility; it hampers access to education; it undermines children's dignity

ample, child prostitution and bonded child labor both deny access to education and impacts on the child's social, physical and s health.<sup>53</sup> The CRC also reflects this new change of attitudes in Article 32 affirming that children have a right to be free from "economic exploitation".<sup>54</sup> Nevertheless, much of child labor falls in the "grey area" of this two-tier conceptualization.<sup>55</sup>

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and self-esteem, such as slavery or bonded labor and sexual exploitation; it is detrimental to full social and psychological development". ILO adds the following categorization of child labor: - Labor that is performed by a child who us under the minimum age specified for that kind of work (as defined by national legislation, in accordance with accepted international standards and that is thus likely to impede the child's education and full development; -Labor that jeopardizes the physical, mental or moral well-being of a child, either because of its nature or because of the conditions in which is carried out, known as hazardous work; and -Unconditional worst forms of child labor, which are internationally defined as slavery trafficking, debt bondage and other forms of forced labor, forced recruitment of children for use in armed conflict, prostitution and pornography, and illicit action.

53. *Id.*

54. Convention on the Rights of the Child, art. 32 (1989) available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

55. Humbert, *supra* note 35, at 15.

### III. Types of Child Labor

ILO (1996) and UNICEF (1997) delineate eight main types of exploitative forms of child labor: hazardous working conditions<sup>56</sup>, domestic service<sup>57</sup>, street children<sup>58</sup>, child labor in the informal economy<sup>59</sup>, child slavery<sup>60</sup>,

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56. *Id.* at 19. For example, children employed in the mining industry, involved in the manufacturing industry (for export such as carpets, garments, and soccer ball stitching) and within the agricultural sector (such as cocoa plantations) are endangering their health because of poor ventilation and lighting and suffer the effects of excessive noise, and exposure to dust and other chemicals during the development processes. Thus, they will inevitably suffer from respiratory problems (such as silicosis), regular headaches, hearing, sight, dermatological, muscle, wounds and joint problems putting at stake their long-term physical and mental well-being. In the service sector of the hotel, fast food and tourism industry children are pulled into the lure of making money quickly with no real benefit for their education or health and might also be drawn into prostitution.
57. *Id.* at 21. Children in domestic service are frequently subjected to physical, psychological, and sexual abuse and are thus highly exploited. They frequently work in isolation work long hours and some are unpaid (ILO 1996). This condition of “domestic servant” specifically domestic work performed by children outside the scope of their own household) is connected to the worst forms of child labor such as debt bondage and slavery (Noguchi 2005).
58. *Id.* Even though there is no universally accepted definition of street children “no one definition can capture the totality of the experiences of street children worldwide. A street child maybe “of the street” or “on the street”. A child “of the street” has no home but the street; such a child may have abandoned or been abandoned by his family, of he may have no surviving family member”. Children who find themselves in these circumstances are commonly involved in selling food and small consumer gadgets, window washing, shoe shining, tire fixing, rag picking, begging and puttering. It is not only the work they perform which is problematic but also the environment in which they work, as it exposes them to traffic fumes, harassment, and physical and in many cases - to sexual violence.
59. *Id.* Children who work in the informal economy are sometimes described as invisible and are the least protected under legal and regulatory frameworks. Frequently the informal economy is closely linked to the formal production sector. Evidence tends to suggest that in the manufacturing industry transnational corporations may engage small-scale family enterprises for the production of their goods. “Since most child labor occurs in this sector and is beyond the reach of most formal institutions, it represents one of the principal challenges of the effective abolition of child labor”.
60. *Id.* One of the most known forms of slavery is family bondage where children inherit debt from their family and are obliged to work to pay it off. Bonded labor, clearly mentioned in the Supplementary Convention on Abolition of Slavery of 1956 is mostly found in the agriculture, textile, quarrying and construction sectors where the situation is often manipulated by the creditor making it nearly impossible for the borrower to pay back the loan. “The main difference between adult and child bonded labor is that children have not themselves contracted the debt- it was done on behalf of adults. The

trafficking and commercial sexual exploitation<sup>61</sup> and children in armed conflict<sup>62</sup> and illicit activities<sup>63</sup> ILO as unconditional worst forms of child labor has named the last four of these.<sup>64</sup> In the context of this paper “exploitative forms of child labor” and “child labor” shall be the main point of focus as opposed to “child work” which encompasses all forms of economic activity.<sup>65</sup> The two terms will be used interchangeably to describe intolerable types of child labor.

#### IV. International Regulation of TNCs

In order to assess whether theoretically and practically if TNCs are bound to respect human rights and thus, children’s rights, one must assess the possible direct and/or indirect obligations derived from the established international legal framework protecting children against labor exploitation, which inevitably, shall be shown, some modalities because they may constitute forced labor, torture or cruel, inhumane, or degrading treatment have reached the level of *jus*

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link between child labor and the inter-generational perpetuation of poverty could hardly be clearer. Bonded children flourish in different parts of the globe; not only in South Asia with which it is most commonly linked, but also in Latin America, Africa and South-East Asia”.

61. *Id.* Children are often trafficked for prostitution, for begging, and for other activities such as agriculture and domestic service. It is thought that child trafficking has become a billion-dollar-a-year business, with an estimated 1.2 million children falling victim annually. Child victims of commercial and sexual exploitation experience extreme forms of physical, psychological, and emotional cruelty which often have life threatening consequences for example, contracting HIV infection, and other sexually transmitted diseases or can lead to unwanted pregnancies. The situation is particularly acute for girls.
62. *Id.* The forced conscription of children to participate in rebel or guerrilla actions led ILO to include this practice as one of the worst forms of child labor. The number of children under the age of eighteen who have been coerced or induced, either by State or by non-state military groups, to take up arms as child soldiers or to serve as porters, messengers, cooks and sex slaves is generally thought to be in the range of 300,000, with 120,000 of those in Africa alone.
63. *Id.* Many children because of their immediate environment and/or as a form of survival get often involved in illicit activities such as producing and trafficking drugs. Examples of this practice vary from Colombia to Cambodia and from the United States to the Russian Federation.
64. Convention for Worst Forms of Child Labour, art.3, Jun. 1, 1999, 87 I.L.O 182.
65. INTERNATIONAL LABOUR ORGANIZATION, <http://ilo.org/ipcc/facts/lang-en/index/htm> (last visited Sept. 21 2016).

*cogens* among the international community.<sup>66</sup> *Jus cogens* or peremptory norms are generally defined as norms accepted and recognized by the international community from which no derogation is allowed<sup>67</sup>

They are prevailing norms not because States have decided so, but because they have an intrinsically superior character and cannot be disposed of through normal inter-state relations thus, binding all actors within the international community and potentially creating obligations *erga omnes* applicable to TNCs<sup>68</sup> Furthermore, while human rights treaties that protect children are not self-executing and do not support private means of action they do not necessarily have to be enforced by states or signatories, “[t]heir existence and near global recognition significantly contributes to the creation of universally binding customary international law”<sup>69</sup>

### **a. Interpretation of International Human Rights Standards Applicable to TNCs**

#### **i. The Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) is a legal source of direct corporate human rights responsibilities.<sup>70</sup> In fact this obligation is asserted in its Preamble, which states: “every individual and every organ of society.... shall strive... to ensure the observance and implementation of human rights and this excludes no one, no company, no market, no cyberspace.”<sup>71</sup> Article 29 of the UDHR also

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66. Vienna Convention of the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

67. *See Id.* at art. 53.

68. Alexander Orakhelashvili, PEREMPTORY NORMS IN INTERNATIONAL LAW 8, (Oxford Univ. Press 2006).

69. *See* Madeleine Grey Bullard, *Child Labour Prohibitions are universal, binding and obligatory law: The revolving state of customary international law concerning the underpowered child labourer*, 24 HOUSTON J. INT’L L. 140, 160 (2001), Two factors contribute to customary international law: state practice and *opinio juris*. Customary international law develops over time, evidenced by general patterns of practice and a belief of states that they must act out of their legal or moral obligation, which can be translated in treaties, declarations, international agreements and judiciary practice.

70. G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 10, 1948). [hereinafter “UDHR Res.”].

71. Louis Henkin, *Keynote Address: the Universal Declaration at 50 and the challenge of global Markets*. 1, BROOK. J. INT’LL. 17, 25 (1999).

denotes that: “[e]veryone [including TNCs] has duties to the community and ‘any State, group or person should abstain from acts or activities that can put at stake the rights and freedoms in the Declaration.’”<sup>72</sup>

These provisions can be interpreted as conferring direct obligations on non-state actors, such as TNCs, to respect children’s rights (the negative duty of non-violation), to protect children’s rights (the positive duty to prevent the violation of children’s rights by others and to fulfill children’s rights (the positive duty to take measures for progressive improvement).<sup>73</sup> The assumption is that anyone who has the power to affect children’s rights must do so without violating or undermining them.<sup>74</sup> These articles make an important statement within the context of the human rights responsibilities of TNCs.<sup>75</sup>

## ii. The Slavery Conventions

The Slavery Convention of 1926 is “considered to be the first modern international treaty for the protection of human rights.”<sup>76</sup> In this convention, slavery is referred to as “chattel slavery” which falls within the traditional meaning of slavery where people were treated like livestock and as tradable commodities.<sup>77</sup> Even though the convention does not mention child labor, it makes a statement on both on the repugnant nature of slavery and how state parties must take all the necessary measures to stop all forms of slavery.<sup>78</sup>

Later, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery of 1958 were added to the first convention by expanding the definition of slavery, prohibiting slavery and urging states to eliminate all institutions and

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72. UDHR Res. *supra* note 70, at art. 29.

73. *Id.*

74. Rogers Dhliwayo, *Understanding the obligations of non -state actors in the realization of children’s rights*, Institute for Democracy in Africa 9, 1- 44 (Mar. 2007).

75. *Id.*

76. Franzika Humbert, *THE CHALLENGE OF CHILD LABOUR IN INTERNATIONAL LAW*, 16 (Cambridge Univ. Press ed. 2009).

77. Convention to Suppress the Slave Trade and Slavery, art. 1, Sept. 25, 1926, 60 L.N.T.S 253.

78. *Id.* at art. 8.

practices similar to slavery.<sup>79</sup> The practices outlined in Article 1, particularly debt bondage, highlight the level of dependency of the victim in relation to the control of the other person (condition; status; disposal) whereby a person is usually economically exploited.<sup>80</sup> The sense of “ownership and control” is a key to differentiating slavery-like practices and other human right infringements.

By inference child labor practices, like debt bondage and the hazardous working conditions faced by vulnerable and dependent children employed by TNCs in the mining industry in Africa, Asia, and Latin America and within cocoa farms in West Africa not only prevents a child’s physical, psychological and educational development but more importantly leads to the economic exploitation of children.<sup>81</sup> Even Uzbekistan’s government has been considered to be a “slave nation” by forcing over 2 million schoolchildren between the ages of 10 and 15 to work in cotton fields.<sup>82</sup>

Children are highly dependent and easily dominated (or economically exploited) by their parents. Enterprises, and even governments, can lead one to assume that “the degree of dependency necessary for work to be qualified as a slavery-like practice will be attained in almost all cases”<sup>83</sup> Child labor as defined by ILO and UNICEF can therefore be considered as a contemporary form of slavery.<sup>84</sup> Slavery (and by extension, an exploitative form of child labor) is a peremptory norm of international law which has been accepted by the interna-

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79. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sep. 7, 1956, 226 U.N.T.S. 3.

80. See, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art 1, Sep. 7, 1956, 226 U.N.T.S. 3. The Supplementary Convention actually refers to children in order to avoid “sham adoptions.” A “sham adoption” occurs when a family, generally in financial difficulty, gives or sells a child to a richer family, nominally to be adopted but in reality, to work in the rich family’s household without enjoying either the same statutes or the same treatment as ordinary children in the household into which they are adopted. A similar practice occurs when children are sent to the households of relatives or others who are expected by the child’s parents to give special attention to their education but in reality, exploit their labour. *Humbert supra* note 76, at 40.

81. Clapham *supra* note 15, at 79.

82. Environment Justice Foundation, *Slavenation: state sponsored forced child labour in Uzbekistan’s cotton fields*, ENVIRONMENTAL JUSTICE FOUNDATION, London, UK, [http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/2010\\_ejf\\_slavenation.pdf](http://www.cottoncampaign.org/uploads/3/9/4/7/39474145/2010_ejf_slavenation.pdf)

83. Humbert, *supra* note 24, at 41.

84. See ILO *supra* note 42; See Humbert *supra* note 35.

tional community; a norm from which no derogation is allowed and therefore, applicable *erga omnes* to TNC operations.<sup>85</sup> As Kinley and Tadaki point out, “to the extent that slavery often functions as a means of economic oppression for the benefit of private interests, it would be clearly appropriate to impose on TNC the obligation to refrain from exploiting forced or bonded labor.”<sup>86</sup> Similarly, within the Supplementary Convention it includes, the forms of exploitative child labor, such as industrial and agricultural work, domestic and family service, forced and bonded labor, commercial and sexual exploitation, street work, children forced into armed conflicts, children in illicit activities and child trafficking.<sup>87</sup>

### iii. The International Covenants

Child labor standards are contained in the International Covenant on Civil and Political Rights (ICCPR) as well as the<sup>88</sup> International Covenant on Economic Social and Cultural Rights (ICESCR), which may be interpreted to apply to businesses.<sup>89</sup> Human rights notions are now increasingly considered applicable in the private sphere through the doctrine of positive obligations. Entering in a new paradigm shift, the doctrine of positive obligations implies that, TNCs should not abstain from exercising their power to protect human rights but rather required to exercise such power to respect human rights.

Both the ICCPR and the ICESCR reflect this path and state in their respective Preambles the obligations of individuals and their “duties to other individuals and to the community to which he [sic] belongs is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”. Similar to Article 4 of the UDHR and the Supplementary Convention on the Abolition of Slavery, the ICCPR (Art. 4; Art.7 and Art.8 (2) and (3)) prohibits the economic exploitation of children in the form of slavery

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85. Bullard, *supra* note 70.

86. Kinley and Tadaki, *supra* note 18.

87. *See generally*, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sep. 7, 1956, 226 U.N.T.S. 3.

88. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S.171.

89. *See* International Covenant on Economic Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S.3.

and servitude, torture (or cruel, inhumane and degrading treatment) from which no derogation is allowed.

The ICCPR forbids, under Article 8 (1), child labor even though it refers to child labor in its traditional form of chattel slavery. Nevertheless, one can deduce that child labor as a slavery-like practice may come within the notion of “servitude” (Art. 8 (2)) of the ICCPR. This is in line with the Supplementary Convention of 1956 (Art. 7 and Art. 1) and along with the comments from the drafting process of article 8 of the ICCPR it seems plausible to refer to slavery-like practices when looking at servitude and therefore, child labor.<sup>90</sup> The same would hold true under the Forced or Compulsory Labor Convention No. 29 and its complementary framework the Abolition of forced Labor Convention No 105. The protection of “minor” children by the ICCPR, enshrined in Article 24 (1), makes it clear that children have the right to positive “measures of protection” by their family, society and the state. This stresses the horizontal effect of the provision (commonly referred to as “Drittwirkung der Grundrechte”) and the protection against abusive child labor. State parties to the Convention have the immediate and absolute duty not only to prevent child labor from occurring (for example as a result of exploitation from enterprises including exploitation by the child’s own parents) but also *inter alia* to put into action special economic, social and cultural measures for the rehabilitation and education of previous child laborers.

This may also include, not only the enforcement of national measures on the prohibition of child labor, but also suitable scrutiny

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90. (Shultz and Castan 2000). Of relevant notice is that the ICCPR in Article 8 (3) differentiates between “servitude” and “forced labor”. Even though the two types overlap they cannot be treated equally as the restrictions on forced or compulsory labor admits exceptions and derogations. The main characteristic of forced or compulsory labor is involuntariness, whereas slavery and servitude are also barred in case of voluntariness (Van Bueran 1995). Though the concepts are not equivalent, slavery like practices do contain the elements that constitute forced labor and should be judged within the scope of the “forced labor” under Article 8 (3) of the ICCPR. “This view is confirmed by other legal authors who have held that Art. 8 (3) lit. a prohibits all forms of forced labor *beyond* slavery and slavery-like practices, and that the notion of servitude was considered to cover systems of forced, compulsory or “corrective” labor. Hence, child labor can be said to come within the meaning of forced labor” (Humbert 2009 p. 59). In this case the exceptions and exemptions foreseen in Article 8 (3) lit b and c are not applicable in the case of child labor since child labor (not tolerable child work) fits within the notion of servitude which is restricted under Article 8 (2).

of labor practices within private enterprises. For example, Pakistan's government a signatory to the ICCPR, has outlawed in its Constitution (Art. 11) slavery, forced labor, trafficking and the employment of children under the age of fourteen in hazardous work conditions. While also including "principles of policy" on free and compulsory education and the creation of just and humane work conditions for children, a balance of rights between employers and employees and the creation of an adequate livelihood for all. Nepal, a country also party to the ICCPR, provides jurisdictional measures protecting children against cruelty have been incorporated into domestic law, thus criminalizing child cruelty.<sup>91</sup> Therefore, children's human rights have to be respected by everyone, including TNCs.

As with the ICCPR, under the ICESCR States have an obligation to protect the individual rights of children from violations by third parties including non-state actors. Under Article 5 (1), the ICESCR clearly forbids states as well as other private groups (such as non-state actors) or individuals from engaging in any activity aimed at the destruction of rights outlined in the Covenant.<sup>92</sup> With regard to the special situation of young girls, the ICESCR is requires states "to protect [young] women from discrimination."<sup>93</sup> In Uganda, 2.7 million children aged 5-15 are employed and, even though education is not compulsory, the government has granted funds to allow free schooling. However, the percentage of young girls dropping out of school is higher than for boys. This high dropout rate may be due to early marriages and employment in informal or full time work for TNCs.<sup>94</sup>

The Committee on Economic, Social and Cultural Rights, a body of independent experts who monitor the implementation of the ICESCR by its member states, has also highlighted the role of other non-state actors (e.g. the World Bank and the International Monetary Fund) in prioritizing not just economic growth projects but also the enjoyment of human rights by children avoiding projects contraven-

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91. Jean-François Akandji-Kombe, *Positive Obligations under the European Convention of Human Rights*, Council of Eur., 37 (2007), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d.pdf>.

92. ICESCR (art. 5 (1)).

93. Clapham, *infra* note 121, at 324.

94. Van Hoof *infra* note 127.

ing the Covenant and citing those that involve child labor<sup>95</sup> Nevertheless, the emphatic duty of the states, direct parties to the treaties, to ensure the respect of human rights by businesses, cannot be dismissed.

#### iv. The Convention on the Rights of the Child

The problems associated with child labor, in recent times, have been aided by the Convention on the Rights of the Child of 1989 (CRC).<sup>96</sup> It aimed to formalize in a Convention children's rights and - the right of children to be protected from economic exploitation<sup>97</sup>

It can be argued, however, that the CRC provides relevant framework of rights regarding child labor.<sup>98</sup> The CRC has the largest number of signatories of any Convention.<sup>99</sup> It was also the fastest to be implemented, which it did in 1990, just a year after its being signed.

Article 32 of the CRC is one of the main articles where a general recognition of the right of children to be protected from economic exploitation is enshrined.<sup>100</sup> Under the CRC, children have the right

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95. (Art. 22).

96. The 1989 Convention on the Rights of the Child is available from: <http://www2.ohchr.org/english/law/crc.htm>.

97. The protection of children from economic exploitation was first outlined in the Declaration of the Rights of the child of 1924 and later expanded in the Convention of the Rights of the Child.

98. Rights relevant to the issue of child labor include in particular, Article 32 (protection from economic exploitation and child labor), Articles 11 and 35 (combating trafficking in children) Article 19 (protection against violence, abuse, neglect and exploitation), Article 34 (protection of children from sexual exploitation or abuse) and Article 38 (setting international standards in relation to children and armed conflict).

99. The CRC has to date 140 signatories and 193 parties: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

100. Article 32 of the CRC states (emphasis added): 1. States Parties recognize the right of the child to be *protected from economic exploitation* and from performing any *work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development*. 2. States Parties shall take *legislative, administrative, social and educational measures* to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a *minimum age or minimum ages for admission to employment*; (b) Provide for appropriate *regulation of the hours and conditions of employment*; (c) Provide for *appropriate penalties or other sanctions* to ensure the effective enforcement of the present article.

to be protected from hazardous work that is likely to impact on the child's "health or physical, mental, spiritual, moral or social development."<sup>101</sup> In this respect the scope of application of Art. 32 (1) is wider when compared to Article 10 (3) of the ICESCR as it forbids "any work" as opposed to just "work harmful to their morals or health or dangerous to life or likely to hamper their normal development."

The CRC urges States to introduce minimum age legislation; taking into consideration the relevant international instruments such as International Labor Organization Convention concerning Minimum Age for Admission to Employment N° 138.<sup>102</sup> This is particularly relevant since it mirrors the ILO and UNICEF definition of child labor; stating that as labor, which does a child who is under the minimum age specified in national and international standards, perform.<sup>103</sup>

In line of thought with the ICCPR and the ICESCR, Article 32 of the CRC similarly allows for the creation of regulation and the inspection of enterprises.<sup>104</sup> The horizontal effect is visible, as States have an obligation to prevent and restrain violations against the right to protection from economic exploitation by private entities (namely TNCs).<sup>105</sup> India, a party to the CRC, has included the prohibition of the employment of children below the age of fourteen (14) in any factory or mine or in any other hazardous work in its Constitution.<sup>106</sup> This is legally enforceable against not only the state but also corporations.<sup>107</sup> Recommendations from the Committee on the Rights of the Child are useful here as they specify the actions that non-state actors are expected to take, as well as underline, the necessary monitoring mechanisms that should be in place to respect the human rights of

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101. See direct relationship between Article 32 and Articles 24 and 28 of the CRC on the right to education and to health (Verheyde 2006; Eide & Eide 2006).

102. Iloc Art. 138

103. However, the CRC allows for discretionary and somewhat confusing multiple standards on the minimum age for the employment of children; this has not escaped the attention of critics who allege that the CRC is a repetitive convention, made up of issues already covered in other treaties (Kern 2000).

104. CRC Art. 32.

105. *Id.*

106. INDIA CONST. art. 4.

107. Justice S. Muralidhar, *The Expectations and Challenges of Judicial Enforcement of Social Rights*, SOCIAL RIGHTS JURISPRUDENCE 4 (2008).

children.<sup>108</sup> Regarding the right to be protected from economic exploitation, State parties not only have the duty to pass legislation on the hours worked and conditions of the employment, but also to enforce suitable penalties or other appropriate sanctions on enterprises, including TNCs.<sup>109</sup> As with the ILO Minimum Age Convention (Art. 2), the CRC reaffirms the significance between the minimum age for admission to employment and compulsory education.<sup>110</sup> Education is seen as a key to combating poverty and thus child labor (Art. 28).<sup>111</sup> The CRC reiterates the need for a multi-approach strategy where not only legal but also administrative, social and educational measures are put in place to combat child labor.<sup>112</sup>

In this context, the Committee on the Rights of the Child has highlighted the interdependence between children's civil rights in shielding against violations of children's economic and social rights.<sup>113</sup> For example, "[t]he obligation on State parties to establish an accessible registration birth. Art. 7 (1)) is essential because without a verifiable record of number and ages, it is impossible to plan effectively economic and social rights policies and programs.<sup>115</sup> In addition, an absence of birth documents makes minimum age legislation preventing the economic, social and sexual exploitation of child labor impossible to enforce effectively.<sup>116</sup> It is with this in

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108. UN Committee on the Rights of the Child, General comment no. 5 (2003): General measure of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc. CRC/GC/2003/5, (Nov. 27, 2003), <http://www.refworld.org/docid/4538834f11.html>, The Private Sector as Service Provider and its Role in Implementing Child Rights, (Dec. 11, 2002), <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2002.pdf>.

109. Anup Shah, *Corporations and Worker's Rights*, GLOBAL ISSUES (May 28, 2006), <http://www.globalissues.org/article/57/corporations-and-workers-rights>.

110. International Labour Organization Minimum Age Convention concerning Minimum Age for Admission to Employment art. 2 (Jun. 26, 1973).

111. International Labour Organization Minimum Age Convention concerning Minimum Age for Admission to Employment art. 2,( Jun. 26, 1973.)

112. *See generally*, MIEKE VERHEYDE, ARTICLE 28: THE RIGHT TO EDUCATION,( Maartinus Nijhoff Publishers, 2006.)

113. UN, *General Comment No. 7 Implementing Rights in Early Childhood*, ¶3, U.N. Doc. CRC/C/GC/2005 (Sept. 30, 2005).

114. Convention on the Rights of the Child art. 7 (1)( Nov. 20, 1989.).

115. *Id.*

116. GERALDINE VAN BUEREN, COMMITTEE ON THE RIGHTS OF THE CHILD: OVERCOMING INERTIA IN THIS AGE OF NO ALTERNATIVES, 579, Cambridge University Press (2008).

mind that the Committee urged Ethiopia to set up adequate birth registration infrastructures including mobile structures.

In addition, states have an obligation to recover and reintegrate exploited children to the “maximum of its available resources”.<sup>117</sup> As within the scope, Covenants states can also rely on international cooperation mechanisms to fulfill their obligations under CRC (Art 23(4); Art. 28 (3); Art. 39) in pursuing the best interests of the child (Art. 3 (1)).<sup>118</sup>

#### v. The ILO Conventions

The relevance of the Forced Labor Convention (FLC) N° 29 from 1930 and its counterpart the Forced Labor convention N° 105 of 1957 in the context of child labor is calling for an immediate eradication of forced or compulsory labor without enabling state parties to resort to intermediary provisions.<sup>119</sup>

Article 2 of the FLC tries to define the term “forced or compulsory labor.”<sup>120</sup> Over the years, reports of exploitative forms of child labor in situations from domestic service to bonded labor have exposed vulnerable children to the so-called “contemporary forms of forced labor”.<sup>121</sup> Slavery and slavery-like practices have also been equated to forced labor that has gained recognition as a peremptory norm in international law.<sup>122</sup> Since child labor has been found to be

117. Convention on the Rights of the Child art. 2 (1) (Nov. 20, 1989)

118. *Id.* at art. 3 (1).

119. Convention concerning Forced or Compulsory Labour, Preamble (Jun. 28, 1930).

120. Convention concerning Forced or Compulsory Labour, art. 2 (1), (Jun. 28, 1930) (A two-tier element of coercion (“all work or service which is enacted from any person under the menace of any penalty”) and involuntariness (“for which the said person has not offered himself voluntary”) composes the meaning of the concept of “forced or compulsory labour” within the convention. In the case of children they are rarely in the position of giving their consent as they are dependent *de facto e de iure* on their parents. In line with Article 3 and the principle of best interests of the child contained in CRC “the consent of the parents cannot be deemed sufficient in cases of exploitative child labour where the child does not give its consent” (Humbert, 2009 at84). The element of coercion and dependency between a child and its masters also leads one to conclude that economic exploitation of children is also included within the provisions of the Forced Labour Convention).

121. See, ILO Director-General, *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, (May 8, 2001).

122. Andrew Clapham, *Human rights obligations of non-state actors in conflict situations*, 88 INT’L REV. OF THE RED CROSS, 863 (2006).

a slavery-like practice, not only under the Supplementary Convention on Slavery, but also within the meaning of servitude or forced labor in the ICCPR (Art. 8 (2)); the same would hold true under the Forced or Compulsory Labor Convention N°29.<sup>123</sup>

The obligations of the Convention have a horizontal effect “to private individuals, companies or associations” (Art. 4 and 5) obliging state parties to suppress forced or compulsory labor with adequate national measures and enforce appropriate penal sanctions.<sup>124</sup> However, the lack of appropriate means or experience by government may hamper the eradication of child labor.<sup>125</sup> In Angola, many children are involved in prostitution, domestic and hazardous labor.<sup>126</sup> Law enforcement is weak and inspections are rare. Plus, more than thirty percent of children ages 5-14 are working allowing TNCs to operate on discretionary grounds.<sup>127</sup>

The Convention on the Worst Forms of Child Labor N° 182 of 1999 and its accompanying Recommendation 190 is a reflection of the growing international consensus on the urgent need to fight against the worst forms of child labor gaining *jus cogens* status.<sup>128</sup> The convention indicates which types of child labor exploitation

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123. See, ILO, A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and rights at Work 2005, (2005), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—declaration/documents/publication/wcms\\_081882.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_081882.pdf), (The Convention does seem to include exemptions i.e. forms of work that do not constitute “forced or compulsory” labour (Art. 2 (2) lit. a-e). However, child labour as a contemporary form of slavery in Article 8 (2) of the ICCPR cannot be subject to exemptions neither under Article 8 (3) lit. b and c of the ICCPR nor by majority under Article 2 (2) of the ILO Convention concerning Forced or Compulsory Labour this would outwit the absolute prohibition of slavery-like practices of Art. 8 (2) and deteriorate the coherence of international law).

124. Convention concerning Forced or Compulsory Labour, art. 25 (Jun. 28, 1930).

125. See generally, International Labour Organization, *Effective abolition of child labour*, <http://www.ilo.org/declaration/principles/abolitionofchildlabour/lang—en/index.htm> (last visited, Sept. 19, 2016).

126. See, U.S. DEPT. OF LABOR, 2013 FINDINGS ON THE WORST FORMS OF CHILD LABOR (2013), <https://www.dol.gov/ilab/reports/child-labor/findings/2013TDA/angola.pdf>.

127. Heidi van Hoof, *The European Commission’s commitment to Education & to the elimination of Child Labour*, ALLIANCE 2015 STOP CHILD LABOUR CAMPAIGN, Nov. 9, 2007, <http://www.indianet.nl/pdf/eucommitment.pdf>.

128. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Preamble (Jun. 17, 1999).

states should prioritize.<sup>129</sup> Thus, defining the worst forms of child labor and reaffirming that these types of work are not mutually exclusive and can fall within the scope of one or more categories.<sup>130</sup> “It underscores protection from child labor and its worst forms as a human and development issue.”<sup>131</sup>

States have the possibility to determine which types of activities constitute hazardous work, but only in consultation with workers unions and workers themselves and must take into account international standards.<sup>132</sup> Recommendation N° 190 on the Worst Forms of Child Labor serves as a useful guide. States also have an obligation to take all the necessary measures to prohibit child labor.<sup>133</sup> The grounds for the Convention establishes that categories of child labor that cannot be accepted and consequently cannot be subjected to progressive abolition.

Thus, states are obliged to take not only immediate, but also time-bound measures.<sup>134</sup> These include penal or other necessary

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129. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 3 (Jun. 17, 1999).

130. Yaa Yeboah & Frank Panford, Eliminating the worst forms of child labour under Time-Bound Programmes: Guidelines for strengthening legislation, enforcement and overall legal framework, ILO, 4, (2003) [http://www.ilo.org/wcmsp5/groups/public/—africa/documents/meetingdocument/wcms\\_228974.pdf](http://www.ilo.org/wcmsp5/groups/public/—africa/documents/meetingdocument/wcms_228974.pdf).

131. Id. , (Contrary to the Minimum Age Convention, Convention N° 182 neither forbids light work under the age of thirteen (or twelve) nor work that interferes with compulsory schooling. Whilst the Minimum Age Convention refers to all three categories of child labour that ought to be abolished Convention N° 182 centres itself in more detail on the two later categories - hazardous work and unconditional worst forms of child labour [child slavery, trafficking, debt bondage, forced recruitment into armed conflicts prostitutions, illicit activities and pornography] for which it does not provide exceptions).

132. ILO, *Recommendation 190: Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, (Jun. 17, 1999), <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm>.

133. ILO, *Recommendation 190: Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, (Jun. 17, 1999), <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm>.

134. See generally Yaa Yeboah & Frank Panford, ELIMINATING THE WORST FORMS OF CHILD LABOUR UNDER TIME-BOUND PROGRAMMES: GUIDELINES FOR STRENGTHENING LEGISLATION, ENFORCEMENT AND OVERALL LEGAL FRAMEWORK, at 5, Geneva: Int'l Labour Office (2003) (The International Programme on the Elimination of Child Labour established by ILO in 1992 has developed the Time-Bound Programme approach “[i]s a government-led effort that is designed to bring to bear the expertise of all relevant ministries and other actors within a single unified framework. The result should be massive reduction or complete elimination of selected worst forms of child labour

sanctions, (for actors such as TNCs) and rehabilitation and reintegration measures for former child laborers (Art. 7).<sup>135</sup> To achieve this, states should “design and implement programs of action to eliminate as a priority the worst forms of child labor” (Art.5; Art.6) and support each other via international cooperation and assistance programs (Art.8), which may include the contribution of TNCs.<sup>136</sup> Going to the “root cause” of child labor and fulfilling the victim’s needs highlights the value that education is given within the Convention (Art. 7 (2); lit. c)).<sup>137</sup>

## **b. Direct Applicability of International Human Right Standards to TNCs**

Since the 1970s, a number of voluntary initiatives have been formulated by intergovernmental organizations aimed at directly regulating TNC activities.<sup>138</sup> A cursory analysis of the various instruments, notably of the OECD Guidelines, the ILO Tripartite Declaration and other UN initiatives is in order as they directly impose obligations to TNCs to combating child labor.<sup>139</sup>

### **i. The OECD Guidelines**

The OECD Guidelines for Multinational Enterprises, revised in 2011<sup>140</sup>, aim at reinforcing private efforts to delineate and put into action responsible corporate conduct, wherever they operate, including the effective elimination of child labor.<sup>141</sup> The updated Guidelines include new recommendations on human rights abuses and corporate

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within a specific time frame. It incorporates measures that prevent children from engaging in activities identified as “worst forms” by addressing the root causes and targets the withdrawal and rehabilitation of children who are already engaged in such activities”).

135. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 7, June. 17, 1999, ILO No. 182.

136. *Id.* at art. 7.

137. *Supra* note 134.

138. David Kinley & Junko Tadaki, *infra* note 48.

139. *Id.*

140. Organization for Economic co-operation and development, OECD, Guidelines for Multinational Enterprises (2011), <http://www.oecd.org/corporate/mne/48004323.pdf>.

141. *Id.*

responsibility for their supply chains.<sup>142</sup> Since guidelines are voluntary and not legally binding, they merely recommend enterprises to respect the human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with the host government's international obligations and commitments.

Specifically, with regards to child labor the Guidelines recommend that enterprises agree to act within the "framework of applicable law" to effectively eradicate the problem. Within the Guidelines, there is no specific reference to the relevant aforementioned ILO Conventions to tackle child labor (ILO Conventions N°138 and 182) but the fact that they mention the UDHR is worth highlighting. Even though guidelines are not meant to replace national law and regulation, the Preface of the Guidelines does mention the ILO Declaration on Fundamental Rights and Principles at Work.<sup>143</sup>

Because ILO Conventions N°138 and N°182 are contained in the ILO Declaration, it can be presumed that these Conventions will be form a basis when applying the guidelines. Governments adhering to the guidelines are requested to set up National Contact Points (NCP) not only to promote, but also to resolve disputes that may occur from the guidelines. However, the NPC has no authority to enforce the guidelines.<sup>144</sup>

All interested parties may bring claims before the National Contact Points for breach of the guidelines by enterprises. This path has been cleverly used by non-governmental organizations (NGOs) regarding the abusive behavior of TNC such as in the mining industry in resettlement areas in Zambia and in the footwear industry against Adidas on child labor practices in India.<sup>145</sup>

## ii. The ILO Tripartite Declaration

The 1977 ILO Tripartite Declaration of the Principles concerning Multinational Enterprises (revised in 2000 and 2006) is aimed at a

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142. *Id.*

143. *Id.* at 37.

144. Sarah Joseph, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, 618 (Malcolm Langford ed., 2008).

145. *Id.*

wider group of actors than the OECD Guidelines.<sup>146</sup> In addition to enterprises working in their territories (including TNC), the Declaration addresses governments, member states, employers, and workers organizations to adopt adequate social policies.<sup>147</sup> The ILO Tripartite Declaration pushes state not only to respect the UDHR and its related Covenants, but also to ensure the effective abolition of child labor explicitly referring to the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Convention N°182 on the elimination of worst forms of child labor and to respect the minimum age for admission to employment portrayed in ILO Convention N° 138. Thus, “the Declaration does provide material evidence that international labor law regime has come to include human rights obligations for national and multinational enterprises.”

Like the OECD Guidelines, the ILO Tripartite Declaration is not legally binding and though both provide for complaints mechanisms aimed at holding enterprises responsible for violations of workers/children rights, judicial or quasi-judicial bodies do not take up their enforcement measures.<sup>148</sup> Their roles are rather limited to clarification of the interpretation of the instruments.<sup>149</sup>

### iii. The UN Global Compact

Another international soft-law proposal analogous to an international code of conduct is the 1999 UN Global Compact.<sup>150</sup> The compact contains ten nucleus principles on social and environmental affairs including *inter alia* the effective abolition of child labor (Principle 5) both via adequate individual business practices and by

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146. Organization for Economic CO-operation and development, OECD, Guidelines for Multinational Enterprises, at 37, (2011), <http://www.oecd.org/corporate/mne/48004323.pdf>.

147. International Labour Organization, TRIPARTITE DECLARATION of PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES and SOCIAL POLICY, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) (2006).

148. David Kinley, Junko Tadaki, *FROM TALK to WALK: The EMERGENCE of HUMAN RIGHTS RESPONSIBILITIES for CORPORATIONS at INTERNATIONAL LAW*, 44(4) VIRGINIA JOURNAL OF INTERNATIONAL LAW 950 (2003-04).

149. *Id.*

150. U.N. Global Impact, The TEN PRINCIPLES of the UN GLOBAL IMPACT, [HTTPS://WWW.UNGLOBALCOMPACT.ORG/WHAT-IS-GC/MISSION/PRINCIPLES](https://www.unglobalcompact.org/what-is-gc/mission/principles).

sustaining corresponding public policy proposals.<sup>151</sup> The enterprises that are members to the Global Compact are requested to implement the principles and circulate the progress made on the UN Global Compact website where civil society organizations may react to these publications.<sup>152</sup> The UN Global Compact (and its credibility) has been the target of criticism over the years for its failure to monitor and verify businesses' activities in particular for violations against human rights. In fact, TNCs no longer enjoy the signatory status of the Global Compact *per se*. To enhance its credibility, the UN Global Compact enacted a complaints mechanism (directed to the Global Compacts Office) for abuses made by an enterprise adhering to the Global Compacts aims and principles.<sup>153</sup> If a company declines to dialogue on a certain issue, it will be labeled as “non-communicating” and automatically eradicated from the UN Global Compact list of participants.<sup>154</sup>

#### iv. The UN Norms

The UN Sub-Commission on the Promotion and Protection of Human Rights adopted in 2003 a resolution that enraptured the “Norms on responsibility of Transnational Corporations and other Businesses Enterprises with regard to Human Rights,(hereinafter “UN Norms”).<sup>155</sup> Its innovation directly establishes human rights obligations to TNCs and other enterprises within their “sphere of influence”. Similarly to other international instruments, it directly asserts the application of the UDHR and other relevant outlined legal

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151. U.N. Global Impact, The TEN PRINCIPLES of the UN GLOBAL IMPACT, PRINCIPLE 5 (1999), [HTTPS://WWW.UNGLOBALCOMPACT.ORG/WHAT-IS-GC/MISSION/PRINCIPLES](https://www.unglobalcompact.org/what-is-gc/mission/principles).

152. U.N. Global Impact, The Ten Principles of the UN Global Impact, (1999), <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

153. U. N. Glob. Compact, *Grievance Mechanism for Business and Human Rights*, <https://www.unglobalcompact.org/library/631> (last visited September 21, 2016).

154. *Id.*

155. The UN Sub-Commission on the Promotion and Protection of Human Rights is a body created to act as a “think-tank” to assist the UN Commission on Human Rights [since 2006 the Human Rights Council] (an inter-governmental body of fifty-three member states of the United Nations). Its twenty-six members are elected as independent experts by the inter-governmental Commission on Human Rights” (Clapham 2006 p. 225-226). The 2003 Norms on Responsibility of Transnational Corporations and other Businesses Enterprises with regard to Human Rights are available from: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En).

instruments to corporate activity. This includes the protection of children from economic exploitation prohibited in various international treaties.<sup>156</sup> TNCs are expected to internally comply with these norms and periodically report on the initiatives taken to implement them. In contrast with previous OECD and ILO texts, it attempts to define the meaning of TNCs (Para. 20).<sup>157</sup>

Not underrating the major role of states, the UN Norms are visionary as they recognize the power of TNCs and inculcates them “the obligation to *promote, secure fulfillment of, respect, ensure respect of and protect human rights* recognized in international law as well as national law, including the rights and interests of indigenous groups and other vulnerable groups” [for instance children].<sup>158</sup> The UN Norms demand that TNCs “shall *respect* economic, social and cultural rights as well as civil and political rights and *contribute* to their realization” suggesting a form of horizontal legal obligations (of respecting and contributing just like states) towards citizens who are under their sphere of influence.<sup>159</sup> While there has been much reluctance within the business and international communities towards their acceptance and their adoption has ultimately failed, the UN Norms establish a relevant embryonic legal framework to impose human rights obligations onto TNCs.<sup>160</sup>

#### v. The 2011 Guiding Principles on Businesses and Human Rights – a remedial legal synthesis?

The 2011 Guiding Principles on Business and Human Rights submitted to the Human Rights Council in June 2011 represent a remedial legal synthesis of the on-going efforts to bring human rights to bear on TNCs. Remedial, as the Guiding Principles “will not bring human rights challenges to an end. Thus, it will mark the end of the

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156. UDHR.

157. (Para. 20) (Clapham 2006).

158. (Para.1

159. Para 12.

160. See 2008 Report from the Human Rights Council prepared by John Ruggie “Protect, Respect and Remedy: a Framework for Business and Human Rights” highlighting the role of the state to protect people from corporate human right abuses ditching the idea for direct regulation of companies under the Norms. Available from: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (Kinley et al 2007)

beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments”<sup>161</sup> The principles do not outline a framework for the future but rely on the goodwill of companies and states. There are no deadlines—no review of progress within the instrument. A legal synthesis, because the thirty one Guiding Principles aim at bringing existing standards and practices into a comprehensive and systematic framework and bridging the current gaps by offering operationalized solutions.<sup>162</sup> The systematic framework is based on a three pillar based approach of Protect, Respect and Remedy.

Despite criticisms of being too weak as they do not, for example, further elaborate on the extraterritorial obligation of the duty to protect, the Guiding Principles emphasize the role of TNCs to respect human rights of specific groups, including children and the need to take into account additional standards (these may include the CRC and the overarching child labor legal framework).<sup>163</sup> In addition, it emphasizes the mainstreaming of human rights, especially the realization of children’s rights, into corporate responsibility actions as TNCs should not only avoid but address the infringement of human rights where involved. In this context, TNCs may well “undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of human [and children’s] rights.”<sup>164</sup> These commitments should include carrying out human rights impact assessments (“human rights due diligence”) and contributing to the child’s educational development wherever they operate.<sup>165</sup>

### **c. Self-Regulation of TNCs**

Since the 1990’s within the “context of debates over globalization of capital and the resurgence of sweatshops and child labor-focused largely, though not exclusively on brand conscious firms in the apparel industry (e.g. Nike, the Gap, etc.)”, there has been a trend among TNCs of adopting their own voluntary codes of conduct

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161. Guiding Principles 2011 Introduction at para. 13.

162. Guiding Principles 2011 Introduction at para. 14.

163. Guiding Principles 2011 at princ. 12 and Commentary para. 3.

164. Guiding Principles 2011 at princ. 11 and Commentary para.3.

165. *Supra* princ 7 & 10.

which contain certain standards of behavior in relation to many areas including respect for labor and human rights.<sup>166</sup> “For example, these codes can set minimum standards for the company’s own behavior, as well as standards for the types of countries the company will be willing to invest in, and standards for the behavior of acceptable business partners.”<sup>167</sup> The majority of codes of conduct are produced by the textile, clothing and footwear industry. It is in these labor-intensive industries where reference to child labor in codes of conduct is most evident.<sup>168</sup>

The aim of adopting codes of conduct is to protect a company’s brand, image and reputation ensuring the end that consumers do not boycott their products or services<sup>169</sup> This voluntary approach can also be seen as a way to limit the regulatory and monitoring action of governments.

In fact,

“(…) firms initially developed codes of conduct to shield themselves from several types of external pressures. In at least some instances, they then used their engagement in voluntary efforts as a way to ward off further government intervention.”<sup>170</sup>

There are a multitude of various types of codes of conduct some unilaterally adopted (for instance with Gap, Nike, Disney, etc.) others industry lead (for example, the Worldwide Responsible Apparel Production Principles; the World Federation of Sporting Goods Industry code; The International Cocoa Initiative, etc.) and some codes of

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166. (Bartley 2005 p. 219)

167. Joseph 2000 p. 82

168. A study carried out by the International Organization of Employers and cited in Urminsky (2001) analysed 258 codes of conduct addressing labour practices, including forced or child labour and determined that the sector with the highest number of codes of conduct was the textile, garment and footwear industry with 62 codes. Among the codes studied only 47 percent mentioned the issue of child labour. Other labour intensive sectors referring to the issue of child labour include the food and beverage industry and forestry and construction sectors. Urminsky 2001; Martin-Ortega and Wallace 2005).

169. (Alston 2005). It is also to some extent the result of the “corporate governance debate” balancing of interest of all stakeholders i.e. those that may be affected by TNCs actions (suppliers, employees, customers, investors, creditors but also the local population)

170. (Bartley 2005 p. 227).

conduct are the product of multi stakeholder negotiations, such as: SA8000; The Ethical Trading Initiative; The Clean Codes Campaign, etc.<sup>171</sup>

According to a study carried out by the World Bank in 2003, there were 1,000 existing company codes. “Among the “leadership” firms [apparel, footwear and light manufacturing sector] examined, there appears to be an emerging trend that the minimum age for child labor must be at least 15, or the age for completing compulsory education, whichever is greater. Although there is no discrepancy in the commitment of all the codes of conduct to eradicate the use of child labor, there are variances among codes, which set the minimum age for child labor at anywhere between 14 and 18.<sup>172</sup> [T]he emerging trends in child labor conform to ILO Minimum Age Convention, No. 138 and the Worst Forms of Child Labor Convention, No. 182, in that minimum age is the greater of 15 (or 14 in certain countries), or the age for completing local compulsory education.<sup>173</sup>

The ILO provides for far more extensive protections for children than those mandated in most codes, such as protecting children from work that is hazardous or would “harm health”.<sup>174</sup> Additionally, few firms comply with such recommendations as ILO Recommendation No. 146, which provides that for any child found performing labor, the firm must enable them to attend school, and will not hire them during school hours.”<sup>175</sup>

## **v. The Challenges to Enforcement of Child Labor Standards**

The enforcement of child labor standards puts emphasis on the states, as the main parties to the treaties and as the main drivers to respect, fulfill, promote and protect children from exploitative forms of child labor. However, extended obligations are evidently imposed on TNCs in the majority of child labor standards instruments (treaty and non-treaty based). These instruments reflect general recommended behavior of customary nature implying that TNCs should not only re-

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171. SA8000; The Ethical Trading Initiative; The Clean Codes Campaign, etc.

172. *Supra* note 135.

173. *Supra* note 135.

174. *Supra* note 135.

175. Worldbank 7-8 (2003).

spect the human rights of children, but should also to take steps to realize children's rights and abolish child labor.

The strengths and weaknesses of UN instruments in safeguarding children from exploitation are clearly seen in the immediate applicability of civil and political rights (ICCPR) and the progressive realization of economic and social rights (ICESCR) making the latter limited in their success due to the state's "available resources".<sup>176</sup> This means that the developed world is in a better economic position to implement the CRC and combat child labor via a "multi-approach strategy" which translates into enacting legislative measures to punish any abusive behavior by TNCs as well as education, penal, health, labor rehabilitation measures and programs than the developing world is, where the problem of child labor is more acute.<sup>177</sup> However, it should be mentioned that international aid could help in this process. The CRC, while it disposes of monitoring and collection of information provisions, lacks an enforcement mechanism.<sup>178</sup> Despite being one of the most ratified conventions, more than one third of the ratifying countries have lodged reservations asking for exemptions. Among are Islamic countries that have indicated the CRC will be interpreted in harmony with Islamic Law and values which could easily undermine the object and rationale of the legal instrument.<sup>179</sup> Its failure to set minimum age standards for employment; the usage of the term "appropriate" to express the conditions of work and working time regulations; and its fines for violations, are all deficiencies that make the CRC document somewhat vague and inefficient.<sup>180</sup>

Furthermore, enforcing protection against the economic exploitation of children may require different and sometimes overlapping measures in developed and developing states. In developed states,

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176. Danwood Mzikenge Chirwa, *In search of philosophical justifications and suitable models for the horizontal application of human rights*, 8 Afr. Hum. Rts. L.J., 294, 296-97 (2008) (citing H. STEINER & P. ALSTON, *INT' HUM. RTS. IN CONTEXT: LAW, POLITICS, MORALS* 361-63 (3d ed. 2008)).

177. Hyder Kamran, *Value Creation Through Corporate Social Responsibility in Developing Countries: A Case Study of Proctor & Gamble Pakistan*, 3 INT'L J. OF BUS. RESEARCH & MGMT., 286 (2012).

178. Eric Engle, *The Convention of the Rights of the Child*, 29 Quinnipiac L. Rev. 809, 793-819 (2011).

179. Frederick B. Jonassen, *A Baby-Step to Global Labor Reform: Corporate Codes of Conduct and the Child*, 17 MINN. J. INT'L L. 16, 17-58 (2008).

180. *Id.*

the problem of child labor is due to the inadequate protection and inspectorate scrutiny of children that conciliate work with education in the agriculture or service sectors).<sup>181</sup> In the developing world, the most effective way to reduce children under the age of 12 from working is to provide access to primary education and enable more flexible working arrangements.<sup>182</sup>

The role of the ILO and of International Program for the elimination of Child Labor in combating child labor cannot be discarded. The issue of the exploitation of child labor has been taken as a primary matter considered in Conventions N° 138 and N° 182.<sup>183</sup> Despite their efforts, the conventions have slowly gained the support of influential states reflecting that governments are willing to sacrifice children's human rights over economic gain.

Support from developing countries with regard to the minimum age convention has also been slow due to consideration of age differentials portrayed in the Convention between the developed and developing world is deficient. "To date, less than 60% of ILO member countries have ratified all of the ILO core labor conventions, among which is the effective abolition of child labor."<sup>184</sup> Unfortunately, ILO also lacks the power to enforce its conventions resorting primarily to dialogue, moral persuasion and technical assistance.<sup>185</sup> Furthermore, it does not have the authority to grant remedies/compensation to injured child laborers.

In addition, much of the work carried out by children is in the "informal" sector where not only is it impossible to acquire adequate and precise statistics of the extent of the illegality but also to enforce child labor standards adequately.<sup>186</sup> For example, ILO Recommendation 146 highlights that children should be issued documents or licenses specifying their work eligibility; however, in practice it is

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181. Geraldine Van Bueren, *The International Law on the Rights of the Child*, 266 (1998).

182. G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal to Some Traditional Views*, *The Right to Food*, 97 (2007).

183. *Minimum Age Convention*, Jun. 26, 1973, 58 ILO 138.

184. N. Jaffe & J. Weiss, *The Self-Regulating Corporation: How Corporate Codes can save our Children*. *FORDHAM J. & FIN. L.*, 893-922 (2006).

185. KIMBERLY A. ELLIOTT & RICHARD B. FREEMAN, *CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION*, 93 (2003).

186. *Report of the rapid assessment on: Child Labour in the Urban Informal Sector in three governorates of Jordan (Amman, Mafraq and Irbid)*, International Labour Organisation (ILO) 15 (2014).

nearly impossible to effectively supervise migrant children, children working on the streets or those engaged in itinerant jobs.<sup>187</sup> There are also inconsistencies by employers and lack of supervision by states in the maintenance of company records of the names and ages of children they employ limiting the enforcement of the minimum age convention provisions.<sup>188</sup> Labor inspection services overseeing the operations of TNCs are also deemed to have a lack of human resources, and expertise, and low salaries; additionally, they are generally uncoordinated and plagued by corruption.<sup>189</sup>

## **vi. Paving the Way for a Renewed International Legal Framework for TNCs to Realize Children’s Rights?**

### **i. Binding international regulation**

In the short-term, a coordinated approach to the multiplicity of human rights standards applicable to TNCs, in the context of child labor, might be the wisest thing to do to protect children’s rights and guide TNCs in their daily operations. Even though the 2011 Guiding Principles on Businesses and Human Rights may represent a “legal synthesis” the lack of an adequate framework for the future and review mechanisms tears down the potential of such document, leaving space for further legal uncertainties.<sup>190</sup>

In the long-term, the establishment of a comprehensive international jurisdictional framework directly applicable to TNCs activities would be beneficial in delimiting their responsibilities and in tackling exploitative child labor practices. This could be embodied in a new treaty regime or in a “hybrid instrument” directed at TNCs while

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187. Minimum Age Recommendation, Jun. 26, 1973, 58 ILO 146.

188. Geraldine Van Bueren, *The International Law on the Rights of the Child*, 266 (1998).

189. Manuel Antonio Alhambra & Beryl ter Haar & Attila Kun, *Independent Monitoring of Private Transnational Regulation of Labour Standards: A Feasible Proposition for a “Transnational Labour Inspectorate” System*, (2013) [http://ilera-europe2013.eu/uploads/paper/attachment/267/2013\\_06\\_01\\_TLI\\_Garcia\\_Haar\\_Kun.pdf](http://ilera-europe2013.eu/uploads/paper/attachment/267/2013_06_01_TLI_Garcia_Haar_Kun.pdf).

190. Office of the High Comm’r for Human Rights, *Guiding Principles on Business and Human Rights*, U. N. Human Rights (2011).

keeping major executive duties within the remit of states.<sup>191</sup> It could also result in creating obligations for TNCs under an additional Protocol to the CRC with adequate complaint mechanisms<sup>192</sup>

Alternatively, a legal regime or code of international corporate responsibility could be developed where a recognized international coordinating institution (for example, ILO or UN Human Rights Council) would have the power to ensure broad agreement of the content of the norms and provide an archetype for their implementation. This entity would have the power to publicly investigate and condemn abusive conduct by TNCs. This would help change the behavior of TNC operating abroad that employ child labor and could have a disastrous economic impact on them.

Following from this, shortcomings of national legislation, the problem of state accountability and complicity and the limitations of criminal accountability could be tackled. Furthermore, direct international regulation would also provide uniform interpretation of the human rights obligations of TNCs and deter corporations from being complicit with corrupt or fragile states creating a paradigm shift from the traditional state-centric framework of international law.<sup>193</sup>

Even though, these may seem like radical approaches, which would involve a completely new international human rights law framework, it is not impossible for TNCs. Despite the failure of the UN Norms and the limitation of enforcement mechanisms of other legal standards directly imposing obligations on TNCs what can be learnt from these voluntary initiatives (or “soft law approaches”) represents a leap forward and a “model treaty” in setting, “universal, broad-based and authoritative” child labor human right standards for

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191. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J INT’L L., 931-1002 (2003).

192. One could foresee the advantages of the direct individual complaints mechanism (access to justice at the international level) now appearing under the Committee on the Rights of the Child under the third optional protocol, which will allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols which was previously missing. Available from: <http://www2.ohchr.org/english/bodies/crc/>.

193. Sarah Joseph, *Human Rights Treaties*, SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, 618 (2008).

TNCs both at the national and international level.<sup>194</sup> Refuting the idea that the impact of international law might be diluted by soft law standards regarding the activities of TNCs.

In point of fact, “companies are likely to support [binding] regulation when it supports its business strategy or capitalizes on areas that they have invested.”<sup>195</sup> One cannot let market forces behind disguised unenforceable corporate codes determine the human rights responsibilities of TNCs.<sup>196</sup> Protection of children in the workplace could be enhanced if these current soft-law mechanisms obtain their legitimacy under international law.<sup>197</sup>

ii. The added value of other relevant non-state actors

The role of other non-state actors such as NGOs, educational and religious organizations, the media, multilateral organizations like the World Bank (WB), the International Monetary Fund and the World Trade Organization (WTO) cannot be discarded in the context of a renewed legal framework for TNCs.<sup>198</sup> All have the potential to contribute towards enforcing TNCs’ observance of human rights standards and ending child labor.

The relevance of civil society, individuals and consumer pressure, global aid and trade institutions on TNCs, also have, the capacity to directly affect TNCs’ earnings by ensuring that a TNC has a

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194. D. Kinley and R. Chambers, *The UN Human Rights Norms for Corporations: The Private Implications of Public International Law*, 6 *Human Rights Law Review*, 447, 493 (2006).

195. CLAIRE FAUSET, *WHAT’S WRONG WITH CORPORATE SOCIAL RESPONSIBILITY? CORPORATE WATCH CSR REPORT 2006* 14 (2006) <https://corporatewatch.org/publications/2006/whats-wrong-corporate-social-responsibility>.

196. Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, in *THE NEW CORPORATE ACCOUNTABILITY* Ch. 8, 207-237 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds., Cambridge Univ. Press 2007) (calling “meta-regulation” to the large number of hard and soft law approaches each regulating one another as part of the so-called “contemporary corporate governance”).

197. Olga Martin-Ortega & Rebecca M.M. Wallace, *The interaction between corporate codes of conduct and international law: a study of women and children in the textile industry*, in *RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY* 302-18 (Stephen Tully, ed., Cheltenham: Edward Elgar Publ’g Ltd 2005).

198. Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility?*, in *THE NEW CORPORATE ACCOUNTABILITY* Ch. 8, 207-37 (Doreen McBarnet, Aurora Voiculescu & Tom Campbell, eds., Cambridge Univ. Press 2007).

good human rights record.<sup>199</sup> Going beyond the conceptual wrangling over whether or not they should act as an enforcement agency for international and national child labor law standards the fact remains that, they have the capacity of being a powerful regulator in the “global foreign investment flows” of TNC activities due to their close relationship with private enterprises, particularly in developing countries.

For example, a key WB institution, the International Finance Corporation that provides businesses with loans to execute development projects normally in partnership with host states, requires corporations to conduct their operations in an “environmental, social and responsible manner” this includes the prohibition of forced or hazardous child labor. Non-compliance with these policies may put at stake the loan and implementation of the project. Trade sanctions also have the potential to deter TNCs from committing human right abuses. “For example, if a product were made by child or forced labor, states that ban imports produced by child labor might rely on a ILO standard to argue in favor of trade restriction.”<sup>200</sup> Such arguments would attach current international child labor standards to trade.

Whether or not free trade imperative versus human rights are compatible *per se* is beyond the scope of this work nevertheless, it might be claimed that “in light of the contemporary concerns of the community of nations” a “moral argument” exists under Article XX (a): protection of human life and health and under Article XX (b) of the 1947 General Agreement on Tariffs and Trade (WTO predecessor organization) to impose restrictive trade sanctions to curtail possible children’s human rights abuses including child labor by TNCs.<sup>201</sup> However, the advantages of such an approach for states are always debatable.<sup>202</sup>

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199. *Id.*

200. David Kinley & Junko Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VA. J. INT’L L. 931, 1006 (2003-2004).

201. *Id.*

202. *Id.*

### iii. Clarifying the language of international instruments

Before any form of mechanism or legal path directly or indirectly applicable to TNCs is in place at the national and/or international levels, there is a need to for the international community to agree on defining on what constitutes a ‘child’ and what in particular constitutes a ‘child laborer’.<sup>203</sup> “Every society values at least some of its children but not every society agrees on what is good for children, or on the correct mix of work and education which best fulfills children’s present duties towards their families while preparing them for adulthood”.<sup>204</sup>

Currently, there is a lack of a universally accepted method of establishing the differences in child labor standards between the developed and developing world, which is mainly due to the multiplicity of values, and cultures.<sup>205</sup> This explains the ratification of the Minimum Age Convention by only a few developing nations and the resort to regional agreements (for instance, the African Child Convention) to close this gap.<sup>206</sup> The current approach of setting a minimum age for work might be wrong altogether “as some child development experts believe that age is not always the best way to decide whether individual children are ready for work, or whether any particular kind of work is appropriate for a specific child”.<sup>207</sup>

The significance of clarifying child labor is paramount for the child itself, for TNCs activities and ultimately to end exploitative child work.<sup>208</sup> In the absence of a comprehensive and universal child labor definition TNCs operating globally might consider developing or making use of existing human and rights impact assessment meth-

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203. Id.

204. David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 *HOFSTRA LAB. & EMP. L. J.* 383, 448 (1998-1999).

205. Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries* 4 *YALE HUM. RTS. & DEV. L.J.* 25, 32-33 (2001) (addressing the question on how to promote universal human rights in developing countries and the globalisation of labour standards for child labour).

206. UNICEF, [http://www.unicef.org/esaro/children\\_youth\\_5930.html](http://www.unicef.org/esaro/children_youth_5930.html) (last visited Sept. 18, 2016).

207. S.L. Bachman, *The Political Economy of Child Labour and Its Impact on International Business*, *BUSINESS ECONOMICS*, Jul. 2000, at 30, 33.

208. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 *VA. J. INT’L L.* 931, 1015 (2003-2004).

ods (including child standards) to avoid social harm against local communities and fulfill children's rights.<sup>209</sup>

#### iv. Identifying the “root causes” of child labor

The international community should take a more holistic approach to the issue of child labor addressing in particular the situation of young girls and those children involved in informal work who are presently overlooked in child labor instruments. This approach urges states to identify the “root causes” of child labor which in most cases includes a complex set of economic and social factors that violate children's political, economic and social rights, discriminates against them and channels a number of children into poverty limiting their health, educational, moral development and active participation in society.

It also urges powerful TNCs to construct a “structure of correlative duties”, which they implicitly have towards states but especially towards children where they operate. Mainstreaming child labor concerns, the rescue, rehabilitation, monitoring, enforcement and development of reintegration programs to tackle worst forms of child labor within national policy development frameworks should be a priority. Even if the immediate abolition of child labor seems unrealistic, priority should be given to eradicate the worst forms of child labor.<sup>210</sup>

To build such a supportive framework TNCs can contribute by leveraging more resources and developing a system of intensified cooperation and “interactive regulation” with national governments, international and, regional bodies, intergovernmental institutions (World Bank, UNESCO, UNICEF), civil society, individuals and children themselves.<sup>211</sup> The right of the child to participate and to be heard (child agency) in the decision making process empowers children as they can find ways to identify pragmatic solutions to the child

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209. Tarek F. Maassarani, Margo Tatgenhorst Drakostt & Joanna Pajkowska, *Extracting Corporate Responsibility: Towards a Human Rights Impact Assessment*, 40 *CORNELL INT'L L.J.* 135, 166-67 (2007).

210. Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 *YALE HUM. RTS. & DEV. L.J.* 25, 53 (2001).

211. David Kinley & Junko Tadaki, *supra* note 209, at 933.

labor problematic.<sup>212</sup> Such measures should be put in place against violations and provide victims with effective remedies protecting them and avoiding “re-victimization”. Strengthening legal enforcement and development mechanisms and the role of ILO-IPEC will be a key to the eradication of child labor, an objective that is closely linked to reaching the Millennium Development Goals.<sup>213</sup>

## V. Conclusion

The problem of exploitative child labor is widespread within the international community and throughout history. There is no deficiency of international human right standards regarding child labor and one might argue that child labor as a contemporary form of slavery, forced labor, torture, cruel, inhuman or degrading treatment (Art. 7; Art. 8 ICCPR) has reached *jus cogens* status from which no derogation is allowed (Art. 4 ICCPR) thus potentially creating obligations *erga omnes* applicable to TNCs.<sup>214</sup>

However, the increasing numbers of such exploitative phenomenon must inevitably hoist serious doubts about the effectiveness of those standards. The traditional state-centric approach of international child labor standards and attendant international institutions such as the UN and ILO, are all presently unable and badly equipped to regulate powerful TNCs, which are, by definition, not limited by concepts of territorial sovereignty. International law has been reluctant to regulate the social conduct of TNCs hence, the nonexistence of legally binding international human rights instruments for enterprises.

In fact, corporations are not subjects of international law. Human rights obligations for non-state actors (in this case TNCs) are highly controversial not only because it trivializes the essence of human rights, but it also confers unsuitable power and legitimacy to TNCs. The counterargument has been that human rights belong to the indi-

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212. Anna A. Kornikova, International Child Labour Regulation: What Companies Need to Know About Treaties Pertaining to Working Youth, 34 BROOK. J. INT’L L. 208, 225 (2008-2009).

213. BJØRNE GRIMSRUD, MILLENNIUM DEVELOPMENT GOALS AND CHILD LABOUR 21 (Unicef 2006) <http://www.bvsde.paho.org/bvsacd/milenio/unicef.pdf>.

214. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Mar. 23, 1976) <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

vidual and they cannot be deprived of their rights regardless of the circumstances. However, individuals and corporations are both capable of violating international human rights and therefore, children's rights.

The broadening of the historic paradigm, - that human rights standards are the state's obligations alone, - emphasizes the responsibility of influential TNCs which are seen as key in not only eradicating child labor but also in the attainment of children's rights. Therefore, the international human rights regime will be seriously compromised in the years ahead if it is unsuccessful in devising an appropriate and effective framework than the one that currently exists to take into account the role played by TNCs in realizing children's rights.