

GENERAL COMMENT 16 ON STATE OBLIGATIONS REGARDING THE IMPACT OF THE BUSINESS SECTOR ON CHILDREN’S RIGHTS: WHAT IS ITS STANDING, MEANING AND EFFECT?

PAULA GERBER,* JOANNA KYRIAKAKIS† AND KATIE O’BYRNE‡

A lot of attention has been paid to the responsibility of business to protect human rights generally, but very little to the role of the business sector when it comes to children’s rights specifically. This lack of attention is being addressed by the United Nations Committee on the Rights of the Child (‘CRC’), which has developed a new General Comment on State Obligations regarding the Impact of the Business Sector on Children’s Rights. This article explores the legal standing of general comments developed by United Nations treaty committees before examining the implications of this new general comment on the business sector and children’s rights. This article also analyses the innovative drafting process adopted by the CRC for this particular general comment and considers whether that process reflects a trend towards increased stakeholder participation in human rights norm-building on the international stage. Finally, the authors evaluate the new general comment in light of the broader international dialogue on business and human rights.

CONTENTS

I	Introduction	2
II	What Is the Standing of General Comments?	4
	A Source of Authority	5
	B Status in Law	7
	C Function in Practice	9
III	The Innovative Process of Developing <i>General Comment 16</i>	11
	A The Drafting Process	12
	B Trends in Interpretative Practice	13
IV	<i>General Comment 16</i> and the Broader Business and Human Rights Discourse	15
	A The Special Representative on Human Rights and Business and a Participatory Work Model	16
	B Evaluating General Comment 16	21
V	Conclusion	35

‘There can be no keener revelation of a society’s soul than the way in which it treats its children.’¹

— Nelson Mandela

* LLB (QUT), MSc (King’s College, London), LLM (Monash), PhD (Melbourne), Associate Professor, Law School, Monash University and Deputy Director of the Castan Centre for Human Rights Law. The authors thank the anonymous referees for their thoughtful suggestions on the draft article and the assistances of the Editors of the *Melbourne Journal of International Law*.

† LLBLP (Flinders), BA (Flinders), SJD (Monash), Lecturer, Law School, Monash University and Associate of the Castan Centre for Human Rights Law.

‡ LLB (Monash), LLM (Cantab), Sessional Lecturer, Melbourne Law School, University of Melbourne and Research Assistant at Monash University.

¹ Nelson Mandela, (Speech delivered at the launch of the Nelson Mandela Children’s Fund, Pretoria, 8 May 1995).

I INTRODUCTION

The fact that there are 193 states parties to the United Nations *Convention on the Rights of the Child* ('*Convention*')² indicates that states take children's rights seriously and have at least some degree of commitment to recognising the inherent dignity of all children and ensuring they receive the protection necessary to enable them to reach their full potential. However, the business community has not demonstrated the same degree of commitment to protecting and promoting children's rights.

Indeed, there are numerous examples of corporations perpetrating violations of children's rights. Some violations that affect populations generally — for example, deprivation of food, clean water and health services — can result in irreparable harms that affect children more acutely than adults.³ Other violations are child-specific. For example, children have been forced to undertake hazardous forms of labour⁴ and have suffered the consequences of environmental hazards caused by corporate activities.⁵ Some hotels, airlines and networking websites have facilitated child trafficking.⁶ Children are sexualised in the media

² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention*').

³ Margaret Wachenfeld, 'Children's Rights Are Finally Getting the Attention They Deserve', *The Guardian* (online), 30 March 2012 <<http://www.guardian.co.uk/sustainable-business/childrens-rights-business-wrongs-un-framework?INTCMP=SRCH>>. See also United Nations Children's Fund, 'The State of the World's Children 2012: Children in an Urban World' (Report, February 2012); Business & Human Rights Resource Centre, *Business & Children Portal* (2013) <<http://www.business-humanrights.org/ChildrenPortal/Home>>.

⁴ See, eg, International Programme on the Elimination of Child Labour, 'Children in Hazardous Work: What We Know, What We Need to Do' (Report, International Labour Organization, 10 June 2011); Human Rights Watch, 'A Poisonous Mix: Child Labor, Mercury, and Artisanal Gold Mining in Mali' (Report, December 2011); Dhaatri Resource Centre for Women and Children — Samata and HAQ: Centre for Child Rights, 'India's Childhood in the "Pits": A Report on the Impacts of Mining on Children in India' (Report, March 2010); Gerard Oonk et al, 'Maid in India: Young Dalit Women Continue to Suffer Exploitative Conditions in India's Garment Industry' (Report, Centre for Research on Multinational Corporations and India Committee of the Netherlands, April 2012); Payson Center for International Development and Technology Transfer, 'Oversight of Public and Private Initiatives to Eliminate the Worst Forms of Child Labor in the Cocoa Sector in Côte d'Ivoire and Ghana' (Report, Tulane University, 31 March 2011); Shawna Templeton, *Demand for 'Conflict Minerals' Endangers Congo's Women and Children* (June 2010) World Vision <<http://www.worldvision.org/news.nsf/news/advocacy-congo-minerals-201006-enevs>>; Human Rights Watch, 'Fields of Peril: Child Labor in US Agriculture' (Report, May 2010).

⁵ See, eg, Joint UNEP/OCHA Environment Unit, 'Lead Pollution and Poisoning Crisis' (Report, November 2010); Dan McDougall, 'Tobacco Poison Surrounds Child Workers', *The Sunday Times* (online), 15 November 2009 <http://www.thesundaytimes.co.uk/sto/news/world_news/article190548.ece>; Gethin Chamberlain, 'India's Generation of Children Crippled by Uranium Waste', *The Observer* (online), 30 August 2009 <<http://www.guardian.co.uk/world/2009/aug/30/india-punjab-children-uranium-pollution>>.

⁶ See, eg, Chris McGreal, 'Craiglist Is Hub for Child Prostitution, Alleged Trafficked Women', *The Guardian* (online), 8 August 2010 <<http://www.guardian.co.uk/technology/2010/aug/08/craiglist-underage-prostitution-allegations>>; Brittany Bacon, *Stolen Innocence: Inside the Shady World of Child Sex Tourism* (17 July 2007) ABC News <<http://abcnews.go.com/TheLaw/story?id=3385318&page=1#.UZCXP7WVo0x>>.

and advertising.⁷ Workplace discrimination and employer reluctance to supporting new families also harms young children.⁸ The marketing of artificial breastmilk substitutes compromises infant health.⁹ Lawsuits alleging violations of children's rights have been filed in a variety of jurisdictions against a number of companies, including:

- Sanlu Group (alleging child illness from melamine contaminated milk products);¹⁰
- Pfizer (alleging child injury and death from drug trials);¹¹
- Firestone (alleging child labour);¹²
- Nestlé, Cargill and Archer Daniels Midland (alleging child labour and trafficking);¹³
- Wet-A-Line Tours (alleging child sex recruitment);¹⁴ and
- DuPont (alleging birth defects as a result of fungicide exposure).¹⁵

The UN Committee on the Rights of the Child ('CRC') is seeking to prevent further violations of children's rights by corporations by developing a general comment that focuses specifically on the business sector and children's rights. This is a notable development for a number of reasons. First, *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights* ('General Comment 16')¹⁶ represents the 'birth certificate' of the UN's nascent attention to the substantive interaction between the business sector and children's rights. Secondly, its drafting process is emblematic of a recent trend of innovative consultation between treaty bodies and their stakeholders.

⁷ See, eg, Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *Sexualisation of Children in the Contemporary Media* (2008); Emma Rush and Andrea La Nauze, 'Corporate Paedophilia: Sexualisation of Children in Australia' (Discussion Paper No 90, Australia Institute, October 2006).

⁸ See, eg, Human Rights Watch, 'Failing Its Families: Lack of Paid Leave and Work-Family Supports in the US' (Report, February 2011); Emilio Godoy, 'Labour — Mexico: "They First Asked if I Was Pregnant"', *Inter Press Service News Agency* (online), 5 March 2009 <<http://www.ipsnews.net/2009/03/labour-mexico-they-first-asked-if-i-was-pregnant/>>; Ding Wenlei, 'A Woman's Dilemma', *Beijing Review* (online), 13 November 2008 <http://www.bjreview.com.cn/nation/txt/2008-11/10/content_163308.htm>.

⁹ See, eg, Charlotte Faircloth, 'A Weak Formula for Legislation: How Loopholes in the Law Are Putting Babies at Risk' (Report, UNICEF, National Childbirth Trust and Save the Children, 2007); Joanna Moorhead, 'Milking It', *The Guardian* (online), 15 May 2007 <<http://www.guardian.co.uk/business/2007/may/15/medicineandhealth.lifeandhealth?INTCMP=SRCH>>.

¹⁰ 'Chinese Courts to Accept Milk-Scandal Cases: Report', *Agence France-Presse* (online), 3 March 2009 <<http://www.google.com/hostednews/afp/article/ALeqM5jjcJyPZG2dJ2-BZ7fcVy5BoM0mA>>.

¹¹ *Abdullahi v Pfizer Inc*, 562 F 3d 163 (2nd Cir, 2009).

¹² *Flomo v Firestone Natural Rubber Co LLC*, 643 F 3d 1013 (7th Cir, 2011).

¹³ *Doe v Nestlé, SA*, 748 F Supp 2d 1057 (CD Cal, 2010).

¹⁴ Plaintiff A, 'Complaint', Submission in *Plaintiff A v Schair*, 2:11-CV-145, 14 June 2011.

¹⁵ *Brown v El duPont de Nemours & Co*, 820 A 2d 362 (Del, 2003). See also Jeremy Watson, 'Victims of Fungicide Receive Payout', *Scotsman* (online), 12 August 2007 <<http://www.scotsman.com/news/scottish-news/top-stories/victims-of-fungicide-receive-payout-1-1421790>>.

¹⁶ Committee on the Rights of the Child, *General Comment No 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, 62nd sess, UN Doc CRC/C/GC/16 (17 April 2013) ('General Comment 16').

The UN human rights treaty committees have developed a multitude of general comments, yet their precise standing within international law is by no means clear. This article therefore begins by analysing exactly what general comments are and their place within international human rights law — specifically, their source of authority, status in law and function in practice. It then examines the innovative consultative process adopted by the CRC in developing *General Comment 16* and queries whether this reflects a trend towards increased stakeholder participation in the creation of general comments. Finally, the authors analyse the content of *General Comment 16* and evaluate it through the lens of the broader international dialogue on business and human rights, including the recently endorsed ‘*Protect, Respect and Remedy: A Framework for Business and Human Rights*’ (‘*Framework*’),¹⁷ the *Guiding Principles on Business and Human Rights* (‘*Guiding Principles*’)¹⁸ and the ‘*Children’s Rights and Business Principles*’.¹⁹

II WHAT IS THE STANDING OF GENERAL COMMENTS?

Although various UN treaty committees have published over 100 general comments,²⁰ the sources, status and functions of these documents are still not well understood. The Human Rights Committee (‘HRC’) states that general comments represent ‘its interpretation of the content of human rights provisions’ and are focused on ‘thematic issues or its methods of work’.²¹ The CRC has

¹⁷ Human Rights Council, *Promotion and Protections of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Protect, Respect and Remedy — A Framework for Business and Human Rights*, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008) (‘*Framework*’).

¹⁸ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/17/31 (21 March 2011) (‘*Report of the Special Representative*’); John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/17/31 (21 March 2011) annex (‘*Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*’) (‘*Guiding Principles*’).

¹⁹ UNICEF, UN Global Compact and Save the Children, ‘*Children’s Rights and Business Principles*’ (Report, 2012) (‘*Children’s Rights and Business Principles*’).

²⁰ There are 111 general comments at the time of writing, published by the following committees:

- Human Rights Committee: 35;
- Committee on Economic, Social and Cultural Rights: 21;
- Committee on the Elimination of All Forms of Racial Discrimination: 34 (referred to as general recommendations, rather than general comments);
- Committee against Torture: 3;
- Committee on the Rights of the Child (‘CRC’): 17;
- Committee on Migrant Workers: 1; and
- Committee on the Elimination of Discrimination against Women: 28 (also referred to as general recommendations).

See also Nisuke Ando, *Max Planck Encyclopedia of Public International Law* (at November 2008) ‘*General Comments/Recommendations*’. In this article, the term ‘general comments’ is used generically to cover all such instruments, including recommendations and conclusions.

²¹ Office of the United Nations High Commissioner for Human Rights, *Monitoring Civil and Political Rights* <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>>.

adopted the same definition in regard to its general comments,²² while Alston has described general comments as

a means by which a UN human rights expert committee distils its considered views on an issue which arises out of the provisions of the treaty whose implementation it supervises ... In essence the aim is to spell out and make more accessible the 'jurisprudence' emerging from its work.²³

While useful for the limited purpose of definition, these statements do little to clarify the authority or scope of general comments. Given the significant number of general comments that have been published by UN treaty bodies, there has been relatively little scholarly focus on the weight that should be accorded to these publications. Before analysing the particular drafting process and implications of *General Comment 16*, this article seeks to fill this gap by analysing three distinct aspects of general comments, namely: the source of authority for publishing general comments; the legal status of such documents; and how they are used in practice.

A Source of Authority

The first issue to be considered is: where does a treaty committee's authority to publish general comments come from? There is no specific mandate in any human rights treaty that empowers a treaty committee to publish general comments interpreting the meaning of treaty provisions. While '[i]t is generally recognized that one of the main tasks of international organizations is to supervise compliance with their rules',²⁴ the extent to which authority to interpret the law inheres in that task may be disputed.

The only reference to 'general comments' in the *International Covenant on Civil and Political Rights* ('ICCPR')²⁵ is in art 40(4), which provides:

The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

The intent of this provision is ambiguous. On its face, it is not clear whether the term 'general comments' means 'miscellaneous comments' (made on each individual report to a specific state party) or 'universal comments' (made to all states parties). Other human rights treaties contain similar authorising provisions, albeit using slightly different language. For example, art 45(d) of the *Convention* empowers the CRC to 'make suggestions and general recommendations' to states

²² Office of the United Nations High Commissioner for Human Rights, *Committee on the Rights of the Child — General Comments* <<http://www2.ohchr.org/english/bodies/crc/comments.htm>>.

²³ Philip Alston, 'The Historical Origins of the Concept of "General Comments" in Human Rights Law' in Laurence Boisson de Chazournes and Vera Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff, 2001) 763, 764 (citations omitted).

²⁴ Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (Martinus Nijhoff, 5th revised ed, 2011) 873.

²⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

parties and the General Assembly, while art 21 of the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')²⁶ permits the Economic and Social Council to submit to the General Assembly 'reports with recommendations of a general nature'.

Historically, the ambiguity of these authorising provisions has been used to the advantage of both states parties and the treaty bodies themselves. The practice of publishing general comments to guide all states parties arose because, in the early years, some states and committee members were reluctant to countenance explicit findings of treaty violations by an individual state party.²⁷ To overcome this, the HRC released guidelines in 1980 for the development of general comments.²⁸ In these guidelines, the HRC interpreted the vague reference to 'general comments' in art 40(4) of the *ICCPR* as empowering it to 'formulate general comments'²⁹ that would provide overall guidance to states parties generally, rather than target individual states.

The first five general comments of the HRC were published in 1981.³⁰ This was over a decade before the publication of the first collective state-specific concluding observations on compliance.³¹ It is now clear that the uncertain language of the authorising provisions 'can accommodate the ... current practice' of treaty bodies,³² notwithstanding textual ambiguities. Otto goes so far as to suggest that it is inherent in the supervisory powers of treaty committees

²⁶ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

²⁷ Thomas Buergenthal, 'The UN Human Rights Committee' (2001) 5 *Max Planck Yearbook of United Nations Law* 341, 387; Conway Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comment' (Working Paper No 17, Centre for Human Rights and Global Justice, New York University School of Law, 2008) 6–7. See also Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review* 27, noting at 28: 'For much of the 35-year history of the treaty body system, it was considered by some treaty body members that the treaties simply did not authorise the issuance of comments on any State'; Torkel Opsahl, 'The Human Rights Committee' in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press, 1992) 369, 407–8 (citations omitted), explaining the historical reticence as follows:

According to a minimalist view, the proper role of the Committee under Article 40 is to contribute to the promotion of the *Covenant* ... This view has been articulated by some members, especially from Eastern Europe, and in the literature. Its proponents ... strongly oppose the idea that the Committee should criticize individual States Parties or determine that they do not fulfil their obligations to implement the *Covenant*.

²⁸ *Report of the Human Rights Committee*, UN GAOR, 36th sess, Supp No 40, UN Doc A/36/40 (29 September 1981) annex IV ('*Statement on the Duties of the Human Rights Committee under Article 40 of the Covenant*').

²⁹ *Ibid* 101. See also *Report of the Human Rights Committee*, UN GAOR, 36th sess, Supp No 40, UN Doc A/36/40 (29 September 1981) annex VII ('*General Comments under Article 40, Paragraph 4, of the Covenant*') 107.

³⁰ See, eg, Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) 173–6 ('*Compilation of General Comments*').

³¹ See, eg, Human Rights Committee, *Consideration of Reports Submitted by the States Parties under Article 40 of the Covenant*, UN Doc CCPR/C/79/Add.1 (25 September 1992); Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention*, 4th sess, UN Doc CRC/C/15/Add.8 (18 October 1993).

³² Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 116, 127.

that they possess a degree of “‘hard” interpretive power’ in expounding general comments, ‘without which ... treaty committees would be unable to fulfil their primary enforcement function’.³³ Keller and Grover point out that no state party has ever raised a formal objection to the competence of a treaty committee to issue general comments.³⁴ This indicates that, whether or not the power to interpret is inherent in the authorising treaty provisions, the competence of treaty bodies to issue general comments is now accepted by states.

B Status in Law

The second issue to be considered is: what is the status of general comments in international law? Are they ‘law’ and, if so, what kind?

It is doubtful that general comments would initially have been regarded as having any distinct status in law, being essentially procedural and descriptive and therefore rather innocuous in character.³⁵ Fifteen years ago, the Committee Against Torture described itself as ‘not an appellate, a quasi-judicial or an administrative body, but rather a monitoring body created by the States parties themselves with declaratory powers only’,³⁶ indicating that its outputs would not have legal authority.

Today, it remains accepted that general comments do not legally bind states parties.³⁷ Furthermore, it would be overstating the standing of general comments to say that they have attained the status of a source of international law.³⁸ While they have acquired a more normative and prescriptive status than in the past, the precise contours of that status are difficult to define. Otto notes that general comments are now often thought of as ‘quasi-judicial’ and as carrying ‘enormous political and moral weight’.³⁹ In the view of Thomas Buergenthal, a former judge of the International Court of Justice, general comments frequently address

³³ Dianne Otto, “‘Gender Comment’: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?” (2002) 14 *Canadian Journal of Women and the Law* 1, 13. See also Theodor Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process* (Clarendon Press, 1986) 10; *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 182: ‘Under international law, the Organization must be deemed to have those powers which, though not expressly provided ... are conferred upon it by necessary implication as being essential to the performance of its duties’.

³⁴ Keller and Grover, above n 32, 127.

³⁵ Blake, above n 27, 8–9.

³⁶ Committee against Torture, *Report of the Committee against Torture*, UN GAOR, 53rd sess, Supp No 44, UN Doc A/53/44 (16 September 1998) annex IX (‘General Comment on the Implementation of Article 3 of the Convention in the Context of Article 22’) 53 [9].

³⁷ Keller and Grover, above n 32, 129; International Law Association, ‘Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies’ (Paper presented at the Berlin Conference, Germany, 2004) 5 (‘*ILA Berlin Conference Paper*’); *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13 [36] (Supreme Court of Ireland): ‘Neither the [International] Covenant [on Civil and Political Rights] nor the Protocol at any point purports to give any binding effect to the views expressed by the Committee’. See also ICCPR, *Optional protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³⁸ See Blake, above n 27, 22–4 (but query whether general comments would fall into the description of ‘the teachings of the most highly qualified publicists of the various nations’ under art 38(1)(d) of the *Statute of the International Court of Justice*).

³⁹ Otto, above n 33, 11.

difficult issues of interpretation⁴⁰ in a form similar to the highly influential advisory opinions of international tribunals.⁴¹ Consequently, it can be said that general comments have gradually become important instruments in the lawmaking process of treaty committees, independent of the reporting system.⁴²

Craven concurs that while general comments are not binding, they have ‘considerable legal weight’,⁴³ while Shelton more gently suggests that general comments are ‘secondary soft law’ instruments, interpreting and adding detail to the express rights in treaties.⁴⁴ It could be argued that the normative force of general comments is increased by their lack of dissenting opinions. On the other hand, general comments may be criticised as representing the ‘lowest common denominator’⁴⁵ of consensus.⁴⁶

Particularly common in the literature on general comments is the notion of their ‘authoritative’ status. Steiner and Alston describe modern-day general comments as ‘more or less authoritative’ legal interpretations.⁴⁷ The Office of the High Commissioner for Human Rights has stated that

[t]he treaty body system has made a significant contribution to the promotion and protection of human rights, with treaty bodies providing authoritative guidance on the meaning of international human rights standards, the application of treaties and the steps States parties should take to ensure full implementation of human rights ...⁴⁸

Blake sagely draws attention to the fact that while the concept of ‘authoritative interpretation’ is frequently invoked, the word ‘authoritative’ may be defined in various ways: ‘General Comments are often characterised by a level of plasticity, whereby their authoritativeness changes depending on the context’.⁴⁹ Blake argues that general comments make an important contribution to the work of the ‘interpretive communities’ of international law, with iterative and persuasive rather than hard-line positive force.⁵⁰ This may in time influence the formation of custom. At the very least, Keller and Grover argue, states parties have a good faith obligation to consider the output of the bodies empowered to supervise human rights treaties.⁵¹

⁴⁰ Buergenthal, above n 27, 388.

⁴¹ Ibid 386.

⁴² Ibid 387.

⁴³ Matthew C R Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press, 1998) 91.

⁴⁴ Dinah Shelton, ‘Commentary and Conclusions’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 449, 451.

⁴⁵ *In Larger Freedom: Towards Security, Development and Human Rights for All — Report of the Secretary-General of the United Nations*, UN GAOR, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) [159].

⁴⁶ See Buergenthal, above n 27, 388.

⁴⁷ Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000) 265.

⁴⁸ *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body: Report by the Secretariat*, UN Doc HRI/MC/2006/2 (22 March 2006) [11].

⁴⁹ Blake, above n 27, 22.

⁵⁰ Ibid 34–8.

⁵¹ Keller and Grover, above n 32, 129.

In connection with legal status, it should be noted that treaty bodies have increasingly elaborated interpretations that are evolutionary rather than static. Buergenthal has reflected on the development and potential of the general comment, which in his view ‘over time ... has become a distinct juridical instrument’.⁵²

No single view has gained widespread acceptance,⁵³ but it is clear that the legal status of general comments has grown beyond a mere technical recommendation into an authoritative source of interpretation. That status seems to fall short of positive law, but general comments nonetheless play a substantive legal role in the elaboration of standards and possible future custom within the complex matrix of international law. Clarity in relation to the legal status of general comments may, somewhat ironically, be aided by the development of a general comment on this question.

C *Function in Practice*

The third question is the function or role of general comments: how are they used and what do they do? Again, the function of general comments is flexible. Steiner notes: ‘The accumulated general comments range from spelling out the internal procedures of the Committee ... to making general interpretations of the substantive provisions’.⁵⁴ The function of the general comment has also developed significantly over time.⁵⁵ While this section is chiefly concerned with international law, it is also appropriate to briefly consider how general comments have been used in domestic law.

In 1981, the HRC articulated⁵⁶ the purpose of its general comments as facilitating dissemination of the insights it had garnered over time from periodic reports:

The purpose of these general comments is to make this experience available for the benefit of all States parties in order to promote their further implementation of the *Covenant*; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights.⁵⁷

General comments, then, initially functioned as exhortations aimed at information sharing and encouraging voluntary promotion and compliance.

Keller and Grover, having reviewed the HRC’s general comments spanning 30 years, conclude that general comments now serve three functions: legal

⁵² Buergenthal, above n 27, 386.

⁵³ See Alston, above n 23, 764.

⁵⁴ Henry J Steiner, ‘Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?’ in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 15, 22.

⁵⁵ Otto, above n 33, 10.

⁵⁶ In terms very similar to the Committee on Economic, Social and Cultural Rights eight years later: Committee on Economic, Social and Cultural Rights, *Report on the Third Session*, UN ESCOR, Supp No 4, UN Doc E/1989/22 and E/C.12/1989/5 (February 1989) annex III (‘General Comments’) 87.

⁵⁷ *Report of the Human Rights Committee*, UN GAOR, 36th sess, Supp No 40, UN Doc A/36/40 (29 September 1981) annex VII (‘General Comments under Article 40, Paragraph 4, of the Covenant’) 107.

analysis; policy recommendation; and practice direction.⁵⁸ This ascription of multi-layered functionality is apt, as general comments tend to range from describing what the law *is* to articulating what the law *should be*: from business-as-usual to best practice.

The norm-building function of general comments is heightened when general comments go beyond the express terms of the treaty into what Abashidze calls ‘human rights gray areas’.⁵⁹ For example, *General Comment 5* of the Committee on Economic, Social and Cultural Rights (‘CESCR’) deals with persons with a disability,⁶⁰ although the *ICESCR* does not mention such persons.⁶¹ Other general comments have specified further freestanding rights to housing⁶² and water⁶³ and have elaborated non-derogable rights beyond the express terms of art 4(2) of the *ICCPR*.⁶⁴ Blake argues that treaty committees are more capable than states parties of elaborating ‘progressive and often politically unpopular interpretations’.⁶⁵ This may be regarded as a useful function in relation to the rights of children and other vulnerable persons, though such normative creativity has not been without its critics.⁶⁶

General comments are ‘frequently invoked before tribunals, particularly by litigants seeking a progressive interpretation of the law’.⁶⁷ Internationally, they have been relied on to establish propositions of law by the Grand Chamber of the European Court of Human Rights,⁶⁸ the Inter-American Court of Human Rights⁶⁹ and the African Commission on Human and Peoples’ Rights,⁷⁰ as well as by UN treaty bodies⁷¹ and international criminal tribunals.⁷² These various bodies have tended to treat the general comments as authoritative.

⁵⁸ Keller and Grover, above n 32, 124–6.

⁵⁹ Aslan Abashidze, ‘The Complementary Role of General Comments in Enhancing the Implementation of Treaty Bodies’ Recommendations and Views (The Example of CESCR)’ in M Cherif Bassiouni and William A Schabas (eds), *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 137, 147.

⁶⁰ *Compilation of General Comments*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) 17–27.

⁶¹ Abashidze, above n 59, 146.

⁶² Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UN ESCOR, Supp No 3, UN Doc E/1992/23 and E/C.12/1991/4 (1992) annex III (‘*General Comment No 4 (1991): The Right to Adequate Housing (Art 11(1) of the Covenant*’).

⁶³ Committee on Economic, Social and Cultural Rights, *General Comment No 15 (2002): The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003).

⁶⁴ Human Rights Committee, *General Comment No 29: States of Emergency (Article 4)*, 1950th mtg, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).

⁶⁵ Blake, above n 27, 13.

⁶⁶ See, eg, Stephen Tully, ‘A Human Right to Access Water? A Critique of *General Comment No 15*’ (2005) 23 *Netherlands Quarterly of Human Rights* 35.

⁶⁷ Blake, above n 27, 16.

⁶⁸ See, eg, *Hirst v United Kingdom [No 2]* (2005) IX Eur Court HR 187, 198 [27].

⁶⁹ See, eg, *Bámaca Velásquez v Guatemala* [2000] Inter-Am Court HR (ser C) No 70, [172].

⁷⁰ See, eg, African Commission on Human and Peoples’ Rights, 218/98: *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria*, (7 May 2001) [24].

⁷¹ See, eg, Committee against Torture, *Decision: Communication No 282/2005*, 37th sess, UN Doc CAT/C/37/D/282/2005 (7 November 2006) [4.2], [7.2], [7.5] (‘*SPA v Canada*’).

⁷² See, eg, International Criminal Tribunal for Rwanda, *Prosecutor v Akayesu*, Trial Chamber I, Judgment (1998) [742].

State practice in relation to the appropriate usage of general comments is growing,⁷³ but is by no means sufficiently clear or consistent to constitute subsequent practice in application or agreement to the extent that they can be used to interpret a treaty pursuant to art 31(3) of the *Vienna Convention on the Law of Treaties*.⁷⁴ For example, some domestic courts consider general comments authoritative,⁷⁵ while others vehemently reject any attempt to confer authoritative status⁷⁶ — and those views have not been consistently adhered to even within a single jurisdiction.⁷⁷ Nevertheless, general comments are now cited in arguments and judgments in domestic cases around the world.⁷⁸

In practice, general comments have taken the form of a powerful and indispensable juridical tool that assists in reinforcing standards as well as in pushing at the boundaries of the law. The role that general comments now play makes the CRC's *General Comment 16* particularly significant.

III THE INNOVATIVE PROCESS OF DEVELOPING *GENERAL COMMENT 16*

The process of developing general comments can have a critical impact on their capacity to promote coherent and consensus-based interpretations of international human rights law.⁷⁹ This section examines the drafting process undertaken by the CRC in relation to *General Comment 16*. The analysis illuminates some emerging trends in the interpretative practice of treaty bodies.

⁷² See, eg, *Prosecutor v Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT/95-17/1-T, 10 December 1998) 55 n 165, 58–9 n 170, 59 n 172, 63 n 180, 64 n 182.

⁷³ For an excellent resource on domestic and international practice, see *ILA Berlin Conference Paper*, above n 37.

⁷⁴ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁷⁵ See, eg, *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* [2002] 6 Butterworths Constitutional Law Reports 625, 629 [17] (wherein the High Court of South Africa stated: 'General Comments have authoritative status under international law'.)

⁷⁶ See, eg, Tokyo District Court, 1784 Hanrei Jiho 67, 74 (15 March 2001) (summarised in *ILA Berlin Conference Paper*, above n 37, at [87]): 'the *General Comment* neither represents authoritative interpretation of the ICCPR nor binds the interpretation of the treaty in Japan'. See also *Jones v Ministry of Interior Al-Mamlaka Al Arabiya AS Saudiya* [2007] 1 AC 270, [23] (Lord Bingham):

the Committee is not an exclusively legal and not an adjudicative body; its power ... is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of ... the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight.

⁷⁷ Compare, eg, the treatment of general comments as sources contributing to the identification of legal principles in *A and others v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221, [34] and *R (Al-Skeini and others) v Secretary of State for Defence* [2006] 3 WLR 508, [101] with the statement in *Jones v Ministry of Interior Al-Mamlaka Al Arabiya AS Saudiya* [2007] 1 AC 270, [23]. Compare also the treatment of general comments as 'supplementary means of interpretation' in Osaka High Court, 1513 Hanrei Jiho 71, 87 (28 October 1994) (reported at (1995) 38 *Japanese Annual of International Law* 118) with the statement in Tokyo District Court, 1784 Hanrei Jiho 67, 74 (15 March 2001).

⁷⁸ See Blake, above n 27, 20.

⁷⁹ See generally Keller and Grover, above n 32.

A *The Drafting Process*

The CRC undertook an extensive process of consultation in relation to the development of *General Comment 16*.⁸⁰ The process involved three broad stages. First, the CRC prepared an annotated outline of the proposed text of *General Comment 16*.⁸¹ Second, over a six-week period from March to May 2012, they called for submissions on the annotated outline from organisations and individuals. The CRC published online all submissions that were not submitted confidentially. Twenty-eight submissions were published from a range of specialised agencies, Non-governmental Organisations ('NGOs'), universities and individuals.⁸²

Those submissions were then considered by the CRC and were said to have 'informed' the production of the draft General Comment in July 2012,⁸³ although no specifics were given as to how the submissions were taken into account. Finally, submissions were invited on the *Draft General Comment* and published online. Nineteen submissions were published;⁸⁴ interestingly, these were largely from organisations that did not make submissions regarding the annotated guideline. In addition to the online public consultation process, the development of *General Comment 16* was informed by regional and international consultations involving different stakeholders, conducted by the CRC in 2011 and 2012.⁸⁵ *General Comment 16* in its final form was adopted by the CRC in February 2013.

While the CRC's submission and consultation process engaged non-state actors, such as UN agencies, NGOs, business associations and trade unions, less clear is the extent to which states directly participated in the development of *General Comment 16*. The experience of states with respect to child rights is to some extent implicit in *General Comment 16*, in so much as the document is a reflection of the experience of the CRC in reviewing states parties' periodic

⁸⁰ See generally Office of the United Nations Commissioner for Human Rights, *Call for Submission on Draft One of the Committee on the Rights of the Child's General Comment on Child Rights and Business Sector* <http://www2.ohchr.org/english/bodies/crc/callsubmissionsCRC_BusinessSector.htm>.

⁸¹ *Ibid.*

⁸² See Office of the United Nations High Commissioner for Human Rights, *Submissions Received* <http://www2.ohchr.org/english/bodies/crc/SubmissionsCRC_BusinessSector.htm>.

⁸³ Committee on the Rights of the Child, 'General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector: First Draft' (Draft General Comment, July 2012) [5] <http://www2.ohchr.org/english/bodies/crc/callsubmissionsCRC_BusinessSector.htm> ('*Draft General Comment*').

⁸⁴ See Office of the United Nations High Commissioner for Human Rights, *CRC General Comment on Child Rights and the Business Sector — Publication of Submissions on Draft One of the General Comment* <<http://www2.ohchr.org/english/bodies/crc/SubmissionsGCBusinessSector.htm>>.

⁸⁵ *General Comment 16*, UN Doc CRC/C/GC/16, [6]. A report of at least one of these consultations is available online: International Commission of Jurists and Office of the High Commissioner for Human Rights, 'Expert Meeting on Child Rights and the Business Sector: Exploring the Content of the General Comment by the Committee on the Rights of the Child' (Report, 16 September 2011) <http://www.unicef.org/csr/css/REPORT_CRC_Expert_Meeting_Final.pdf> ('*International Commission of Jurists Report*'). The consultation involved expert members of the CRC, the Committee on Economic, Social and Cultural Rights, NGO representatives, representatives from the International Labour Organization, UNICEF, the Office of the High Commissioner for Human Rights, national human rights institutions and trade unions: at I.

reports.⁸⁶ Further, a number of states were involved in the CRC's 2002 day of general discussion on the private sector as service providers,⁸⁷ an important precursor to *General Comment 16*.⁸⁸ However, no states made formal (public) submissions on the various drafts circulated by the CRC, though it was presumably open to them to do so.

There is nothing new about broad consultation with stakeholders in the formulation of general comments.⁸⁹ Indeed, the Office of the United Nations High Commissioner for Human Rights has noted that, by 2010, the process for developing general comments involved '[w]ide consultation with specialized agencies, NGOs, academics and other human rights treaty bodies', the discussion of drafts with interested parties and the invitation of expert advice and informal background papers.⁹⁰ The process of seeking input on draft documents is arguably now representative of the practice of some UN organs.⁹¹ What is novel about the process used by the CRC in respect of *General Comment 16* is the relatively transparent submissions process, which included publishing submissions online.

B Trends in Interpretative Practice

The practice of broad consultation on the content of general comments is suggestive of a number of significant features in the interpretative practice of treaty bodies. The first feature to note is that the consultative process reflects the increasingly normative focus of general comments alluded to in the above discussion. By deliberately engaging with the views of human rights NGOs in developing a draft, a treaty committee opens itself to more overt promotion of the substantive agenda of human rights, rather than simple explication of obligations and procedure. While this may enable creative, responsive and progressive explication of international law, it may conversely de-legitimise the interpretative authority of general comments if states view the end product to be the result of stakeholder lobbying, rather than a reflection of the treaty body's independent expertise. This could be a particular risk if treaty bodies stray too far

⁸⁶ *General Comment 16*, UN Doc CRC/C/GC/16, [6].

⁸⁷ The states involved were Bangladesh, Canada, Chile, Costa Rica, Côte d'Ivoire, Czech Republic, Egypt, Estonia, Germany, Ghana, Jordan, Libyan Arab Jamahiriya, Luxembourg, Madagascar, Nigeria, Pakistan, Slovenia, Sri Lanka, Switzerland, Syrian Arab Republic, Turkey and United Arab Emirates: Committee on the Rights of the Child, *Report on the Thirty-First Session*, UN Doc CRC/C/121 (11 December 2002) [638].

⁸⁸ See *General Comment 16*, UN Doc CRC/C/GC/16, [6].

⁸⁹ See Blake, above n 27, 14–16 (on the role of Non-governmental Organisation ('NGOs') in international normative development).

⁹⁰ *Report on the Working Methods of the Human Rights Treaty Bodies relating to the State Party Reporting Process*, UN Doc HRI/ICM/2010/2 (10 May 2010) [122].

⁹¹ For example, the Human Rights Council Advisory Committee, charged with drafting a Declaration on Human Rights Education and Training, published a draft of the declaration and invited comments from interested persons: see Human Rights Council Advisory Committee, *Open-Ended Working Group on the Draft United Nations Declaration on Human Rights Education and Training* (2013) United Nations Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/HRBodies/HRC/Education/Pages/OEWGEducationSession1.aspx>>. See also *United Nations Declaration on Human Rights Education and Training*, GA Res 66/137, UN GAOR, 66th sess, 89th plen mtg, Agenda Item 64, Supp No 49, UN Doc A/RES/66/137 (16 February 2012).

towards pronouncements based on what the law should be, rather than what it actually is.

Secondly, consultation provides unprecedented public access to the drafting process. The use of technology to invite submissions via email and publishing those submissions online adds immediacy and facilitates wide dissemination. By drawing on a broad range of expertise from both NGOs and individuals, the CRC acknowledged the growing reach of human rights inquiry around the world. That said, the realisation of this benefit may depend on how the submissions are used. Public consultation can be risky if the final document does not meaningfully reflect the submissions received. This may offend or alienate stakeholders who feel that their views are being given mere lip service. In this instance, there is evidence that public submissions did influence the final version of *General Comment 16*. This is reflected, for example, in the language adopted to describe state duties to respond to alleged corporate violations of children's rights⁹² and in the elaboration of issues particular to the informal business sector and children's rights,⁹³ as were recommended in submissions.

A third and related feature is that consultation with civil society balances the traditional state-centric approach to the interpretation of international law.⁹⁴ This prompts the challenging question of whether consultation will necessarily create a more representative or legitimate product.⁹⁵ If this is the aim, treaty committees must depend on organisations and individuals to give an accurate picture of human rights situations on the ground and to competently represent the interests of those affected. There is no guarantee of this: it is notable, for example, that most of the organisations that made submissions on *General Comment 16* are of

⁹² Recommendations by the Castan Centre for Human Rights Law that the language of the duty to protect as set out in the *Draft General Comment* be strengthened were reflected in the final version of *General Comment 16*: see Castan Centre for Human Rights Law, Faculty of Law, Monash University, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector: First Draft*, 24 August 2012, 3–4 <<http://www2.ohchr.org/english/bodies/crc/docs/SubmissionsGC/CastanCentre.pdf>>; *General Comment 16*, UN Doc CRC/C/GC/16, [28]. Cf *Draft General Comment*, above n 83, [12]–[14].

⁹³ The International Organisation of Employers recommended greater elaboration on issues that pertain to the informal sector: International Organisation of Employers, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector: First Draft*, 8 August 2012, 1 <<http://www2.ohchr.org/english/bodies/crc/docs/SubmissionsGC/InternationalOrganisationEmployers.pdf>>. This was reflected in the expansion from one paragraph to a dedicated part on the subject in the final General Comment: see *General Comment 16*, UN Doc CRC/C/GC/16, [35]–[37]. Cf *Draft General Comment*, above n 83, [10].

⁹⁴ It should be noted however, that while members of the CRC do not represent the interests of particular states, they are nominated by states: *Convention* art 43(3).

⁹⁵ See Blake, above n 27, 16; Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005) 33–4.

Western origin (though their presence and expertise may extend beyond the West).⁹⁶

On balance, however, increased public consultation in the development and interpretation of human rights norms is a positive step. Inviting and engaging with the views of diverse organisations and individuals during the drafting process is likely to give treaty committees a clearer view of relevant concerns and contexts.⁹⁷ This in turn enhances a committee's capacity to promote coherent and consensus-based understandings of international human rights law.⁹⁸

IV GENERAL COMMENT 16 AND THE BROADER BUSINESS AND HUMAN RIGHTS DISCOURSE

The consultative process embraced by the CRC in its development of *General Comment 16* is not only indicative of an emerging trend among human rights treaty bodies towards transparency and wider stakeholder engagement. It is also reflective of — and consistent with — the move toward highly participatory and stakeholder engaged processes within the UN when it comes to the issue of business and human rights more broadly.⁹⁹

This Part situates *General Comment 16* within recent international discourse on business and human rights. It begins by outlining the work of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises ('SRS'), emphasising the significance of participatory processes to the uptake of his final policy framework by key stakeholders. It then evaluates the content of *General Comment 16* in light of the SRS's final guiding documents and the international regulatory landscape that now prevails.

⁹⁶ Explanatory footnote that out of 19 submissions, 17 were of European/American origin: see Office of the United Nations High Commissioner for Human Rights, *CRC General Comment on Child Rights and the Business Sector — Publication of Submissions on Draft One of the General Comment* (2011) <<http://www2.ohchr.org/english/bodies/crc/SubmissionsGCBusinessSector.htm>>.

⁹⁷ Abstraction is a criticism that has been levelled at general comments: Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905, 927 n 99.

⁹⁸ The same can be said in respect of the new practice of issuing joint general comments by two or more Committees and other cross-pollinating processes: see, eg, Office of the United Nations High Commissioner for Human Rights, *Joint CEDAW-CRC General Recommendation/Comment on Harmful Practices: Call for Submissions* <<http://www2.ohchr.org/english/bodies/cedaw/JointCEDAW-CRC-GeneralRecommendation.htm>>. See also Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Martinus Nijhoff, 2001) 96; *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, UN Doc HRI/MC/2006/2 (22 March 2006); Abashidze, above n 59, 147–8.

⁹⁹ It is telling that in one of the early consultations held on the development of *General Comment 16*, in the context of a discussion of the recently concluded work of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises ('SRS'), it was emphasised that the process leading to the General Comment 'should be inclusive and open to the participation of all stakeholders': *International Commission of Jurists Report*, above n 85, 3. This further suggests the perception that a stakeholder-inclusive approach is a legacy of the SRS.

A *The Special Representative on Human Rights and Business and a Participatory Work Model*

General Comment 16 comes in the wake of sustained and growing international attention to the subject of business and human rights in recent years. As described by the SRSR:

The issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity. These developments heightened social awareness of businesses' impact on human rights and also attracted the attention of the United Nations.¹⁰⁰

Growing interest in the role of the business sector in protecting, promoting and complying with human rights laws came about because of the problem of negative human rights impacts caused by businesses operating in an increasingly globalised economy and facilitated by inadequate laws and/or insufficient law enforcement at both the local and international levels.¹⁰¹ The SRSR described this problem as a governance gap arising from a prevailing misalignment between the capacity of transnational business to contribute to serious human rights abuses and the governance capacity of governments to respond to those harms.¹⁰² The result is a permissive environment for corporate human rights abuses.

In response to a growing awareness — and acceptance — of this dynamic,¹⁰³ there have been numerous international efforts to devise soft and hard law mechanisms to redress the imbalance. Among a proliferation of mostly voluntary mechanisms developed in the 1990s and 2000s by various international

¹⁰⁰ *Report of the Special Representative*, UN Doc A/HRC/17/31, [1]. For a brief chronology of efforts among international organisations to address the issue of human rights performance by transnational business enterprises, see Karin Buhmann, 'The Development of the "UN Framework": A Pragmatic Process towards a Pragmatic Output' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2011) 85, 86–90.

¹⁰¹ On the dynamics of what is referred to as the governance gap: see, eg, Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443, 461–5; Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 171, 176–81.

¹⁰² Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie — *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/35 (19 February 2007) [3], [82]; *Framework*, UN Doc A/HRC/8/5, [3], [11]–[16].

¹⁰³ Evidencing the general acceptance of a governance gap characterised by a permissive environment for business related human rights abuses is the SRSR, who takes the dynamics of this gap as his theoretical starting point: see *Framework*, UN Doc A/HRC/8/5, [3]. The *Framework* has been endorsed by the Human Rights Council: *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 8/7, UN Doc A/HRC/RES/8/7 (18 June 2008) para 1 ('HRC Res 8/7').

agencies¹⁰⁴ were efforts within the UN to devise a set of human rights norms that would apply to business. The *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ('Draft Norms')¹⁰⁵ that resulted from this UN effort were intended to direct progress towards treaty-based legally binding human rights obligations directed at corporations via the domestic laws of states, so as to address the existing lacunae in law.¹⁰⁶ However, the *Draft Norms* became mired in a political stalemate, with deep polarisation among stakeholder groups emerging as to the validity of pursuing a binding normative instrument directed at business.¹⁰⁷

It has been suggested that a cause of the divisions created by the *Draft Norms* was the lack of sufficient engagement with stakeholders and, in particular, with the prospective duty-holders — businesses — in the process of the *Draft Norms*' development.¹⁰⁸ Whether this played a significant role in the *Draft Norms*' failure to gain traction,¹⁰⁹ relative to the more intractable problem that they were likely to demand deep changes to business practice and create clear legal obligations for businesses,¹¹⁰ is not readily apparent. In any event, what is clear is that this belief — that a lack of sufficient stakeholder engagement was a fault of the *Draft Norms*' process — has informed the politics of UN efforts on business and human rights going forward.

¹⁰⁴ For a comprehensive outline of initiatives and standards pertaining to business and human rights existing at the commencement of the SRSG's mandate, see Commission on Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with Regard to Human Rights*, UN ESCOR, 61st sess, Agenda Item 16, UN Doc E/CN.4/2005/91 (15 February 2005); Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Sectoral Consultation Entitled 'Human Rights and the Extractive Industry', 10–11 November 2005*, UN ESCOR, 62nd sess, Agenda Item 17, UN Doc E/CN.4/2006/92 (19 December 2005).

¹⁰⁵ Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003) ('Draft Norms'). While the *Draft Norms* were unanimously adopted by the Sub-Commission on the Promotion and Protection of Human Rights, they were not adopted by the Commission on Human Rights ('Commission'): Commission on Human Rights, *Report on the Sixtieth Session*, UN ESCOR, Supp No 3, UN Doc E/2004/23 (23 April 2004) 333.

¹⁰⁶ For an outline of the *Draft Norms*, their relationship to the work of the SRSG and the political debates that they have engendered, see David Kinley, Justine Nolan and Natalie Zerial, 'The Politics of Corporate Social Responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (2007) 25 *Company and Securities Law Journal* 30.

¹⁰⁷ The SRSG described the *Draft Norms* as having 'triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments': *Report of the Special Representative*, UN Doc A/HRC/17/31, [3].

¹⁰⁸ Buhmann, above n 100, 101.

¹⁰⁹ As noted above, the Commission decided not to endorse the *Draft Norms*: Commission on Human Rights, *Report on the Sixtieth Session*, UN ESCOR, Supp No 3, UN Doc E/2004/23 (23 April 2004) 333.

¹¹⁰ For a countervailing argument that the failure of the *Draft Norms* and subsequent success of the SRSG process can be understood as rooted primarily in the SRSG distancing his project from more radical and substantive business accountability, see Christine Parker and John Howe, 'Ruggie's Diplomatic Project and Its Missing Regulatory Infrastructure' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 273, 279–83.

It was in the wake of this controversy regarding the *Draft Norms* that the Commission on Human Rights ('Commission')¹¹¹ appointed Professor John Ruggie as the SRSG.¹¹² The SRSG's mandate and mode of operation were influenced by the stalemate created by the *Draft Norms* and in particular by the belief that, in order to transcend the stalemate, the SRSG's work would need to be the product of a highly participatory process.¹¹³

The SRSG's mandate included the assessment of developments to date on business and human rights and the making of proposals for the best ways in which the international community should go forward into the future.¹¹⁴ The Commission also specified that Professor Ruggie was 'to consult on an ongoing basis with all stakeholders'.¹¹⁵ Consultation was to include states, international and regional organisations, transnational corporations and other business enterprises and civil society.¹¹⁶ In terms of adopting a participatory process, the SRSG appears to have been successful. For example, Buhmann reports that by the end of only his first three-year term, the SRSG had already convened over 16 multi-stakeholder consultations, as well as sector- and topic-specific consultations, commissioned over two dozen research projects and disseminated findings and conclusions in ways that allowed stakeholders to make comments on progressive drafts.¹¹⁷ Much of this was enabled via a dedicated portal to the SRSG's work on the website of the Business & Human Rights Resource Centre.¹¹⁸

By the completion of his mandate in 2011, the SRSG had developed two principal documents to guide future activity in respect of business and human rights. The first was the *Framework*, which constituted the overarching policy guide for future thinking and action on business and human rights at an international level. The *Framework* is comprised of three pillars, each of which

¹¹¹ The Commission was replaced by the Human Rights Council in 2006.

¹¹² The SRSG's original mandate is set out in: *Human Rights Resolution 2005/69: Human Rights and Transnational Corporations and Other Business Enterprises*, CHR Res 2005/69, 61st sess, 59th mtg, UN Doc E/CN.4/RES/2005/69 (20 April 2005) para 7 ('*CHR Res 2005/69*'). The Human Rights Council extended the SRSG's mandate for a further three years in 2008: *HRC Res 8/7*, UN Doc A/HRC/RES/8/7, para 4.

¹¹³ See Parker and Howe, above n 110, 276–7 (describing the SRSG's approach as a diplomatic response to the debates and divisions caused by the *Draft Norms*).

¹¹⁴ *CHR Res 2005/69*, UN Doc E/CN.4/RES/2005/69, para 7; *HRC Res 8/7*, UN Doc A/HRC/RES/8/7, para 4.

¹¹⁵ *CHR Res 2005/69*, UN Doc E/CN.4/RES/2005/69, para 3. See also *HRC Res 8/7*, UN Doc A/HRC/RES/8/7, para 4(g).

¹¹⁶ *CHR Res 2005/69*, UN Doc E/CN.4/RES/2005/69, para 3. See also *HRC Res 8/7*, UN Doc A/HRC/RES/8/7, para 4(g).

¹¹⁷ Buhmann, above n 100, 102. See also *Report of the Special Representative*, UN Doc A/HRC/17/31, [8] (where the SRSG notes that by January 2011 he had held 47 international consultations on all continents and had conducted site visits in more than 20 countries).

¹¹⁸ Business & Human Rights Resource Centre, *UN Secretary-General's Special Representative on Business & Human Rights* (2013) <<http://business-humanrights.org/SpecialRepPortal/Home>>.

is to be pursued by states and businesses simultaneously. The three pillars are:

- (i) the state duty to protect against human rights abuses by third parties;
- (ii) the corporate responsibility to respect human rights through due diligence; and
- (iii) the right of victims of corporate-related human rights abuses to access effective remedies, through either judicial or non-judicial mechanisms.¹¹⁹

The *Framework* was supplemented by the SRSG's *Guiding Principles*, which provide guidance as to measures that enable the *Framework* to be operationalised by states and businesses.¹²⁰

In contrast to the *Draft Norms*, both the *Framework* and the *Guiding Principles* have been endorsed by the Human Rights Council¹²¹ and set the agenda for UN activity regarding business and human rights into the foreseeable future.¹²² Commentators have argued that there are a number of indicators that the SRSG's work has been a success. These include the endorsement of the Human Rights Council,¹²³ the engagement of states and companies in a fruitful dialogue¹²⁴ and evidence of corporations establishing policies aimed at ensuring corporate due diligence.¹²⁵ In other words, there appears to have been significant adoption of the *Framework* by key stakeholders. Buhmann attributes much of

¹¹⁹ *Report of the Special Representative*, UN Doc A/HRC/17/31, [6].

¹²⁰ *Ibid.*

¹²¹ *HRC Res 8/7*, UN Doc A/HRC/RES/8/7; Human Rights Council, *Resolution 17/4: Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN Doc A/HRC/RES/17/4 (6 July 2011) ('*HRC Res 17/4*').

¹²² As a follow up to the SRSG's mandate, the Human Rights Council has established a Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises ('Working Group'), whose work is directed towards the implementation of the *Guiding Principles*: see *HRC Res 17/4*, UN Doc A/HRC/RES/17/4, para 6. According to its mandate, the Working Group will undertake an inclusive method of work: see, eg, at para 6(h). This includes guiding the work of a Forum on Business and Human Rights, an annual meeting of stakeholders established so as to discuss trends and challenges in the implementation of the *Guiding Principles* and to promote dialogue and cooperation on issues linked to business and human rights: at paras 6(i), 12; Office of the High Commissioner for Human Rights, *United Nations Forum on Business and Human Rights The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* <www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx>.

¹²³ See, eg, Radu Mares, 'Business and Human Rights after Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 1, 1.

¹²⁴ Penelope Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights' (2012) 3 *Journal of Human Rights and the Environment* 5, 9. See also *Report of the Special Representative*, UN Doc A/HRC/17/31, [7] (on international groups and organisations that have embraced the SRSG's *Framework*).

¹²⁵ On corporate uptake of the *Guiding Principles*, see Human Rights Council, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 20th sess, Agenda Item 3, UN Doc A/HRC/20/29 (10 April 2012) [33]–[38]. However, caution should be exercised in equating the uptake of corporate due diligence policies on the books to improved business performance on human rights. On the risks of de-coupling and the environmental requirements necessary for corporate due diligence processes to have concrete impacts on human rights performance, see Parker and Howe, above n 110, 292–301.

this success to the perceived legitimacy of these documents in terms of their so-called ‘throughput legitimacy’.¹²⁶ Throughput legitimacy refers to processes that allow stakeholders to provide input into the final result through transparent processes that involve wide representation and options for deliberation.¹²⁷ Such throughput legitimacy is believed to be linked to the ‘compliance pull’, that is, meaningful stakeholder adoption and hence effectiveness of the instruments.¹²⁸ Given that the *Guiding Principles* and *Framework* are non-binding policy directives,¹²⁹ compliance pull is extremely important.¹³⁰

However, there have also been criticisms of the SRSG’s *Framework* and *Guiding Principles*. These primarily revolve around different views as to the role law should play with respect to the current problem of business involvement in human rights abuses¹³¹ and, in particular, the failure of the SRSG to incorporate any explicit role for imposing binding international human rights obligations on business actors.¹³² The final SRSG documents have also been criticised for falling short of fully acknowledging the degree to which hard law has extended obligations with respect to businesses.¹³³ It is difficult to rule out that adoption of the *Framework* and *Guiding Principles* by businesses, states and the UN may be more of a reflection of the legal conservatism of those documents rather than a result of the participatory process that characterised their development.

The next section evaluates *General Comment 16* in light of the SRSG’s *Framework* and *Guiding Principles*, as well as the Children’s Rights and Business Principles. The latter is a set of principles devised by UNICEF, the UN Global Compact and Save the Children in the wake of the SRSG’s innovations and constitutes an important precursor and complement to *General Comment 16*.

¹²⁶ Buhmann, above n 100, 101. See also *Report of the Special Representative*, UN Doc A/HRC/17/31, [8] (attributing positive reception of the *Framework* to the inclusive character of stakeholder consultation). As noted in n 110, the contrary view is that it is the distancing of the SRSG from any real corporate accountability processes that has enabled the diplomatic success of the *Framework* and *Guiding Principles*: Parker and Howe, above n 110, 279–83.

¹²⁷ Buhmann, above n 100, 90.

¹²⁸ See *ibid* 90–6.

¹²⁹ The *Report of the Special Representative*, UN Doc A/HRC/17/31, [14] state:

The *Guiding Principles*’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.

¹³⁰ See Buhmann, above n 100, 91–2 (on the particular importance of compliance pull in respect of non-binding instruments).

¹³¹ Mares, above n 123, 35.

¹³² Simons, above n 124, 9–11. See also Parker and Howe, above n 110, 273–301.

¹³³ See, eg, Castan Centre for Human Rights Law, Faculty of Law, Monash University, Submission to the Secretary-General’s Special Representative on Business and Human Rights, *Inquiry on Proposed Guiding Principles for Business and Human Rights*, January 2011 <<http://www.law.monash.edu.au/castancentre/publications/cc-submission-business-human-rights-principles.pdf>>; John H Knox, ‘The Ruggie Rules: Applying Human Rights Law to Corporations’ in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2012) 51, 79–82.

B *Evaluating* General Comment 16

The SRSG, Professor John Ruggie, described the completion of his mandate as ‘the end of the beginning’.¹³⁴ In presenting his *Guiding Principles* to the Human Rights Council, he stated:

Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the 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.¹³⁵

The SRSG clearly recognised that his *Framework* and *Guiding Principles* provided guidance but did not constitute the endgame with respect to business and human rights. This is further clarified by his recognition that the *Guiding Principles* should not be treated as a ‘tool kit’ or ‘one size fits all’, but rather as a policy document that needs to be refined and adapted to suit the wide variety of businesses in the global economy and the varied contexts in which they operate.¹³⁶

The development by the CRC of *General Comment 16* is precisely the kind of elaboration and cumulative progression on business and human rights in specific contexts that the SRSG envisaged and that is crucial to the progressive realisation of children’s rights in the business sector. There is a growing tendency within the work of treaty bodies to directly address the obligations of states to protect against human rights abuses arising from corporate activities and to consider specifically the roles played by non-state actors with respect to human rights. This trend is evident in general comments, in concluding observations following periodic States Party reports and in decisions under individual communications, especially in the last 5 to 10 years.¹³⁷ However, *General Comment 16* is the first instance of a treaty body reflecting, in a sustained way, upon the specific issues that arise with respect to business and a particular category of rights or rights-holder, based on the CRC’s special expertise.

¹³⁴ *Report of the Special Representative*, UN Doc A/HRC/17/31, [13], cited in Mares, above n 123, 1.

¹³⁵ *Report of the Special Representative*, UN Doc A/HRC/17/31, [13].

¹³⁶ *Ibid* [15].

¹³⁷ On these trends: see, eg, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of March 2006 Entitled ‘Human Rights Council’: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises — Addendum — State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, 4th sess, Agenda Item 2, UN Doc A/HRC/4/35/Add.1 (13 February 2007). See also Gamze Erdem Türkelli, Wouter Vandenhole and Arne Vandenbogaerde, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector*, 23 April 2012, 4 nn 7, 8 <<http://www2.ohchr.org/english/bodies/crc/SubmissionsCRCBusinessSector.htm>>.

General Comment 16 is 22 pages long and divided into seven sections, namely:

- I Introduction and objectives;
- II Scope and application;
- III General principles of the *Convention* as they relate to business activities;
- IV Nature and scope of State obligations;
- V State obligations in specific contexts;
- VI Framework for implementation; and
- VII Dissemination.

General Comment 16 is a combination of legal obligations and policy recommendations. The first five sections essentially lay the legal foundation for the policy framework set out in s VI, although directions as to specific measures that would enable the realisation of state obligations tend to be found throughout the whole of *General Comment 16*.¹³⁸ Section III, on the General Principles of the *Convention* that relate to business activities, sets out the four notions fundamental to the realisation of children's rights through legislation, policy and practice — namely: the right to non-discrimination; the best interests of the child; the right to life, survival and development; and the right of the child to be heard — with brief commentary as to how each of these primarily interact with the business sector. Section IV likewise sets out the legal obligations of states to respect, protect, fulfil and rectify violations of children's rights within the business sector. Section V sets out the legal obligations of states and provides policy directives as they relate to five specific contexts that raise special concerns — namely: the provision of services for the enjoyment of children's rights (that is, outsourcing foundational state services to the private sector); the informal economy; children's rights in global business contexts; the obligations of states when acting within international organisations; and managing businesses operating in places in a state of emergency or conflict.

Against this elaboration of the legal terrain, s VI of *General Comment 16* identifies in more detail the specific measures that states should take to protect the rights of children in relation to business activities. Table 1 below highlights elements of that framework for implementing children's rights in the business sector.

¹³⁸ It should be noted that the final drafting of *General Comment 16* is a substantial improvement on previous drafts in so much as the separation of legal obligations (contained in ss I-V of *General Comment 16*) and policy framework (contained in s VI of *General Comment 16*) is now clearer than it was in earlier drafts.

Table One: Extracts of relevant provisions of the framework (Section VI of *General Comment 16*)

State Measures	Practical Implementation
Legislation and Regulation	<p>States must ensure that the principle of the best interests of the child is central to the development of legislation that shapes business activities and operations including laws that cover employment, taxation, corruption, privatization, transport and other general economic, trade or financial issues.¹³⁹</p> <p>States should provide a ‘clear and predictable legal and regulatory environment which enable business enterprises to respect children’s rights’.¹⁴⁰</p> <p>‘States should create employment conditions within business enterprises which assist working parents and caregivers’.¹⁴¹</p> <p>‘States should develop and implement effective laws and regulations to obtain and manage revenue flows from all sources, ensuring transparency, accountability and equity’.¹⁴²</p> <p>States should regulate particular issues as they pertain to the pharmaceutical, mass media, marketing and digital media industries.¹⁴³</p> <p>‘States must set a minimum age for employment; appropriately regulate working hours and conditions; and establish penalties’.¹⁴⁴</p>
Enforcement Measures	<p>Lack of implementation and enforcement of laws regulating business activities is a critical problem for children. States should therefore strengthen the regulatory agencies responsible for the oversight of standards relevant to child rights such as health and safety, consumer, environmental and labour inspectorates so that they have sufficient powers and resources to monitor and investigate complaints and provide and enforce remedies for abuses of children’s rights.¹⁴⁵</p>

¹³⁹ *General Comment 16*, UN Doc CRC/C/GC/16, [15].

¹⁴⁰ *Ibid* [53].

¹⁴¹ *Ibid* [54].

¹⁴² *Ibid* [55].

¹⁴³ *Ibid* [57]–[60].

¹⁴⁴ *Ibid* [56].

¹⁴⁵ *Ibid* [61].

State Measures	Practical Implementation
Child Rights Due Diligence for Business	<p>‘To meet their obligations to adopt measures to ensure that business enterprises respect children’s rights, States should require businesses to undertake child rights due diligence. This will ensure that business enterprises identify, prevent and mitigate their impact on children’s rights’ throughout their operations, including those operations conducted by their subsidiaries and other business partners globally.¹⁴⁶</p> <p>Because there are higher risks that business enterprises may be involved in violations of child’s rights in certain circumstances, such as when operating in states experiencing conflict or emergencies, states should require stricter due diligence and monitoring processes in those circumstances.¹⁴⁷</p> <p>States should encourage effective business child rights due diligence by creating instruments to benchmark and recognise good performance by business with regard to children’s rights. They should lead by example requiring state-owned enterprises to undertake human rights due diligence and to publicly communicate their reports on their impact on children’s rights, including reporting to Parliament when appropriate.¹⁴⁸</p> <p>Child rights due diligence is particularly important in the context of extra-territorial harm and states should make it a requirement that business enterprises that receive public support and services, such as those provided by an export credit agency, carry out their own child rights due diligence, in order to demonstrate they have identified and are addressing any risks.¹⁴⁹</p>
Policy Measures	<p>‘States should encourage a business culture that understands and fully respects children’s rights’.¹⁵⁰</p> <p>‘States should include the issue of children’s rights and business in the overall context of the national policy framework for implementation’ of the <i>Convention</i>. Guidelines should explicitly set out government expectations for business with respect to children’s rights, in regard to both state business operations and trans-national business relationships.¹⁵¹</p> <p>Larger firms should be encouraged to use their influence over small and medium-sized enterprises to strengthen children’s rights throughout their value chains.¹⁵²</p>

¹⁴⁶ Ibid [62].

¹⁴⁷ Ibid.

¹⁴⁸ Ibid [64].

¹⁴⁹ Ibid [45(c)], [64].

¹⁵⁰ Ibid [73].

¹⁵¹ Ibid.

¹⁵² Ibid [74].

State Measures	Practical Implementation
Remedial Measures	<p>‘Children often find it difficult to access the justice system to seek effective remedies for abuse or violations of their rights when business enterprises are involved’.¹⁵³</p> <p>Difficulties include: they may lack legal standing; lack knowledge about their rights and the mechanisms available to them to seek redress; lack trust and confidence in the judicial process. Furthermore, the power imbalance between children and the business concerned, as well as the prohibitive costs of litigation against companies, constitute real obstacles to children seeking redress for violation of their rights.¹⁵⁴</p> <p>States should remove social, economic and juridical barriers so that children ‘have access to effective judicial mechanisms without discrimination’.¹⁵⁵</p> <p>States should contemplate the adoption of criminal legal liability — or other form of legal liability of equal deterrent effect — for legal entities, including business enterprises, in cases concerning serious violations of the rights of the child such as forced labour.¹⁵⁶</p> <p>States should provide medical and psychological assistance, legal support and measures of rehabilitation to children who have been victims of abuse and violence caused or contributed to by business actors.¹⁵⁷</p> <p>Children must have a voice and participate in the remedy process and their confidentiality and privacy must be respected.¹⁵⁸</p> <p>Proactive steps must be taken to make children aware of non-judicial, as well as judicial mechanisms available to them, for example, by publicising their existence through the school curriculum, youth centres or community-based programs, and translating relevant publicity materials into local languages.¹⁵⁹</p>

¹⁵³ Ibid [66].

¹⁵⁴ Ibid.

¹⁵⁵ Ibid [68].

¹⁵⁶ Ibid [70].

¹⁵⁷ Ibid [31].

¹⁵⁸ Ibid [69].

¹⁵⁹ Ibid [71].

State Measures	Practical Implementation
Policy Measures	<p>‘States should encourage a business culture that understands and fully respects children’s rights’.¹⁶⁰</p> <p>‘States should include the issue of children’s rights and business in the overall context of the national policy framework for implementation’ of the <i>Convention</i>. Guidelines should explicitly set out government expectations for business with respect to children’s rights, in regard to both state business operations and trans-national business relationships.¹⁶¹</p> <p>Larger firms should be encouraged to use their influence over small and medium-sized enterprises to strengthen children’s rights throughout their value chains.¹⁶²</p>
Co-ordination and Monitoring	<p>Because departments and agencies that are involved with business policies and practices tend to work quite separately from those departments and agencies with responsibility for child rights, it is necessary to provide training and support to relevant departments and individuals so that they are equipped to take the <i>Convention</i> and its protocols into account when developing law and policy.¹⁶³</p> <p>National human rights institutions (‘NHRI’) can play an important role in linking the different governmental departments concerned with child rights and with business.¹⁶⁴</p> <p>States have an obligation to monitor violations of children’s rights committed or contributed to by business, including in their global operations. To do so states should, among other things, gather requisite information and statistics, collaborate with civil society and NHRIs and use child rights impact assessments.¹⁶⁵</p>

¹⁶⁰ Ibid [73].

¹⁶¹ Ibid.

¹⁶² Ibid [74].

¹⁶³ Ibid [75].

¹⁶⁴ Ibid [75].

¹⁶⁵ Ibid.

State Measures	Practical Implementation
Child Rights Impact Assessments	<p>States must undertake continuous child rights impact assessments in order to ensure the best interests of the child are a primary consideration in business related legislation and policy development.¹⁶⁶</p> <p>Child rights impact assessments help states to evaluate in advance, how new business-related policy, proposed legislation, regulations, budgets or other administrative decisions can impact on children.¹⁶⁷</p> <p>Different methodologies and practices may be used to complete a child rights impact assessment, but at a minimum it must use the framework of the <i>Convention</i>.¹⁶⁸</p> <p>Child rights impact assessments can also be used retrospectively to evaluate the actual impact of implementation in order to generate evidence and understanding of which measures are effective to protect children from violations caused or contributed to by business.¹⁶⁹</p> <p>Child rights impact assessments can be used to consider the impact of the activities of a particular business or sector, as well as to assess the impact of different activities on specific groups of children, such as girls, children with disabilities and Indigenous children.¹⁷⁰</p>
Collaboration and Awareness-Raising	<p>States should adopt and implement a comprehensive strategy to educate children, parents and caregivers that business has a responsibility to respect the rights of children wherever they operate. Education, training and awareness-raising about the <i>Convention</i> should be targeted at business enterprises and emphasise the status of the child as a holder of human rights and encourage active respect for the <i>Convention</i>.¹⁷¹</p> <p><i>General Comment 16</i> itself should be widely disseminated.¹⁷²</p>

¹⁶⁶ Ibid [78].

¹⁶⁷ Ibid [80].

¹⁶⁸ Ibid [79].

¹⁶⁹ Ibid [77].

¹⁷⁰ Ibid [80].

¹⁷¹ Ibid [82].

¹⁷² Ibid [85].

As recommended in many of the submissions to the CRC on progressive drafts,¹⁷³ *General Comment 16* is aligned with the SRSB's *Framework and Guiding Principles* in a number of ways.¹⁷⁴ This is likely to be in part by design and in part an inevitable product of the CRC's natural focus upon states and the SRSB's preference for a state-centric model within his *Framework*.

General Comment 16 is directed at states parties to the *Convention*. According to para 8 of *General Comment 16*:

The present general comment principally addresses States' obligations under the *Convention* and the Optional Protocols thereto. At this juncture, there is no international legally binding instrument on the business sector's responsibilities vis-à-vis human rights. However, the Committee recognizes that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the *Convention* and the Optional Protocols thereto.¹⁷⁵

Beyond these few comments acknowledging that duties and responsibilities with respect to children's rights go beyond the state to other actors, the remainder of *General Comment 16* speaks solely to the obligations of states. As highlighted in Table 1 above, *General Comment 16* guides states as to what is needed to meet their obligations under the *Convention* and its protocols and how to create an enabling and supportive environment for businesses to respect children's rights.

¹⁷³ See, eg, Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector*, Child, 30 April 2012 <<http://www2.ohchr.org/english/bodies/crc/docs/CallSubmissionBusinessSector/WGBHR.pdf>>.

¹⁷⁴ *Draft General Comment*, above n 83, [7]. Importantly, however, the CRC acknowledges that the legal landscape is not limited to these documents: *General Comment 16*, UN Doc CRC/C/GC/16, [7]. Additionally, it recognises relevant International Labour Organization ('ILO') conventions, the Organisation for Economic Co-Operation and Development ('OECD') *Guidelines for Multinational Enterprises*, the ILO Tripartite Declaration on Multinationals and Social Policy, the UN Global Compact and the *Children's Rights and Business Principles*: Organisation for Economic Co-Operation and Development, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, first published 1976, 2011 ed) ('*OECD Guidelines*'); International Labour Office, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (International Labour Organization, 4th ed, 2006) ('*ILO Tripartite Declaration of Principles*'). See also International Labour Organization, *Conventions and Recommendations* (2013) <<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>>. It is beyond the scope of this article to analyse *General Comment 16* against these instruments, but it is worth noting that it is entirely appropriate that the CRC should be drawing on the full array of binding and influential instruments on the issue of business and human rights.

¹⁷⁵ *General Comment 16*, UN Doc CRC/C/GC/16, [8]. See also *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNT 227, (entered into force 18 January 2002); *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002).

This is of course to be expected. As a treaty body, the CRC's principal authority relates to the elaboration of the obligations of states parties and it is to this audience that *General Comment 16* primarily speaks. This wholesale focus upon states parties, as opposed to non-state actors, as the duty-bearers in international human rights law is incidentally consistent with the SRSG's emphasis on the central role of the state in realising compliance with human rights by the business sector.¹⁷⁶ According to the SRSG's *Framework*, states have a duty to protect against human rights abuses, while corporations have a responsibility to respect human rights.¹⁷⁷ Unlike the notion of 'duty', 'responsibility' — as conceived in the SRSG's *Framework* — is not equivalent to a legal obligation. Rather, '[t]he *Framework* speaks of the corporate responsibility to respect all human rights as part of a corporation's social license to operate even when not mandated by law'.¹⁷⁸ Indeed, the SRSG explicitly rejected the notion that corporations are duty-bearers under international law.¹⁷⁹ By emphasising that legal obligations with respect to human rights ultimately lie with states, the SRSG remained within a traditional state-centric model of international human rights law, notwithstanding his recognition of the important, but legally subsidiary, role played by other actors.

General Comment 16 likewise adopts a terminology that differentiates *obligations* on the part of states and *responsibilities* on the part of corporations, notwithstanding para 8 of the *Convention*, which hints at the issue of extant binding human rights duties on non-state actors. Further, like the SRSG's model, *General Comment 16* repeatedly emphasises children's access to remedies as an integral component of efforts to realise children's rights in the business sector.¹⁸⁰

Despite the fact that the CRC predictably focused upon the obligations of states, it was conceivable that *General Comment 16* might have incorporated a specific part directed to businesses and other non-state actors. This would be in

¹⁷⁶ See, eg, Commission on Human Rights, *Promotion and Protection of Human Rights: Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN ESCOR, 62nd sess, Agenda Item 17, UN Doc E/CN.4/2006/97 (22 February 2006). The SRSG states, at [79]:

The role of States in relation to human rights is not only primary but also critical. The debate about business and human rights would be far less pressing if all Governments faithfully executed their own laws and fulfilled their international obligations. Moreover, the repertoire of policy instruments available to States to improve the human rights performance of firms is far greater than most States currently employ. This includes home countries providing investment guarantees and export credits, often without adequate regard for the human rights practices of the companies receiving the benefits.

¹⁷⁷ *Framework*, UN Doc A/HRC/8/5, [9].

¹⁷⁸ Sara L Seck, 'Collective Responsibility and Transnational Corporate Conduct' in Tracy Isaacs and Richard Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press, 2011) 140, 141 (emphasis added).

¹⁷⁹ See Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"*, UN GAOR, 4th sess, Agenda Item 2, UN Doc A/HRC/4/35 (19 February 2007) [33]–[44]. An exception lies with respect to international crimes: at [19]–[32]. See also Joanna Kyriakakis, 'Developments in International Criminal Law and the Case of Business Involvement in International Crimes', *International Review of the Red Cross* (forthcoming); Knox, above n 133, 71–5.

¹⁸⁰ *General Comment 16*, UN Doc CRC/C/GC/16, [4], [5], [30], [31], [44], [61], [66]–[72]. This corresponds to pillar three of the SRSG's *Framework* (access to effective remedies): *Framework*, UN Doc A/HRC/8/5, [82]–[103].

keeping with the progressive interpretative function of general comments outlined earlier. Not only has the CESCR set a precedent for directly addressing the responsibilities of non-state actors in recent general comments,¹⁸¹ there are also a number of benefits to be derived from focusing, to some extent, on non-state actors within *General Comment 16*. Human Rights Watch ('HRW') noted in its submission to the CRC on the *Draft General Comment* that

the responsibilities of business in relation to human rights — including child rights — are increasingly recognized by international law and other norms. Understanding that this General Comment is intended to provide guidance to States party to the Convention on the Rights of the Child, we nevertheless feel that it should address the scope and content of the responsibilities of businesses that are subject to those State parties' jurisdictions. Doing so would usefully inform and support the recommendations to States about how to discharge their obligations under the Convention to respect, protect and fulfil the rights of the child in the context of business activities and operations. It also would help to provide a valuable and authoritative point of reference for initiatives seeking to outline how businesses can respect and support child rights.¹⁸²

On this latter point, HRW was speaking about initiatives such as the Children's Rights and Business Principles, which are directed specifically to business and seek to provide guidance as to how businesses can respect child rights (as per the SRSB's second pillar) as well as support them.¹⁸³ The Children's Rights and Business Principles are a set of 10 principles designed to guide companies 'on the full range of actions they can take in the workplace, marketplace and community to respect and support children's rights'.¹⁸⁴ Like the

¹⁸¹ See, eg. Committee on Economic, Social and Cultural Rights, *General Comment No 14 (2000): The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) [63]–[65]; Committee on Economic, Social and Cultural Rights, *General Comment No 15 (2002): The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) [60]; Committee on Economic, Social and Cultural Rights, *General Comment No 17 (2005): The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He or She Is the Author (Article 15, Paragraph 1(c), of the Covenant)*, UN ESCOR, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006) [55]–[57]; Committee on Economic, Social and Cultural Rights, *The Right to Work: General Comment No 18*, UN ESCOR, 35th sess, Agenda Item 3, UN Doc E/C.12/GC/18 (6 February 2006) [52]–[54]; Committee on Economic, Social and Cultural Rights, *General Comment No 19: The Right to Social Security (Art 9 of the ICESR)*, UN ESCOR, 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [82]–[84].

¹⁸² Human Rights Watch, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector*, August 2012, 1–2 <<http://www2.ohchr.org/english/bodies/crc/docs/CallSubmissionBusinessSector/HumanRightsWatch.pdf>> (citations omitted). This proposal was supported by the Castan Centre for Human Rights Law in its submission: Castan Centre for Human Rights Law, Faculty of Law, Monash University, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector*, 24 August 2012, 6 <<http://www2.ohchr.org/english/bodies/crc/docs/SubmissionsGC/CastanCentre.pdf>>.

¹⁸³ *Children's Rights and Business Principles*, above n 19.

¹⁸⁴ United Nations Global Compact, *Children's Rights and Business Principles* <http://www.unglobalcompact.org/Issues/human_rights/childrens_principles.html>.

SRSB, the Children's Rights and Business Principles are built around existing standards, initiatives and best practices related to business and human rights but with an explicit child rights perspective. The Children's Rights and Business Principles are built around issues such as eliminating child labour (Principle 2); decent work for young people, parents and carers (Principle 3); marketing and advertising (Principle 6); and environment and land (Principle 7). They are intended to guide business in relation to children given that, despite being stakeholders of business, children are often overlooked in business decision-making on matters that ultimately pertain to them.¹⁸⁵

While the Children's Rights and Business Principles are recognised and supported by the UN through its endorsement of the work of the UN Global Compact,¹⁸⁶ they are ultimately a private initiative. The Children's Rights and Business Principles therefore do not have the same authoritative status enjoyed by general comments, as discussed above. Further, private initiatives often act in a vacuum with respect to advising as to the precise ways in which human rights can and should be deployed by business. This is especially true where an initiative looks at expectations that go beyond the narrow notion of corporate responsibility with respect to human rights as simply being 'to do no harm' (as employed by the SRSB).¹⁸⁷ It would have been preferable for the CRC to address this issue within *General Comment 16* and provide much needed clarification of the expectations and duties of business and other non-state actors in respect of child rights. Indeed, the CRC's specific expertise and authority in the area of children's rights would have added a powerful and complementary voice to the Children's Rights and Business Principles. Given the role that general comments play with respect to pushing boundaries around evolving international law, the failure to address this issue is regrettable.¹⁸⁸

Nor would the CRC be without legal bases should it have sought to address certain issues directly towards the business sector. For example, there is emerging consensus that businesses are directly bound by *jus cogens* norms.¹⁸⁹ Further, the increasing proliferation of treaties that obligate states to legislate so

¹⁸⁵ Ibid.

¹⁸⁶ On the UN Global Compact initiative and its status, see Ursula A Wynhoven, 'The Protect-Respect-Remedy Framework and the United Nations Global Compact' (2011) 9 *Santa Clara Journal of International Law* 81, 84–6.

¹⁸⁷ *Framework*, UN Doc A/HRC/8/5, [24]. The SRSB's limited notion of corporate responsibility with respect to human rights has been critiqued. For example, Mares notes the way in which it fails to encourage oversight by core companies in corporate groups: Mares, above n 123, 41–4.

¹⁸⁸ It should be noted, however, that *General Comment 16* does include some features that recognise progress in international law beyond the state-centric model. For example, it provides that state obligations under the *Convention* extend to their capacities as members of international organisations: *General Comment 16*, UN Doc CRC/C/GC/16, [47]–[48]. It also refers to violations 'committed or contributed to by business enterprises': at [76]. A stronger statement recognising that business enterprises can 'commit, or contribute to', human rights contained in an earlier draft was omitted from the final version of *General Comment 16*: see *Draft General Comment*, above n 83, [1].

¹⁸⁹ See, eg, Committee on Non-State Actors, International Law Association, 'Non-State Actors in International Law: Aims, Approach and Scope of the Project and Legal Issues' (Paper presented at The International Law Association Hague Conference, The Hague, 2010) 17.

as to bind legal entities with respect to certain norms¹⁹⁰ are another legal basis that renders such actors an increasingly legitimate subject of treaty body scrutiny. In any event, in light of the omission of any such part from *General Comment 16*, the Children's Rights and Business Principles provide an important counterpart to the state-focused nature of the SRSR's *Framework* and *Guiding Principles* in the area of business and human rights generally and the CRC's *General Comment 16* specifically.

Despite this limitation, *General Comment 16* is comprehensive in its recommendations to states parties on the variety of laws, practices and policies that pertain to children's rights. This points to another way in which *General Comment 16* is consistent with the SRSR's broader policy framework. Like the SRSR, *General Comment 16* emphasises the importance of addressing *all* rights, not merely a subset of rights, as relevant to the business sector. The CRC has highlighted that

[g]iven the broad range of children's rights that can be affected by business activities and operations, [*General Comment 16*] ... seeks to provide States with a framework for implementing the *Convention* as a *whole* with regard to the business sector.¹⁹¹

This is consistent with the SRSR's approach, where he emphasised the capacity of businesses to impact on all human rights, focused upon formulating a framework for action that would encompass all rights and criticised attempts to devise a more limited list of corporate-specific human rights obligations.¹⁹²

The CRC's holistic approach in *General Comment 16* to the full gamut of children's rights is to be welcomed. It reflects the reality that children can be adversely affected by business in both direct ways (for example, as child labourers or victims of trafficking) and indirect ways (for example, as a group particularly vulnerable to the effects of pollution in their environment). Like the SRSR, *General Comment 16* provides recommendations as to a wide variety of institutional laws, policies and practices of states parties that could have a bearing on the realisation of child rights, even if that impact is not immediately apparent. An example is the emphasis on transparency and accountability of revenue initiatives to combat tax evasion and corruption, which in turn impact upon state resources to progressively realise child rights.¹⁹³

¹⁹⁰ See, eg. Joanna Kyriakakis, 'Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 108, 110–11.

¹⁹¹ *General Comment 16*, UN Doc CRC/C/GC/16, [5] (emphasis added). In the *Draft General Comment*, the CRC did enumerate the provisions of the *Convention* that are particularly implicated by business operations: *Draft General Comment*, above n 83, [3]. These are: art 3(1) (the best interests of the child should be a primary consideration for actions taken by public or private sector welfare providers); art 17 (the role of mass media); art 18(3) (provision of child care for working parents); art 19 (protection of children in the care of others); art 21(e) (inter-country adoptions must not result in improper financial gain); art 23 (rights of the disabled child); art 24 (the right to health); art 28 (the right to education); art 32 (economic exploitation); and art 34 (sexual exploitation and sexual abuse). See also *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002) art 3(4) (the legal liability of legal persons, including business enterprises).

¹⁹² *Framework*, UN Doc A/HRC/8/5, [6], [51]–[53].

¹⁹³ *General Comment 16*, UN Doc CRC/C/GC/16, [55].

A further similarity between the SRSG's policy framework and *General Comment 16* is the use of the concept of due diligence. The Framework states that '[t]his concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts'.¹⁹⁴ Due diligence is central to the SRSG's view as to how corporations can discharge their responsibility to respect human rights.¹⁹⁵ However, as argued by Parker and Howe, there is a risk that due diligence policies will simply be a greenwashing of corporate action on human rights, unless they operate within a sufficiently coercive legal environment.¹⁹⁶ The CRC also emphasises this idea of due diligence by advising states on actions they should adopt in order to encourage companies to actualise due diligence policies and practices and that will foster a stronger regulatory context in which corporate due diligence policies operate.¹⁹⁷ These actions include states leveraging wealth transfers, such as export credit and procurement contracts, to ensure business compliance with child rights due diligence practices both locally and extraterritorially.¹⁹⁸

While growing coherence among international efforts directed at issues in business and human rights is valuable and the SRSG's *Framework* and *Guiding Principles* represent the rallying point for such efforts, it is also important that the CRC did not feel constrained in clarifying obligations that may go beyond those stated in the SRSG's *Framework* and *Guiding Principles*. Although the *Guiding Principles* have been described as the 'authoritative UN normative document on business and human rights',¹⁹⁹ it is clear that their normative contribution 'lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses'.²⁰⁰ For this reason, insofar as the CRC takes a different view as to what existing international law requires, this can be defended if supported by other international instruments and state practice.²⁰¹

Commentators have indeed argued that in some ways the SRSG may have fallen short in his articulations of the current status of certain issues under

¹⁹⁴ *Framework*, UN Doc A/HRC/8/5, [56].

¹⁹⁵ See *Framework*, UN Doc A/HRC/8/5, [56]–[64]. It is worth noting that whereas the SRSG embraced the idea of due diligence, he rejected the idea of 'spheres of influence', which had been a notion employed in the *Draft Norms* to describe in conceptual terms the 'space' within which corporations would be expected to use their influence to positively affect human rights: see *Framework*, UN Doc A/HRC/8/5, [65]–[72]. The CRC did not employ the notion of 'spheres of influence' in its *Draft General Comment*, most likely reflecting that notion's falling out of favour following the SRSG's mandate.

¹⁹⁶ Parker and Howe, above n 110, 292–301.

¹⁹⁷ See *General Comment 16*, UN Doc CRC/C/GC/16, [62]–[65].

¹⁹⁸ See *ibid* [27], [45], [64]. Similar recommendations were made by the SRSG: see, eg, *Guiding Principles*, UN Doc A/HRC/17/31, annex [4], [6] (Principles 4 and 6 and commentaries).

¹⁹⁹ Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector*, 30 April 2012, 2 <<http://www2.ohchr.org/english/bodies/crc/docs/CallSubmissionBusinessSector/WGBHR.pdf>>.

²⁰⁰ *Report of the Special Representative*, UN Doc A/HRC/17/31, [14].

²⁰¹ The *Guiding Principles* recognise that '[n]othing in these *Guiding Principles* should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights': *Guiding Principles* UN Doc A/HRC/17/31, annex Preamble.

international human rights law, particularly in areas of emerging doctrine. An example is the obligation of states to regulate the extraterritorial activities of businesses based within their territories.²⁰² On this question, the SRSB was particularly timid and found that while international law does not prohibit state extraterritorial jurisdiction over businesses in certain circumstances, it does not require it.²⁰³ This position has been criticised on the basis that it pays ‘insufficient attention to the differences in the language of human rights treaties on this point’, some of which support an understanding of jurisdiction that goes beyond territorial boundaries.²⁰⁴ For example, Wabwile provides a sustained analysis of the nature of the state’s external obligations to implement social and economic rights of children, emphasising that state reporting practices, statements by treaty bodies and UN special rapporteurs, as well as scholarly writing, point to emerging doctrines of extraterritorial obligations with respect to certain child rights.²⁰⁵

It is commendable that the CRC did not consider itself constrained by the SRSB’s *Framework* and *Guiding Principles* in declaring wider state obligations with respect to business and child rights.²⁰⁶ For example, *General Comment 16* includes a dedicated section on the external obligations of states parties with respect to child rights,²⁰⁷ in light of the particular legal challenges that arise from violations of child rights that occur in the context of global business operations.²⁰⁸ This includes a strong statement on state obligations with respect to business and child rights extending beyond the territory of the state in some circumstances. For example, *General Comment 16* states:

Under the *Convention*, States have the obligation to respect and ensure children’s rights within their jurisdiction. The *Convention* does not limit a State’s jurisdiction to ‘territory’. In accordance with international law, the Committee has previously urged States to protect the rights of children who may be beyond their territorial borders. It has also emphasized that State obligations under the *Convention* and the Optional Protocols thereto apply to each child within a State’s territory and to all children subject to a State’s jurisdiction.²⁰⁹

Home States also have *obligations*, arising under the *Convention* and the Optional Protocols thereto, to respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link

²⁰² See, eg, Castan Centre for Human Rights Law, Faculty of Law, Monash University, ‘Submission to the Secretary-General’s Special Representative on Business and Human Rights, *Inquiry on Proposed Guiding Principles for Business and Human Rights*’, January 2011 <<http://www.law.monash.edu.au/castancentre/publications/cc-submission-business-human-rights-principles.pdf>>; Knox, above n 133, 79–82.

²⁰³ See *Framework*, UN Doc A/HRC/8/5, [19].

²⁰⁴ Knox, above n 133, 79–80.

²⁰⁵ Michael Wabwile, ‘Re-Examining States’ External Obligations to Implement Economic and Social Rights of Children’ (2009) 22 *Canadian Journal of Law and Jurisprudence* 407.

²⁰⁶ The CRC situated the SRSB’s *Framework* and *Guiding Principles* within a broader legal landscape relevant to the issue of business and child rights, alongside the ILO conventions, the *OECD Guidelines*, the *ILO Tripartite Declaration of Principles*, the UN Global Compact and the *Children’s Rights and Business Principles*: see *General Comment 16*, UN Doc CRC/C/GC/16, [7].

²⁰⁷ *General Comment 16*, UN Doc CRC/C/GC/16, [38]–[46].

²⁰⁸ *Ibid* [38].

²⁰⁹ *Ibid* [39] (citations omitted).

exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned. When adopting measures to meet this obligation, States must not violate the *Charter of the United Nations* and general international law nor diminish the obligations of the host State under the *Convention*.²¹⁰

Given the particular legal challenges that arise from human rights abuses that occur in global supply chains and transnational business operations, the inclusion of these particular issues and the clarification of home state obligations to regulate business entities operating abroad is a crucial step towards redressing the prevailing governance gap.²¹¹

V CONCLUSION

General Comment 16 is an important step in redressing the prevailing governance gap with respect to the business sector and child rights. It is timely in light of the recent sustained attention given to the subject of business and human rights by the Human Rights Council and provides much needed elaboration and guidance on state obligations with respect to realising child rights in the business sector. Children are among the most vulnerable groups in society and can be particularly impacted by the activities of businesses in a variety of negative ways. They are also among the least capable of accessing mechanisms intended to enable their participation in business decision-making and have difficulty seeking redress where their rights have been infringed. *General Comment 16* — which speaks to the range of means by which states must address these disadvantages faced by children in the realisation of their rights — is therefore to be welcomed.

This article has analysed three distinct aspects of *General Comment 16*, namely its standing (and that of general comments generally), its meaning and its likely impact.

With respect to its standing, the conclusion reached is that, as a general comment, *General Comment 16* is not a source of law, but nonetheless carries great authoritative weight. Its significance goes beyond a mere technical recommendation to states on how to meet their obligations under the *Convention* and its protocols, functioning instead as an authoritative source of interpretation of international law informed by the treaty bodies' expertise with states' reports and by wide-ranging consultation with stakeholders.

This article has demonstrated that general comments are important juridical tools that assist in reinforcing standards as well as in pushing boundaries of the law. In addition to providing invaluable direction to states as to their legal obligations and how to meet these, general comments are frequently invoked before regional human rights tribunals, UN treaty bodies, international criminal

²¹⁰ Ibid [43] (citations omitted) (emphasis added).

²¹¹ For recommendations on how *General Comment 16* could have been strengthened on the issue of extraterritorial state duties, see Castan Centre for Human Rights Law, Faculty of Law, Monash University, Submission to the Committee on the Rights of the Child, *General Comment by the UN Committee on the Rights of the Child Regarding Child Rights and the Business Sector — First Draft*, 24 August 2012, 4–5 <<http://www2.ohchr.org/english/bodies/crc/docs/SubmissionsGC/CastanCentre.pdf>>.

tribunals and in domestic courts, being treated as authoritative pronouncements of international law.

Like the SRS's mandate that came before it, the CRC's process of developing *General Comment 16* has been transparent and participatory. Participatory processes seem likely to constitute a trend in the creation of general comments into the future. It is unclear the extent to which broad stakeholder consultation will improve the perceived legitimacy of general comments, with much depending on the circumstances of consultation and the way in which views are reflected in the final product. Despite this open question, the CRC appears to have achieved a reasonable balance in the creation of *General Comment 16*, with evidence that submissions genuinely informed the development of subsequent drafts, which in turn resulted in a progressive but by no means radical interpretation of international law.

Finally, in terms of its likely impact, it is clear that *General Comment 16* will not — in and of itself — bring an end to the violation of children's rights by business enterprises. Such a change will only occur if the reforms at the international level are mirrored at the domestic level. That is, if states embrace the framework set out in s VI of *General Comment 16* and implement the various recommended measures. Thus, while the CRC's contribution to the dialogue about children's rights and the business sector is welcomed, it remains to be seen whether *General Comment 16* is ultimately able to

prevent and remedy violations of child rights by business actors, and ensure business enterprises carry out their responsibilities in the realisation of the rights of the child and encourage business to positively contribute to the realisation of these rights.²¹²

²¹² Office of the United Nations High Commissioner for Human Rights, *Call for Submissions on Draft One of the Committee on the Rights of the Child's General Comment on Child Rights and Business Sector* <http://www2.ohchr.org/english/bodies/crc/callsubmissionsCR_C_BusinessSector.htm>.