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Future Generations: Fundamental or an Afterthought?

Children's rights in the EU initiative for legislation on corporate due diligence and corporate accountability for human rights

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SUMMARY

Momentum is building for closing the regulatory gaps on business responsibility for adverse human rights impacts. One of the most ambitious actions so far is the initiative for an EU directive on corporate due diligence and accountability for human rights and the environment. A proposal for the provisions of the directive is expected this summer (2021). Historically children's rights have been topic in the margins of the discourse of business and human rights. But awareness is growing on the many aspects of children's rights that can be impacted by business operations, and thereby a growing expectation on businesses to address these concerns. Children both experience human rights impacts in disproportionate and differentiated ways compared to adults, and children face additional barriers in voicing their grievances and accessing remedy. Thus, it is important to ensure that children's rights are properly incorporated in the upcoming EU directive.

The purpose of this thesis is therefore to examine how children and their rights have been characterized and incorporated in the preparatory work informing the Directive. Additionally, to answer the questions of whether there needs to be specific obligations towards children in the Directive, and if so, what those obligations should be.

Analysing all preparatory work, the thesis concludes that although children have been characterized as a vulnerable group facing risks of severe human rights impacts, very little attention has been given to investigate effective measures to prevent these impacts from materializing. Additionally, children's participatory rights have almost completely been omitted.

The thesis further concludes that without specific obligations towards children, there is no evidence saying that a general human rights framework will sufficiently protect children's rights from adverse business impacts. The measures offered in the preparatory work are not adequate in order to ensure that children's rights are addressed in business due diligences processes.

Instead the thesis suggests that requiring a mandatory child rights perspective in businesses' due diligence processes can better ensure that children's rights are addressed holistically. Such processes must ensure that children's participatory rights are respected in order to fully capture the complete picture of a business' impact in children's rights.

Requiring special attention to children as a group also aligns with EU's constitutional obligation to uphold the best interest of the child as a primary consideration in all policy areas.

SAMMANFATTNING

Det finns just nu momentum för att stänga de luckor i lagstiftningen kring företags ansvar för negativa effekter på mänskliga rättigheter. En av de mest ambitiösa åtagandena hittills är initiativet till ett EU-direktiv med syfte att kräva skäligen aktsamhet (så kallad "due diligence") och ansvar från företag för påverkan på mänskliga rättigheter och miljön. Ett lagförslag förväntas komma under sommaren i år (2021). Historiskt sett har barns rättigheter varit en fråga i marginalerna i förhållande till företagsansvar för mänskliga rättigheter. Men kännedomen växer angående vidden av barns rättigheter som kan påverkas av företags aktiviteter. Därmed växer också förväntningarna på företag att förebygga och minska förekomsten av dessa risker och deras konsekvenser. Barn påverkas oproportionerligt och på annorlunda sätt jämfört med vuxna av kränkningar av deras mänskliga rättigheter. Samtidigt står barn inför ytterligare hinder i att göra sina röster hörda för att påpeka kränkningar och för att tillgodose sig kompensation. Därmed är det viktigt att försöka sig om att barns rättigheter är tillbörligt integrerade i det kommande EU-direktivet.

Syftet med denna uppsatsen är därför att utforska hur barn och deras rättigheter är karaktäriserade och integrerade i förarbetet till Direktivet. Utöver det, att även svara på frågorna om huruvida Direktivet borde innehålla specifika skyldigheter gentemot barn, och om så är fallet, vilka skyldigheter det borde vara.

Analysen av förarbetet visar att barn beskrivs som en sårbar grupp med stora risker för allvarliga kränkningar av deras mänskliga rättigheter. Trots detta har det inte lagts mycket uppmärksamhet på att analysera vilka åtgärder som är effektiva för att försäkra sig om att dessa specifika kränkningar förhindras. Vidare så har barns rättigheter kopplat till deltagande, t.ex. att få sina åsikter hörda och beaktade försumrats.

Uppsatsen drar vidare slutsatsen att utan specifika skyldigheter gentemot barn så finns det inga bevis som säger att deras rättigheter kommer att vara skyddade och beaktade i ett generellt direktiv som detta om mänskliga rättigheter. Åtgärderna som föreslagits i förarbetet är inte tillräckliga för att se till att barns rättigheter beaktas i due diligence processer.

Istället föreslår uppsatsen att ett obligatoriskt barnrättsperspektiv i företags due diligence processer bättre skulle kunna säkerställa att barnrättsrisker hanteras på ett effektivt och holistiskt sätt. Sådana processer måste även ta hänsyn till barns rättigheter kring deltagande för att på ett fullgott sätt kunna få en komplett bild av hur ett företag påverkar barns rättigheter.

Att kräva specifika skyldigheter gentemot barn är också i linje med EUs konstitutionella skyldighet att upprätthålla barnets bästa som en primär faktor i alla policyområden.

Abbreviations

CMW	Convention on the Protection of the Rights of Migrant Workers and Members of their Families
CRBP	Children’s Rights and Business Principles
CRC	Convention of the Rights of the Child
CRPD	Convention on the Rights of People with Disabilities
EU mHREDD	EU Directive on Corporate Due Diligence and Corporate Accountability
ILO	International Labour Organisation
ILO C138	ILO Convention No. 138 on maternity protection
ILO C156	ILO Convention No. 156 on equal opportunities and treatment for workers with family responsibilities
ILO C182	ILO Convention No. 182 on the worst forms of child labour
ILO C183	ILO Convention No. 183 on maternity protection
NFRD	Directive on Disclosure of Non-Financial and Diversity Information
OHCHR	Office of the United Nations High Commissioner for Human Rights
PRR	Protect Respect and Remedy Framework
SRS	Special Representative of the Secretary-General
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNICEF	United Nations Children’s Emergency Fund

1 Introduction

1.1 Background

As said by the former Special Representative for the UN Secretary-General on business and human rights, John Ruggie: “Children are among the most marginalized and vulnerable members of society and can be disproportionately, severely, and permanently impacted by business activities, operations and relationships”.¹ At the same time, children are today organizing, and even leading movements for political, social and economic change in our societies on topics ranging from climate change, gender equality, voting rights, to gun control regulation.² Children are demonstrating that they are more than simply objects of protection but also capable protagonists in their own lives and their communities, demanding participation. Children are in some places even challenging common understandings, and misconceptions of child labour. While not denying the harmful and common practice of exploiting children in hazardous work, there are also children demanding that their contribution to society through decent and safe forms of work is given due recognition.³ When examining adverse human rights impacts on children due to business operations, both these aspects of what it means to be a child are important to keep in mind.

For the past couple of decades there has been a growing interest among civil society, states, businesses and many other stakeholders, in the role of the private sector regarding human rights impacts stemming from business activities.⁴ One fundamental reason for this increased attention is the existing governance gap allowing businesses to negatively impact individual’s and group’s realization of their human rights, without being held accountable, leaving victims without remedy.⁵ This gap in regulation is becoming ever more important as the capacity and influence that large multinational businesses have in our globalized world is constantly growing.⁶ Businesses today have the power to influence human rights through their relationship with their employees, through their ownership of the means of production, through influencing legislation and public discourse on the topic.⁷ Although child labour has been the dominating topic in regards to what impact business can have on children for the past 30 years, the understanding of the ways in which businesses can impact children’s rights, both positively and negatively, is now expanding.⁸ It is in fact nearly impossible for a business to not impact children’s lives in some way. Children are family members of the business’ employees, they are consumers and member of the community in which the business operate. Businesses impact children’s lives by their products and services,

¹ UNICEF, Save the Children and UN Global Compact (2014).

² McNulty, J. (2019).

³ Ibid.; Collins, T. (2014), p. 604 & 605.

⁴ Gerber, P. et al. (2013), p. 108.

⁵ Ibid.

⁶ Ibid.

⁷ Birchall, D. (2021), p. 9-10.

⁸ Erdem Türkelli, G. (2020), p. 32.

through how their workers are remunerated and treated, through environmental impacts, and by affecting the socioeconomic conditions of where they operate.⁹

In the same way that the topic of children's rights and business is developing, so is momentum building for more robust legislation on corporate responsibility for impacts on human rights and the environment. The United Nations Guiding Principles on Business and Human Rights¹⁰ (hereafter: UNGPs) is a non-binding instrument regulating responsible business conduct related to human rights and the environment. During the past 10 years the framework has grown in authority with businesses incorporating its guidelines into their processes and policies, and with several domestic legislative initiatives emerging requiring companies to take responsibility for their impacts on people and the planet. One of the latest and most ambitious efforts is the initiative for an EU directive on corporate due diligence and accountability for human rights and the environment¹¹ (hereafter: EU mHREDD law). Although still in its legislative process it looks as though the law will cover all businesses domiciled in the EU and all businesses wanting to place products on the EU market. Businesses will be required to conduct so called human rights due diligence, a process in which a business identifies and addresses human rights and environmental risks throughout the its value chain.¹² Depending on the final outcome of this legislative initiative, the law has the potential to have far-reaching positive impacts on human rights linked to corporate activity.

As this EU-law is taking shape, and the entire topic of business and human rights is in a critical time of gaining influence, there is an opportunity for those concerned with children's rights to ensure that this previously marginalized topic gets incorporated properly.¹³ Since the discourse of children's rights and business has previously been limited to the issue of child labour, it is now important that other aspects of harm on children due to business activities are included. It is often assumed that children have the same interest as adults, and while this is often the case, it is not always true. Children's rights have been subsumed under general human rights concerns and their specific rights and vulnerabilities have thereby been overlooked.¹⁴

This is concerning since it is well documented that children experience adverse human rights impacts in unique ways compared to adults and that harm can be more severe, and sometimes irreversible due to the unique developmental period of childhood.¹⁵ Additionally, despite examples of child-led movements for societal change, children generally lack the means to raise their

⁹ Ibid., p. 3.

¹⁰ UN (2011) *Guiding Principles on Business and Human Rights*, Implementing the United Nations "Protect, Respect and Remedy" Framework. UN HRC Report A/HRC/17/31.

¹¹ Procedure on the EU Directive on Corporate due diligence and Corporate accountability (202/2129(INL)). Available at:

[https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/2129\(INL\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2020/2129(INL)&l=en).

¹² European Parliament (2021).

¹³ Erdem Türkelli, G. (2017), p. 291.

¹⁴ Paré, M. & Chong, T. (2017), p. 924; Kolieb, J. (2020), p. 361.

¹⁵ Erdem Türkelli G, (2020), p. 4.

concerns themselves. And even if they do make their voices heard, they depend on adults listening to them and implementing changes on their behalf, since children lack participation powers in society such as the right to vote and to be a part in decision-making.¹⁶ When human rights harm occur due to business activities, children also face additional barriers accessing effective remedies.¹⁷

Due to the risks children face, and the fact that they have historically been overlooked in the business and human rights discourse, it is important to ensure that upcoming legislation properly incorporates children's rights in a way which guarantees that violations are identified, prevented and remedied. Consideration for children's rights should not miss this opportunity as the field is developing and setting its boundaries. The risk is that otherwise children's rights might simply be viewed as an afterthought and not incorporated as a fundamental element.¹⁸

1.2 Purpose and Research Questions

With the given background the aim of this thesis is twofold: Firstly to explore and map out the wide range of children's rights that could potentially be impacted by business operations. Secondly, to assess whether the upcoming EU mHREDD law adequately will address children's rights in order to close the prevailing governance gap with respect to the business sector and children's rights.

The thesis will answer the questions:

- How has children's rights been conceptualized and considered throughout the legislative process of the EU mHREDD law?
- Should the EU mHREDD law include specific duties in regards to children's rights?
 - And if so, what should those duties be?

1.3 Contribution to Current Research

Academic interest for the topic of business and human rights has grown exponentially since the publication of the UNGPs, and is now considered an academic field on its own.¹⁹ The establishment of faculty positions and Master's programs fully dedicated to business and human rights, and the launch in 2015 of the academic journal *Business and Human Rights*, is evidence of that.²⁰

¹⁶ Erdem Türkelli G, (2020), p. 23.

¹⁷ Kolieb, J. (2020), p. 361.

¹⁸ Erdem Türkelli G, (2020), p. 23.

¹⁹ Wettstein, F. (2020), p. 32.

²⁰ Ibid.

While academic attention to business and human rights have rapidly grown for the past couple of decades, there is scholarly consensus that issues regarding children's rights has been a topic in the margins and until recently, understudied.²¹ For the most part, research has been limited to child labour and most often conceptualizes children only as a vulnerable group, not paying sufficient attention to children's participatory rights and abilities, perpetuating the notion of children being passive and not active stakeholders in regards to their rights. Therefore there is a need for research capturing the full range of children's rights that business operations potentially can have an impact on, and how these rights can best be fulfilled and protected.²²

Children's rights research in general has come much further in exploring children's participatory rights and abilities, much fuelled by the paradigm shift in thinking about children that the CRC brought forth.²³ It would be beneficial for research on children's rights in relation to business to draw on that research in order to ensure that the full range of children's rights are considered, encompassing not only rights aimed at protecting children from harm, but also rights placing children as active rights-holders.

Gamze Erdem Türkelli has made extensive scholarly contributions to the topic of children's rights and business. Most importantly, in 2020 she published the first, and to my knowledge only, comprehensive book on the legal inquiries of children's rights and the business sector ("*Children's Rights and Business: Governing Obligations and Responsibility*").²⁴ The book illustrates the need for additional research and attention from other societal actors on business and children and analyses the legalization process around business and human rights from a children's rights perspective.

Tara Collins, a children's rights researcher, has also helped develop the field by writing several articles (for example "*The Relationship between Children's Rights and Business*"²⁵ and "*Some Considerations for Child Rights Impact Assessments*"²⁶) and a book chapter ("*Children's Rights in Human Rights Impact Assessment: Marginalized or Mainstreamed?*"²⁷) on the relationship between children's rights and business.

²¹ Erdem Türkelli, G. (2017), p. 278 & 290; Erdem Türkelli, G. (2020), p. 48; Crane, A. & Kamzi, B.A. (2010), p. 567.

²² Collins, T. (2019), p. 123; Erdem Türkelli, G. (2020), p. 48.

²³ Lundy, L & McEvoy, L. (2012), p. 91.

²⁴ Erdem Türkelli, G. (2020), *Children's Rights and Business: Governing Obligations and Responsibility*, Cambridge University Press.

²⁵ Collins, T. (2014) *The Relationship between Children's Rights and Business*, invited manuscript for special issue, International Journal of Human Rights, October, 18(6), pp. 582-633.

²⁶ Collins, T. & Guevara, G. (2014) *Some Considerations for Child Rights Impact Assessments (CRIAs) of Business*, Revue générale de droit, 44(1), 153-192.

²⁷ Collins, T. (2019) *Children's Rights in HRIA [Human Rights Impact Assessment]: Marginalised or mainstreamed?* in N. Götzmann (ed.). *Human Rights Impact Assessment*, Research Handbooks on Impact Assessment series, 118-133, Edward Elgar Publishing.

There is also a need for research that is rightsholder-centric in the business and human rights field.²⁸ Business and human rights scholar Surya Deva discusses in an editorial for the *Business and Human Rights Journal* in 2019, the importance of ensuring that legislation in this area actually benefits rights-holders. He also calls on research to “explore the differentiated and disproportionate adverse impacts” on certain groups of stakeholders, for example indigenous people, children and people with disabilities.²⁹

This thesis aims to fill these gaps by exploring and mapping out the wide range of children’s right which can potentially be impacted by business operations. Highlighting the importance of not simply subsuming children’s rights under general human rights, but actually ensuring that the specific adverse impacts they risk are not made invisible. The intent is to also incorporate the children’s rights approach which so radically was established through the adoption of the Convention of the Rights of the Child (hereafter: CRC), acknowledging that the child is vulnerable and in need of protection, but at the same time lifting the rights and abilities that children have to make their voices heard and be a part of decision-making which affects their lives.

The main contribution this thesis will have to the current state of research is that it will provide a thorough analysis of the preparatory work of the EU mHREDD law from a children’s rights perspective. Through that analysis questions can be answered as to what the best approach could be in order to capture the full range of children’s rights in legislation on corporate responsibility for human rights, having the rights-holder at the center of analysis. So far no comprehensive analysis has been made on the legislative process of the EU mHREDD law from a child rights perspective. Discussions on the EU mHREDD law has mainly concerned the central, and very important, aspects of the law. Such as if all businesses should be included, if the law should cover all human rights or if it should be limited to some, how the liability regime should be designed.³⁰ However, in order for the law to actually have a positive impact on the human rights of certain marginalised groups, all aspects of the law needs to be carefully considered. Such as how the law will guarantee that children’s rights will be effectively addressed by businesses when implementing the law. If children’s rights will be effectively addressed could depend on details of the law.

This analysis can inform not only the final proposal of the EU mHREDD law, but also other legislative frameworks on the same topic. This research can also inform those who will implement these types of laws, both states and businesses, as it describes both the range of children’s rights which can be impacted and previous failures to address these. Having a deeper understanding of children’s rights and how businesses impact these can lead to more efficient measures to mitigate such harms.

²⁸ Deva, S. et al., (2019), p. 204-205.

²⁹ Ibid., p. 205.

³⁰ European Commission (2020a).

1.4 Delimitations

The questions this thesis aims to answer are related to the efficiency of the law to achieve protection of children's rights. The thesis will focus on the relevance of incorporating specific measures targeted towards children's rights in order to achieve that aim. It is however noted that there are many other aspects of the law which will contribute to the ability of the law to protect and uphold children's rights. Such aspects are for example how the enforcement mechanisms will be designed or how heavy the burden of proof will be on potential plaintiffs wanting to raise claims against companies. This thesis does not aim to analyse those aspects, but is simply interested in whether there is a need for explicit obligations towards children's rights in order to guarantee that impacts on children's rights are addressed in businesses due diligence processes.

The scope of this thesis will not cover impacts on children related to children as consumers. It is noted that businesses can have both a positive and negative impact on children through the products and services they provide. Such negative impacts could for example be if directly harmful materials are used in toys or marketing unhealthy foods directly to children.³¹ Positive impacts can be providing safe toys and sports equipment for children to play, or books and learning material designed to enhance children's cultural life.³² These are outside the scope of this thesis.

1.5 Theory and Methodology

The thesis will be guided by a human rights-based approach informed by the CRC's characterization of children. The basic components of a human rights-based approach are the three core principles set out by the United Nations: activity should further the realization of human rights; human rights standards should guide all phases of activity; and activity should contribute to the development of the capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights.³³

The CRC has gained status as both source and as a theoretical framework for research in itself³⁴ and being guided by the CRC's conceptualization of children means that children are not seen as passive objects in need of protection, but are seen as rights-holders with the rights and ability to influence their own lives and society. Children's rights are meant to "be a resource for those who lack power, particularly children who are often powerless in their interactions with adults"³⁵. The CRC promotes children to be participants shaping their own lives and demands that those with duties towards children take action to fulfil those.³⁶ This view of children is in line with general discourse human rights saying that "rights empower, not just benefit, those who hold them"³⁷.

³¹ Crane, A. & Kamzi, B.A. (2010), p. 574.

³² *Ibid.*, p. 577.

³³ United Nations (2003), note 24.

³⁴ Cordero Arce, M. (2015), p. 283.

³⁵ Lundy, L. & McEvoy, L. (2012), p. 91.

³⁶ *Ibid.*, p. 91.

³⁷ United Nations Committee on the Rights of the Child (2008), p. 8.

The importance of conceptualizing children in this way in research is important, since research in the past has characterized children as passive and non-essential to society, which has had direct consequences for the research methods adopted.³⁸ Therefore, ensuring that children are seen at active rights-holders is an important aspect of this thesis.

The research is conducted through a desk-based review and analysis of the EU policy debate and other relevant scholarly and stakeholder contributions. The analysis of the preparatory work of the EU mHREDD law will be guided by the child rights-approach described above and informed by lessons learned from similar legislative frameworks. Analysis of whether the proposed solutions for protection of children's rights in the EU mHREDD law will be sufficient will be informed by outcomes and assessments of similar legislation.

1.6 Structure of the Thesis

The thesis will begin by giving an overview of the scope of child rights covered in international law (*chapter 2*). This will include both rights that are directly enjoyed by children, and also rights which if not respected will have an indirect impact on children, such as labour rights of parents. The following chapter (*chapter 3*) analyses how these rights interact with business operations and outlines what role children's rights have played in the business and human rights discourse. This chapter thereby provides a baseline for the analysis of the potential need for special measures for children in the EU mHREDD law.

Chapter four describes the norm legalization process regarding business and human rights describing the developments leading up to the initiative on the EU mHREDD law. The *fifth* chapter conducts a thorough analysis of the preparatory work produced throughout the legislative process of the EU mHREDD law. The analysis concludes how children's rights and risks have been conceptualized, what solutions have been proposed to ensure protection of children's rights, and the reasons for choosing those solutions.

Based on the findings from the analysis of the preparatory work, the final chapter (*chapter 6*) assesses whether the solutions offered to secure children's rights are likely to be efficient, or if additional measures are needed.

Finally, conclusions will be summarized and the research questions answered.

2 Children's Rights in International Law

This chapter gives an overview of the entire scope of international standards related to children's rights, most of which are relevant to the business context. Some of these are rights are enjoyed directly by the child, whereas others are rights which if violated will have an indirect adverse

³⁸ Lundy, L. & McEvoy, L. (2012), p. 91.

impact on the rights of the child. Such rights could for example be the working conditions for employees who are parents, impacting the child's living standards, access to education, right to health etc. A more thorough analysis of the ways business operations have a direct or indirect impact on children's rights will be mapped out in the next chapter. The purpose of this chapter is to provide an understanding of the width of children's rights which need to be considered by businesses when planning and conducting their activities.

2.1 All Human Rights are Children's Rights

While this chapter is focused on the specific rights of the child, it is also important to note that since human rights are granted to every person, regardless of age, status or other variables³⁹ children are also covered by all other human rights. It is therefore not sufficient to simply address rights specific to the child in order to fully understand the impact businesses can have on children. The general scope of human rights must also be analysed through a child rights perspective. Having a child rights perspective on general human rights is important since the unique impact human rights violations can have on children can otherwise be overlooked and thereby marginalizing children's enjoyment of human rights.⁴⁰

Some human rights treaties that are not specifically child rights focused still include additional obligations towards children. For example gives the Convention on the Rights of People with Disabilities (CRPD)⁴¹ a specific right to children with disability to receive the special care he or she need, and that the financial resources of the caregivers should be considered in order to ensure that those needs are met.⁴² The CRPD also established the right to work for people with disabilities and the right to non-discrimination of workers due to disabilities⁴³. Ensuring non-discrimination for people with disabilities in the workplace has an indirect positive impact on children whom have parents with disabilities.

Another interesting treaty is the Convention on the Protection of the Rights of Migrant Workers and Members of their Families (CMW)⁴⁴. This Convention (CMW) sets standards for the treatment of migrant workers and their families. Since it relates not only to the migrant worker him- or herself, but also includes families it is highly relevant to the context of business impacts on children's rights. The family perspective that this convention takes is noteworthy as it so clearly highlights that a child's enjoyment of his or her rights can be closely linked to impacts on other family members. Some examples of rights that the CMW covers related to the whole family are

³⁹ Kolieb, J., (2020), p. 357.

⁴⁰ Collins, T. (2019), p. 120; Crane, A. & Kamzi, B.A. (2010) p. 567 & 568.

⁴¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106.

⁴² CRPD, art. 7.

⁴³ Ibid., art. 5, art. 8.2.iii, art. 9 and art. 27.

⁴⁴ UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158.

the right to special protection of the family unit of migrant workers⁴⁵ and the prohibition of confiscation and destruction of worker's or their family member's IDs⁴⁶. Some rights specific to children of migrant workers are to be registered at birth and to acquire a nationality⁴⁷ and the right to have access to education on the same terms as nationals⁴⁸.

2.2 The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC)⁴⁹ is the most central instrument for child rights. It was adopted in 1989 and was revolutionary, and is still today, due to how it challenges the social status of children, framing them as independent individuals with the right to participate in society.⁵⁰ It holds high authority due to being the most widely ratified convention worldwide.⁵¹

The CRC covers a full range of rights specific to children in the areas of political-, cultural-, civil-, economic-, and social rights. Rights established in the convention are for example the right to play and leisure⁵², to social security⁵³, to a high standard of health⁵⁴, to adequate living standards⁵⁵, to education⁵⁶, to protection from abuse, exploitation and neglect⁵⁷, and special consideration for children belonging to specifically vulnerable groups such as refugees⁵⁸, indigenous populations⁵⁹, and disabled children⁶⁰.

The right of the child to have one's voice heard, respected and taken into account⁶¹, access to information⁶² and protection of privacy⁶³ are examples of rights which conceive children as important actors in their communities and with the right to influence their own lives, not simply as individuals in need of protection.⁶⁴

⁴⁵ CMW, art. 38 and art. 44.

⁴⁶ Ibid., art. 21.

⁴⁷ Ibid., art. 29.

⁴⁸ Ibid., art. 30, art. 43, art. 45, art. 12, art. 13.

⁴⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577.

⁵⁰ UN Committee on the Rights of the Child (CRC), *GC No. 12 (2009)*, para. 1, p. 5.

⁵¹ Kolieb, J., (2020), p. 355; Collins, T. (2019), p. 120.

⁵² CRC, art. 31.

⁵³ Ibid., art. 26.

⁵⁴ Ibid., art. 24.

⁵⁵ Ibid., art. 27.

⁵⁶ Ibid., art. 28.

⁵⁷ Ibid., art. 19, 32-37.

⁵⁸ Ibid., art. 22.

⁵⁹ Ibid., art. 30.

⁶⁰ Ibid., art. 23.

⁶¹ Ibid., art. 12.

⁶² Ibid., art. 17.

⁶³ Ibid., art. 16.

⁶⁴ Collins, T. (2019), p. 120.

Four of the CRC's provisions have been identified as being core elements, or general principles, meaning that everything concerning children's rights, from interpretation to implementation should be guided by these principles.⁶⁵ These four principles are the right to non-discrimination⁶⁶, the best interest of the child⁶⁷, the right to life, survival and development⁶⁸, and the right of the child to be heard and participate in decision-making that affects them⁶⁹. It is also widely recognized that these four principles should guide other duty bearers than states, such as businesses.⁷⁰

The CRC also has three optional protocols on the following topics; Prohibition of the use of children as combatants⁷¹, Prohibition of the sale of children, child prostitution and child pornography⁷², and the Right of the Child on a Communications Procedure⁷³ which aims to establish a complaint mechanism for children and those representing their interests. The first two are widely accepted just as the CRC itself⁷⁴, but the last one concerning a complaint mechanism has only been ratified by 46 state parties so far.⁷⁵

2.2.1 General Comment 16 on State obligations regarding the impact of the business sector on children's rights

The UN Committee of the Rights of the Child (CRC Committee) is the monitoring body of the CRC and its Optional Protocols, and consists of 18 independent experts.⁷⁶ The CRC Committee publishes General Comments, which are authoritative interpretations on the provisions of the CRC, based on thematic issues.⁷⁷ Central for this thesis is the General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights⁷⁸ (General Comment

⁶⁵ Kolieb, J., (2020), p. 355.

⁶⁶ CRC, art. 2.

⁶⁷ Ibid., art. 3.1.

⁶⁸ Ibid., art. 6.

⁶⁹ Ibid., art. 12.

⁷⁰ Erdem Türkelli, G. (2020), p. 27.

⁷¹ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000.

⁷² UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 16 March 2001.

⁷³ UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 14 July 2011.

⁷⁴ The protocols have 170 and 177 ratifications respectively, compared to the CRC which has 196 ratifications. See United Nations Treaty Collection, Status on Treaties at: <https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=en>.

⁷⁵ United Nations Treaty Collection, Status of Treaties, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=en.

⁷⁶ OHCHR, Human Rights Bodies, CRC, Committee on the Rights of the Child: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx>.

⁷⁷ Kolieb, J., (2020), p. 369.

⁷⁸ UN Committee on the Rights of the Child (CRC Committee), *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*.

No. 16). The CRC Committee is the first UN treaty body to elaborate on the relationship between its treaty and business responsibility, therefore making General Comment No. 16 an important contribution to the discourse.⁷⁹ This general comment is of high relevance for this thesis as it provides clear recommendations on how states should regulate businesses in relation to children's rights.

Content of General Comment No. 16

The aims of the General Comment No. 16 are to give states guidance on how to ensure that business activities do not adversely impact children's lives, how to enable businesses to respect children's rights, and how to ensure access to effective remedy for children whose rights have been violated.⁸⁰ It establishes that the duty to respect children's rights does extend to private actors, such as businesses, and that States are obliged to adopt legislation regulating business conduct extraterritorially in order to protect children's rights.⁸¹ Such legislation should be clear and predictable⁸² and States should require businesses to conduct child-rights due diligence.⁸³ Additionally, where there is a high risk of child rights violations a stricter process for due diligence coupled with an effective monitoring system should be required.⁸⁴ The Commission notes that if child-rights due diligence is subsumed in a more general due diligence process, it is important that the rights in the CRC influence decisions and that any measures taken to prevent or remedy human rights abuses have special considerations for the differentiated impact on children.⁸⁵

In regards to children's participatory rights, the General Comment No. 16 says that States should include children in consultation when developing business-related laws and policies that might affect them.⁸⁶ And States should ensure that children who face particular barriers making their voices heard have opportunities to voice their views and perspectives.⁸⁷ It also highlights the need for businesses to include the view of children when consulting communities whom might be affected by a business project. State's responsibilities in this regard is to guide businesses in how such processes should be designed and conducted,⁸⁸ and recommends including child-rights impact assessments in relation to business activities.⁸⁹

⁷⁹ Collins, T. (2014), p. 587; Mechlem, K. (2009), p. 113.

⁸⁰ UN CRC Committee, General Comment No. 16 (2013), para. 5.

⁸¹ Ibid., para. 8 & para. 43.

⁸² Ibid., para. 53.

⁸³ Ibid., para. 62.

⁸⁴ Ibid., para. 62.

⁸⁵ Ibid., para. 63.

⁸⁶ Ibid., para. 21.

⁸⁷ Ibid., para. 21.

⁸⁸ Ibid., para. 23.

⁸⁹ Ibid., para. 21.

Legal standing of human rights treaty bodies' general comments

The legal standing of general comments from UN human rights treaty bodies is not clear.⁹⁰ They are not a source of law but are not simply recommendations.⁹¹ Instead they can be described as important judicial tools which carry a “great authoritative weight”⁹². They have assisted in reinforcing standards and with pushing the boundaries of the law.⁹³ They are frequently invoked regional and international tribunals, and in domestic courts and are there treated as authoritative statements of international law.⁹⁴ Thereby, the General Comment No. 16 has given further institutionalized legitimacy of moving children to the forefront of the business and human rights debate.

The reason why output from human rights treaty bodies play an important role in establishing the normative content of human rights is due to the unique nature of human rights treaties, which calls for a specialized way of interpreting them compared to other treaties. Normally, states interpret treaties among themselves with the guidance of the treaty interpretation rules in the VCLT.⁹⁵ However, human rights treaties are not adopted between two mutually benefiting parties. Instead, the purpose of human rights treaties is to protect the rights of individuals, placing obligations on states to do so. Therefore, it would be problematic to allow states to interpret these themselves, risking interpretation more favourable to the state, and therefore a need for independent supervision and interpretation follows.⁹⁶ Mechlem argues that the special character of human rights treaties “require interpretation which is favourable enough to ensure effective protection of the third party beneficiary”⁹⁷. The General Comment No. 16 can thereby be seen as providing authoritative and needed independent instructions for legislation on business and children’s rights in order to ensure effective protection.

2.3 ILO Conventions

Highly relevant to the business and human rights context are Conventions drafted by the International Labour Organisation (ILO). The ILO is a United Nations agency whose aim is to advance social and economic justice through setting international labour standards. Their conventions are legally binding international treaties which states can ratify and have been fundamental in establishing common labour standards worldwide.⁹⁸ The ILO has two conventions directly addressing children and labour rights: ILO convention No. 138 on the minimum age of

⁹⁰ Gerber, P. et al. (2013), p. 96.

⁹¹ Ibid., p. 99-101.

⁹² Ibid., p. 127; UN Secretariat (2006).

⁹³ Gerber, P. et al. (2013), p. 100.

⁹⁴ Ibid., p. 127.

⁹⁵ Mechlem (2009), p. 919.

⁹⁶ Ibid., p. 912 & 919.

⁹⁷ Ibid., p. 912.

⁹⁸ ILO, About the ILO. Available at: <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.

employment (ILO C138)⁹⁹ and ILO Convention No. 182 on the worst forms of child labour (ILO C182).¹⁰⁰ The ILO also has a number of other conventions which do not directly address children, but where implementation has major impacts specifically on children's rights. Two of these especially relevant for this analysis are: ILO Convention No. 156 on equal opportunities and treatment for workers with family responsibilities (ILO C156)¹⁰¹ and ILO Convention No. 183 on maternity protection (ILO C183)¹⁰².

ILO C182 prohibits the worst forms of child labour which is defined as; slavery or practices similar to slavery including trafficking of children, debt bondage, serfdom and forced labour; child prostitution and child pornography; the use of children for illicit activities; and work which is likely to harm the health, safety or morals of children.¹⁰³ The Convention obliges states to design and implement measures to eliminate these types of child labour in consultation with stakeholders including those effected, such as children.¹⁰⁴

ILO C138 defines what constitutes as child labour, and thereby distinguishes from what type of situations of work that is illegal for children to participate in and in what situations children can legally perform work. The general minimum age of employment is set at 15 years old¹⁰⁵, but any work which is hazardous is prohibited for anyone under 18 years.¹⁰⁶ Hazardous work is work which is likely to jeopardise the health, safety or morals of the child or young person.¹⁰⁷ Light work can be permitted for children between 13 and 15 years if the work is not harmful to the child's health or development, and will not impact their education at school.¹⁰⁸

ILO C156 aims to ensure that people with family responsibilities are able to engage in the labour market without facing discrimination due to having responsibilities to care for family members, such as children.¹⁰⁹ It establishes obligations on the states to take measures in order to enable workers with family responsibilities to exercise free choice in employments¹¹⁰, to ensure that having family responsibilities should not be considered a valid reason for termination of employment¹¹¹, to establish child-care and family services¹¹², and to take measures to enable

⁹⁹ International Labour Organization, *Minimum Age Convention, C138*, 26 June 1973, C138.

¹⁰⁰ International Labour Organization, *Worst Forms of Child Labour Convention, C182*, 17 June 1999, C182.

¹⁰¹ International Labour Organization, *Equal Opportunities and Equal Treatment for men and women workers, and workers with family responsibilities*, C156, 23 June 1981, C156.

¹⁰² International Labour Organization, *Maternity Protection, C183*, 15 June 2000, C183.

¹⁰³ ILO, C182, art. 3.

¹⁰⁴ Ibid., art. 6.

¹⁰⁵ ILO, C138, art. 2.

¹⁰⁶ Ibid., art. 3.

¹⁰⁷ Ibid., art. 3.

¹⁰⁸ Ibid., art. 7.

¹⁰⁹ ILO, C156, preamble and art. 3.

¹¹⁰ Ibid., art. 3.

¹¹¹ Ibid., art. 8.

¹¹² Ibid., art. 5.

workers to become and remain integrated in the labour force after an absence due to family responsibilities.¹¹³

Finally, ILO C183 establishes several rights for pregnant and breastfeeding women in the labour force. Rights include; pregnant and breastfeeding women not having to perform work which is hazardous for themselves or their child¹¹⁴, paid maternity leave at a minimum of 14 weeks¹¹⁵, non-discrimination due to pregnancy or anything related to pregnancy, childbirth, or breastfeeding¹¹⁶, and the right to daily breaks or reduction of hours for breastfeeding¹¹⁷.

Summary

This chapter has provided a brief overview of the rights which children enjoy. Some of them are directly related to the child, while some are indirectly linked. This chapter has also highlighted that all general human rights are applicable to children and needs to be implemented with a child rights perspective in order to fully benefit the child. The following chapter will put these rights in a business context, explaining and illustrating through examples how business operations can directly and indirectly impact this wide range of children's rights.

3 Children's Rights and Business

As children's rights in the business context so far has been a topic on the side-lines, this chapter will begin with explaining why there is a need to focus on children's rights when discussing issues of business and human rights. Once the relevance of the topic is established the chapter will analyse and illustrate more precisely what child rights are impacted by business, what that impact looks like and give examples of when businesses have succeeded and failed in identifying and acting on its impacts on children's rights.

3.1 Why a Specific Focus on Children in the Business and Human Rights Context?

3.1.1 Overlooked impacts and a lack of awareness

A red thread in scholarly research on children's rights and business, and the premise of this paper, is the fact that there is currently and historically a lack of awareness among both businesses and states of how children's rights are related to business operations.¹¹⁸ Thereby warranting a greater

¹¹³ ILO, C156, art. 7.

¹¹⁴ ILO, C183, art. 3.

¹¹⁵ Ibid., art. 4 & 6.

¹¹⁶ Ibid., art. 8.

¹¹⁷ Ibid., art. 10.

¹¹⁸ Collins, T. (2019), p. 123.

light to be shone on this topic. Children's rights researcher Tara Collins points out that this lack of understanding is surprising due to the widely known and ratified CRC.¹¹⁹ In order to identify the full range of child rights risks, a business needs to pay attention to both how adverse impacts on general human rights can affect a child, and the unique rights that children enjoy. The efforts concerning children's rights and business impacts have however so far stopped at the issue of child labour, and has not ventured far beyond that. By limiting the scope of children's rights to child labour, ignoring the full spectrum of children's rights, a lot of business impacts are overlooked.¹²⁰ For example, a study conducted by the Global Child Forum and the Boston Consulting Group assessed more than 1000 companies across different sectors on how they address children's rights.¹²¹ The study showed that despite companies having a raised awareness of general human rights, that awareness has not translated into how this relates to children.¹²² While 62% of companies have a policy on child labour, only 24% address other child rights issues.¹²³ When asked about what international standard they use to address child rights issues, companies mostly referred to ILO Standards on child labour. Only 1 % referred to the CRC and only 1% referred to the Children's Rights and Business Principles¹²⁴ (CRBP).¹²⁵ By failing to identify a wider scope of child rights impacts, the measures against child labour will also be hampered, since some of the neglected child rights impacts often act as root causes to child labour. Identifying and targeting them would thereby assist in eradicating child labour more efficiently and with more long-term sustainability.¹²⁶ It could for example be issues such as low wages for parents and the lack of child care and parental leave.

What makes these issues more difficult to identify compared to child labour is that several of these impacts do not occur in the workplace, but instead impacts the child in his or her community or family situation. Despite these impacts being directly related to a business activity it takes a deeper analysis in order to correctly categorize as such. Due to the complexity of these impacts some businesses have simply chosen to ignore them¹²⁷, while others lack the understanding or competence on how to go about identifying these risks and act on potential findings.¹²⁸

Collins points to the fact that classic audits have been inadequate in identifying children's rights impacts due to their often limited focus on labour, health and safety issues.¹²⁹ General human rights impact assessments have also been inefficient in this regard since they are usually structured in a

¹¹⁹ Ibid., p. 123.

¹²⁰ Crane, A. & Kamzi, B.A. (2010) p. 567 & 568; Collins, T. (2014), p. 590.

¹²¹ Global Child Forum & Boston Consulting Group (2014), p. 5.

¹²² Ibid., p. 5.

¹²³ Ibid., p. 11 & 12.

¹²⁴ The Children's Rights and Business Principles is a UNICEF framework guiding businesses on how to incorporate children's rights into their business policies and operations. This will be further elaborated on starting on page 36 in this thesis.

¹²⁵ Global Child Forum & Boston Consulting Group (2014), p. 16.

¹²⁶ Collins, T. (2019), p. 121.

¹²⁷ Williams, (2018), para. 4.

¹²⁸ Erdem Türkelli, G. (2020), p. 22; Paré M, & Chong T. (2017), p. 924.

¹²⁹ Collins, T. (2019), p. 123 & 124.

way which do not allow for indicators of child rights concerns, if the business does not make special efforts to include those.¹³⁰

Due to difficulties that businesses have in understanding the relevance of children's rights in the business and human rights context it can be concluded that awareness, training, and competence building is needed in order to raise the awareness of children's rights in the business context. Collins argues for example that child rights experts, equipped with the knowledge and tools enabling child participation, are needed in all human rights impact assessment teams.¹³¹

3.1.2 Childhood as a unique period in life - disproportionate and different effects

Ensuring that a child rights perspective is not overlooked is especially important due to the fact that human rights impacts can have more severe consequences on a child than on an adult, and that children experience distinct impacts from those of adults. Childhood is a season in a person's life of "rapid development with physiological, psychological and social aspects", and children have particular needs in order to sustain their development during this time.¹³² Any negative impacts during this season can have extensive consequences on the child's development, and other long-lasting, irreversible and even transgenerational impacts.¹³³ This is why children enjoy unique rights and protections. A specific impact from a business activity can be deemed to be tolerated if it happens to an adult, while the same impact could be considered to be serious for a child, and therefore could be an infringement of his or her rights. A common example of human rights impacts that have a disproportionate effect on a child compared to an adult is pollution. Studies show that chemicals are absorbed more efficiently by children than by adults and can have delayed results due to their still developing organs.¹³⁴ Harmful chemicals in food are also absorbed in higher rates by children than by adults. One study showed that lead accumulated more rapidly in children's bones, twice as much for an infant compared to an adult. These types of toxic harms can lead to irreversible damage to a child's health and development.¹³⁵

Research also shows that multiple psychologically or physically damaging events in childhood links to health issues later in life, such as lung disease, cancer, depression, alcoholism, and drug abuse.¹³⁶ Similarly the circumstances and events of a person's first five years in life will profoundly affect a person's well-being and ability to have successful social interactions and relationships in the future, as this is when the foundations of social competence is laid.¹³⁷ This explains why an adult could have the ability to recover without lasting means from a certain adverse human rights impact, while the very same human rights impact could have a much more severe, long-lasting, or even a different type of effect on a child.

¹³⁰ Collins, T. (2019), p. 125.

¹³¹ Ibid., p. 124.

¹³² Erdem Türkelli, G. (2020), p. 14.

¹³³ Ibid., p. 13 & 14.

¹³⁴ Ibid., p. 17.

¹³⁵ Ibid., p. 17; National Scientific Council of the Developing Child & National Forum on Early Childhood Policy and Programs (2010), p. 5-6.

¹³⁶ Erdem Türkelli, G. (2020), p. 15.

¹³⁷ Ibid., p. 15; National Scientific Council of the Developing Child (2004), p. 1-2.

An impact can also affect an adult and a child in different ways. Take the example of low wages. First of all it will directly impact the adult worker's right to fair wages, and it will indirectly impact the adult's right to his or her economic and social rights such as access to adequate living standards, access to food, and right to health. For the child of that worker, the low wages will have similar indirect impacts on the child's economic and social rights. On top of that, there are additional child specific rights which might be impacted, such as the child's right to education (if school has costs such as uniforms and books) and in extreme cases it could affect the child's right to be protected from child labour as the child might need to work in order to help provide for the family. This is why it is vital that when assessing a business' human rights impacts, that impacts are not measured only by what impacts adults will experience, but also considering if impact on children could be more severe, or if there are even different types of impacts on children.

Case study of identifying distinct impacts on children

The mining company Barrick Gold participated in a pilot project conducted together with the sustainability consultancy firm Twentyfifty and UNICEF with the aim of managing potential impacts on children's rights.¹³⁸ The approach embedded a child rights lens in the human rights impacts assessment methodology and included a child vulnerability matrix. The assessment gave greater understanding concerning impacts on children as distinct from impacts on adults. It also revealed child rights impacts which were not related directly to the mine, but to the socio-economic circumstances of the community, which gave opportunity for Barrick Gold to support positive impacts on child rights in the community and avoid cementing negative ones. After the results of the pilot project the company now has permanently integrated the child vulnerability matrix in all future human rights impact assessments and seeks to improve its grievance mechanism in order to better identify impacts on children.¹³⁹

3.1.3 Position in society - dependency and lack of influence

Children's weak position in society, such as their lack of adequate political voice, dependency on adults for accessing information and a lack of resources in general also calls for extra concern.¹⁴⁰ Children are not allowed to vote, they can not be elected, they can not participate in economic affairs by signing contracts, and their perspectives are rarely considered even in matters of great concern to them.¹⁴¹ Reasons for adults not including children is historically due to preconceived notions of children's maturity and abilities. Scientific research contradicts this and shows that even very young children have the ability to comprehend and conduct logical reasoning around issues of rights such as freedom of speech and social injustices.¹⁴² Denying children a voice is therefore not based on their actual abilities for contribution and it denies children the opportunity to have an

¹³⁸ Barrick Gold, News, Available at: <https://www.barrick.com/news/news-details/2016/pilot-projects-adds-childrens-perspective-to-human-rights-impact-assessments/default.aspx>.

¹³⁹ UNICEF (2015), p. 20.

¹⁴⁰ Erdem Türkelli, G. (2020), p. 14.

¹⁴¹ Ibid., p. 23.

¹⁴² Ibid.

influence, and denies society valuable contributions from child perspectives. This also reinforces current power structures where children are made even more powerless. A child rights approach needs to challenge and seek to dismantle such constructed power-relations, and enable children to actively participate with meaningful influence.¹⁴³ Viewing children as active agents and empowering them to participate, according to the CRC's view of children, is both an important aspect and a reason why there needs to be a focus on children in business and human rights contexts.

3.1.4 Not all children are the same - intersectional perspectives

Due to intersectional aspects of children's rights, a deeper understanding and more attention to child rights is warranted. Children are often seen as a homogenous group with the same vulnerabilities, risks and needs. But in fact children are diverse and can be disproportionately affected by human rights impacts due to belonging to certain groups such as ethnic minorities, indigenous groups, gender, social class, being disabled etc.¹⁴⁴ Due to the lack of understanding of business impacts on children's rights in general, these more complex aspects are easily neglected, putting some children at heightened risk of human rights violations.

3.1.5 Identify and support positive impacts

Another aspect often overlooked is the way in which business can have a positive impact on children's rights and ways in which children and young people can contribute to business.¹⁴⁵ Sometimes businesses refrain from digging into children's rights since they expect that assessing child rights impacts will only lead to negative findings, when in fact there are many impacts that businesses can have on children and young people that are positive. Positive impacts can for example be providing job opportunities for young people, supporting parents in their caregiving responsibilities, engage in community activities improving access to clean water and sanitation, and ensuring safe products for play and learning.¹⁴⁶ A better understanding of the full range of children's rights in the business context will help businesses to increase their support of children's rights, as was evident in the Barrick Gold example above.

3.2 Impacts on Children's Rights by Business Activities

This section aims to map out what precise child rights can be impacted, negatively or positively, by business operations. Real life examples will also be given in order to illustrate why and how those impacts can occur, what they can look like, and to show examples of how businesses have succeeded or failed at identifying, taking measures to prevent or mitigate adverse impacts, and

¹⁴³ Erdem Türkelli, G. (2020), p. 24.

¹⁴⁴ Ibid., p. 20; Collins, T. (2019), p. 121.

¹⁴⁵ Collins, T. (2019), p. 121.

¹⁴⁶ Collins, T. (2014), p. 584.

approached the issue of remedy for children. Important to note is that this section does not mean to conclude whether there is legal liability for these impacts for businesses, but simply from a human rights perspective show where there are impacts on rights.

3.2.1 Child labour and decent work for young people

Through eliminating harmful child labour and promoting decent work for teenagers, businesses can avoid negative child rights impacts and support positive ones. As mentioned, both in academia and legislative initiatives focus on children's rights and business have had an almost exclusive attention on child labour. This has in turn impacted the aims of businesses' efforts to identify and tackle child rights issues, limiting those measures to labour exploitation of children. Due to the high priority of child labour, the common perception has been skewed to believing that the primary business impact on children is child labour.¹⁴⁷ The strong emphasis has even in some ways had a negative impact on children since it has resulted in a hampering of important opportunities for young people to engage in appropriate forms of work and earn an income.¹⁴⁸ Businesses have for example resorted to far-reaching and short-sighted measures to distance themselves from child labour, which instead has turned out to have negative effects on children.¹⁴⁹

One quite extreme example is from Bangladesh in the 1990s. Widespread use of child labour was discovered in garment factories supplying products to stores in the United States. Due to external pressure from US based campaigners the businesses linked to the factories decided that all children should stop working in the factories immediately. No in depth analysis was made of what the root causes were of the use of child labour. Since the circumstances of the children working in the factories were never addressed, most of those children ended up in child labour again, usually in even more hazardous conditions, or in child prostitution. Only a small number returned to school which was the aim of dismissing the children from work.¹⁵⁰ Later on, research into this situation found that the children working in the garment factories had access to more nutritious food and had better access to health care than children not working in those factories. However, the children working in factories did generally not attend school but did have some previous education.¹⁵¹

This is of course not an endorsement of allowing businesses to use children as labourers simply due to the fact that there are worse alternatives out there. Instead the point is that despite good intentions, businesses' efforts to eliminate child labour can in fact have a worse impact on children's rights, instead of having a positive impact. This example emphasized that businesses need to thoroughly assess their approaches from a child rights perspective, ensuring that they are long-term, focused on root causes and must involve the participation of the children impacted in

¹⁴⁷ Collins, T. (2019), p. 123; Geary, P. (2014), p. 12.

¹⁴⁸ Collins, T. (2019), p. 123.

¹⁴⁹ Collins, T. (2014), p. 601.

¹⁵⁰ Ibid., p. 601.

¹⁵¹ Ibid.

order to have positive impacts on children's rights. Instead of simply dismissing the children, the businesses could have engaged with the children and their caregivers to examine any opportunities to support the rights of those children, and how to avoid causing further damage.¹⁵²

Due to confusion on what constitutes child labour, societal discourses, and the pressure of eradicating it, small family businesses in supply chains have had to completely stop using the help of their children, despite this not being harmful for the child, due to fears of being accused of child labour.¹⁵³ These types of work opportunities could be vital to a child in order for him or her to learn a future trade or to enable the child to fully participate in the community. In many places mandatory education finished at around age 15 and without much opportunity for higher education, it is vital for young persons to be able to provide for themselves. Without decent work opportunities they end up in unemployment.¹⁵⁴ There has been critique that some approaches to child labour are Eurocentric, lacking the contextual understanding of children in non-Western countries and by not including the voices of children from those places. One example of when children were consulted on the issue was in a research project involving 300 children from Bangladesh, Ethiopia, the Philippines and Central America. It showed that 77% preferred that work and school was combined nuancing the black and white image of children at work.¹⁵⁵ At the same time, it is important to remember that young people at work are in a more vulnerable position than adults and need special protections against exploitation. Businesses can positively impact those children's rights by providing decent work and by ensuring that they are protected in the workplace from potential harm or exploitation according to provisions on relevant ILO Conventions.

Despite child labour being the main child rights issue that businesses have focused on the impacts still remains vast. According to the ILO, 152 million children are in child labour and 73 million working in hazardous child labour.¹⁵⁶ This tells us that despite the enormous attention the topic has gotten, the issue of child labour needs better approaches in order to ensure positive impacts on children's rights and to avoid negative ones.

3.2.2 Economic, social and cultural rights

Health

As mentioned above in section 3.1.2, research shows that environmental impacts have a more severe impact on children's right to health¹⁵⁷ than adults, due to the physical development of their bodies. Children of migrant workers can be at higher risk since they might not have the same

¹⁵² Collins, T. (2014), p. 599.

¹⁵³ Ibid., p. 601.

¹⁵⁴ Ibid., p. 602 & 603.

¹⁵⁵ Ibid., p. 604 & 605.

¹⁵⁶ Kolieb, J., (2020), p. 373.

¹⁵⁷ CRC, art. 24; ICESCR, art. 12.

access to health care services as nationals¹⁵⁸. One example of when children's right to health was directly impacted by business operations comes from a human rights impact assessment of a uranium mine in Malawi which found that the company's efforts to do no harm to stakeholder benefited children the least. While employees of the company gained the most protection, children were deemed to be the stakeholder group which received the least protection. The most prominent failure to protect children's rights were due to the construction of a new coal mine next to the children's school resulting in impacts on the child's right to health. Criminal gangs targeted children to steal fuel around the mine operations resulting in failure to avoid impact on children's rights not to be harmed or to be exploited in criminal activities.¹⁵⁹ The company also decided to build a school to support the local children. However this resulted in a major influx of children coming from surrounding villages. These children arrived alone and some slept overnight in the school. This posed a security risk for the children, especially for girls whom were at risk of sexual harassment.¹⁶⁰

Another case where children's health was severely impacted due to business operations is the case against Boliden. In the 1980s, Boliden Mineral AB (one of Sweden's largest mining corporations) exported its mining waste (smelter sludge) to Chile through the Chilean company Promel S.A. Promel then shipped the sludge to the city of Arica where it was dumped at a site used as a playground for children and where social housing was located. Promel was supposed to process the waste and remove the harmful arsenic, but this was never done.¹⁶¹ Reports of various diseases began emerging from the area such as cancer, impaired breathing, skin disease, neurological disorders, increased rates of miscarriages and birth defects, and even though Promel were requested by local authorities to remove the sludge they did not. Most severe were the effects on children who were born with physical or mental birth defects or developed severe forms of cancer. Finally the Chilean authorities removed the sludge and deposited it in a desert outside of the city.¹⁶² Due to high levels of lead, cadmium and arsenic in the area where the waste was dumped originally, about 1,880 houses had to be demolished.¹⁶³ Proceedings were held both in Chile and in Sweden but no compensation was given due to Promel being bankrupt¹⁶⁴ and Boliden Mineral AB was not considered liable due to failure to show a chain of causality between the damages and Boliden.¹⁶⁵

Environmental impacts such as business operations cutting access to water or other essential land use, like the ones described in the examples above, can also impact several other child rights such

¹⁵⁸ CMW, art. 28, art. 43, and art. 45.

¹⁵⁹ Salcito, K., et al. (2014), p. 43.

¹⁶⁰ Ibid., p. 42.

¹⁶¹ District Court judgement (T-1012-13), p. 10 & 124); European Parliament (2019), p. 46.

¹⁶² District Court judgement (T-1012-13), p. 33, para. 65-66; European Parliament (2019), p. 46

¹⁶³ District Court judgement (T-1012-13), p. 34; European Parliament (2019), p. 46.

¹⁶⁴ European Parliament (2019), p. 47.

¹⁶⁵ Ibid., p. 49.

as adequate standard of living and education.¹⁶⁶ Indigenous children are especially affected by extreme interferences in access to land, such as land acquisitions leading to the need to relocate due to business operations.¹⁶⁷

Right to education

Children's right to education¹⁶⁸ can be interrupted by business activities in a variety of ways. Education can be impacted by the use of child labour, through environmental impact making children sick hindering them from attending school, through resettlements and land acquisition, through low wages of caregivers in instances where school is connected to costs or when low wages of parents calls for the need of children to begin working.

Businesses need to pay special attention to not negatively impacting children of migrant workers¹⁶⁹ and indigenous children's right to education as they are more at risk of having this right violated.

Right to culture

All children have the right to take part in cultural life, scientific progress and artistic productions.¹⁷⁰ Indigenous children and minorities have this right especially protected including the right to practice their religion and language.¹⁷¹ Children of migrant workers also have an established right to access and participate in cultural life and to receive education in accordance to their culture, language and religion.¹⁷² These rights could be impacted by loss of land use due to business operations, or due to relocation. Indigenous children and migrant workers are especially at risk of this impact.

Right to adequate living standards

As has been mentioned above, children's right to adequate living standards¹⁷³ can be impacted by a variety of business behaviour such as business' environmental impacts, by wages and working conditions of parents and caregivers, by resettlements and land acquisitions.

Right to social services

Children's right to social security and social insurance¹⁷⁴ can be impacted if business projects demand in an influx of people into a specific area. Essential functions, such as social services

¹⁶⁶ Paré, M. & Chong, T. (2017), p. 909; CRC, art. 6 (survival and development), 24 (health), 27 (adequate standard of living, water), 28 (education).

¹⁶⁷ UNICEF, UNICEF & CSR, Rights of the Child, *The Convention on the Rights of the Child and Business*.

Available at: <https://sites.unicef.org/csr/crc.htm>.

¹⁶⁸ CRC, art. 28; UDHR, art. 26; ICESCR, art. 13.

¹⁶⁹ CMW, art. 12 and art. 13.

¹⁷⁰ CRC, art. 30.

¹⁷¹ CRC, art. 30; ICESCR, art. 15; ICCPR, art. 27.

¹⁷² CMW, art. 31, art. 43, art. 45.

¹⁷³ CRC, art. 27; UDHR, art. 25; ICESCR, art. 11.

¹⁷⁴ CRC, art. 26; UDHR, art. 22.

might be overwhelmed by this. Children of migrant workers can especially be affected since they do not always access social services on the same terms as nationals¹⁷⁵.

Right to life, survival and development

Climate change, which both states and businesses contribute to, also impact a wide range of children's rights; their right to health, food, water, shelter etc.¹⁷⁶ A study from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the relationship between climate change and the effective enjoyment of the rights of the child states that children are disproportionately affected by climate changes.¹⁷⁷ Besides health impacts (both physical and mental), climate changes can also result in separating children from their families which in itself is a child rights impact, but which also increases their vulnerability to other types of adverse impacts.¹⁷⁸ Extreme weather can disrupt children's access to education, housing, and important social services.¹⁷⁹ Severe losses of stability (family, community, housing etc) will leave children vulnerable to serious exploitation and abuse such as child labour, trafficking, and other illicit activities.¹⁸⁰ This means that climate change has far reaching impact on children's rights such as the right to life, survival, development, right to family life and to not be separated from one's parents, health, adequate standard of living, education, protection from abuse and exploitation, right to play, and the enjoyment of one's culture.¹⁸¹

The right to play and leisure

Children have an unique right to play and leisure, which are important aspects for a child's development¹⁸². The right to play can be impacted if businesses use or pollute land which children use for playing. If businesses exploit young workers using excessive working hours the right to leisure will be impacted.

3.2.3 Family rights and other impacts due to caregivers working conditions

Children can be severely impacted by the working conditions of their parents or other caregivers. Excessive overtime, hazardous work, low wages, severely limited or no parental leave are all aspects that will impact a variety of children's rights such as the child's right to adequate living standard, access to food and water, education, health and the right to family life and the right to be cared for by his or her parents. Low wages of caregivers have even been connected to the use of child labour as the main reason for the use of child labour is economic need.¹⁸³

¹⁷⁵ CMW, art. 27, art. 43 and art. 45.

¹⁷⁶ Kolieb, J., (2020), p. 375-376; UN HRC (2016), p. 4, para. 12.

¹⁷⁷ UN HRC (2016), p. 3, para. 4.

¹⁷⁸ Ibid., p. 4, para. 8.

¹⁷⁹ Ibid., P. 4, para. 10.

¹⁸⁰ Ibid., P. 4, para. 11.

¹⁸¹ CRC, art. 6, art. 9-10, art. 23-24, art. 27-28, art. 19, art. 34-36, art. 30-31.

¹⁸² CRC, art. 31; UDHR, art. 24.

¹⁸³ Collins, T. (2014), p. 603.

Studies on parent's working conditions and working hours show many different types of impacts on children, and it is contested if it is the amount of hours that a parent works or if it is other factors such as the stress-level of the parent's job or when and where the parent works which impacts the child the most.¹⁸⁴ But what is concluded is that if parents have more flexible work hours, the ability to take time off to tend to the needs of a child, access to child care and fair wages the impacts in the child will be more positive.¹⁸⁵ Positive long-term impacts from parents being able to spend more time with their children are better social and emotional development, less inclined to commit crimes, and better mental health, and those impacts last not only during childhood but carries into adulthood.¹⁸⁶

Therefore business can avoid causing adverse impacts on children's rights by ensuring that they respect established labour rights¹⁸⁷ for parents and caregivers and do not discriminate against workers with caregiving responsibilities in the workplace¹⁸⁸, and provide the support they need to fulfil their parental duties as well as duties at work¹⁸⁹. Businesses can also ensure that caregivers who belong to especially vulnerable groups are not discriminated against, such as migrant workers, people with disabilities¹⁹⁰. A child can also be directly impacted if its mother is not protected from performing work while pregnant which could be hazardous for the child¹⁹¹.

An especially vulnerable group regarding rights connected to family, are children of migrant workers. Children might be left in the home country to be cared for by grandparents or other community members, which can leave children open to many sorts of risks and deprives them of their right to be cared for by their parents. Sometimes children come with their parents to the place where they are working and can be deprived of education opportunities, other social protections, or can be harmed if they are at the work site. Children also have the right to home and correspondence¹⁹² which can be impacted by businesses' use of migrant workers. Children of migrant workers are also at risk of not becoming registered at birth or receiving nationality, which could have lifelong impacts for the child.¹⁹³

Migrant workers and their families have the right to freedom of movement and to not have their documentation confiscated¹⁹⁴, and the right to take time off from work in order to enable family life¹⁹⁵. They also have the right not to be imprisoned or deported simply based in failure to fulfil

¹⁸⁴ Crane, A. & Kamzi, B.A. (2010), p. 579.

¹⁸⁵ Crane, A. & Kamzi, B.A. (2010), p. 579.

¹⁸⁶ Ibid., p. 579.

¹⁸⁷ UDHR, art. 23.

¹⁸⁸ ILO, C156, art. 3; ILO, C183, art. 8 and art. 9.

¹⁸⁹ ILO, C156, art. 7, art. 8; ICCPR, art. 23.

¹⁹⁰ CMW, art. 23, art. 54, art. 55, art. 44, art. 38.

¹⁹¹ ILO, C183, art. 3.

¹⁹² CRC, art. 16.

¹⁹³ CMW, art. 29; CRC art. 7 and 8; CRPD, art. 18.

¹⁹⁴ CMW, art. 8, art. 39 and art. 21.

¹⁹⁵ Ibid., art. 38 and art. 44.

contractual agreements¹⁹⁶. Rights connected to deportation and imprisonment are matters of the state but could be connected to businesses as disciplinary measures and connects to the right of migrant workers to be informed of all requirements and working conditions before their arrival.¹⁹⁷

3.2.4 Right to protection from exploitation and different forms of harm

Different forms of abuse, harm and exploitation can be both a direct and indirect impact on children's rights to be protected from these¹⁹⁸, due to business operations. Direct impacts can be harm, abuse and exploitation in the workplace of young workers¹⁹⁹ or when business facilities are used to harm, abuse and exploit children, during or after work hours. Indirect impacts can be when a business project brings an influx of workers, especially males, to an area. As will be shown in the example below, this can lead to sexual exploitation of children, and other types of abuse. Some groups of children are more vulnerable to these types of harms such as indigenous children, migrant or refugee children, children with disabilities and girls²⁰⁰. Business facilities could be dangerous and pose safety threats if children have access to them.²⁰¹ Security personnel hired by a business could also pose a threat to children's rights if they are not trained properly in how to handle children²⁰².

Businesses operating in conflict-affected areas need to pay extra attention to risks of abuse, harm and exploitation facing children. Risks children face in conflict-affected areas are being used as child soldiers, sexual violence, being abducted, being killed or maimed, and attacks on schools and hospitals. Businesses can in some instances contribute to these violations, but can also help prevent them by exercising influence on local government and by engaging in local communities and hiring appropriately trained private security guards.²⁰³

Case study: The Uganda Transport Sector Development Project

In 2008 The Uganda Transport Sector Development Project (TSDP) was launched in Uganda. It's aim was to improve infrastructure through road building. It was funded by the World Bank, and implemented by the Uganda National Roads Authority who contracted several companies based in China to execute the project.²⁰⁴ Other types of assistance, such as technical assistance and consulting were procured from businesses from a number of states such as: Canada, Denmark, Ethiopia, Ghana, Israel, Kenya, Sweden and the United Kingdom, as several more.²⁰⁵

¹⁹⁶ Ibid., art. 20, art. 22, art. 49, art. 51 and art. 56.

¹⁹⁷ Ibid., art. 37.

¹⁹⁸ CRC, art. 33, art. 34, art., 36; art. 37; UDHR, art. 5; ICCPR, art. 7 & art. 24.

¹⁹⁹ CRBP, Principle 2.b.

²⁰⁰ CRPD, art. 7 & art. 16; CRC, art. 22; CMW, art. 10.

²⁰¹ CRBP, Principle 4.a.

²⁰² Ibid., Principle 8.a

²⁰³ Kolieb, J., (2020), p. 373-374.

²⁰⁴ Erdem Türkelli, G. (2020) p. 224 & 225;

²⁰⁵ Ibid., p. 229.

A risk assessment was made, but in line with World Bank safeguarding standards only environmental risks and risks of involuntary settlements were investigated.²⁰⁶ Yet another impact assessment was made in 2009 where child related risks were identified as being resettlement and disruptions of education as children might want to look at the road construction activities. The risk of the spread of HIV/AIDS was also noted but not linked to children. Future tourism due to the development of the area was also linked to exploitation of young boys and girls.²⁰⁷

However, complaints began emerging from local communities of sexual exploitation of minors and teen pregnancies by the road construction workers and others involved with the project. The spread of HIV/AIDS among young girls, school drop outs, sexual harassment of female employees, lack of compensation and participation, fear of retaliation, and even child sex trafficking were also among other adverse impacts reported.²⁰⁸ Since the project was funded by the World Bank the communities had the ability to launch these claims with the World Bank Inspection Panel, which was done after failed attempts at getting remedies from the companies directly.²⁰⁹ However, the first attempt to file a complaint with the World Bank failed, and it wasn't until the community let an NGO be their representative that an investigation from the World Bank was commenced.²¹⁰ The World Bank Inspection Panel found links between the complaints of child rights impacts and the road construction project and found that there were obvious risk factors which should have been included in the risk assessments from the start, and that actions to respond to complaints had been too slow.²¹¹ In addition, a review (stemming from the failures of this project) from the World Bank of all their projects in Uganda revealed that operational-level grievance mechanisms focused mainly on the loss of assets for adults but did not consider child-protection risks. A reason identified for this lack is that women or other members of the community (such as children themselves) were not included as stakeholder representatives.²¹² This project adversely impacted the child's right to be protected from all forms of violence, sexual abuse and exploitation²¹³. It also impacted the right of every child who is victim of abuse or exploitation to recovery and rehabilitation²¹⁴, due to the bribery of perpetrators to police officers and the lack of access to remedies. The cases involving child sex trafficking are violations of ILO C182 and is labelled as one of the worst forms of child labour.

This project shows that it can not be expected that businesses include a child rights perspective if it is not specifically instructed or required to do so. The risk is that child rights impacts will be overlooked if not the right expertise exists in the company or the company sees the need to bring in such external expertise.²¹⁵

²⁰⁶ Erdem Türkelli, G. (2020), p. 225; World Bank (2008), p. 5, para. 4.

²⁰⁷ Erdem Türkelli, G. (2020), p. 226; AfDB, para 6.2.3 & 6.2.4 & 6.2.11 & 6.2.20.

²⁰⁸ World Bank Inspection Panel (2014); Joy for Children (2015), p. 7-10.

²⁰⁹ Erdem Türkelli, G. (2020), p. 232.

²¹⁰ Ibid., p. 232.

²¹¹ Ibid., p. 232.

²¹² World Bank (2016), p. 26, para. 65.

²¹³ CRC, art. 19 & 34.

²¹⁴ Ibid., art. 39.

²¹⁵ Erdem Türkelli, G. (2020), p. 241.

3.2.5 Children's right to participation

A central right often overlooked in the business and human rights context is the right for children to participate. The right of children to express their views, have them heard and respected in all matters that concern them is established in art. 12 CRC and is one of the four core principles of the CRC. Since it is a core principle it means that it should permeate the interpretation and implementation of all other rights²¹⁶ and the CRC Committee highlights that a broad interpretation should be given to the term "all matters affecting the child".²¹⁷ Children also have the right to get the needed support in order to facilitate their participation. The CRC Committee sets up a row of basic requirements which must be in place when implementing the right of children to participate, stating that all processes must be: transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk and accountable.²¹⁸ This right is also linked to other child rights such as the right to freedom of thought, expression, religion, association and peaceful assembly, and the right to access to information²¹⁹. Businesses can respect this right by including consultation with children as stakeholders, for example in human rights impact assessments, and by establishing child-accessible grievance mechanisms. This type of child participation will assist businesses both in identifying business impacts on children's rights, help to design prevention and mitigation efforts in ways which will be in the child's best interest and not further infringe on rights, and will help to ensure that potential remedies will benefit the child.²²⁰

It is also vital to ensure that any child participation process does not harm the child or infringes on any other rights of the child.²²¹

From several of the examples given above it is clear that child participation can help to identify a wider range of both positive and negative child rights impacts. For example in the Barrick Gold case where they discovered socio-economic struggles for children in the communities and could then support positive impact on a variety of children's rights. The Uganda Transport Sector Development Project can serve as an example that including children or their representatives might have been an opportunity to prevent or mitigate some of the serious impacts that the road building project had on children.

A good example of child participation is the travel company Kuoni which has positioned children as a distinct stakeholder group in their human rights impact assessments. In their assessment on human rights impacts from tourism in Kenya, they did not study all child rights, but had in advance narrowed the scope down of what impacts on children might be worth studying, focusing on

²¹⁶ CRC Committee GC No. 12 (2009), para. 2, p. 5.

²¹⁷ Ibid., para. 27, p. 10.

²¹⁸ Ibid., p. 29-31.

²¹⁹ CRC, art. 13, art. 14, art. 15, art. 17.

²²⁰ CRC Committee GC No. 12 (2009), para. 122, p. 27.

²²¹ Ibid., para. 22-25, p. 10.

children in commercial sexual exploitation.²²² This might have caused some impacts to be missed, as concluded by a United Nations Children’s Emergency Fund (UNICEF) representative assessing the project.²²³ However, in their human rights impact assessment two years later in India, the company included children as stakeholders on the full range of human rights.²²⁴ The way Kuoni conducted child participation in that assessment was condoned by UNICEF, saying that other businesses could take inspiration from Kuoni’s way of working.²²⁵

3.2.6 Right to effective remedy

Children have the right to effective remedy for violations of their human rights²²⁶. Child victims of corporate human rights violations face additional barriers accessing remedies, linked to children’s legal status as minors, their dependency on adults, and their level of development.²²⁷ Businesses can have a positive impact on the right of children to remedy by ensuring that operational-level grievance mechanisms are child appropriate and child accessible.²²⁸ According to the CRC Committee grievance mechanism must be known to the child, be reliable and be set up to be used and accessed in child-appropriate ways.²²⁹

As was noted in the Uganda Transport Sector Development Project, remedies were not provided for the children who were harmed, as remedies only focused on the needs of adults.

Summary

This chapter has mapped out the wide range of child rights that can be impacted by business operations, directly and indirectly. It is clear that business impacts goes far beyond child labour and that almost every child right in the CRC can be impacted by business activities in some manner. In fact, it is difficult for a business to avoid some type of interaction with children and their rights, directly or indirectly. Through real examples and cases it has been illustrated what such impacts can look like in the real life of children, and what mistakes and successes businesses have had in effectively identifying and responding to child rights impacts. Attention has also been brought to the fact that so far in the business and human rights discourse, children’s rights have had a marginalized role despite the severe impacts they can face. The complexity of how business operations impact the rights of children, and the lack of understanding of the topic, warrants more competence and efforts to be poured in this field. This is the backdrop for the need to carefully considering how to frame and address children’s rights in legislation on business responsibility for human rights.

²²² Kuoni (2012), p. 11.

²²³ Ibid., p. 32.

²²⁴ Kuoni (2014), p. 11.

²²⁵ Kuoni (2014), p. 37.

²²⁶ UDHR, art. 8.

²²⁷ Paré, M. & Chong, T. (2017), p. 909; Kolieb, J., (2020), p. 376-377.

²²⁸ CRC Committee GC No. 12 (2009), para. 46, p. 13.

²²⁹ CRC Committee GC No. 12 (2009), para. 46 & 47, p. 14; Kolieb, J., (2020), p. 376-377.

4 Regulatory Developments on Business and Human Rights leading up to the EU-initiative

The momentum for adopting an EU Directive on corporate responsibility for human rights and the environment stems from the increased interest and recent developments of legal instruments in this field during the past ten years. This chapter maps out the main aspects of how legislation on corporate responsibility for human rights have developed. This field is currently rapidly growing with both domestic, regional and international instruments being initiated. The understanding and clarification is growing concerning the different roles and responsibilities that businesses could have under international human rights law.²³⁰

Today there are no international legally binding instruments regulating private businesses and human rights, but there are however a couple of soft law instruments which are widely accepted as outlining what responsible business conduct looks like from a human rights perspective. Although soft law is not legally binding and therefore does not have monitoring and enforcement mechanisms compelling compliance, they are serving the purpose of bringing attention to the governance gap in the business and human rights sphere and businesses are incorporating aspects of these into their policies and operations. Domestic and international legal frameworks that are being drafted and adopted are often inspired by the foundations laid in these soft law instruments.²³¹

The UN Guiding Principles on Business and Human Rights

The most widely accepted and authoritative soft law instrument on business and human rights is the UNGPs.²³² In 2005 the mandate was given to the newly appointed position Special Representative of the Secretary-General (SRSG) to create standards of expected behaviour from business with regard to human rights.²³³ In 2008 the SRSG presented the Protect, Respect and Remedy framework (PRR).²³⁴ The PRR outlines the difference in responsibilities that states versus businesses have. The first pillar recognises the well-established obligation under international law, that states have the duty to fulfil the human rights of individuals and protect against abuses from third parties, including businesses.²³⁵ Businesses on the other hand have the responsibility to respect human rights, which means that a business should not infringe on the human rights of others and should address adverse human rights impacts with which they are involved.²³⁶ The framework also establishes that rights-holders should have access to judicial and non-judicial remedies if human rights harm occurs. In 2011 the SRSG operationalized the PRR through the

²³⁰ Collins, T. (2014), p. 583.

²³¹ Paré, M. & Chong, T. (2017), p 912.

²³² Landau, I. (2019), p. 223.

²³³ Wettstein, F. (2020), p. 29.

²³⁴ UN Human Rights Council (HRC) (2008), *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5.

²³⁵ *Ibid.*, paras. 27-50, pages 9-14.

²³⁶ *Ibid.*, paras. 51-81, pages 14-22.

creation of the UNGPs. They were unanimously endorsed by the UN Human Rights Council in 2011 and accepted by both states and businesses.²³⁷ They were however also criticised for compromising too much in order to cater to business interests.²³⁸

The UNGPs are built on the three pillars set out in the PRR framework and have been instrumental in establishing the concept of human rights due diligence.²³⁹ The UNGPs state that the responsibility of businesses to respect human rights requires avoiding causing or contributing to human rights harm through ones own activities and address such harms if they occur. It also includes preventing and mitigating human rights impacts which are directly linked to ones operations through a business relationship.²⁴⁰ This means that there are three ways in which a business can be involved in a human rights impact, by causing, contributing or directly linked through a business relationship. Each participation category (cause, contribute, or linked to) has a different implication for the business' responsibility to respond to the human rights harm.²⁴¹ If the business is found to have caused or contributed to the harm through their own activities, the business must cease or change its activity in order to prevent or mitigate the harm. If harm has already occurred there is a responsibility to additionally provide remedy.²⁴² If the business is merely directly linked to the harm based on a business relationship with an entity which caused or contributed to the harm, the business does not have the responsibility to provide remedies. However, the business must use its leverage over the entity which caused or contributed to the harm in order to encourage that entity to cease and prevent the activity.²⁴³ The process of achieving responsible business conduct according to the UNGPs is through conducting human rights due diligence. Due diligence is described as having four steps: assessing actual and potential human rights impact, integrating and acting on the findings, tracking responses, and communicate how impacts are addressed.²⁴⁴ This means that the due diligence process serves both the purpose of identifying human rights risk in order to be able to prevent them, and to identify whether human rights risks have occurred triggering the responsibility to act.

Despite calls from children's rights civil society organizations and from the UN Human Rights Commission, the UNGPs do not explicitly mention children's rights.²⁴⁵ In the commentary to Principle 18 however it is stated that "business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization"²⁴⁶. The UNGPs do not however give any

²³⁷ Wettstein, F. (2020), p. 29.

²³⁸ Deva, S. (2013).

²³⁹ Landau, I. (2019), p. 223.

²⁴⁰ UNGPs, Principle 13.

²⁴¹ Ibid., Principle 19.

²⁴² Ibid., Principle 19 & 22.

²⁴³ Ibid., Principle 19.

²⁴⁴ Ibid., Principle 17.

²⁴⁵ Kolieb, J., (2020), p. 360.

²⁴⁶ UNGPs, Principle 18, commentary.

specified guidance on how the due diligence process should be adapted to include the interests and perspectives of these vulnerable groups.²⁴⁷

Children's Rights and Business Principles

As a response to the lack of specific guidance and obligations in the UNGPs towards children's rights, UNICEF took a leading role in linking responsible business behaviour with children's rights. UNICEF, in collaboration with Save the Children and the UN Global Compact, created the Children's Rights and Business Principles²⁴⁸ (CRBPs) which gives guidance to businesses on what measures they can take in order to avoid having adverse impacts on children's right and how to support positive impacts.²⁴⁹ The CRBPs are not a legal framework, but deserves to be mentioned anyway due to their important role in putting the spotlight on the nexus between children's rights and business.²⁵⁰ The framework is based on the CRC and the two ILO Conventions C182 and C138 regarding child labour and young workers, and it highlights the four general principles of the CRC as being at the centre of corporate responsibility towards children's rights.²⁵¹

The CRBP contains 10 Principles which translates these established human rights relevant to children into an operational framework to be used by businesses.²⁵² Each of the 10 Principles are divided up into two categories of actions that businesses can take to either "respect" or "support" children's rights. The measures identified as needed in order to respect children's rights are based on the obligations set out in the UNGPs and the measures to support children's rights are added value initiatives which can strengthen child rights, but that are not necessarily identified to fall under any legal child rights obligation according to international standards.²⁵³ An important contribution of the CRBPs is that they give attention to how children's rights can be impacted by businesses throughout its value chain, from sourcing raw materials and production to marketing and product safety.

Although the CRBP have been helpful in clarifying how businesses should act in order to respect children's rights they have gaps and limitations still needed to be filled.²⁵⁴ Limitations are for example that they do not elaborate on all the rights found in the CRC and they do not cover additional ILO Conventions which provisions are very relevant to children's rights.²⁵⁵ For example do they not go into detail of the importance of how labour rights for parents impact children which has later on been identified by UNICEF as a vital aspect of business impact on children's rights.²⁵⁶

²⁴⁷ Collins, T. (2019), p. 122.

²⁴⁸ UNICEF, Save the Children & UN Global Compact (2012) *Children's Rights and Business Principles*.

²⁴⁹ Kolieb, J., (2020), p. 366.

²⁵⁰ Ibid., p. 367.

²⁵¹ CRBP, Principle 1, p. 14; Kolieb, J., (2020), p. 367.

²⁵² Kolieb, J., (2020), p. 367.

²⁵³ Ibid., p. 366.

²⁵⁴ Collins, T. (2014), p. 584.

²⁵⁵ Ibid., p. 587.

²⁵⁶ UNICEF & UN Global Compact, *Family Friendly Workplaces: Policies and Practices to Advance Decent Work in Global Supply Chains*.

The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (OECD Guidelines)²⁵⁷ is just like the UNGPs, a leading soft law framework, backed by governments, designed to improve the conduct of transnational business. These guidelines were launched already in 1976 and only contained one article on human rights, but has since then been updated and now have a large section dedicated to human rights and the environment. When the UNGPs were adopted the OECD Guidelines incorporated human rights due diligence and more comprehensive responsibilities on human rights aligning themselves with the UNGPs.²⁵⁸

A unique aspect of the OECD Guidelines is that they have an enforcement mechanism, the National Contact Points which can receive complaints from victims as a non-judicial grievance mechanism.²⁵⁹ In regards to children, the instrument refers to the abolition of child labour and highlights that children are a particularly vulnerable group. Besides that there are no explicit mentions of what business activities could impact child rights, or what child rights might be relevant to businesses.²⁶⁰

A binding UN Treaty on Business and Human Rights

After the mandate of the SRSG was over the UN established the Working Group on Business and Human Rights (UN Working Group).²⁶¹ It was mandated to take over where the SRSG ended by supporting the implementation of the UNGPs.²⁶² Attempts began in the UN to adopt a binding treaty on business and human rights on UN level and an open-ended intergovernmental working group was established to facilitate this process.²⁶³ This process was initiated by civil society activity, especially from stakeholders in the Global South, expressing their dissatisfaction with the UNGPs ability to create real positive impacts on human rights.²⁶⁴ Discussions and negotiation on the binding UN Treaty began in 2015²⁶⁵ and elements for a treaty draft was published in 2017.²⁶⁶ A first draft, called the Zero Draft²⁶⁷ was published in 2018 and during this year stakeholders were given the opportunity to provide input on the draft. Since then two more drafts have been

²⁵⁷ OECD (2011) *OECD Guidelines for Multinational Enterprises*, OECD Publishing.

²⁵⁸ Wettstein, F. (2020), p. 26.

²⁵⁹ Ibid.

²⁶⁰ Kolieb, J., (2020), p. 365.

²⁶¹ Wettstein, F. (2020), p. 30.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ See for instance the first report of the working group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/20/29, dated 10 April 2012.

²⁶⁵ Wettstein, F. (2020), p. 31.

²⁶⁶ Business & Human Rights Resource Centre, Big Issues, Binding Treaty. Available at: <https://www.business-humanrights.org/en/big-issues/binding-treaty/#:~:text=In%20June%202014%2C%20the%20UN,corporations%20and%20other%20business%20enterprises>

²⁶⁷ Office of the High Commissioner for Human Rights, Zero Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (revised version) (2019).

published, the latest one (the Second Revised Draft) was published in August 2020.²⁶⁸ Article 6.3.c in the Second Revised draft, due diligence measures undertaken by businesses must include “special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas”.²⁶⁹

The French Duty of Vigilance Law and other domestic and regional laws

The increased attention to corporate human rights violations without accountability, and the growing understanding of businesses’ role and responsibility for human rights has caused a stream of initiative on domestic level in order to regulate responsible business behaviour.²⁷⁰ Most comprehensive and ground-breaking is the French Duty of Vigilance Law²⁷¹, adopted in 2017.²⁷² The aim of the French law is both to provide access to remedy for victims of human rights abuses and to increase corporate accountability.²⁷³ The law only covers large businesses (over 5,000 employees in France or over 10,000 employees worldwide) which means that around 200-250 are affected.²⁷⁴ The law is heavily influenced by the UNGPs and businesses are required to establish, disclose and effectively implement a so called vigilance plan each year. The vigilance plan needs to include measures to adequately both identify and address serious human rights and environmental harm. The vigilance plan should not only include risks linked to the business’ own activities, but also cover activities by subsidiaries, subcontractors and suppliers.²⁷⁵ All human rights violations, fundamental freedoms, serious bodily injury, environmental damage and health risks resulting directly or indirectly from the activities of the company and of the companies it controls are covered by the law.²⁷⁶ The law establishes civil liability for harms resulting from a business’ failure to observe its duty of vigilance which can result in the business being required to repair damages and compensate victims. Even if no human rights harm has occurred, a business can be obliged through court proceedings combined with financial penalties, to correctly establish, publish and implement its duty of vigilance plan if it is found that their vigilance plan is insufficient.²⁷⁷ It is today the only binding domestic law imposing obligations on businesses for the full range of internationally recognized human rights.

²⁶⁸ Business & Human Rights Resource Centre, Big Issues, Binding Treaty. Available at: <https://www.business-humanrights.org/en/big-issues/binding-treaty/#:~:text=In%20June%202014%2C%20the%20UN,corporations%20and%20other%20business%20enterprises>

²⁶⁹ UN, OEIGWG Chairmanship (2020) Second Revised Draft, art. 6.3.c.

²⁷⁰ Wettstein, F. (2020), p. 31.

²⁷¹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.

²⁷² Wettstein, F. (2020), p. 31.

²⁷³ Bright, C. (2021), p. 88.

²⁷⁴ French Duty of Vigilance Law, art. L. 225-102-4; Bright, C. (2021), p. 88.

²⁷⁵ French Duty of Vigilance Law, art. L. 225-102-4.

²⁷⁶ French Duty of Vigilance Law, art. L. 225-102-4; Bright, C. (2021), p. 88.

²⁷⁷ French Duty of Vigilance Law, art. L. 225-102-5.

A positive impact from the law is that companies' due diligence practices have improved overall, however, the bar has not been set very high. An analysis conducted by a group of NGOs found that a majority of vigilance plans were inward-looking, focusing on the risks to the business itself rather than on the risks for people and the planet.²⁷⁸ This either shows a lack of understanding of the purpose of human rights due diligence or possibly reveals a relaxed attitude towards human rights due diligence efforts. Other shortcomings are that the concept of human rights due diligence still is vague and that it has been interpreted in different ways by companies and other stakeholders.²⁷⁹

Besides the French Duty of Vigilance Law several other domestic initiatives are currently being drafted or have been adopted. One example is the Dutch Child Labour law which established due diligence obligations for businesses, but limited to child labour. The Modern Day Slavery Act in the UK is another example. This law however is merely a transparency law which does not require due diligence, only annual reporting on efforts made (or not made) to eradicate trafficking and forced labour from supply chains.²⁸⁰

The EU also already has a few binding regulatory instruments in the business and human rights area. One is the Directive on Disclosure of Non-Financial and Diversity Information²⁸¹ (NFRD) which requires large corporations to report on social and environmental challenges. Two instruments which require due diligence is the Conflict Mineral Regulation²⁸² which covers imports of tin, tantalum, tungsten and gold originating from conflict-affected and high-risk areas, and the EU Timber Regulation²⁸³ covering timber and timber products.

The initiative for an EU Directive on corporate due diligence and corporate accountability

In April 2020 the European Commissioner for Justice, Didier Reynders, announced that the European Commission has committed to introducing rules, in 2021, for mandatory corporate due diligence and corporate responsibility for human rights impacts (what this thesis refers to as the EU mHREDD law).²⁸⁴ One central reason behind the initiative is the failure of voluntary human rights due diligence frameworks (such as the UNGPs and the OECD Guidelines) to actually benefit those whose rights are impacted.²⁸⁵ According to a study by the European Commission only 37%

²⁷⁸ Bright, C. (2021), p. 90.

²⁷⁹ Ibid.

²⁸⁰ Wettstein, F. (2020), p. 31.

²⁸¹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

²⁸² Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

²⁸³ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

²⁸⁴ Working Group on Responsible Business Conduct (2020) *Webinar: European Commission Promises Mandatory Due Diligence Legislation in 2021*. Available at: <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>.

²⁸⁵ European Parliament (2020a), p. 10, para. 4 & p. 6, para. D, & F.

of businesses conduct human rights due diligence and only 16% cover the entire supply chain.²⁸⁶ A need has therefore been identified to create legislation which changes business behaviours in regards to human rights impacts.²⁸⁷ Another major reason is to create a level playing-field for businesses instead of ending up with fragmented regulations on the EU market. Not putting businesses who want to act responsibly at a competitive disadvantage.²⁸⁸

Strong indicators so far show that the law will be cross-sectoral, apply to all sizes of businesses and cover all human rights. In the latest report from the European Parliament a proposal of suggested articles for the law includes obligations on businesses to conduct due diligence in its entire value chain and to properly address any adverse impacts.²⁸⁹ They determine that the law applies to all businesses,²⁹⁰ that due diligence efforts need to be based on a risk monitoring methodology,²⁹¹ and that businesses can be held liable if any human rights harm arises which they themselves or businesses under their control have caused or contributed to by acts or omissions²⁹². A businesses can not rid themselves of liability simply by conducting due diligence. Instead, the due diligence measures taken must be considered objectively sufficient in order to avoid legal liability.²⁹³ A business will avoid legal liability if it can show that it's due diligence measures were sufficient to avoid causing or contributing to adverse human rights impact.

The EU Parliament has yet to vote on a final proposal for the text of the law, which means that much is still up in the air. The efficiency of the law will depend on matters such as where the burden of proof will rest and how compliance is monitored and enforced. The extent of child rights integration in the law so far will be discussed in the following chapter.

5 Children's Rights in the Legislative Process for the EU mandatory Human Rights Due Diligence Law

The aim of this chapter is to analyse how children's rights have been discussed in the legislative process. What concerns in regards to children's rights have been lifted, or not included, and what measures are proposed in order for the EU law to tackle those concerns? The chapter includes three parts. The first part analyses all the preparatory work for the EU mHREDD law, the second part analyses the two reports that have been published which include recommendations on what the

²⁸⁶ Ibid., p. 6, para. G.

²⁸⁷ Ibid., p. 6, para. E.

²⁸⁸ Working Group on Responsible Business Conduct (2020) *Webinar: European Commission Promises Mandatory Due Diligence Legislation in 2021*. Available at: <https://responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021/>, video at around 14 minutes in.

²⁸⁹ European Parliament (2021), p. 29, art. 1; European Parliament (2020a), p. 16, art. 1.

²⁹⁰ European Parliament (2021), p. 30, art. 2; European Parliament (2020a), p. 17, art. 2.

²⁹¹ European Parliament (2021), p. 32, art. 4; European Parliament (2020a), p. 19, art. 4.

²⁹² European Parliament (2021), p. 41-42, art. 19; European Parliament (2020a), p. 26, art. 20.

²⁹³ European Parliament (2021), p. 41, art. 19.

actual provisions of the law should look like, and the final part is a concluding analysis of how and to what extent children's rights have been integrated in the legislative process of the EU mHREDD law.

5.1 Preparatory Work

This section analyses all the preparatory work in order to understand how the topic of children's rights have been discussed throughout the process. The most central and comprehensive study in preparation for this law is the *Study on due diligence requirements through supply chains*²⁹⁴ which is a study evaluating different regulatory options for a possible EU wide law on corporate responsibility for human rights. The study is almost 600 pages long and it assesses four different regulatory options for a possible directive on corporate responsibility for human rights. It has received input from 334 business survey respondents and 297 general survey respondents which include business associations, industry organisations, civil society, trade unions and government bodies, and legal practitioners.²⁹⁵ Thereby this document provides good insights from a wide range of stakeholders.

Another key study in the legislative process for the mandatory due diligence law is the *Human Rights Due Diligence Legislation - Options for the EU*²⁹⁶, which includes two briefings; *Substantive Elements of Potential Legislation on Human Rights Due Diligence* and *EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims*. These two briefings were commissioned by the European Parliament's subcommittee on Human Rights in order to make recommendations on the upcoming law.

The legislative process has also been informed by the report *Access to legal remedies for victims of corporate human rights abuses in third countries*²⁹⁷ which was published as early as 2019.

During the legislative process under 2020 and the beginning of 2021, the European Parliament also received three opinions from EU committees which have influenced the design of the law. A process for including submissions from a wide range of stakeholders also took place during this time. The European Parliament has now voted on and adopted a report which includes a proposal for the European Commission on what the Parliament sees fit to include in the law. The adoption of that report with the proposed articles is where the legislative process is at the moment of writing this thesis. The Commission is expected to publish its proposal for the law in June this year (2021).²⁹⁸ Much can of course change in the final proposal, but the preparatory work and the two draft reports with suggestions on articles give strong indications on the broad strokes of the law.

²⁹⁴ European Commission (2020a), *Study on due diligence requirements through the supply chain*.

²⁹⁵ Ibid., p. 16.

²⁹⁶ European Parliament (2020b).

²⁹⁷ European Parliament (2019) *Access to legal remedies for victims of corporate human rights abuses in third countries*.

²⁹⁸ ECCJ (2021).

Themes identified in the preparatory work which are relevant for this thesis to analyse are: Reasons for the law, regulatory options, how children their human rights risks are characterized, and solutions proposed to address child rights risks and the probable efficiency of those solutions.

Reasons for the law

One of the central reason for the initiative of the EU mHREDD law is that past, mostly voluntary, efforts have failed to deliver sufficient protection of human rights from business impacts. This reason also echoes through much of the preparatory work, especially highlighting the failure of voluntary efforts to address impacts on specifically vulnerable groups.²⁹⁹ The lack of access to justice and remedy is also an important reason for this law.³⁰⁰ One briefing even refers to children's rights as one specific reason as to why there is a need for mandatory due diligence, as voluntary measures have failed to address children's rights.³⁰¹ A third key reason is to create a level playing-field by holding European companies at the same standard.³⁰²

The *Study of due diligence requirements* has asked its 600 respondents about where they think current due diligence practices fall short. Common replies are that risk is often understood as risk to the company, and not the human rights risk, and that since there are no legal requirements, companies will themselves decide on what will be covered in their due diligence processes. This leads to non-efficiency for rights-holders as businesses will tackle issues that are doable to take action on from the business' point of view, not based on the risk of rights-holders.³⁰³ Lack of knowledge on how to address any identified risks was also an issue highlighted.³⁰⁴ Another shortcoming brought up by responders was that due diligence practices are gender-blind which then results in them falling short of identifying specific risks faced by women. Responders said that this is an important gap to fill since women are disproportionate and differentiated affected by adverse human rights impacts.³⁰⁵

Responses from stakeholders in the study are thereby in agreement with the EU that current regulations are not sufficient due to their voluntary nature and due to lack of competence in businesses in the field of human rights. It is also interesting to note that the lack of a gender perspective is seen as one of the reasons for current failures. The fact that businesses are inclined to focus their due diligence efforts, not based on severity of risks to human rights, but on what the business has knowledge about and is capable of handling is concerning from a child rights perspective. As highlighted in chapter 3, businesses' impacts on children's rights are not always

²⁹⁹ European Parliament Committee on Development (2020), p. 4, para. 2; European Commission (2020a), p. 92 & 93.

³⁰⁰ European Parliament (2019) *Access to legal remedies for victims of corporate human rights abuses in third countries*, p. 5.

³⁰¹ European Parliament (2020b), p. 12.

³⁰² European Commission (2020a), p. 146-147.

³⁰³ *Ibid.*, p. 92 & 93.

³⁰⁴ *Ibid.*, p. 93.

³⁰⁵ *Ibid.*, p. 92.

direct impacts, but indirect. The impacts might also be of such nature that they do not become apparent until later in the child's life. This makes children's rights less visible and requires special competence to identify. The nature of impacts on children's rights coupled with businesses' shortcomings in dealing with complex human rights issues makes child rights impacts at risk of being overlooked in due diligence processes.

A final shortcoming to current implementation of due diligence highlighted in the preparatory work is that businesses have treated those processes as a tick-box exercise without meaningful engagement with stakeholders, especially with the most vulnerable stakeholders.³⁰⁶ Meaningfully including input from children as stakeholders will help to identify child rights risk at an early stage. Children are generally not included in decision-making, they face additional barriers to make their voices heard and most often need adults to facilitate such a process for them.³⁰⁷ It is therefore concerning that engagement with stakeholders have been low, indicating that such processes might not be available for children.

On these grounds, the main reasons for this legal initiative are very much relevant for the risks facing children's rights.

Regulatory options

The preparatory work evaluates four main regulatory options for the EU mHREDD law:

- Option 1: no change;
- Option 2: new voluntary guidelines;
- Option 3: new reporting requirements; or
- Option 4: the introduction of mandatory due diligence requirements.

All the preparatory work is in agreement that introducing mandatory due diligence requirements (option 4) would have the most positive impact on human rights,³⁰⁸ which is in line with the input from stakeholders as well.³⁰⁹

There are generally three different approaches to designing human rights due diligence laws (option 4). A first model is to specify the law focusing it on certain issues, such as child labour or a specific sector such as mineral extraction. A second model, seen in the UNGPs and the OECD Guidelines, is to cover all human rights. A third approach is to cover all human rights but refer to specific treaties when defining the scope of human rights.³¹⁰ Again there is overwhelming consensus among all groups of stakeholders that the future EU directive should cover all human rights and environmental issues, and not be specific to certain rights, sectors, or human rights

³⁰⁶ European Commission (2020a), p. 93 & 219.

³⁰⁷ Paré, M. & Chong, T. (2017), p. 909; Kolieb, J., (2020), p. 376-377.

³⁰⁸ European Commission (2020a), p. 23.

³⁰⁹ Ibid., p. 17.

³¹⁰ European Parliament (2020b), p. 5.

treaties.³¹¹ The reasoning behind this is that having issue-specific regulation would be costly and complicated for businesses and that rights not mentioned in any issue-specific provision would be overlooked despite them possibly having serious adverse impacts.³¹² Current issue-specific regulations, such as laws on modern slavery, child labour or specific minerals has shown to neglect several relevant human rights issues, since such laws do not have a holistic approach missing to target the surrounding causes which contribute to the human rights impact.³¹³ Another reason for including all human rights is to “avoid legal uncertainties and the artificial separation of human rights”.³¹⁴

From these arguments, the conclusion is drawn in the preparatory work that “a deliberate focus on the entire spectrum of human rights... ensures that vulnerable groups are within the scope of the due diligence, including women, children, migrant workers and LGBTI individuals”³¹⁵. It is not clarified exactly how a focus on all human rights will ensure that risks facing vulnerable groups will be addressed sufficiently. However, the arguments for a cross-issue law covering all human rights instead of an issue-specific law is sound. Issue-specific laws run the risk of overlooking the mutually reinforcing root causes of certain human rights violations making measures to tackle them inefficient. Many human rights impacts which are not highlighted in such laws will also run the risk of being downgraded and seen as less significant.

However, to draw the conclusion that a focus on all human rights will automatically ensure that all vulnerable group’s human rights risk will be covered seems a bit optimistic. Looking at the evolution of international human rights law for example shows evidence of the contrary. International human rights law began with broad treaties covering the broad strokes of human rights for all people. But since then a multitude of treaties have had to be added targeting specific issues or specific groups who did not in practice get their rights realized through broad general frameworks. It is of course true in theory that all rights and vulnerable groups are covered, but what is important is the implementation and the outcome of this law. A better conclusion to be drawn from this discussion is that a broad law covering all human rights has the potential to benefit the human rights of all groups. Realizing that potential might depend on what additional measures or mechanisms are included in the law to guarantee the inclusion of often overlooked issues and groups.

Characterization of children and their human rights risks

Children and the human rights risk they face are not discussed in detail in the preparatory work. They are not mentioned as a group that might face additional barriers in accessing remedies,

³¹¹ European Parliament Committee on Foreign Affairs (2020), p. 7, para. 23; European Commission (2020a), p. 127; European Parliament (2020b), p. 5.

³¹² European Commission (2020a), p. 128.

³¹³ Ibid., p. 226.

³¹⁴ European Parliament (2020b), p. 5.

³¹⁵ European Commission (2020a), p. 226.

despite other groups such as indigenous people and persons with disabilities are specifically mentioned.³¹⁶ Children are also not mentioned in regards to being a stakeholder group who should be given the opportunity to take part in meaningful consultations in due diligence processes. Other stakeholder groups that are mentioned are trade unions, environmental organisations, women and women's organisations, and indigenous communities.³¹⁷

Children are however mentioned as a group which is more vulnerable to adverse human rights impacts.³¹⁸ But in discussions on the need to ensure that impacts on vulnerable groups facing disproportionate impacts are addressed, only women and girls are specifically highlighted, not children as a group.³¹⁹ The specific risks that children as a group face are not mentioned.

It can be concluded that children are mentioned as a vulnerable group in need of protection from human rights harm. However, measures to address their specific risks are not discussed. Children are not characterized as an important stakeholder group and their participatory rights are not mentioned when discussing stakeholder engagement and access to remedies. This means that a comprehensive child rights perspective according to the rights in the CRC has not been present in this preparatory work.

Solutions to address risks to children's rights

There are two main solutions offered throughout the preparatory work for ensuring that impacts on particularly vulnerable groups are addressed are; Requiring a gender-perspective throughout all due diligence processes and including non-binding guidelines accompanying the law.³²⁰

However, one document (*Human Rights Due Diligence Legislation - Options for the EU*) differs from all the others by suggesting specific child rights measures.³²¹ The briefing acknowledges that despite previous due diligence frameworks (such as the UNGPs and OECDs Guidelines) not being issue specific, there have been calls from civil society organizations demanding additional standards for the protection of vulnerable groups such as women, children, indigenous people, and migrants.³²² Based on this, the recommendation of the briefing is that reference should be made to additional duties for these groups, but that the EU mHREDD legislation at the same time needs to emphasize the universal and indivisible character of all human rights.³²³

³¹⁶ European Parliament (2019) *Access to legal remedies for victims of corporate human rights abuses in third countries*, p. 16.

³¹⁷ European Parliament Committee on International Trade (2020), p. 6, para. 14.

³¹⁸ European Commission (2020a), p. 321.

³¹⁹ European Parliament Committee on Foreign Affairs (2020), p. 7, para. 26; European Commission (2020a), p. 226-227.

³²⁰ European Commission (2020a), p. 226-227 & p. 272.

³²¹ European Parliament (2020b), p. 7.

³²² European Parliament (2020b), p. 7; ECCJ (2018); Council of Europe (2016).

³²³ European Parliament (2020b), p. 7 & 14; European Parliament, Committee on International Trade (2020), p. 6, para. 16.

Gender perspective

Almost all the documents which make up the preparatory work proposes a required gender-perspective in due diligence processes, and many times this is repeated several times in the same document. Reference is often made to the UN Working Group's Guidelines on Gender Dimensions of the UNGPs³²⁴ (hereafter: UN Gender Guidelines), as a guiding tool.³²⁵ Reasons given for the need of a cross-cutting gender perspective is that women face disproportionate and differentiated impacts through business operation. Another reason is that there is a high number of women employed in supply chains in a large number of sectors, and that these types of jobs are generally paid less and have higher rates of informal employment.³²⁶ Usually the suggestion of applying a gender-perspective is linked to discussions on past failures to address a wide range of particularly impacted groups.³²⁷ This frames adding a gender-perspective as being a solution for addressing disproportionate impacts on all vulnerable groups, not just women.³²⁸

The need for a gender-perspective also gets referred to in discussions on access to justice and effective remedy in the preparatory work. It is stated that several different types of vulnerabilities different can be barriers, but specifically mentions gender inequality as one of those. Suggestion is that the law should ensure that women benefit equally from the remedies that businesses provide.³²⁹

On top of the stakeholder input from the preparatory work, several civil society stakeholders have released their own statements on the issue of gender-inclusion and the EU mHREDD law. In a publication put together by the Business and Human Rights Resource Centre for the German EU Council input from a group 20 diverse stakeholders are presented. One of the key takeaways from this publication is the call for a dedicated gender perspective and considerations of the differentiated impacts on vulnerable groups voiced by many of the contributors, both businesses and organizations representing rights-holders.³³⁰ Stakeholders fear that without such requirements in the law, differentiated impacts on women and girls will not be addressed by businesses.³³¹ Another civil society organization (ActionAid) highlights that despite the documented knowledge of the disproportionate impact on women from business activities, this has not materialized into

³²⁴ The UN Gender Guidelines is a report and guiding recommendations on how to include a gender-perspective to each principle in the UNGPs. The UN Gender Guidelines will be explained more further on. UN Human Rights Council (HRC) (2019), *Gender dimensions of the Guiding Principles on Business and Human Rights : report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, 23 May 2019, A/HRC/41/43.

³²⁵ European Commission (2020a), p. 226-227; European Parliament Committee on Foreign Affairs (2020), p. 9, para. 36; European Parliament Committee on Foreign Affairs (2020), p. 12, para. 49.

³²⁶ European Parliament, Committee on International Trade (2020), p. 6, para. 16.

³²⁷ European Parliament Committee on Development (2020), p. 4, para. 2 & p. 5, para. 8.

³²⁸ European Parliament Committee on Foreign Affairs (2020), p. 9, para. 36.

³²⁹ *Ibid.*, p. 12, para. 49.

³³⁰ Business & Human Rights Resource Centre (2020), p. 8, 18 & 36 & 57, 64 & 66.

³³¹ *Ibid.*, p. 18 & 36 & 57.

“anything meaningful in practice” in the EU mHREDD legislation process so far.³³² ActionAid sees the need for explicit measures for women pointing to the fact that in standard risk assessments, gender disparities are not identified and therefore measures could be misguided and not benefit women as much as men.³³³ ActionAid fears that if measures on gender sensitive due diligence are not included at the start of these legislative initiatives it will take years to correct such gaps and urge legislators to not miss this opportunity. Efforts to measure for vulnerable groups later will become just add-ons and not integrated in the mainstream processes.³³⁴

Calling for a gender perspective to be mandatory in due diligence processes is a way of mainstreaming these issues into general processes. Mainstreaming can have a few different meanings but according to the definition presented by the Council of Europe gender mainstreaming means “introducing a gender perspective in a given policy field in order to make sure that the effects of policies are more gender neutral”³³⁵. This is different from using a targeted approach to address certain issues. The targeting approach sets out an explicit focus on a certain issue combined with specialized rights and obligations. The mainstreaming approach recognizes that an issue is so important that it must be considered throughout all undertakings.³³⁶

Mainstreaming gender concerns is not a new phenomenon in the business and human rights regulatory field. Concerns of overlooking impact on women have been raised in regards to all the main previously drafted regulatory frameworks on business and human rights, such as the UNGPs, the UN Treaty on Business and Human Rights and the French Duty of Vigilance Law.³³⁷

In regards to the UNGPs, mainstreaming gender in the implementation of due diligence efforts was recognized as so essential that the UN Working Group in 2019 released a booklet on the Gender Dimensions of the Guiding Principles on Business and Human Rights³³⁸ (this is the UN Gender Guidelines which previously have been referenced). The UN Gender Guidelines includes a report on gender-dimensions in the area of business and human rights and specific gender-guidelines for each principle in the UNGPs, and stresses the critical need for both states and businesses to step away from gender-neutral due diligence due.³³⁹ The UN Gender Guidelines echoes the reasons mentioned above for the need for a stronger focus on gender-related human rights impacts: the inadequate attention on gender from businesses and states in due diligence processes, the disproportionate adverse human rights impacts on women, and the additional

³³² ActionAid (2019).

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Council of Europe (1998), p. 17.

³³⁶ Erdem Türkelli, G. (2020), p. 25.

³³⁷ HRC (2017), p. 6 para 22 & p. 22 para. 128; Women’s International League for Peace and Freedom (2017), p. 2; Awori, S. et al. (2018), p. 285 & 286; Human Rights Watch et al. (2011), p. 2; Joint Civil Society Statement (2021) Available at: <https://www.ecchr.eu/en/press-release/france-must-ensure-implementation-of-duty-of-vigilance-law-to-protect-human-rights-defenders/>.

³³⁸ HRC (2019), Gender dimensions of the Guiding Principles on Business and Human Rights : report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.

³³⁹ UN (2019), p. 54, para. 21 & p. 47, para. 3.

barriers that women and girls face when seeking remedies.³⁴⁰ The UN Gender Guidelines also suggests that although the guidance in the report is focused only on women, it could be applied to any type of rights holder who faces barriers and discrimination in regards to their human rights.³⁴¹

Non-binding additional guidelines

The *Study on due diligence requirements* states that additional non-binding guidelines can be a good solution for ensuring protection for vulnerable groups, stating that they have been useful for reporting non-financial information in regards to the EU non-financial reporting Directive (hereafter: NFRD).³⁴² There is however no references to in what ways they have been useful in the NFRD. The study lists a non-exhaustive list of standards and guidelines which could function as additional non-binding guidance in the EU mHREDD law. The list includes for example the UNGPs and the OECD Guidelines, guidance on sector-specific initiatives and guiding instruments on how to address certain risks. Guiding documents on how to address certain risks include for example the UN Gender Guidelines³⁴³, the Children's Rights and Business Atlas³⁴⁴, and The Principles on Climate Obligations of Enterprises^{345,346} It is positive that there is a guiding document referring specifically to children's rights, which indicates recognition of the need for additional attention to this stakeholder group.

The question that needs to be raised however, is how effective these accompanying guidelines will be as they are non-binding. This is especially relevant in light of the evidence previously presented that businesses have not been inclined to follow voluntary guidelines, that those have had little to no effect on human rights violations in supply chains, and the failure of businesses to address significant risks and instead focusing on risks that are easy to handle.³⁴⁷

In addition to the preparatory work not providing reasons for how accompanying guidelines have been influential for the NFRD, the many voluntary guidelines in that directive have in fact been pointed out as problematic. The critique is that they create fragmentation in company reporting, since businesses are allowed to report in accordance with the international standard of their choice.³⁴⁸ The European Commission also added more additional guidelines to the NFRD in 2019, since the directive with its previous guidelines did not produce reporting in line with the goals of the directive.³⁴⁹ Despite these efforts the NFRD has not been effective in responding to the needs of the investment community and other stakeholders. This, alongside other matters, has led the

³⁴⁰ UN (2019), p. 6, p. 54, para. 21 & p. 47, para. 3.

³⁴¹ Ibid., p. 49, para. 9.

³⁴² European Commission (2020a), p. 272.

³⁴³ UN Human Rights Council (2019).

³⁴⁴ UNICEF, *Children's Rights and Business Atlas*.

³⁴⁵ Expert Group on Climate Obligations of Enterprises (2018).

³⁴⁶ European Commission (2020a), p. 273.

³⁴⁷ Ibid., p. 218-219.

³⁴⁸ ECCJ (2014), p. 3.

³⁴⁹ European Commission (2020b), p. 1; GermanWatch & Alliance for Corporate Transparency (2021).

European Commission to present and adopt a far-reaching proposals to review the NFRD in April 2021.³⁵⁰ The European Commission sees a need to revise and strengthen the existing directive and the current system of voluntary guidelines was mentioned as one of the reasons for the NFRD not being efficient.³⁵¹ In its proposal for strengthening the directive the European Commission rejects the legislative option to continue with the current approach of non-binding guidelines, and also rejects the legislative approach to update these guidelines but keep them voluntary.³⁵² Instead the way forward seems to be including more detailed reporting requirements in order to ensure that the information reported meets to goal of the legislation.³⁵³

Momentarily disregarding the apparent failure of voluntary guidelines in the NFRD, the argument in their favour, is that the EU mHREDD law will give a stronger protection than previous voluntary legal frameworks (like the UNGPs for example) since the actual due diligence duties will be mandatory in the EU mHREDD. However, this line of thought can be further informed by the preparatory work itself as it tries to assess future impacts on human rights depending on the different regulatory options. That section states that several businesses say that they think that there will an overall increased positive impact on human rights from the law, but they have a hard time assessing what type of impact and to what extent. The study links this uncertainty to the track-record of businesses' non-compliance of due diligence duties when enforcement mechanisms are weak, even though due diligence duties were mandatory. References are made to two studies, one on the 2010 Dodd Frank Act in the US and one on the EU Conflict Mineral Regulation. Both these studies showed that despite mandatory obligations, businesses often will seek the easiest way of complying with the law based on the risks to the business in case the law would be enforced.³⁵⁴ If businesses approach the EU mHREDD in the same manner the effectiveness of the law will be limited, and it can be assumed that children's rights will continue to be overlooked. This assumption is valid since many business impacts on children's rights are indirect or might not be discovered until much later in life, making it hard to tie responsibility to the business, and thereby lowering the chances of enforcing liability. Therefore incentives to follow additional non-binding guidelines to address child rights impacts in due diligence processes could be low.

Finally, the preparatory work tries to answer the question on whether mandatory due diligence regulation will be effective from a human right perspective. It concludes that a large majority of stakeholders think that the impact on human rights from introducing mandatory due diligence obligations would be positive,³⁵⁵ as long as businesses conduct robust risk assessments, include

³⁵⁰ European Commission (2021) *High-level conference on a proposal for a Corporate Sustainability Reporting Directive - the way forward*. https://ec.europa.eu/info/events/finance-210506-non-financial-reporting-directive_en.

³⁵¹ Ibid.

³⁵² European Commission (2020b), p. 3; Allen & Overy (2020).

³⁵³ European Commission (2021) *High-level conference on a proposal for a Corporate Sustainability Reporting Directive - the way forward*. https://ec.europa.eu/info/events/finance-210506-non-financial-reporting-directive_en.

³⁵⁴ European Commission (2020a), p. 523.

³⁵⁵ Ibid.

meaningful collaboration with stakeholders, and that enforcement mechanisms are strong.³⁵⁶ Whether robust risk assessments actually will be conducted is however unsure. Thus identifying three important aspects of the law which need to function well in order to provide positive effects on human rights: robust risk assessments, stakeholder engagement, and effective enforcement. The track record from current implementation of due diligence frameworks however concludes that the quality of risk assessments and stakeholder engagement have been low, threatening the positive impacts on human rights. For example has this thesis pointed out earlier³⁵⁷, that general human rights impacts assessments and audits are not commonly designed to capture child rights concerns, unless specific efforts to include them are made.

Summary of the analysis of the preparatory work

The first thing that can be concluded from the preparatory work is that the issue of heightened risks for certain groups is not discussed much in detail. Most focus in the studies are on the technical details of the law, which is of course a major aspect that needs to be conducted correctly if the law is to achieve its aim. However, the main aim of the law is to prevent adverse human rights impacts due to business activities, and therefore it is warranted to have some deeper analyses of how to ensure that all rights-holders will benefit from the law and that vulnerable groups will not be overlooked. It is therefore quite disappointing that there has been no in depth assessments on what measures will be effective to address certain salient risks or vulnerable groups. It all seems to rely on businesses being competent enough to conduct risk assessments of high quality and acting efficiently on those findings.

Most noteworthy is the lack of attention on how to address the issue of access to justice and remedies for certain groups, which is hardly discussed at all. This should have been further addressed since low stakeholder engagement was one of the aspects identified as being a reason why past efforts have failed. It is additionally concerning that this is not discussed more in depth since stakeholder engagement has been identified as an important aspect of successful due diligence.

Other common themes brought up in the preparatory work is the failure of voluntary efforts. That businesses have approached due diligence as a tick-box exercise and not focused on the risks of rights-holders but risks to the business, and the lack of knowledge among businesses on how to conduct due diligence. Even when there has been mandatory due diligence duties, businesses seem to generally do the bare minimum in order to fulfil such duties, and in many cases do not even fulfil their duties if the risk of enforcement and being held legally liable is low.

There is consensus on having a broad and flexible law covering all human rights issues and sectors. The positive aspects of that is that the law can be applicable to all businesses and that measures to tackle human rights impacts will be holistic and hopefully more effective, instead of simply trying

³⁵⁶ Ibid., p. 525 & 549.

³⁵⁷ See page 20 in this thesis.

to treat each rights impact in isolation. Even though the concern is raised that vulnerable groups are impacted more severely there is no deeper analysis on how to fill that gap. The main solution offered is non-binding guidance to accompany the law. This is concerning since voluntary guidance has not been effective in the past, which the preparatory work itself recognises. Voluntary guidelines in combination with the fact that many impacts on children's rights are difficult to link to a business in a way which holds them legally liable, low incentives are created for businesses to include children's rights sufficiently in due diligence.

The other solution suggested to ensuring that disproportionate impacts on certain groups are addressed is to include a requirement on gender-sensitive approach to due diligence processes. There has been a strong call in almost all the documents of the preparatory work of requiring businesses to have a gender-perspective in their due diligence efforts, in their access justice mechanisms and when providing remedies. The most common reasons for that requirement is that women and girls experience human rights impacts in disproportionate and differentiated ways, but also that there is a large workforce of women in the low paying jobs in global supply chains. This is interesting as children are also often described as a group which experience human rights impacts in disproportionate and differentiated ways, however there is no specific mention on how to protect children from those severe impacts. Other vulnerable groups have only been briefly mentioned when being identified as such, but have not received any calls for specific measures in the way that the gender aspect has. Children are instead overwhelmingly mentioned in regards to child labour, but not in regards to other human rights impacts or in regards to the participatory rights. This analysis have also shown that past regulatory frameworks on business and human rights have also been critiqued for not including a gender perspective. It was seen as so vital for the efficiency of the UNGPs that the UN Working Groups produced guidelines for each principle in the UNGPs on how to incorporate a gender perspective.

The legitimacy and efficiency of the two main solutions; additional non-binding guidelines and applying a gender-perspective, will be further analysed in the next chapter (chapter 6).

5.2 Committee Reports with Recommendations on the Content of the Law

The Committee on Legal Affairs have so far published two reports which include recommendations to the EU Committee on how the text of the EU directive should be designed and what should be included. The first one (hereafter: the Draft Report) was published in September 2020 and voted on and adopted, in the EU Parliament in January 2021.³⁵⁸ After public consultations, debated in the Parliament, and Committee opinions it was updated and a final

³⁵⁸ European Parliament (2020a) *Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability*, Committee on Legal Affairs.

version (hereafter: the Final Report) was voted on and adopted in March 2021 in the EU Parliament.³⁵⁹ This section analyses these two drafts looking at the approach taken to children's rights and also compare differences between the two reports to see how the legislative process has developed in regard to children's rights. Due to the many calls for gender perspective in the preparatory works it is interesting to also explore what attention gender has been given in the drafts.

Both the Draft Report and the Final Report are structured in the same way, first a section named *Motion For a European Parliament Resolution* which gives account on important matters to consider in the drafting of the law. Second follows the recommendation for the actual text of the directive, starting with a preamble and then the articles.

The introductory texts

There is a significant increased focus on children in the two reports compared to the preparatory work. The improved visibility of children is also very notable comparing the Draft Report to the Final Report. The increased attention to children in the two Reports is mostly seen in the preamble and mainly concern highlighting the wide range of risks children face due to business operations.

For example, while both reports refer to child labour,³⁶⁰ the Final Report highlights both a broad scope of children's rights which can be impacted by business operations and the lack of awareness businesses have concerning these impacts.³⁶¹ The Final Report states that business activities can impact the entire range of children's rights set out in the CRC and acknowledges that childhood is a unique period of development where adverse impacts could have lifelong, irreversible and even transgenerational consequences.³⁶² It explicitly mentions that businesses in general have a "limited awareness of the range of impacts they have on children's rights", and the "potential life-changing consequences these can have for children"³⁶³. The Final Report also states that businesses have a responsibility to protect children in particular, in addition to preventing child labour³⁶⁴ and that due diligence without attention to children risk being ineffective.³⁶⁵ This is a significant acknowledgement of the unique and severe risks that face children and the fact that special measures are needed in order to protect children's rights. It is also a huge improvement from the Draft report which only mention that children risk being exploited in child labour. Additionally, references to child rights guidance tools like the CRBPs and CRC General Comment 16 is added in the Final Report, while being left out in the Draft Report.³⁶⁶

³⁵⁹ European Parliament (2021) *Report with recommendations to the Commission on corporate due diligence and corporate accountability*, 2020/2129(INL), A9-0018/2021, 11.2.2021, Committee on Legal Affairs, Rapporteur: Lara Wolters.

³⁶⁰ European Parliament (2020a), p. 6, para. D.

³⁶¹ European Parliament (2021), p. 8, para. N.

³⁶² *Ibid.*, p. 23, para. 28.

³⁶³ *Ibid.*, p. 9, para. R.

³⁶⁴ *Ibid.*, p. 8, para. N.

³⁶⁵ *Ibid.*, p. 23, para. 28.

³⁶⁶ *Ibid.*, p. 6 & p. 18, para. 3; European Parliament (2020a), p. 10, para. 3.

Despite this acknowledgement of the disproportionate human rights impacts that children face, their participatory rights are still left out. When discussing accessibility to operational-level grievance mechanisms and access to remedies only women, indigenous people and persons with disabilities are mentioned as groups which businesses should guarantee access to.³⁶⁷

In regards to stakeholder engagement both reports emphasize the importance of including: workers, trade unions and indigenous people.³⁶⁸ The Final report however adds children in a list of potential stakeholders which should be consulted, although not as a particularly important group for meaningful participation.³⁶⁹

Gender-perspective

The strong attention to the disproportionate impacts on women and the call for gender-perspective in due diligence processes which was apparent in the preparatory work is equally emphasised in the two reports. Both of the reports mention that businesses should integrate a gender-perspective in their human rights due diligence processes, with guidance from the UN Gender Guidelines, due to the differentiated and disproportionate impacts of human rights violations on women. This is mentioned repeatedly in both the reports.³⁷⁰

Even though the Final Report mentions that due diligence without attention to children risk being ineffective in protecting their rights, the calls for a gender-perspective are worded in much stronger language and, as mentioned, repeated several times. The calls for including a gender perspective states that businesses should include a gender perspective in their due diligence processes.³⁷¹ The reference to child rights due diligence simply raises a warning flag saying that children's rights might not be sufficiently protected if the law is not designed with attention to them, without any call to action.

The Articles

Despite the increased attention on the risks children face in the beginning of these reports, the actual articles do not make any mention of children explicitly nor do they lay down any hard obligations on specific measures for vulnerable groups. There are many concerns and gaps being raised in the recommendations that are not addressed in the articles. Such as how to deal with the issue of low awareness among businesses of their impact on children's rights, and how to ensure that due diligence processes are designed with due attention to children's rights. No specific obligations are being put on businesses or member states to address these problem areas.

One article which is worth noting is article 9 on grievance mechanisms. The Final Report refers to the General Comment 16, in addition to UNGP Principle 31, as a guide on how to design an

³⁶⁷ European Parliament (2021), p. 15, para. 25 & 26.

³⁶⁸ Ibid., p. 25, para. 38-39; European Parliament (2020a), p. 14, para. 26-27.

³⁶⁹ European Parliament (2021), p. 25, para. 40.

³⁷⁰ Ibid., p. 9, para. P. & p. 23, para. 25; European Parliament (2020a), p. 4. & p. 13, para.21.

³⁷¹ European Parliament (2021), p. 23, para. 25.

effective grievance mechanism.³⁷² The General Comment 16 says that an operational-level grievance mechanism can sometimes be a useful tool in the best interest of the child to raise concerns towards a business.³⁷³ It is not clear however in the article if that entails a legal obligation to make operational-level grievance mechanisms child-accessible, or if it is simply referring to the general approach to operational-level grievance mechanism found in the General Comment 16.

Children are mentioned in a list of stakeholder groups in the Final Report, while this was omitted in the Draft Report.³⁷⁴ There is however no obligation that children must be involved as stakeholders.

Both the reports include an article on the non-binding accompanying guidelines. The Final Report states that the purpose of the guidelines is to guide prioritization and proportionality in terms of “impacts, sectors and geographical areas”.³⁷⁵ The CRBP and the General Comment 16 are included as examples of guidelines which should be added. The Draft Report did not include these.

Summary of the reports and their recommendations for a proposed law

From a child rights perspective there are major important improvements made in the Final Report compared to the Draft Report. Significant improvements are for example that the wide range of children’s rights which can be impacted by business operations are mentioned and the lack of awareness businesses have concerning these impacts. Also that both the CRBP and the General Comment 16 are referenced as non-binding guidelines and that the General Comment 16 should inform the design of grievance mechanisms. This indicates that the need for a stronger child rights inclusion has been noticed by the drafters during the legislative process. However, the inclusion of children is still mainly in the non-binding sections of the reports, and not in the actual articles of the law. The same goes for measures on a gender. Since many of the concerns raised in regards to children’s rights have not materialized into hard obligations in the articles, it is hard to conclude what protection they will offer to children. Even though the language for gender-sensitive approaches were stronger than for including a child-perspective in due diligence processes, those have not either been transformed into specific mandatory duties.

5.3 Concluding Analysis of the Integration of Children’s Rights

The analysis of the preparatory work for the EU mHREDD law shows that there is consensus for a law covering all human rights, but that there are concerns for the adverse human rights impact on vulnerable groups, including children. Some solutions were brought forth to ensure that the disproportionate impacts on their human rights would be addressed, but they are not completely

³⁷² European Parliament (2021), p. 36, art. 9; European Parliament (2020a), p. 22, art. 9.

³⁷³ CRC General Comment 16, p. 19, para. 71.

³⁷⁴ European Parliament (2021), p. 31, art. 3; European Parliament (2020a), p. 18, art. 3.

³⁷⁵ European Parliament (2021), p. 39, art. 14.

convincing as to their efficiency. The two main solutions offered are to include additional non-binding guidance on certain issues and risks, and to apply a gender perspective to due diligence processes. Since such additional guidance documents would be voluntary in nature, it is however difficult to say what level of protection that would grant children and other vulnerable groups. It was also mentioned that as long as businesses conduct robust risk assessments and the enforcement mechanisms are strong, all vulnerable groups' rights will be covered. But this blanket statement seems quite naive, and there is no evidence saying that businesses will have the incentive or the competence needed in order to do this job thoroughly. On the contrary, evidence points to the fact that businesses in general direct their due diligence efforts on issues which are the most convenient for the business to tackle. Human rights impact assessments are also not generally designed to identify specific child rights risk, risking that they become overlooked. Additionally, even when there have been mandatory duties on businesses to conduct human rights due diligence, there has been major misunderstandings on what human rights due diligence means and most efforts have been misguided, managing the risks to the business and not the risks for rights-holders. This has especially been the case when the business can assume that their failed human rights due diligence efforts will not lead to severe consequences for the business.

Therefore the argument could be made that non-binding guidance will be helpful for those businesses that already have an ambition to take human rights impacts seriously. But for businesses that do not have a genuine motivation in this area, evidence points to the fact that due diligence will not be conducted in such a robust way that especially vulnerable groups will get the attention needed. This approach therefore jeopardizes one of the main goals of the law of achieving a level playing-field, by allowing different thresholds of ambition. This approach might give too much flexibility for businesses to decide their own level of commitment, when instead the legislator could find ways to better ensure that vulnerable group's rights are indeed taken into consideration.

Another interesting finding from this analysis is the heavy attention gender has gotten, from all types of stakeholders, and both regarding this EU mHREDD law, but also previous similar regulatory frameworks. There are calls for requiring businesses to conduct all their due diligence efforts with a gender-sensitive approach, and although other vulnerable groups have been mentioned, none of them have gotten that level of attention. Reasons that have been mentioned for the need for a strong gender perspective is that females experience human rights impacts in disproportionate and differentiated ways. From the child rights overview in chapter 3, it has been shown that the same wording is used when explaining children's vulnerability to human rights impacts. The question then arises on what makes the call for a gender perspective legitimate compared to the same type of focus on children, if they are found to be in the same position? It is also interesting to note that despite the strong calls from many stakeholders on a requirement for a gender perspective in due diligence processes, this suggestion has not materialized into any hard obligations in the proposed articles.

There was one briefing in the preparatory work which suggested specific obligations towards children and other vulnerable groups³⁷⁶, but this suggestion was not discussed further in any other of the documents or in the reports with suggested articles for the law.

Finally, children's participatory rights have had very little attention throughout the preparatory works. Children are only discussed as a vulnerable group, and when matters of stakeholder engagement and access to effective remedy are discussed, children have not been one of the groups that have had a high priority of including. This is unfortunate since low stakeholder engagement with especially vulnerable groups, and the lack of effective remedies, are some of the core reasons why past due diligence efforts have failed.

6 Solutions for Addressing Children's Rights

This chapter aims to answer the two main questions that arose from the analysis of the preparatory work of the EU mHREDD law. Firstly, whether the solution of additional voluntary guidelines offered in the preparatory work is sufficient for guaranteeing effective protection of the rights of specific vulnerable groups. Secondly, whether there are arguments for mandatory mainstreaming of children's rights throughout due diligence processes in the same way that gender mainstreaming has been a constant demand.

6.1 Addressing Children's Rights through Additional Non-Binding Guidelines

Addressing vulnerable group's rights through additional non-binding guidelines is the only recommendation from the preparatory work which so far has materialized into hard obligations in the report with the suggested articles. It is therefore very important to answer the question of whether encouraging businesses to properly address children's rights, through simply referencing international guidelines is sufficient in order to avoid interfering with those rights.

From the analysis of the preparatory work it was concluded that no evidence was given supporting the efficiency of additional non-binding guidelines. It is concerning that the only main solution picked up the EU to protect especially vulnerable groups has not been researched better, before highlighting it as the main solution.

In the context of business and human rights, there is not much evidence showing that voluntary guidelines in general are an effective tool to protect human rights. On the contrary, the EU mHREDD preparatory work itself referenced multiple times the fact that businesses have not been

³⁷⁶ See page 45 in this thesis.

inclined to follow voluntary guidelines on human rights. In fact, one of the major driving forces behind the initiative to this law is that voluntary guidelines on human rights due diligence for businesses have not been efficient. There is no evidence showing how voluntary guidelines in the NFRD have been helpful to create efficient implementation. On the contrary, it seems as though the Directive is moving away from voluntary guidelines and towards a law with more detailed reporting standards. Child rights and business scholar Erdem Türkelli even sees voluntary guidelines as a danger to children's rights due to their voluntary nature which allows for a "pick and choose" approach.³⁷⁷

The preparatory work also showed that the fulfilment of due diligence obligations have been overall weak even in legislation where such requirements have been mandatory. On top of the examples already presented in the preparatory work, the same patterns are seen in France as businesses have implemented the French Duty of Vigilance Law.

Analysis from NGOs show that the content of the large majority of vigilance plans businesses have published³⁷⁸ have heavily focused on the risks to the company itself instead of risks of adverse human rights impacts on people.³⁷⁹ When describing identified risks and how to address them, the plans have been too general and vague, providing little information on the identified risks actually could materialize in the business' operations.³⁸⁰ Prioritization of addressing risks have been made based on stakeholder expectations and importance to the company, not based on the severity and saliency of the risks of adverse human rights impact on rights-holders.³⁸¹ It is also clear from several vigilance plans that they are made with the aim of avoiding judicial proceedings or other sanctions, and not with the aim of ensuring that their business operations do not interfere with a person's human rights.³⁸²

These findings point towards either a major lack of competence in conducting human rights due diligence, or to a lack of ambition and effort to actually avoid violating human rights throughout one's business operations. No matter if the problem is a lack of knowledge or a lack of genuine motivation, the result is still the same, comprehensive risk assessments and their implementation is not being done. Since robust risk assessments is one of the prerequisites identified for the law to have a positive impact on human rights in the preparatory work, this should raise some red flags.

³⁷⁷ Erdem Türkelli, G. (2017), p. 292.

³⁷⁸ It should be noted that the two studies referenced were done on vigilance plans from the first and second year of the law coming into force, and that hopefully it can be expected that as businesses build their competence within this field that their due diligence processes will improve. The report on the vigilance plans from the second year of implementation did show some signs of improvement, but also some areas where implementation was weaker, see Shift (2019), p. 5.

³⁷⁹ Sherpa et al. (2019), p. 15; Shift (2019) p. 11.

³⁸⁰ Sherpa et al. (2019), p. 15 & 16; Shift (2019) p. 7.

³⁸¹ Sherpa et al. (2019), p. 15 & 16.

³⁸² Ibid., p. 46.

These issues found in implementing current mandatory due diligence, does not offer a lot of confidence that businesses will adequately incorporate voluntary guidelines to ensure that their due diligence processes reach a high standard covering all potential child rights risks. Especially since child right's risks are often indirect and are reinforced by systematic discrimination and socioeconomic issues. This is also supported by assessments of published vigilance plans under the French law, showing that large scale generalised violations such as low wages and long working hours are less prominent or non-existing.³⁸³ This is important to note, since a lot of human rights risks facing children are part of systemic rights violations, which corporations' potentially contribute to upholding. Sherpa, one of the NGOs conducting the analysis of the French vigilance plans shares this opinion and points out that even though the primary obligation to ensure laws on for example living wages and other fundamental labour rights falls on states, these are human rights risk which companies need to include in their duty of vigilance plan in order for the plans to be adequate.³⁸⁴ The plans must show how the business "allows, encourages or profits from situations of social dumping in the country where it operates".³⁸⁵ Having a child rights perspective in due diligence processes could help identify these surrounding issues as human rights impacts assessment tools must be adapted to capture child rights impacts which are often outside the workplace.

The different levels of commitment that businesses have towards human rights, combined with the approach of using voluntary guidelines could possibly damage the goal of creating a level playing-field for businesses.³⁸⁶ A multitude of guidelines could create uncertainty and inconsistency of what is expected of business creating competitive advantages for businesses who do not have a genuine approach to conducting human rights due diligence.³⁸⁷ This can damage the efficiency of the law as firms might be reluctant to report on and address, for example serious child rights risks based on voluntary guidelines, as this might be compared negatively with other businesses whom have not been detailed in their approach to children's rights. The confusion and fragmentation which many voluntary guidelines can create was also mentioned as an issue in regard to the NFRD.

Input from UNICEF in England also state that additional guidelines are not a sufficient solution. UNICEF states that they could be helpful for businesses on how to incorporate children's rights in their due diligence, but that the requirement to have a child rights perspective should be mandatory.³⁸⁸ UNICEF wants children to be seen as a distinct group in human rights due diligence processes in any future corporate human rights due diligence law.³⁸⁹

³⁸³ Ibid., p. 43.

³⁸⁴ Ibid., p. 43.

³⁸⁵ Ibid., p. 43.

³⁸⁶ Landau, I. (2019), p. 237.

³⁸⁷ Ibid., p. 242.

³⁸⁸ UNICEF UK (2020), p. 41.

³⁸⁹ Ibid., p. 24 & 40-41.

This stance from UNICEF echoes with the expectations on future legislation set out in the General Comment 16. The General Comment 16 is seen by scholars as crucial to the progressive realisation of children's rights in the business sector.³⁹⁰ The General Comment 16 states that legislation needs to have a clear child rights focus in order for children's rights not to be overlooked³⁹¹ and that there should be an expressed requirement for all businesses to conduct child rights due diligence.³⁹² The General Comment 16 is not opposed to subsuming child rights due diligence in a more general due diligence process but stresses that if a business does not do specific child rights due diligence, there are high requirements on the business to ensure that any differentiated impact on children is identified.³⁹³ The Final Report for the EU mHREDD law references the General Comment 16 on how to design effective grievance mechanisms. Due to its authoritative standing on interpreting human rights law the EU should pay closer attention to what obligations the General Comment 16 puts on states in regard to how they should legislate on the topic.³⁹⁴ The EU should not pick and choose what parts of the general comment that seems convenient to add, but to embrace the treaty body's expert recommendations. The General Comment 16 should be the foundation of any future legislation on business and human rights³⁹⁵ and implementing the measures set out in the General Comment 16 is needed in order for business-linked violations of children's rights to be sufficiently addressed.³⁹⁶ In order for children's rights to be properly incorporated in business and human rights discourse, it is important to properly integrate them now as the field is developing, instead of sticking it on as an add on later.³⁹⁷

Summary

To conclude this section, there is not much evidence pointing to the fact that additional non-binding guidelines will ensure that adverse human rights impacts on children will be identified and addressed sufficiently by businesses. Instead, the EU should be guided by the General Comment 16 on how to incorporate children's rights in the EU mHREDD law. The General Comment 16 is an authoritative source of interpretation of human rights law and recommends child rights specific due diligence. By not following the recommendations set out in the General Comment 16, and what is promoted by child rights experts, and instead hoping that voluntary guidelines will sufficiently protect children without much evidence to show for it, the EU shows a low commitment to children's rights.

³⁹⁰ Gerber, P. et al. (2013), p. 113; Erdem Türkelli, G. (2017), p. 291.

³⁹¹ UN Committee on the Rights of the Child (CRC), General comment No. 16 (2013), para. 43.

³⁹² Ibid., para. 62.

³⁹³ Ibid., para. 63.

³⁹⁴ Erdem Türkelli, G. (2017), p. 291.

³⁹⁵ Ibid., p. 291.

³⁹⁶ Gerber, P. et al. (2013), p. 128.

³⁹⁷ Erdem Türkelli, G. (2017), p. 291.

6.2 Mandatory Child Rights Perspective in Due Diligence Processes

Despite the General Comment 16 and other child rights experts recommendations for a mandatory child rights perspective in due diligence processes, the EU mHREDD law does not refer to this as being a solution. However, much of the preparatory work has demanded a cross-cutting gender perspective in order to make due diligence efficient for women's rights. This might be a good solution as it allows for the law to still be broad, covering all human rights, but still has mechanisms which capture traditionally overlooked groups.

This section will compare the arguments for a gender perspective to the situation and risks that face children in connection to potential corporate human rights harm, to see if the situations are comparable. From this comparison conclusions can be drawn as to whether there is also a legitimate argument for requiring a mandatory child rights perspective in the EU mHREDD law. The final section will discuss whether rights mainstreaming is an effective approach to guarantee the rights of marginalized groups. Since the previous section concluded that voluntary guidelines are not effective, it is even more important to find other approaches to ensuring the integration of children's rights.

6.2.1 Reasons for gender mainstreaming

There are three main reasons put forth for strongly calling for a mandatory gender perspective in due diligence processes. Firstly, the failure of both states and businesses to properly identify and address human rights risks facing women and girls. Secondly, the differentiated and disproportionate impacts that women and girls suffer from corporate human rights impacts. Thirdly, that women face additional barriers in making their voices heard and in accessing effective remedies and justice.³⁹⁸ The barriers women face are rooted in the context of power-inequalities in which human rights impacts occur, and without a gender-perspective these power relationships will remain the same.³⁹⁹ Some of these aspects are simply societal constructions while other vulnerabilities are linked to women' being the ones giving birth to children, and facing discrimination due to that biological function. As mentioned in the previous chapter, the same concerns have been raised in regards to the UNGPs and the UN Treaty on Business and Human Rights and the French Duty of Vigilance Law.⁴⁰⁰

The risks of not having a mandatory obligation to mainstream gender-issues in human rights due diligence is that women will be made invisible, that violations experienced by women will not be accounted for, and might even be further normalized.⁴⁰¹ Since the purpose of legislation on

³⁹⁸ HRC (2017), p. 6 para 22 & p. 22 para. 128; Women's International League for Peace and Freedom (2017), p. 2; Awori, S. et al. (2018), p. 285 & 286; Human Rights Watch et al. (2011), p. 2.

³⁹⁹ Awori, S. et al. (2018), p. 285 & 286.

⁴⁰⁰ HRC (2017), p. 6 para 22 & p. 22 para. 128; Women's International League for Peace and Freedom (2017), p. 2; Awori, S. et al. (2018), p. 285 & 286; Human Rights Watch et al. (2011), p. 2; Joint Civil Society Statement (2021) Available at: <https://www.ecchr.eu/en/press-release/france-must-ensure-implementation-of-duty-of-vigilance-law-to-protect-human-rights-defenders/>.

⁴⁰¹ Awori, S. et al. (2018), p. 286, 288 & 290; Bourke Martignoni, J. & Umlas, E. (2018), p. 64.

corporate responsibility for human rights is to prevent, protect and remedy any human rights harm, the achievement of that aim is jeopardized without such measures.⁴⁰²

Studies have also pointed to additional benefits of requiring a gender-perspective in human rights due diligence. It will force businesses to innovate the ways in which they identify and address human rights risks, since the classic approaches used today fail to capture surrounding socioeconomic and political contexts leading to disproportionate impact on women.⁴⁰³ And while recognizing that a business can not solve all these underlying issues on their own, businesses do “have a responsibility to acknowledge these situations and ensure that it is not perpetuating or benefiting from gendered inequalities.”⁴⁰⁴

6.2.2 Analysis on the need of mainstreaming children’s rights

Comparing the reasons for mainstreaming gender in due diligence processes with the situations that children find themselves in, there are striking similarities. This thesis has laid out compelling evidence that children, just like females, face disproportionate and differentiated human rights impacts.⁴⁰⁵ Due to the unique period of mental and physical development that childhood is, children are much more susceptible to harm than adults. Negative impacts can have long-lasting and even irreversible consequences on a child’s life. Children also suffer from societal power-imbances making it difficult for them to make their voices heard and have influence in decision-making. Some of these barriers are due to the development stage that children are in which makes them dependent on adults to provide and explain information to them. Other barriers are practical since children lack finances or other resources needed to make their voices heard, needing adults to facilitate communication. Societal prejudice against the abilities of children to form logical opinions on important matters is another barrier. For all these reasons it can be concluded that children, in similar ways as females suffer barriers in regards to participation.

Children’s rights have also been overlooked in the business and human rights context, in the same way that the specific issues facing women have been overlooked in current due diligence processes. Children also face the struggle that women historically, and still today face, to be seen not only as a group in need of protection, but also as individuals with agency and participation rights in society. Unequal power-structures in society, based on patriarchal norms put both women as a group and children as a group in a similar disadvantaged position in the context of business and human rights.

⁴⁰² Women’s International League for Peace and Freedom (2017), p. 2.

⁴⁰³ Bourke Martignoni, J. & Umlas, E. (2018), p. 7 & 36.

⁴⁰⁴ Ibid., p. 8.

⁴⁰⁵ See page 20 in this thesis.

The risk of not requiring businesses to mainstream a child rights perspective are therefore also the same as women face. The efforts from businesses in their due diligence processes will fail to properly identify the specific human rights impacts that affect children. Adequate attention will not be brought to the human rights risks they face. This risk is also that children will not have any mechanisms through which their voices, not only can be heard, but also respected. Benefits could also be the same, which are innovating new ways to conduct human rights impact assessments to capture risks to children's rights, which in turn could lead to better and more efficient methods to approach due diligence processes.

6.2.4 Mainstreaming as a best approach and as a part of EU's strategy

Mainstreaming children's rights in the EU mHREDD law is also supported by research showing that there is an overall inadequate attention to children's rights in EU legislative processes which needs to be addressed.⁴⁰⁶ Recommendations to the EU from a Eurochild study on the topic is to mainstream children's rights by conducting child rights impact assessments throughout legislative processes.⁴⁰⁷ There are already firmly embedded processes to mainstream other issues such as gender equality,⁴⁰⁸ which is perhaps why the call for a gender-perspective has been so strong through the legislative process of the EU mHREDD law. The EU itself sees a need to ensure mainstreaming of children's rights into all relevant laws and policies in order to achieve its aim of protecting children.⁴⁰⁹

Illustrating this, there are many examples of EU laws that have failed to properly consider children's rights in their drafting stages resulting in negative impacts for children in the implementation of the laws. For example has research conducted by Garde on EU's internal market and consumer policies has shown that it has failed to protect children's rights by on the one hand mentioning that children are a particularly vulnerable groups of consumers, but on the other hand using wording in the directive which is so restrictive and vague that the issue of their vulnerability is not gaining any attention at all.⁴¹⁰ This resounds with the legislative process for the EU mHREDD law, as it does emphasize the severe human rights risks that children face, but does not offer clear solutions on how to protect them. Another example is the EU's work-family reconciliation framework which includes the Pregnant Worker's Directive. According to James⁴¹¹, the provisions for pregnant and new mothers have only considered the needs from a gender equality perspective and have completely overlooked a children's rights perspective.⁴¹² This shows the importance of not just adding a gender-perspective thinking that it will capture all vulnerable

⁴⁰⁶ Eurochild (2014), p. 9.

⁴⁰⁷ Ibid., p. 23-24.

⁴⁰⁸ Ibid., p. 8 & 9.

⁴⁰⁹ Ibid., p. 2 & 8.

⁴¹⁰ Garde, A. (2011), p. 525.

⁴¹¹ James, G. (2012), p. 363.

⁴¹² Eurochild (2014), p. 10.

groups, as was suggested in the preparatory work. Intersectional perspectives and perspectives from a wider range of groups needs to be considered.

It is also relevant to note the constitutional obligations that the EU has towards children. According to art. 24 of the EU Charter on Fundamental Rights⁴¹³ the best interest of the child must be a primary consideration in all policy areas. Article 3.5 TEU states that in its relations with the wider world, the EU shall particularly contribute to the rights of the child.⁴¹⁴ This supports arguments for singling out children as a specific group deserving of additional measures in EU legislation.

Business and children's rights scholar Erdem Türkelli also proposes that mainstreaming children's rights into broader human rights frameworks is the best and most efficient way to protect children's rights in the business context.⁴¹⁵ However, taking a mainstream approach, Erdem Türkelli argues, does come with its challenges as it demands a lot more from the business conducting the processes in terms of awareness and in-depth knowledge about the specific issue at hand, in this case children's rights.⁴¹⁶

Erdem Türkelli draws references from a study made by Sweden's and Norway's development agencies on the topics of best practices for integration of children's rights in international development projects. That research showed that a targeted approach had faster results but with low sustainability, while a mainstreamed approach was slower, more resource demanding but had better long-term sustainability.⁴¹⁷ The study also concluded that these two approaches are not mutually exclusive, and that the choice of approach can depend on different factors and that each approach can be used in different time phases of a project.⁴¹⁸ Applying these findings in the business and human rights context, Erdem Türkelli suggests that a targeted approach might be needed in the beginning stages to ensure sufficient knowledge about how to integrate children's rights in a business and human rights framework. Once depth of knowledge is there, one can begin to mainstream children's rights into the larger framework of business and human rights.⁴¹⁹

Erdem Türkelli makes an important point by emphasising that a certain degree of knowledge on children's rights will be needed by states and business in order to mainstream children's rights into general due diligence processes. A business which does not have sufficient competence on children's rights might then have to begin with conducting specific children's rights impact assessments in addition to a more broad human rights impact assessment. This is even more reason

⁴¹³ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, art. 24.

⁴¹⁴ European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht*, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, art. 3.5.

⁴¹⁵ Erdem Türkelli, G. (2020), p. 25.

⁴¹⁶ Ibid., p. 25.

⁴¹⁷ Erdem Türkelli, G. (2020), p. 25; Tostensen, A. et al. (2011), p. 97.

⁴¹⁸ Erdem Türkelli, G. (2020), p. 25; Tostensen, A. et al. (2011), p. 97..

⁴¹⁹ Erdem Türkelli, G. (2020), p. 26.

for the EU to combine a targeted and a mainstreaming approach to children's rights in the EU mHREDD law. Instead of beginning with a broad instrument and then add additional measures at a later stage, the EU should from the start require that businesses implement targeted measures to ensure child rights inclusion in due diligence processes, and as competence is built, these can be integrated in the general processes at the company. This ensures that child rights concerns are integrated as a central part of human rights due diligence, instead of being tacked on at a later stage, which could compromise integration.

Summary

Women and children face similar risks of being differentiated and disproportionately impacted by human rights violations. They also face similar barriers for participation and access to remedy. Perhaps the reasons for a strong call for mainstreaming gender-issues is due to the fact that there are already processes in place at the EU in regards to mainstreaming gender-issues in legislation and that there have been a stronger mandate to do so. But in reality, a similar mandate is warranted for children's rights to guarantee that their rights are adequately addressed. From a long-term perspective it is more sustainable to take a mainstreaming approach than a targeted approach when wanting to address certain issues or vulnerable groups. However, in order to properly incorporate for example children's rights into general processes, there needs to be a certain level of competence in the organisation. It is not clear that such competence exists at businesses today.

Conclusion

How has children's rights been conceptualized and considered throughout the legislative process of the EU mHREDD law?

Throughout the preparatory work children have been conceptualized as a vulnerable group at risk of severe human rights violations on a wide range of rights. The attention to children mainly stops at this. Despite recognizing the heightened risk of severe and long-lasting consequences of adverse human rights that children face, there has been little consideration as to what measures will be the most efficient in order to prevent these risks from materializing. Non-binding guidelines are unconvincingly offered as a solution guaranteeing protection of vulnerable groups, such as children. The participatory rights of children are for the most part omitted. While a couple of other marginalized groups have been highlighted as important to consult, the special right of children to have their views heard and considered are not mentioned. Nor has there been any in depth investigation to ensure that children can access effective remedies if human rights harm occurs.

*Should the EU mHREDD law include specific duties in regards to children's rights?
And if so, what should those duties be?*

Previous implementation of human rights due diligence laws, and other previous attempts from businesses to address human rights risks, have shown inadequacy in identifying risks to children's rights. Businesses lack awareness, in some cases the willingness, and the correct processes to capture how their operations impact children's rights.

If the same pattern is not to be repeated under the EU mHREDD law, it is vital that a strong commitment to children is integrated from the start. Critique raised from stakeholders concerning current similar regulatory framework shows that without specific attention to marginalized groups, their rights run a high risk of being overlooked in broad and general human rights frameworks.

The EU has a constitutional obligation to uphold the best interest of the child as a primary consideration in all policy areas, and to particularly contribute to the rights of the child in its relations with the wider world. Additionally, the CRC is the most ratified human rights treaty in the world, with practically all states having ratified it, meaning that all states have a specific obligation towards the rights of the child. The CRC Committee has given clear authoritative guidance on how the relationship between business and children's rights should be regulated, stating that businesses should be required to conduct specific child rights due diligence.

Based on these arguments, combined with the risks children face, there is a legitimate claim to require specific mandatory obligation towards children in the EU mHREDD law. Without specific obligations, there is no evidence saying that a general human rights framework will sufficiently protect children's rights from adverse business impacts.

An approach which has been widely endorsed to ensure women's rights in business and human rights legislation is for businesses to conduct mandatory gender sensitive due diligence. This approach could also be beneficial for addressing children's rights. By requiring a child rights perspective in due diligence processes, the full range of children's rights can be addressed holistically.

Children's rights due diligence must take into consideration children's participatory rights. For example by including meaningful input from children as stakeholders. Additional barriers that children face in accessing remedy must also be addressed. One way to do that is by establishing child-friendly and accessible grievance mechanisms. A child-friendly grievance mechanism can be helpful in both identifying child rights risk at an early stage and ensuring access to remedy if harm has occurred.

If the EU decides not to require a child rights perspective in due diligence processes, it should at least seek to strengthen children's participatory rights in the ways mentioned above.

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