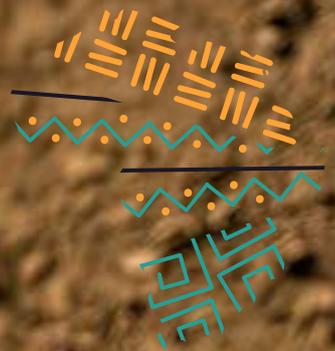




ACERWC
African Committee of Experts on
the Rights and Welfare of the Child



**STUDY
ON CHILDREN'S
RIGHTS AND
BUSINESS
IN AFRICA**

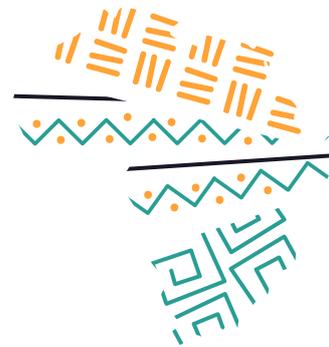


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**African
Union** 

Study on Children's Rights and Business

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LIST OF ACRONYMS

ACCEL	Accelerating Action for the Elimination of Child Labour
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ADB	African Development Bank
AfCFTA	African Continental Free Trade Area Agreement
ANPPCAN	African Network for the Prevention of Child abuse and Neglect
ASM	Artisanal and Small Scale Mining
AU	African Union
BHP	Bujagali Hydropower Project
CRC	Convention on the Rights of the Child
CRC Committee	Committee for the Convention on the Rights of the Child
CRBPs	Children’s Rights and Business Principles
CSAM	Child Sexual Abuse Materials
CSEC	Commercial Sexual Exploitation of Children
CSO	Civil Society Organisation
DRC	Democratic Republic of Congo
ECD	Early Childhood Development
ECOWAS	Economic Community of West African States
ESG	Environment, Social and Governance
FACTI Panel	Financial Accountability, Transparency and Integrity Panel
FAO	Food and Agriculture Organisation
GDP	Gross Domestic Product
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
IFF	Illicit Financial Flows

ILO	International Labour Organisation
ISPs	Internet Service Providers
HIV	Human Immunodeficiency Virus
MNEs	Multi National Enterprises
NAP	National Action Plan
NHRIs	National Human Rights Institutions
NOSRA	National Oil Spill Detection and Response Agency
OECD	Organisation for Economic Co-operation and Development
OPSC	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography
RAP	Resettlement Action Plan
RJC	Responsible Jewellery Council
SCDDA	Supply Chain Due Diligence Act
SDGs	Sustainable development goals
SECTT	Sexual Exploitation of Children in Travel and Tourism
UNEP	United Nations Environment Programme
UN	United Nations
UNICEF	United Nations Fund for Children in Emergencies
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNWTO	United Nations World Tourism Organisation
UPR	Universal Periodic Review
UTSD Project	Uganda Transport Sector Development Project
WHO	World Health Organisation

FOREWORD

How do companies respect children's rights on the continent? When the African Committee of Experts on the Rights and Welfare of the Child made this question one of the major focal points of its intervention by establishing a Working Group on Business and Children's Rights, it appeared essential for the Committee members to clear the path and scrutinize the situation on the ground. Indeed, could it have been any different? The Working Group's mandate, among other tasks, is to formulate norms and recommendations aimed at enhancing the protection of children's rights by businesses. As such, it was crucial to conduct an assessment of the current situation.

The study reviews the normative framework concerning this matter, encompassing a variety of standards of different natures - both binding regulations and voluntary commitments, international as well as regional norms, sometimes integrated with varying degrees of success into national legislations.

This framework imposes obligations not only on states, aligning with the primary purpose of the human rights system in its initial conception, but also on companies, in line with the logic of the African human rights protection system. This system is indeed founded on a dual basis - rights and duties. Individuals, whether individually or collectively, have duties.

The study also explores the practical aspects. Several sectors have been highlighted, including agriculture, which involves a significant portion of the population on the continent; the extractive industry, serving as the foundation and future of certain segments of the global economy; the pharmaceutical industry, with inequalities in vaccine access disadvantaging the continent; negative practices in clinical trials on the continent; and telecommunications, enabling interactions with others. The study thus provides insight into practices in both the formal and informal economies, taking into account the prevalence of informal economies across most of the continent. The study also captures initiatives undertaken by some companies in the agriculture and telecommunications sectors to protect children's rights.



The findings reveal varying degrees of compliance by companies with human rights principles, particularly concerning child protection. The study concludes with an analysis of ongoing dynamics in various countries on the continent, notably the adoption of national action plans on business and human rights. At the time of the study's conclusion, Kenya and Uganda already had their plans in place, and by the time of publication, Nigeria had completed its plan. It is desirable that states commit to the adoption of national action plans. These plans facilitate a holistic and integrated vision for the various actions to be undertaken. The initiative to adopt such plans is commendable, and their effectiveness would be significantly enhanced if states and companies resolutely invest in their implementation. Only through such efforts can present generations work towards bequeathing a dignified Africa to future generations, in line with the aspirations of the Agenda 2040.

Wishing you a fruitful reading experience, and an earnest and reasonable utilization of the wealth of information contained in this study.

By Hon. Hermine Kembo Takam Gatsing

***Chairperson of the ACERWC Working
Group on Children's Rights and Business***

EXECUTIVE SUMMARY

Business enterprises and transnational corporate actors operate in a complex global environment, especially when operating in high risk sectors such as oil and gas, mining, construction, banking and health care amongst others. Understanding human rights responsibilities, their impacts on children, and socially responsible behaviour for companies in particular, is an essential component of risk management in Africa. In addition to minimizing litigation, financial and reputational risks, understanding and demonstrating how business activities impact rights and welfare of children is vital to creating an environment where stakeholders can work more effectively in responding to the impact of business on children's rights. The release of the United Nations Guiding Principles on Business and Human Rights by the United Nations Human Rights Council in 2011 underscores the increasing relevance of the need for businesses to adopt, integrate, and mainstream socially responsible norms into their operations. While the Guiding Principles broadly apply to corporate entities irrespective of size, it is imperative to adopt principles that guarantee sustainable business practices that positively impact the rights and welfare of the child.

Examining the impact and effect of business activities in Africa with particular reference to how these activities affect the rights and welfare of children is imperative for several reasons. First, despite the deleterious activities of corporate actors in various sectors in Africa, there is no robust response in terms of policy documents and regulatory capacity to compel corporations to respect human rights at the continental level. There are increasing concerns on the ability of national judicial systems to effectively prevent, investigate, or prosecute corporate induced children's rights violations. Until recently, human rights mechanisms have been silent on this issue. Second, measuring and analysing the impact of business activities on children's enjoyment of basic human rights marks an important step towards mainstreaming and integrating human rights into business practices at the regional and national level. The findings, results and recommendations will galvanize State entities and provide guidance for regional institutions, and civil society. It will further steer the discourse on business



and human rights towards practical and positive implementation efforts at the State level. Consequently, this study provides a practical instrument to prepare AU Member States to bring attention to these critical corporate excesses as it relates to children, business and human rights violations and hasten the elimination of these practices. Furthermore, as trade and investment continues to drive African economy, the informal economy, largely dominated by women and children, continues to experience severe children's rights violations in the hands of corporate actors. Lack of clarity under the African Continental Free Trade Area Agreement (AfCFTA) further exacerbates the negative impact of business activities on the rights and welfare of children in the informal sector, amongst other sectors.

While there have been some commitments to the business and human rights agenda in Africa with the Draft Policy Framework on Business and Human Rights, there still remains some gaps in policy and institutional alignments, neither is there any policy commitment to institutionalise sustainable practices or ethical codes of conduct for businesses to respect children's rights. AU organs, especially the African Commission, have a strong history of adopting thematic and country specific resolutions and general comments on specific provisions of the African Charter which provide normative content and clarity to state parties on their human rights obligations. This study is geared towards an adoption of, or a commitment to safeguarding children, business, and human rights standards.

Without urgent, coordinated action, Africa will not be on track to reach Target 8.7 of the Sustainable Development Goals, which commits all UN Member States to take urgent measures to eradicate forced labour, modern slavery and the worst forms of child labour. As business activities continue to increase with the potential to impact rights and welfare of children, the African Committee of Experts on the Rights and Welfare of the Child commissioned this report to establish evidence on how businesses directly or indirectly pose risks and impact on the rights and welfare of children, map the business sectors with the greatest potential impact on economic growth by examining illicit financial flows and linkages to investment in children, and examine the direct and indirect impact of selected business sectors on children's rights and the related risks, amongst other objectives. Part 1 provides the contextual background to

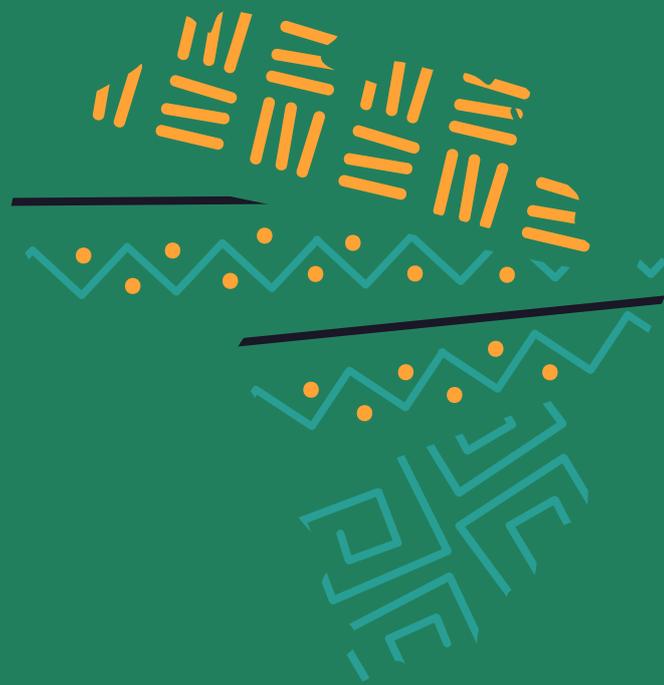
challenges of the effects of business on children. Relying on an ILO Report, the study found that about 40 million girls and 52 million boys were involved in child labour on the African continent at the beginning of 2020, an increase of 20 million children in the last four years. This means there are now more children in child labour in Africa than in the rest of the world combined. Part 2 examines the normative framework on children's rights and business, highlighting the gaps in existing laws and provides an overview of measures taken by the Committee on the Rights of a Child through numerous General Comments. The Children's Rights and Business Principles is the foremost global initiative that holistically elucidates business' impact on the rights and welfare of children in critical areas of development, including eliminating child labour in all its forms. This section also examines the OECD Policy Documents and Guidelines regulating multinational companies globally and in their supply chains, and the African Union (AU) Draft Policy on Business and Human Rights.

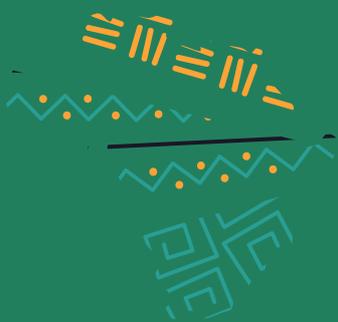
Part 3 includes a look at the treaty body consideration of state party reports with specific reference to state regulation of the business sector. For example, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) frequently comments in its Concluding Observations about child labour related issues. For example, the Concluding Observations to Benin, Kenya, Sudan, and Zimbabwe have an overarching observing theme that child labour is deep rooted in the family and communities and that it has a huge impact on the education and health of children. The Committee thus called on relevant States to undertake intensive sensitization of communities and families on child labour, its consequences, and how parents can prevent it; and put in place new National Action Plans to Eliminate the Worst Forms of Child Labour. Part 4 examines business and human rights challenges in Africa. It found that lack of integration and adoption of safeguards by companies results in negative consequences for children in Africa. It considers that businesses should periodically conduct human rights due diligence and human rights impact assessments. It surveys due diligence obligations globally with particular reference to France, Germany, and the European Union and concludes that there is low level implementation and integration of due diligence laws existing in domestic legislation to project proponents. It also examines the extent to which businesses operating in Africa have adopted and integrated due diligence in their spheres of operations. The study further



identifies the deleterious effect of illicit financial flows on the African economy and how these obstacles and gaps that facilitate transfer mispricing and corruption can be effectively closed so that proceeds of investments can be utilised in providing education, healthcare and human rights protection for children. Part 5 provides a sectorial analysis of how business activities impact the rights and welfare of children. It engages a detailed overview of the extractive industries, energy, agriculture, fisheries and aquaculture, travel and tourism, pharmaceutical, construction, and advertising sectors. It also examines the role of judicial actors in recognising business and human rights principles, and how these principles can be persuasively applied in decision making processes. Part 6 includes avenues through which businesses can provide additional safeguards to protect children's rights. It highlights some good corporate practices of how businesses are creating an avenue for their female employees to balance their work life with parental duties. Part 7 concludes the report while Part 8 provides detailed recommendations for States, business enterprises, National Human Rights Institutions and civil society organisations.

The study's findings articulate the urgent need for a continental action on children, business and human rights through citizenship education and awareness, effective implementation of existing laws, and to recognise the importance of developing National Baseline Assessments on business and human rights as this is instrumental to identifying and addressing how businesses impact the rights and welfare of children. Undoubtedly, Africa lags behind in the implementation of children, business and human rights principles, yet it is one of the continents that suffers tremendously from the egregious conduct of non-state actors. There is a missing narrative on children, business and human rights in Africa. The proposals and recommendations in this study seek to advance the discourses surrounding children, business and human rights to meet the objectives of Agenda 2063: The Africa we want.





PART 1: INTRODUCTION

PART 1: INTRODUCTION

1.0 Background

Across Africa, there are images and stories of children being exploited in various sectors – mining, tourism, agriculture (including cocoa plantations), manufacturing industry, advertising, marketing, and general labour services. The implication of children in these activities puts them at heightened risks of lack of food, shelter, clean water, education, and other potential violations of their human rights. While businesses have created huge economic opportunities, these opportunities can also have an adverse impact on children.¹ For instance, in the technology industry, children remain at “risk of exploitation and abuse online”² with online interactions often programmed or adapted in an addictive manner. In the food and advertising sector, children are often targets of the advertisement of unhealthy foods and sugary drinks, and then indulge in the consumption of these items, creating a pathway towards health challenges such as obesity and overweight children. For the girl child, participation in some advertising activities engenders “gender-based stereotyping” which can “limit their learning achievements and economic opportunities”³ When children are exposed to long-lasting and dangerous adversity occasioned by business activities, without social support mechanisms, they develop a “toxic stress response” which affects their growth and development.⁴ Corporate excesses that impact child labour complicate children’s cognitive development. Sadly, children from historically disadvantaged backgrounds, with lack of socio-economic provisions such as adequate nutrition and access to education, are impacted more. The significance of averting undesirable experiences and generating constructive circumstances for children is critical to drive the debate on positive impact of business activities on children in Africa.

1 UNICEF, “Charting the Course: Embedding children’s rights in responsible conduct. A Brief”, available at: <https://www.unicef.org/media/121001/file/Charting%20The%20Course.pdf> (accessed 29 June 2022).

2 Ibid.

3 Ibid.

4 Center on the Developing Child, “The Foundations of Lifelong Health Are Built in Early Childhood” (2010), available at: <https://46y5eh11fhgw3ve3ytpwxt9r-wpengine.netdna-ssl.com/wp-content/uploads/2010/05/Foundations-of-Lifelong-Health.pdf> (accessed 7 July 2022).



Businesses, investors, and governments have it in their immediate power to engage in sustainable practices without exploiting children. This is because children are often neglected, or are invisible when impacted by business activities.⁵ For example, children involved in the global supply chain, offspring of domestic workers, or children arrested by private security apparatuses, are directly affected by economic activities which go largely undetected.⁶ Indeed, children's rights and children's voices are central to building corporate brands that are anchored in sustainability, growth and development. Over time, a business that systemically addresses adverse impacts on children will reduce the scale of social challenges.⁷

As trade, manufacturing and investment continue to grow in Africa, business has become one of the evolving thematic areas with significant implications on the rights and welfare of children, who make up close to half of the current population in Africa.⁸ It is thus inevitable that businesses, whether small or large, will interact with and have an effect on the lives of children both directly and indirectly.⁹ Children are key stakeholders of business – as consumers, family members of employees, young workers, and as future employees and business leaders. At the same time, children are key members of the communities and environments in which businesses operate.¹⁰

There are various aspects of businesses that present negative implications for children's rights and welfare. These include the lack of employment conditions within business enterprises which assist working parents and caregivers in fulfilling their responsibilities to children in their care; the challenges of economic exploitation and hazardous working conditions for children; lack of functioning labour inspection and enforcement systems in most African States; limited measures taken by States to

5 UNICEF, "Children Are Everyone's Business" (August 2014), 15, available at: <https://www.unicef.org/thailand/reports/children-are-everyones-business-workbook-20> (accessed 15 June 2022).

6 Gamze Erdem Türkelli, *Children's Rights and Business: Governing Obligations and Responsibility* (2020) 22.

7 Oyeniye Abe, *Implementing business and human rights norms in Africa: Law and Policy Interventions* (2022)

8 UNICEF & AU "Children in Africa Key Statistics on Child Survival and Population" (January 2019), available at: <https://data.unicef.org/resources/children-in-africa-child-survival-brochure/> (accessed 29 April 2022).

9 UNICEF, "Children's Rights and Business Principles", available at: https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf (accessed 29 April 2022).

10 *Ibid.*

promote the physical and psychological recovery and social reintegration of children who have experienced various forms of violence, neglect, exploitation, or abuse, including economic exploitation; lack of strict due diligence processes and an effective monitoring system; and the difficulties in obtaining remedies for abuses that occur in the context of transnational business operations. In addition, in Africa, the large-scale tax evasion by businesses using loopholes in taxation systems, tax havens and lack of government regulation results in States losing domestic revenue. However, what is still not widely recognised is that these illicit fiscal practices by businesses deprive developing countries of the resources necessary to deliver access to essential services for communities such as health, education, water, sanitation, and child protection. It has been repeatedly reported that African countries lose much more money to tax evasion and illicit financial flows than what they receive in international aid. By some estimates, countries lose three times more to tax havens than they receive in aid.¹¹ On the other hand, children are affected by everyday hazards differently and more severely than adults. Due to their physiology, children absorb a higher percentage of pollutants to which they are exposed, and their immune systems are more compromised and vulnerable.¹²

The effects of business on children (and their parents and caregivers) can be long-lasting and even irreparable. Children employed or affected by a business are often invisible. Distinctive examples include, but are not limited to children working illegally in the supply chain; children on or around company premises; children employed as domestic workers; children exposed to hazardous or damaging business products; children paid way below minimum wage; children arrested and detained by private security services; children engaged in commercial sexual exploitation with migrants or other workers or in travel and tourism; children of migrant workers left at home; and children exploited and abused within the business sector.¹³ From a governance and accountability perspective, businesses can have a negative impact on children's rights when they do not pay their taxes, or take efforts to address/respond to child rights violations occurring as a result of their operations.

11 Business and Human Rights Resource Center, "Tax Avoidance: The missing link in business and human rights?" available at: <https://www.business-humanrights.org/en/blog/tax-avoidance-the-missing-link-in-business-human-rights/> (accessed 29 April 2022).

12 Ibid.

13 Ibid



The obverse must also be noted that businesses are crucial for economic development, and that they can be an essential driver for societies and economies to advance in ways that strengthen the realization of children's rights through, for example, technological advances, investment and the generation of decent work.¹⁴

However, much as the phenomenon of the intersection of children's rights and business is a growing one in Africa, there is a big evidence gap. To date, no comprehensive study has been conducted at the continental level, covering all regions, in terms of how and in what ways companies address children's rights in their business activities and on how businesses directly and indirectly pose risks and impact upon children's rights and welfare. The evidence gap also exists on the extent to which current legislation, policies, governance systems and standards provide for the protection of children's rights in the context of business, as well as the gaps and challenges in ensuring that children's rights are protected in the context of business.

In response to the realization of the need for a child rights-based response to the challenges in business practices, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC/ the Committee) adopted a resolution to establish a Working Group on Children's Rights and Business during its 35th Ordinary Session, held virtually from 31 August to 8 September 2020. The Working Group was established in accordance with Article 38(1) of the African Charter on the Rights and Welfare of the Child (ACRWC) that authorizes the ACERWC to establish its own Rules of Procedure, which the ACERWC developed and revised in 2013, 2015 and 2020, respectively. Rule 58 of the Revised Rules of Procedure allows the ACERWC to establish special mechanisms, including working groups, and assign specific tasks or mandates to either an individual member or group of members concerning the preparation of its sessions or the execution of special programs, studies, and projects. The aim of the Working Group is to promote the integration of a child rights-based approach to business practices with a view to addressing business-related child rights challenges in Africa. The ACERWC through its Working Group on children's rights and business decided to conduct a continental study on children's rights and business.

14 CRC Committee General Comment no 16 (2013) par 1.

The overall purpose of this continental study is to generate information on the current status of children’s rights and business so as to inform the ACERWC in the execution of its mandate. It serves as an evidence base for developing guidelines and benchmarking the policy, legislative and programmatic priorities for improving children’s rights in the context of business. Furthermore, the study contributes to increasing awareness of the issues involved in this new and developing area of children’s rights in Africa. It is also relevant and in line with the AU’s approach of repositioning Africa for an inclusive social and economic development, under Agenda 2063.¹⁵ This Agenda is built on a prosperous Africa based on inclusive growth and sustainable development.¹⁶

Respecting and supporting children’s rights requires business to both prevent harm and actively safeguard children’s interests. By integrating respect and support for children’s rights into the core strategies and operations, they can strengthen their existing corporate sustainability initiatives while ensuring benefits for their business. Such efforts can build reputation, improve risk management and secure their ‘social license to operate’. A commitment to children can also help recruit and maintain a motivated workforce. Supporting employees in their roles as parents and caregivers, and promoting youth employment and talent generation are just some of the concrete steps that business can take.¹⁷

As part of the introductory context, according to Child Labour: Global estimates 2020, trends and the road forward, a report released by the International Labour Organization (ILO) and UNICEF, 40 million girls and 52 million boys were involved in child labour on the African continent at the beginning of 2020, an increase of 20 million children over the preceding four years. This means there are now more children in child labour in Africa than in the rest of the world combined. One in five African children is engaged in child labour, with more than 80% involved in agriculture, for or alongside family members. Despite earlier progress, the report shows a dramatic rise in child labour in Africa since 2016.¹⁸

15 African Union, “Our aspirations for the Africa we want”, available at: <https://au.int/en/agenda2063/aspirations> (accessed 22 June 2022).

16 Ibid.

17 UNICEF, Save the Children, and the UN Global Compact, “Children’s rights and business principles”, available at: <https://www.unicef.org/media/96136/file/Childrens-Rights-Business-Principles-2012.pdf> (accessed 23 June 2022).

18 ILO, “Accelerated action is needed to reverse the dramatic rise in child labour in Africa”, available at: https://www.ilo.org/africa/whats-new/WCMS_832319/lang-en/index.htm (accessed 22 July 2022).



Without urgent, coordinated action, Africa will not be on track to reach Target 8.7 of the Sustainable Development Goals (SDGs), which commits all UN Member States to take urgent measures to eradicate forced labour, modern slavery and the worst forms of child labour. Specifically, SDG 8.7 commits by 2025 to end child labour in all its forms everywhere.

The scourge of child labour is facilitated by widespread dependence on unskilled and low-skilled labour in large segments of the economy, particularly in agriculture and the urban informal sectors. Also, inadequate laws and, especially, weak law enforcement are key factors.¹⁹

This report is divided into 8 parts. After this introduction, an overview of the normative framework surrounding children's rights and business is provided. Then, treaty body consideration of state party reports with specific reference to state regulation of the business sector is discussed, where after challenges to children's rights in the context of business is discussed. The next section turns to explore specific sectors, namely mining, the energy sector, oil and gas, agriculture, travel and tourism, advertising, transport, construction, the informal economy, and digital environments. Some case studies follow. The penultimate section deals with additional safeguards for business and children's rights. The report concludes with a series of recommendations – for governments, businesses, the international community and civil society, amongst others.

1.1 Methodology

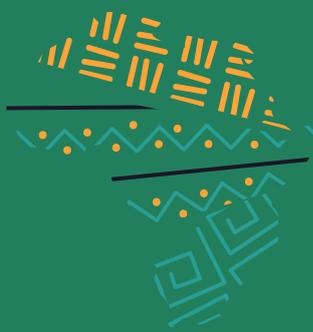
This report is largely based on desk top research. However, it is supplemented by responses received from member states who responded to a questionnaire developed by the authors, and by some interviews with key stakeholders. In addition, a consultation with working children from 8 West, Southern and East African countries was held on 19 October 2022, guided by a series of questions that were developed.

¹⁹ African Union "Ten year action plan on eradication of child labour, forced labour, human trafficking and modern slavery in Africa (2020-2030): Agenda 2063-SDG target 8.7" (2021).

1.2 Aims and objectives of the study

The aims and objectives of the study include the following:

- To establish evidence on how businesses directly or indirectly pose risks and impact on the rights and welfare of children;
- Identify the barriers in the business sector that cause deprivation of children's rights;
- Map the business sectors with the greatest potential impact on economic growth by examining illicit financial flows and linkages to investment in children;
- Examine the direct and indirect impact of selected business sectors on children's rights and the related risks;
- Analyse how and in what ways companies address children's rights in their business activities;
- Identify the existing legal and policy framework, as well as standards that could either hinder or foster business' respect, protection, and promotion of the rights and welfare of children;
- Identify and map key stakeholders that can play a role to drive the promotion and protection of child rights in the business sector;
- Recommend ways in which the AU, RECs, Member States, NHRIs, businesses, civil society and other relevant stakeholders can work more effectively in responding to the impact of business on children's rights; and
- Identify remedies and responses to potential child rights violations by businesses, including through strategic litigation, improved regulation by States, and enactment of legislation.



**PART 2: NORMATIVE
FRAMEWORK FOR
CHILDREN'S RIGHTS
AND BUSINESS**

PART 2: NORMATIVE FRAMEWORK FOR CHILDREN'S RIGHTS AND BUSINESS

This part has two sections. The first deals with the international treaty law framework, specifically the ACRWC and the CRC. It also includes discussions of relevant General Comments of these treaty bodies. It further reviews the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, and relevant ILO conventions. The second part discusses other relevant policies and principles.

2.1 African Charter on the Rights and Welfare of the Child (ACRWC)

The African Charter on the Rights and Welfare of the Child provides for comprehensive protections for children which are relevant to the business environment. The ACRWC has identified four general principles (pillars) which are fundamental to the interpretation of all other rights enshrined in the ACRWC. These are the principles of non-discrimination,²⁰ the best interests of the child,²¹ the right to life and the obligation of state parties to ensure to the maximum extent possible the survival and development of the child,²² and the right of the child to express opinions and to participate.²³ All of these may be implicated in the context of business, such as where children's survival and development is impeded by their involvement in child labour, or where their best interests are threatened by such involvement. The four principles are also useful in understanding the scope and ambit of other substantive rights discussed next.

The starting point is article 15, which provides a guarantee of protection from all forms of economic exploitation and performance of any work likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.²⁴ Article 15(2) requires State parties to take all appropriate legislative and administrative

20 Article 3 of the ACRWC.

21 Article 4 of the ACRWC.

22 Article 5 of the ACRWC.

23 Article 7 ACRWC.

24 Article 15(1). The equivalent article in the UN Convention on the Rights of the Child (1989) is article 32 which is identical.



measures to ensure full implementation of this article in both the formal and the informal sector, to regulate the minimum age and hours and conditions of employment, to provide penalties or other sanctions to ensure the effective enforcement of this article, and to promote the dissemination of information on the hazards of child labour to all sectors of the community. Legislative measures would include labour laws prescribing the minimum age at which children may be employed (this could also be contained in a child protection code), describing the kinds of hazardous work which children aged below 18 may not undertake, and establishing penalties for violations. Laws should detail the hours and conditions in which a child aged below 18 but over the minimum age of employment may work.²⁵ Administrative measures might include establishing inspectorates to visit places of employment to ensure that the laws are enforced.

The ACRWC is explicit in providing for a prohibition on child marriage and other harmful social and cultural practices.²⁶ Requiring children to engage in work can emanate from cultural beliefs that it is 'good' for children to work as it socialises them into acceptance of the exigencies of labour. Although article 31 of the Charter provides for the responsibilities of the child, it does not contemplate harmful child labour that interferes with the enjoyment of other rights.²⁷

Article 22 of the Charter provides for protection of children in the case of armed conflict, including providing measures preventing their recruitment into such conflicts.²⁸ Private actors, e.g. businesses, may be implicated in roles associated with armed conflict in a manner which imperils children's rights.

25 See too ACERWC General Comment no 5 (note 38 below) at Par 5.3.5

26 Article 21 ACRWC. See too Article 1(3) of the African Children's Charter, which requires State parties to discourage any custom, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the African Children's Charter to the extent of such inconsistency.

27 See ACERWC General Comment on article 31 of the African Charter on the Rights and Welfare of the Child (2017).

28 See ACERWC General Comment on article 22 of the ACRWC, available at: https://www.acerwc.africa/wp-content/uploads/2020/10/General-Comment-on-Article-22-of-the-ACRWC_English_Web_version_final-1.pdf (accessed 23 July 2022). "State parties shall provide regulatory frameworks to govern the operations of private persons, companies or entities to curtail them from violating children's rights. There is evidence that some private companies may finance and supply arms, while others provide security forces to serve in an armed conflict, provide transportation of arms to make profit. These actions that perpetuate the continuance of armed conflict and the violation of the rights of a child shall make the private actors responsible for the violations (para 98). "State parties have an obligation to regulate the activities of private actors such that their activities do not violate the rights of a child in armed conflict, tension and strife. Conversely, private actors have an obligation not to supply arms that would be used to lead to armed conflict." (para 99).

Article 27 of the Charter governs children’s protection from sexual exploitation (CSEA). It has been elaborately explained in General Comment No. 7 of the ACERWC.²⁹ The growth of travel and tourism in Africa has increased the prevalence of CSEA, which implies that higher levels of vigilance and improved safeguarding practices need to be put in place.³⁰ The ACERWC advises that tourism industry operators should be drawn into the fight to combat child sexual exploitation, and that they should ensure that specific protocols, guidelines or codes of conduct are developed and implemented in the context of the risks of sexual exploitation of children in the tourism industries.³¹ The General Comment also notes that “[t]here is a gap in holding internet service providers accountable, as some countries have no specific obligation to report child sexual abuse material (CSAM) to authorities for investigation and there is no consistent definition of what constitutes CSAM.” It advises that state parties should establish by law the responsibility of ICT companies to block, remove and report child sexual abuse material hosted on their servers, if need be, in collaboration with website owners.³² The General Comment also states that child grooming (or solicitation of children for sexual purposes) is also regularly used to lure minors into various illicit businesses such as child trafficking, child prostitution, or the production of child sexual abuse material.³³ A specific section (9.2) of the General Comment is devoted to the role of businesses in combatting sexual exploitation and abuse of children.

Article 28 of the Charter relates to the need for prevention measures against the use of children in the production or trafficking of narcotic substances, which may implicate informal economic activities such as drug running. The prohibition of child trafficking and the use of children in all forms of begging provided for in Article 29 governs the grievous violation of children’s rights by those involved in trafficking and those organising groups of children to beg for profit.³⁴

The right to education as provided for in article 11 of the Charter is routinely violated

29 See further: https://www.acerwc.africa/wp-content/uploads/2021/09/General-Comment-on-Article-27-of-the-ACRWC_English-1.pdf (accessed 23 July 2022).

30 As above para 13.

31 Para 120 and 121.

32 Para 137.

33 Para 68.

34 See decision on the communication submitted by the Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l’Homme (Senegal) 003/Com/001/2012).



when children are involved in child labour, as will be explained substantively in subsequent sections. Whilst the Charter, in keeping up with other international treaties in force at the time of its negotiation, requires state parties to provide free and compulsory primary education, it also does encourage the development of secondary education and “to progressively make it available to all”³⁵

Children's right to leisure, recreation and cultural activities (see article 12 ACRWC) is at risk when they are involved in child labour. In addition, their access to recreation and to pursue cultural activities can be threatened by business activities which deprive them of recreational spaces, such as when oil spills and flares take place. Hence, a deeper understating of the impact of business on this fundamental right is worth elaborating.

The right to the best attainable state of physical mental and spiritual health, as set out in article 14 of the ACRWC, is a right which remains unfulfilled for many working children. As set out substantively below, there are numerous examples to illustrate this. In addition, children's health rights may be at risk when their parents (in particular mothers) suffer from adverse working conditions which (for example) do not permit them to breastfeed their infants.³⁶ These factors also affect the duty of parents to ensure the best interests of the child at all times (article 20(1)(a)) and to ensure conditions of living necessary to the child's development (article 20(1)(b)), as well as the enjoyment of parental care and protection (article 19).

Finally of relevance is the child's right to protection against all forms of torture, degrading or inhuman treatment or physical or mental injury (article 16). As is detailed below in relation to mining, oil and the energy sector, fishing and construction, amongst others, children's interaction with business frequently has a bearing on their enjoyment of the right to protection from physical or mental injury, and can involve degrading and inhuman treatment. Hence, this right is also routinely violated through the actions or inactions of businesses, or by children participating in work.

The General Comment No. 5 of the ACERWC (State Party obligations under the African

35 Para 11(3)(b)

36 A recent study of the garment industry in Ethiopia revealed that among the issues identified were lack of breastfeeding facilities and breaks at work, lack of parental leave leading to pay cuts when parents have to take time off to care for sick children, and mandatory overtime. In addition, 92% of all workers (96% of parent workers) who joined the assessment said their wage does not cover the basic expenses for themselves and their families. See <https://www.childrights-business.org/impact/assessment-findings-from-the-child-rights-situation-in-ethiopia-s-garment-manufacturing-industry.html> (accessed 8 October 2022).

Charter on the Rights and Welfare of the Child (article 1) and system strengthening for child protection) is instructive.³⁷ For instance, in relation to the best interests of the child principle, the Committee states that “[t]he child’s best interests include short term, medium term and long term best interests. For this reason, State actions which imperil the enjoyment of the rights of future generations of children (e.g. allowing environmental degradation to take place, or inappropriate exploitation of natural resources) are regarded as violating the best interests of the child standard.³⁸

The Committee repeats the requirement of “due diligence” applicable to human rights obligations under the African Children’s Charter. “States’ due diligence is translated into the form of prevention of human rights violations, investigation of violations, prosecution of perpetrators and ensuring punishment of perpetrators.” Furthermore, the Committee has emphasised that “due diligence” creates an obligation of result, meaning that the compliance of a state party is assessed against the backdrop of the efficacy and adequacy of the implementation measures it has undertaken to enforce laws and administrative and other measures. The burden of proving that measures were pursued with due diligence lies with the state party.³⁹

Is the framework of rights catalogued above adequate to ensure the full realisation of children’s rights in the context of business? The ACERWC believes that seen together with its General Comments, emerging jurisprudence and other internationally ratified treaties, the overarching framework is suitable and fit for purpose. What is needed, however, is a greater consciousness of the threats and risks to children’s rights in the context of business, and deeper engagement with the steps needed to prevent and mitigate these.

37 https://www.acerwc.africa/sites/default/files/2022-09/general_comment_on_state_party_obligations_under_acrwc_%28article%201%29_%26_systems_strengthening_for_child_protection_0.pdf

38 Para 4.2.

39 Para 5.1.



2.1.2 The Convention on the Rights of the Child (CRC)

The CRC, ratified by all of the States that have ratified the ACRWC, contains broadly similar provisions to those detailed above in the context of the impact of business on children's rights. Similarly premised on the four general principles of non-discrimination, best interests of the child, right to life survival and development along with the child's right to participate, the CRC also recognises the child's right to be protected from economic exploitation and from performing any work likely to be hazardous or interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual moral or social development. State parties are required to take legislative, administrative, social and educational measures to ensure implementation of this article, and in particular to provide for a minimum age for admission to employment, to provide for appropriate regulation of the hours and conditions of employment and to provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.⁴⁰ Equivalent articles protect children's rights to health, to rest, leisure, play and recreation, and to protection, and to an adequate standard of living. No child shall be subjected to torture or other cruel, inhuman or degrading treatment.⁴¹

The CRC Committee has issued a General Comment No. 16 (2013)⁴² on State obligations regarding the impact of the business sector on children's rights. It is premised on the view that the business sector's impact on children's rights has grown in past decades because of factors such as the globalized nature of economies and of business operations and the ongoing trends of decentralization, and outsourcing and privatizing of State functions that affect the enjoyment of human rights.⁴³ The General Comment seeks to provide States with a framework for implementing the CRC (and its Optional Protocols) as a whole with regard to the business sector, whilst focusing on specific contexts where the impact of business activities on children's rights can be most significant.

40 Article 32 CRC.

41 Article 37 (a).

42 CRC/C/GC/16.

43 Para 1.

States must ensure that the best interests of the child are central to the development of legislation and policies that shape business activities and operations, such as those relating to employment, taxation, corruption, privatization, transport and other general economic, trade or financial issues.⁴⁴ The best interests of the child is also directly applicable to business enterprises that function as private or public social welfare bodies by providing any form of direct services for children, including care, foster care, health, education and the administration of detention facilities.⁴⁵

Governmental bodies, such as education and labour inspectorates, concerned with regulating and monitoring the activities and operations of business enterprises should ensure that they take into account the views of affected children. States should also hear the voices of children when child-rights impact assessments of proposed business-related policy, legislation, regulations, budget or other administrative decisions are undertaken.⁴⁶ In instances when businesses consult communities that may be affected by a potential business project, it can be critical for businesses to seek the views of children and consider them in decisions that affect them. States should provide businesses with specific guidance, emphasizing that such processes must be accessible, inclusive, and meaningful to children and take into account the evolving capacities of children and their best interests at all times.⁴⁷

States have the obligation to ensure that all actors respect children's rights, including in the context of business activities and operations. To achieve this, all business-related policy, legislation or administrative acts and decision-making should be transparent, informed and include full and continuous consideration of the impact on the rights of the child.⁴⁸ The obligation to respect also implies that a State should not engage in, support or condone abuses of children's rights when it has a business role itself, or conducts business with private enterprises. For example, States must take steps to ensure that public procurement contracts are awarded to bidders that are committed to respecting children's rights.⁴⁹

44 Para 15.

45 Para 16.

46 Para 21.

47 Para 23.

48 Para 26.

49 Para 27.



The duty to protect can encompass the passing of laws and regulations, their monitoring and enforcement, and policy adoption that frames how business enterprises can impact on children's rights.⁵⁰ The obligation to fulfil includes the duty to adopt clear and well-enforced laws and standards on labour, employment, health and safety, environment, anti-corruption, land use and taxation, amongst others.⁵¹ States have an obligation to provide effective remedies and reparations for violations of the rights of the child, including by third parties such as business enterprises.⁵² Agencies with oversight powers relevant to children's rights, including labour, education and health and safety inspectorates, environmental tribunals, taxation authorities, national human rights institutions and bodies focusing on equality in the business sector can also play a role in the provision of remedies.⁵³

As regards the informal economy, the General Comment opines that this sector engages an important part of the economically active population in many countries and contributes significantly to gross national product. However, children's rights can be particularly at risk from business activities that take place outside of the legal and institutional frameworks that regulate and protect rights. States should put in place measures to ensure that business activities take place within appropriate legal and institutional frameworks in all circumstances regardless of size or sector of the economy so that children's rights can be clearly recognized and protected.⁵⁴ They must regulate working conditions and ensure safeguards to protect children from economic exploitation and work that is hazardous or interferes with their education or harms their health or physical, mental, spiritual, moral or social development. Such work is often found, albeit not exclusively, within the informal sector and in family economies.⁵⁵

States have obligations to engage in international cooperation for the realisation of children's rights beyond their territorial jurisdictions where there is a reasonable link between the business and the extraterritorial conduct concerned.⁵⁶ This is even as host

50 Para 28.

51 Para 29.

52 Para 30.

53 As above.

54 Para 36 and 37.

55 Para 37.

56 Para 41.

States have the primary responsibility for the protection and fulfilment of children's rights within their own jurisdictions,⁵⁷ and in particular must ensure an adequate legal and regulatory framework.

States should create employment conditions within business enterprises which assist working parents and caregivers in fulfilling their responsibilities to children in their care such as the introduction of family-friendly workplace policies, including parental leave; support and facilitate breastfeeding; access to quality childcare services; payment of wages sufficient for an adequate standard of living; protection from discrimination and violence in the workplace; and security and safety in the workplace.⁵⁸

In addition to any existing obligations under anti-bribery and anti-corruption instruments,⁵⁹ States should develop and implement effective laws and regulations to obtain and manage revenue flows from all sources, ensuring transparency, accountability and equity.⁶⁰ States must set a minimum age for employment; appropriately regulate working hours and conditions; and establish penalties to effectively enforce article 32 (prevention of economic exploitation) of the CRC. They must have functioning labour inspection and enforcement systems and capacities in place. States should also ratify and enact into domestic law both of the fundamental ILO conventions relating to child labour (ILO Conventions Nos. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and 138 (1973) concerning Minimum Age for Admission to Employment).⁶¹

In view of the existence of this General Comment, applicable to member states who have ratified the ACRWC, it is not proposed that the ACERWC will develop its own General Comment on children's rights and the business sector in Africa.

57 Para 42.

58 Para 54.

59 Such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and/or the United Nations Convention Against Corruption.

60 Para 55.

61 Reference is also made to the World Health Organization Framework Convention on Tobacco Control, and the International Code of Marketing of Breast-milk Substitutes.



2.1.3 Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography (2000)⁶²

This Protocol, ratified by numerous signatories to the ACRWC,⁶³ is relevant to this report because it deals with various forms of sexual exploitation which can implicate (for instance) the travel and tourism industry, and internet service providers and their responsibilities vis a vis child online sexual abuse materials. Article 1 makes it mandatory for State parties to prohibit the sale of children, 'child prostitution' and 'child pornography' as provided for by the CRC. This means that State parties must cover the above offences by substantive criminal law,⁶⁴ and not merely categorise them as administrative offences.⁶⁵ Article 3(1) provides that "[e]ach State party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: sale of children as defined; offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child or transfer of organs of the child for profit; engagement of the child in forced labour; improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption; offering, obtaining, procuring or providing a child for child prostitution; and producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography. The same shall apply to an attempt to commit any of the said acts and to complicity or participation in any of the said acts.⁶⁶ Article 3(4) establishes the liability of legal persons and such liability of legal persons may be criminal, civil or administrative. This clearly refers to the business

62 A/RES/54/263. See further CRC Committee, General Comment No. 25 (2021) on Children's Rights in Relation to the Digital Environment, CRC/C/GC/25 and CRC Committee, Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, CRC/C/156, para. 13.

63 Although not all: for example Botswana, Cameroon, Comoros, the DRC, Eritrea and Ethiopia (amongst others) have not ratified it.

64 CRC Committee, *Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, CRC/C/156, para. 43.

65 See S.K.Witting "Commentary on the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography" Brill publishers, Netherlands (forthcoming 2022).

66 Article 3(2).

sector.⁶⁷ Article 4(2) regulates extraterritorial jurisdiction for OPSC offences, requiring States to take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 3 (1) when the alleged offender is a national of that State or is a person who has his habitual residence in its territory and when the victim is a national of that State. Article 6 (1) sets out the obligation of State parties to afford one another the “greatest measure of assistance’ in connection with the investigation of OPSC offences, including the obligation to obtain evidence.” Article 7 requires State parties to seize and confiscate any goods used to commit or facilitate offences, or proceeds derived from such offences, and close down any premises used to commit OPSC offences. Article 8 sets out the rights and protections of child victims of OPSC offences in the criminal justice system. Article 9(5) requires States to take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising OPSC offences.

2.1.4 ILO Minimum Age Convention (1973) and Worst Forms of Child Labour Convention (1999)

The Minimum Age Convention (No 138) sets the general minimum age for admission to employment or work at 15 years (13 for light work) and the minimum age for hazardous work at 18 (16 under certain strict conditions). It provides for the possibility of initially setting the general minimum age at 14 (12 for light work) where the economy and educational facilities of a country are insufficiently developed. The minimum age specified should not be less than the age of completion of compulsory schooling.⁶⁸ All African States with the exception of Somalia have ratified this Convention. The age which was submitted in accordance with the treaty was 14 years for (amongst

67 “The CRC Committee further highlights the responsibility of specific sectors relevant for the offences under the OPSC, asking State parties to “establish by the law the responsibility of ICT companies to block and remove child sexual abuse material hosted on their servers, of financial institutions to block and refuse financial transaction intended to pay for any such offences, of the sport and entertainment industries to take child protective measures, and of the travel and tourism sector, including travel agencies and booking websites, to refrain from facilitating the sexual exploitation of children” (CRC Committee, Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, CRC/C/156, para. 79). See Witting (as above).

68 Article 2(3).



others) Angola, Benin, Botswana, Cameroon, Central African Republic, Chad, Congo and Côte d'Ivoire. Fifteen years of age was specified for some (including Burkina Faso, Cabo Verde, Egypt and Eswatini); yet others have specified 16 years (including Burundi, Algeria and Djibouti).

In its Article 3, the Worst Forms of Child Labour Convention defines 'worst forms of child labour' as, inter alia, 'all forms of slavery or practices similar to slavery, such as the sale and trafficking of children' and 'the use of, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances'. The Convention provides for various prevention and response strategies to the worst forms of child labour, such as free basic education and direct assistance for the removal of children from the worst forms of child labour. In addition, Article 7 (1) of the Convention requires member states to take all necessary measures to ensure the effective implementation of the Convention, including the provision and application of penal sanctions.

The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022, is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values, and includes a call for the effective abolition of child labour. The Declaration is an expression of commitment that members have an obligation, inherent in membership of the ILO, to respect, promote and realize basic human values – values that are vital to social and economic lives. In adhering to these principles, member states commit to upholding the ILO Conventions on effective abolition of child labour, and the elimination of all forms of forced or compulsory labour. Some African States have utilized the Declaration in assessing government's obligations towards ILO Conventions.

2.2: Other relevant international documents and principles

This part reviews other relevant documents and principles which engage the role of the state and businesses relevant to children's rights and child labour.

2.2.1 Sustainable Development Goals

SDG Target 8.7, in particular, regarding child labour, demands elimination in all its forms by 2025. It requires countries to take immediate and effective measures to eradicate forced labour, end modern day slavery and human trafficking and secure

the prohibition and elimination of the worst forms of child labour, including the recruitment and use of child soldiers.⁶⁹

2.2.2 United Nations Guiding Principles on Business and Human Rights

The United Nations Guiding Principles on Business and Human Rights (UNGPs) of 2011 have the potential to impact standard-setting on business and human rights and regulate non-state actors in all sectors.⁷⁰ Unanimously endorsed by the United Nations Human Rights Council, the UNGPs rest on three pillars: the State's duty to protect against human rights violations; the corporate responsibility to respect human rights in their operations; and greater access by victims to an effective remedy, both judicial and non-judicial, for human rights violations.

Since inception, the UNGPs have influenced numerous legislation and policy tools globally. These Guidelines aim to shape issues about environmental and other human rights of the child. The UNGPs thus become instructive as a rights-based approach to safeguarding children's rights in Africa.⁷¹ Despite the innovative approach to rights realization, the UNGPs only mention children in two places. First, Commentary to Principle 3 provides guidance for businesses on respecting human rights. Such guidance must specify predictable outcomes and best practices. It should also indicate how it carries out its objectives under the Guiding Principles, including conducting corporate human rights due diligence, how it effectively considers issues of gender, marginalization of vulnerable people, at the same time acknowledging the particular challenges that may be faced by children, persons with disabilities, and their families. Second, Commentary to Principle 12 obliges businesses to consider additional standards when evaluating the impact of their activities on the rights and welfare of

69 "Ending child labour in agriculture is crucial for future decent youth employment opportunities, the reduction of poverty and the achievement of food security. It strongly interlinks with SDG 1 for poverty reduction and SDG 2 for food security and nutrition." FAO Framework for ending child labour in agriculture (2020). Nearly half of all child labour in the world takes place in Africa where 72 million children – or one in five – are in child labour and the vast majority are engaged in agriculture.

70 See for example, the Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/17/31 (21 March 2011) [UNGPs]

71 Ibid, Commentary to Principles 3 and 12. See further Abe, 2022 (note 7 above) p 14.



individuals belonging to specific groups or populations, including children and their families. For instance, where a business does not pay living wages, this could impact the children, as children depend on their parents as caregivers in the wider community. Likewise, domestic violence can also impact children, even where the violence is not directly linked to the children.

As a backdrop, the UNGPs provide for the general obligation of States, in fulfilment of the duty to protect, to:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human (and children's) rights, and to periodically assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable businesses respect for human (and children's) rights;
- (c) Provide effective guidance to business enterprises on how to respect human (and children's) rights throughout their operations; and
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human (and children's) rights impacts.⁷²

Furthermore, Principle 15 of the UNGPs enjoins businesses to have policies and processes in place including a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. Principle 17 further clarifies the human rights due diligence approach. It provides to the effect that for businesses to be able to identify, prevent, mitigate and account for how they address their adverse human rights impacts, they should carry out human rights due diligence. The process for conducting such due diligence would include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Businesses are also encouraged to utilise operational-level grievance mechanisms as a feedback tool on the effectiveness of the business enterprise's human rights due

72 UNGPs (above), Operational Principle 3.

diligence from those directly affected.⁷³ Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria.⁷⁴ This will ensure that grievances are timeously and speedily addressed early and remediated directly. The key criteria are that these mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise, and are usually managed by such businesses, alone or in collaboration with others, including relevant stakeholders.⁷⁵ Those impacted by the activities of businesses, such as women and children, can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.⁷⁶

2.2.3 United Nations Global Compact

As a voluntary initiative, the United Nations Global Compact, founded in 2000, seeks wide participation from a diverse group of businesses. As a participant of the UN Global Compact, a company sets in motion changes to business operations so that the UN Global Compact and its Ten Principles become part of its strategy, culture and day-to-day operations; it is expected to publicly advocate for the UN Global Compact and its principles via communications vehicles such as press releases, speeches, etc.; and is required to communicate with their stakeholders on an annual basis about progress in implementing the Ten Principles and in its efforts to support societal priorities.

The United Nations Global Compact's 'Ten Principles'⁷⁷ provide that:

- Businesses should support and respect the protection of internationally proclaimed human rights;
- Businesses should make sure that they are not complicit in human rights abuses;

73 Ibid, Principle 29.

74 Ibid, see Principle 31.

75 Commentary to Principle 29.

76 Ibid.

77 The Ten Principles of the United Nations Global Compact are derived from: The Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.



- Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Businesses should ensure the elimination of all forms of forced and compulsory labour;
- Businesses should ensure the effective abolition of child labour;
- Businesses should ensure the elimination of discrimination in respect of employment and occupation;
- Businesses should support a precautionary approach to environmental challenges;
- Businesses should undertake initiatives to promote greater environmental responsibility;
- Businesses should encourage the development and diffusion of environmentally friendly technologies; and
- Businesses should work against corruption in all its forms, including extortion and bribery.

2.2.4 Children's Rights and Business Principles (CRBPs)

The Children's Rights and Business Principles (CRBPs) were developed by Save the Children, the UN Global Compact, and UNICEF, and were officially released on 11 September 2012.⁷⁸ The CRBPs consist of 10 Principles which holistically elucidate business' impact on the rights and welfare of children in critical areas of development, including eliminating child labour, safety and health, marketing and advertising, products and services, the impact of business activities on the parents, caregivers, and the environment. Thus, while businesses are not signatories to international treaties, they could adopt and enforce the obligations under the CRBPs to ensure positive outcomes for the rights and welfare of children in their areas of operations. They enjoin businesses to take voluntary actions to advance the support of children's rights in the workplace, marketplace, and in the community. Realizing the objectives of the CRBPs through human rights due diligence, human rights impact assessment, and remediation is critical to realizing children's rights in Africa. The CRBPs provide

78 See <https://childrenandbusiness.org/> (accessed 9 October 2022).

the basis for which children are now rights holders and stakeholders in the conduct of business activities and how it impacts them directly.

The ten principles are:

- All businesses should meet their responsibility to respect children's rights and to commit to supporting the human rights of children;
- All businesses must contribute to the elimination of child labour including in all business activities and business relationships;
- All businesses should provide decent work for young workers, parents and caregivers;
- All businesses should ensure the protection and safety of children in all business activities and facilities;
- All businesses should ensure that their products and services are safe, and seek to support children's rights through them;
- All businesses should use marketing and advertising that respect and support children's rights;
- All businesses should respect and support children's rights in relation to the environment and to land acquisition and use;
- All businesses should respect and support children's rights in security arrangements;
- All businesses should help protect children's rights affected by emergencies; and
- All businesses should reinforce community and government efforts to protect and fulfil children's rights.



Source: UNICEF, *Better Business for Children*, <https://sites.unicef.org/csr/theprinciples.html> (accessed 25 July 2022).

2.2.5 Voluntary Principles on Security and Human Rights

Established in 2000, the Voluntary Principles on Security and Human Rights – an initiative by governments, non-governmental organizations, and companies – provide guidance to businesses in the extractive and energy sectors on maintaining the safety and security of their operations within a framework that ensures respect for human rights and fundamental freedoms. The Voluntary Principles are the only human rights guidelines designed specifically for oil, gas and mining companies. They cover three categories: risk assessment, public security and private security. As stated in the Voluntary Principles: “The participants recognize the importance of the promotion and protection of human rights throughout the world and the constructive role business

and civil society – including non-governmental organizations, labour/trade unions, and local communities – can play in advancing these goals.”

2.2.6: ACERWC Agenda 2040

Agenda 2040 was adopted by the Executive Council of the AU through its decision No. EX.CL/Dec.997 (XXXI) as an African Union document. Agenda 2040 establishes aspirations for children for the coming 25 years based on the lessons learnt from the past 25 years. By 2040, the rights of Africa’s children should be firmly protected, with full effect being given to the priorities in the Agenda.⁷⁹ The Agenda sets out ten aspirations, to be achieved by 2040, against a brief background contextualizing the particular issue. Of particular relevance is Aspiration 7: Every child is protected against violence, exploitation, neglect and abuse. More concretely, the Aspiration requires that by 2040:

- No child is exposed to any form of violence, including gender-based violence in the public or private sphere; children are free from physical and psychological abuse, sexual violence and exploitation, and sex trafficking;
- Harmful practices (such as breast ironing, female genital mutilation or cutting and child marriage) have been ended;
- No child is exposed to sexual exploitation and used for child pornography;
- Harmful child labour practices and child trafficking for forced labour is eliminated; and
- No child is subjected to corporal punishment.

2.2.7 Addis Ababa Action Agenda on Financing for Development, July 2015

Two-thirds of corporate tax abuse, which forms a substantial part of illicit financial flows, is enabled by member countries of the Organisation for Economic Co-operation and Development (OECD), which is the leading rule-maker on international tax. This was revealed in the biennial Corporate Tax Haven Index 2021 published by the Tax

⁷⁹ <https://www.acerwc.africa/en/africas-agenda-children-2040/africas-agenda-children-2040> (accessed 10 October 2022).



Justice Network.⁸⁰ Among the biggest enablers of global corporate tax abuse are four British Overseas Territories and Crown Dependencies (#1 British Virgin Islands, #2 Cayman Islands, #3 Bermuda, and #8 Jersey). The islands are followed closely by the Netherlands (#4), Switzerland (#5) and Luxembourg⁸¹ (#6). These countries claim to be developing equitable global tax rules, yet are responsible for the lion's share of illicit financial flows.

The African Union/Economic Commission for Africa High Level Panel on Illicit Financial Flows out of Africa worked between 2012 and 2015 to establish what is now an active global agenda. The Panel made three main contributions. First, it provided a definition of illicit flows that included the corporate tax abuse which is likely the largest single element. This was crucial to flipping the old narrative of corruption perceptions, which consistently – but without objective evidence – identifies lower income countries and their public sectors in particular as the loci of corruption. Understanding that the leading actors in illicit flows are more typically from the private sector of high income countries is a powerful step to ensuring substantive policy progress.

The second contribution of the High Level Panel was to confirm the broad scale of the phenomenon, with estimates for illicit flows out of Africa alone in the many tens of billions of dollars a year.

The third contribution was political. The High Level Panel skilfully developed support across the continent, and then within the global setting of the United Nations. This led directly to the adoption of a target to curb illicit flows in the UN Sustainable Development Goals (SDGs) adopted in 2015. This Sustainable Development Goal, target 16.4, is joined by target 17.1 which establishes tax as the primary means of implementation for the entire framework.⁸²

80 <https://taxjustice.net/2021/05/18/africa-and-the-corrosive-international-tax-system/> (accessed 13 July 2022).

81 As above.

82 https://taxjustice.net/wp-content/uploads/2021/11/State_of_Tax_Justice_Report_2021_ENGLISH.pdf p11 (accessed 9 July 2022). In February 2020, Nigeria and Norway - then chairs of the UN General Assembly and the UN Economic and Social Council (ECOSOC), respectively – set up a similar global effort: The High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, or FACTI Panel. In September 2021, the UN Secretary General adopted the core of these proposals as a central piece of the new UN Common Agenda: “I also propose stronger international cooperation to tackle tax evasion and aggressive tax avoidance, money laundering and illicit financial flows, including through a new joint structure on financial integrity and tackling illicit financial flows, with membership centred around the United Nations, international financial institutions, OECD, major financial centres and expert civil society organizations. Its role could include promotion of transparency and accountability through the provision of data and other information, as well as fostering agreements to address illicit financial flows.”

2.2.8 OECD Policy Documents

2.2.8.1 OECD Declaration and Decisions on International Investment and Multinational Enterprises (1976) (reviewed in 2011)

The OECD Declaration is a policy obligation by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution businesses can make to economic and social progress. No African country is an OECD member. However, 13 non-OECD countries have adhered to the Declaration, including Egypt, Morocco, and Tunisia. The Declaration consists of four elements: namely, The Guidelines for Multinational Enterprises; National Treatment; Conflicting requirements imposed on multinational enterprises; and international investment incentives and disincentives.

2.2.8.2 OECD Guidelines for Multinational Enterprises (2011)

The OECD Guidelines for Multinational Enterprises (2011) contain voluntary recommendations for international business conduct in ten sectors including labour, environment, combating bribery and fighting corruption. The Guidelines seek to promote the positive contributions that multinational enterprises can make to social, economic, and environmental progress of the society.

The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. Implementation of the Guidelines is dependent on National Contact Points, which are government offices located in each of the 36 signatory countries to the Guidelines. In 2011, a new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, was added to the Guidelines.

Paragraph 40 notes that businesses can impact the concept of universality of internationally recognized human rights. It further enjoins businesses to consider



respecting additional human rights standards, especially recognizing that greater care will be needed to “respect the human rights of individuals belonging to specific groups or populations that require particular attention.” These specific groups include women, children, persons with disabilities, migrant workers, and their families, amongst others.

Businesses are encouraged to adopt labour management practices that enhance skilled production. This could be achieved through high skilled, high-quality, well-paid jobs geared towards the reduction of root causes of poverty and child labour in particular. Consequently, paragraph 52 recognizes and encourages the role of businesses in contributing to the prevention of child labour, by raising the standards of education of children living in host countries. Furthermore, paragraph 82 recognizes that children are becoming increasingly significant forces in the global market. As key consumers in the global market, it is important that children get the needed arithmetic and literacy skills required in “today’s more complex, information-intensive marketplace.”

2.2.8.3 OECD Due Diligence Guidance for Responsible Business Conduct (2018)

The Responsible Business Conduct Guidance provides practical support to businesses on the implementation of the OECD Guidelines (2011). It emphasizes implementation of due diligence requirements as this helps avoid adverse impacts of business activities on workers, consumers, and the environment. Question 11 enjoins businesses to engage meaningfully with local communities through information dissemination especially where literacy is low. Children, women, and vulnerable members may need more information and additional attention within the context of stakeholder engagement activities. The OECD Due Diligence Guidance draws from approaches contained in sector specific due diligence guidance.

2.2.8.4 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016)

The OECD Due Diligence Guidance contains detailed recommendations that assist companies to respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices. Businesses sourcing minerals or metals from conflict-affected and high risk areas must comply with this Guidance, which applies to all mineral supply chains. The Guidance recognises that the serious human rights abuses associated with extraction, transport and trade in minerals should be prohibited, especially when such violations are towards women and children. It further suggests risk mitigation measures when sourcing from areas of artisanal mining (ASM). For example, it calls for the elimination of child labour as a condition of engagement in the community, improving women's conditions in ASM communities through gender awareness and empowerment programmes.

2.2.8.5 OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector

The Guidance helps businesses implement the due diligence requirement contained in the OECD Guidelines for Multinational Enterprises within the garment and footwear supply chain to avoid, prevent and mitigate any adverse human rights impacts of business activities in that sector. The Guidelines recognize that responsible supply chain in the garment and footwear sector is critical to sustainable development and promotes inclusive growth particularly for women who are overwhelmingly the majority of participants in the sector.

2.2.9 The Draft AU Policy Framework on Business and Human Rights

To break the weak localisation effort and support the domestic implementation of the UNGPs in African countries, the African Union (AU) with the support of the European Union in 2016 initiated the process of adopting a continental policy framework on business and human rights to address the escalating challenge of corporate human rights abuses on the continent. This led to the development of a draft AU Policy



Framework on Business and Human Rights.⁸³

The aim of the draft AU Policy Framework is to provide a framework for the protection of human and peoples' rights by States and business enterprises to protect and respect human rights, respectively, and ensure 'access to remedies for the abuse of these rights, in the context of business operations on the African continent.'⁸⁴ The Policy Framework is greatly inspired by the UNGPs and is intended to guide member states of the AU and businesses in their respective efforts to protect and respect human and peoples' rights in the context of business operations in Africa.⁸⁵ The draft Policy Framework goes a step further by not only predicating its normative contribution on African regional human rights instruments, but also by addressing business' impact on human and peoples' rights to the pressing issues of peace, sustainable development and climate change.⁸⁶

The draft AU Policy Framework on Business and Human Rights not only brings human rights standards to the private sector in Africa but also engages businesses on the need to develop and integrate human rights policies and practices in business operations all over the continent. The draft AU Policy Framework provides that States and businesses must have due regard to the rights of specific categories of persons (notably, women, children, youths, persons with disabilities, older persons, ethnic/religious/linguistic minorities, indigenous peoples, communities with special attachment to their land, refugees, internally displaced persons, and pastoralists).⁸⁷ States are to

83 Draft Harmonised AU Policy Framework on Business and Human Rights 2016 (unpublished). [AU Policy Framework]. See further the African Commission Resolution on Business and Human Rights in Africa - ACHPR/Res.550 (LXXIV) 2023 (21 March 2023) available at <https://achpr.au.int/en/adopted-resolutions/550-resolution-business-and-human-rights-africa-achpres550-lxxiv-2023>

84 Para 1.

85 AU Policy Framework on Business and Human Rights para 2.

86 The AU instrument on which the Policy Framework is based includes: AU Constitutive Act 2000; the African Charter on Human and Peoples' Rights 1981; the African Charter on the Rights and Welfare of the Child 1990; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003; the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa 2009; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa 2016; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2018; Africa Agenda 2063; the AU 10-year Action Plan on Human and Peoples' Rights; African Mining Vision 2009 and its Action Plan 2011; and the AU Agreement Establishing the African Continental Free Trade Agreement 2018.

87 Para 27.

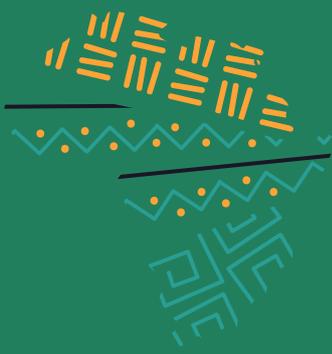
also ensure that laws and policies promote gender equality and the rights of women, and children.⁸⁸ In conflict situations, where women and children are at heightened risk of adverse impact, States must strengthen due diligence regarding respect for international humanitarian law where there are no effective governance structures for the protection of human and peoples' rights.⁸⁹ Remedial mechanisms must not only address the needs of women and children,⁹⁰ businesses must initiate corporate social responsibility-based projects that respond to the development needs of local communities based on the effective participation in the design and implementation of such projects by these communities, and particularly of specific categories of persons (notably, women and children).⁹¹

88 Para 39 (a) (iii).

89 Para 44(b)(vii), (g).

90 Para 48 (c) (iv).

91 Para 56 (m).



PART 3:

TREATY BODY CONSIDERATION OF STATE PARTY REPORTS WITH SPECIFIC REFERENCETO STATE REGULATION OFTHE BUSINESS SECTOR

PART 3: TREATY BODY CONSIDERATION OF STATE PARTY REPORTS WITH SPECIFIC REFERENCE TO STATE REGULATION OF THE BUSINESS SECTOR

3.1 The Committee on the Rights of the Child

The Committee on the Rights of the Child has in recent times provided Concluding Observations specific to state regulation of the business sector. In relation to South Africa in 2016,⁹² the Committee recommended the State party to:

- (a) Establish a clear regulatory framework for the business enterprises operating in the State party to ensure that their activities do not negatively affect human rights or endanger environmental and other standards, especially those relating to children's rights;
- (b) Conduct an independent study on the impact on children's health from environmental pollution caused by the activities of extractive industries, including the impacts from water pollution and from dust from mining;
- (c) Ensure effective implementation by business enterprises, especially large-scale and artisanal extractive enterprises, of international and national environmental and health standards;
- (d) Establish an effective mechanism for monitoring adherence to the above-mentioned standards by business enterprises, especially large-scale and artisanal extractive enterprises, and in case of violations, sanction appropriately, and provide remedies to child victims; and
- (e) Be guided by the United Nations "Protect, Respect and Remedy" framework of 2008.

In respect of Niger,⁹³ it recommended the State party to:

- (a) Establish a clear regulatory framework for the industries, especially mining industries, operating in the State party to ensure that their activities do not negatively affect human rights or endanger environmental and other standards,

92 CRC/C/ZAF/CO/2* (October 2016)

93 CRC/C/NER/CO/3-5 (November 2018).



- especially those relating to children's rights;
- (b) Ensure effective implementation by companies, especially industrial companies, of international and national environmental and health standards and effective monitoring of the implementation of those standards, appropriately sanction and provide remedies when violations occur, and ensure that appropriate international certification is sought; and
 - (c) Require companies to undertake assessments of and consultations on the environmental, health-related and human rights impacts of their business activities and their plans to address such impacts, and to fully and publicly disclose those assessments, consultations and plans.

For Mauritania (November 2018),⁹⁴ the Committee recommended that the State party establishes and implement regulations to ensure that the business sector complies with international and national human rights, labour, environmental and other standards, particularly as they relate to children's rights. In particular, it recommended the State party to:

- (a) Establish a clear regulatory framework for the industries operating in the State party, in particular the fishing, agriculture and extractive industries, to ensure that their activities do not negatively affect children's rights or contravene environmental and other standards;
- (b) Examine and adapt its legislative framework, including its civil, criminal and administrative aspects, to ensure the legal accountability of companies and their subsidiaries operating in or managed from the State party's territory, especially in the mining industry; and
- (c) Require companies to undertake assessments of and consultations on the environmental, health-related and human rights impacts of their business activities and their plans to address such impacts and to fully and publicly disclose those assessments, consultations and plans.

Regarding Angola,⁹⁵ the CRC Committee noted that the 2015–2016 Survey on Multiple Health Indicators found that 23 percent of children, aged 5 to 17, engage in child labour

94 CRC/C/MRT/CO/3-5.

95 CRC/C/AGO/CO/5-7 (2018).

in Angola. The Committee recommended the Government of Angola to:

- (a) Establish a clear regulatory framework for the industries operating in the State party, in particular the oil, gas, diamond, fishing and farming industries, to ensure that their activities do not negatively affect children's rights or endanger environmental and other standards;
- (b) Monitor and ensure the effective implementation by companies (whether private or State owned) of international and national environmental and health standards, apply appropriate sanctions, provide remedies for any violations found and ensure that companies seek the appropriate international certification;
- (c) Require companies to undertake assessments, consultations and full public disclosure with regard to the environmental, health-related and human rights impacts of their business activities and their plans to address such impacts;
- (d) Examine and adapt its legislative framework to ensure the legal accountability of companies and their subsidiaries operating in or managed from the State party's territory; and
- (e) Establish monitoring mechanisms for the investigation and redress of children's rights violations.⁹⁶

3.2 The African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

The ACERWC frequently comments in its Concluding Observations about child labour related issues. For instance, in relation to Benin, the Committee said:

“The Committee notes that the legal frameworks prohibit child marriage and that the State Party is in the process of establishing a Directorate that works on child labour within the Ministry of Labour. The Committee regrets to note that the rate of child labour in the State party stands at 53% which makes it the second highest in the continent. The Committee observes from the report that child labour is deep rooted in the family and communities and that it has a huge impact on the education and health of children as close to half of children in child labour do not go to schools. In

96 Para 14.



this regard, the Committee recommends that the State Party:

- a) Prosecutes perpetrators who engage in child labour;
- b) Increases the number of labour inspectors and build their capacity to identify child labour and withdraw children from situations of child labour;
- c) Expedites the establishment of the Directorate for child labour and provide it with the necessary human and financial resources;
- d) Integrates child labour eradication efforts with education enrolment and school retention efforts to prevent child labour and also to ensure that working children do not dropout of schools;
- e) Undertakes intensive sensitization of communities and families on child labour, its consequences, and how parents can prevent it;
- f) Puts in place a new National Action Plan to Eliminate the Worst Forms of Child Labour;
- g) Targets regions with high incidence of child labour such as Donga and the Hills in devising programs and actions against child labour; and
- h) Addresses other factors that lead to child labour such as poverty, lack of access to education; harmful practices against girls and so forth..."⁹⁷

The Committee also commented in relation to sexual exploitation that the State party provides regulations and codes of conduct for the tourism sector and other private sectors that can contribute towards prevention.⁹⁸

In its response to the 2nd periodic report of Kenya in 2020, the Committee recommended "that the State party ensures that there is regular labour inspection by increasing the number of labour inspectors and build their capacity to identify child labour and withdraw children from situations of child labour; investigates and convict perpetrators of child labour; rehabilitates and reintegrates children withdrawn from child labour; and address the root causes of child labour such as poverty, insecurity, displacement and so forth."⁹⁹

97 Concluding Observations Benin (2017) para 43 available at <https://www.acerwc.africa/concluding-observations/>.

98 Ibid, Para 48.

99 ACERWC Concluding Observations Kenya (2020) para 47 (<https://www.acerwc.africa/concluding-observations/>).

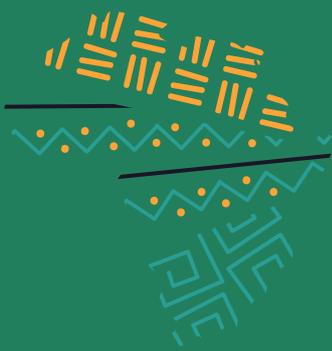
The ACERWC noted with regard to Sudan in 2012¹⁰⁰ that child labour is widespread in the Sudan. Besides, the Child Act proscribes only the labour of children less than 14 years of age, and excludes labour in pastures and agricultural work which do not pose any danger and are not hazardous to their health, whereas such labour is equally dangerous and prevents the child from attending school.

The Committee recommended the Government of the Republic of the Sudan to undertake measures to protect children subjected to the worst forms of labour and align the legal age for work with the obligation to attend school. It also recommended the Government of the Republic of the Sudan to take measures to remedy the economic reasons which give rise to the worst forms of child labour.

Regarding Zimbabwe, in 2015, the Committee recommended the Government of Zimbabwe to implement the relevant laws by ensuring that the minimum age of child labour and hazardous work is respected; to strengthen its inspection mechanisms; prosecute individuals and companies that engage children in worst forms of child labour; introduce corporate social responsibility for the private sector; to scale up the implementation of social welfare programs in collaboration with development partners; and review existing programs aimed at addressing child labour and economic exploitation of children.¹⁰¹

100 Concluding Observations Sudan (2012) available at <https://www.acerwc.africa/concluding-observations/>).

101 ACERWC Concluding Observations Zimbabwe (2015) par 47 (<https://www.acerwc.africa/concluding-observations/>) (accessed 20 October 2022).



PART 4:

BUSINESS AND CHILDREN'S RIGHTS CHALLENGES IN AFRICA

PART 4: BUSINESS AND CHILDREN'S RIGHTS CHALLENGES IN AFRICA

This section of the report deals with diverse and discrete initiatives to address human (and children's) rights challenges in Africa.

4.1 The Due Diligence obligation

The UNGPs call for all businesses to undertake human rights due diligence to operationalise their responsibility to respect human rights. States should adopt legislative and other regulatory measures “to prevent, investigate, punish and redress” business-related human rights abuses. Such measures are important because, to date, business adherence to the corporate respect for human rights has been inadequate.¹⁰² In the UNGPs, human rights due diligence is a term used to describe a cyclical (or ‘iterative’) process through which businesses identify, prevent, mitigate and communicate publicly about their actual and potential adverse human rights impacts. Human rights due diligence focuses on identifying risks to rights-holders, rather than risks to the business.¹⁰³

An example of the application of due diligence to a sector is the jewellery industry. Some of the companies scrutinized for a Human Rights Watch report¹⁰⁴ have taken important steps to address human rights risks in the gold and diamond supply chain. For example, Tiffany and Co. can trace all of its newly mined gold back to one mine of origin and conducts regular human rights assessments with the mine. Cartier and Chopard have full chain of custody for a portion of their gold supply. Bulgari has conducted visits to mines to check human rights conditions. Pandora has published

102 Danish Institute for Human Rights “Human Rights Due Diligence Laws: Key considerations” (October 2021).

103 See too the OECD Guidance's detailed above at 2.2.8. See too 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.

104 Human Rights Watch, “The hidden cost of Jewellery” (8 February 2018), available at: <https://www.hrw.org/report/2018/02/08/hidden-cost-jewelry/human-rights-supply-chains-and-responsibility-jewelry> (accessed 20 October 2022.)



detailed information about its human rights due diligence efforts, including on non-compliance found during audits of its suppliers and steps it is taking to address them.

The Responsible Jewellery Council (RJC) was founded in 2005, by 14 member organisations (ABN AMRO, BHP Billiton Diamonds, Cartier, World Jewellery Confederation, Diamond Trading Company (part of De Beers Group), Diarough, Jewellers of America, National Association of Goldsmiths (UK), Newmont Mining, Rio Tinto, Rosy Blue, Signet Group, Tiffany & Co., and Zale Corporation). It is the world's leading standard-setting organisation for the watch and jewellery industry, bringing together over 1600 companies of all sizes, across the global watch and jewellery supply chain, from retail to mining. The RJC Code of Practice is the global standard for the responsible jewellery and watch industry, focusing on business ethics and responsible supply chains. The Code of Practice covers all the primary minerals and metals used in the manufacture of jewellery: gold, silver, platinum group metals, diamonds and coloured gemstones. According to the website of the organisation, South Africa has 18 members, Botswana 5, Mauritius 2, and Namibia and Nigeria 1 each.

Children's rights are implicated in the jewellery industry because they have been injured and killed when working in small-scale gold or diamond mining pits.¹⁰⁵

Case Study: Dutch Child Labour Due Diligence Law

The Dutch Child Labour Due Diligence Law (operational from 2022) applies to Dutch companies and to non-Dutch companies selling products in the Netherlands. The new Dutch legislation obliges companies to investigate whether their goods or services have been produced utilising child labour and to devise a plan to prevent child labour in their supply chains if they find it. There are significant administrative fines and criminal penalties for non-compliance. The Law also imposes a reporting obligation. The law was first introduced by the Labour Party in 2014 and finally adopted by the Dutch Senate in May 2019. The law applies to all companies that sell or supply goods or services to Dutch consumers, no matter where the company is based or registered, with no exemptions for legal form or size. The Act defines consumers as natural persons or legal entities using, consuming or purchasing goods or services.

To exercise due diligence, a company must investigate whether there is a reasonable suspicion that a product or service in its supply chain has been produced with child

105 Human Rights Watch (as above).

labour. The investigation should be focused on sources which are known and accessible for the relevant company. If, following this investigation, it has a reasonable suspicion that goods and/or services came about with the use of child labour, it should draft and implement a plan of action. According to the explanatory memorandum, a reasonable suspicion exists when there is a clear indication that goods and/or services came about with the use of child labour. The Law defines child labour, in principle, as any form of work conducted by persons under the age of 18 that qualify as the “worst forms of child labour” as defined in Article 3 of the Worst Forms of Child Labour Convention (1999). The Law adopts a risk-based approach to child labour and remediation. The Law does not oblige a company to terminate the business relationship with a supplier after an indication of child labour, but rather to put into place an action plan to avoid the use of that labour in the future. In 2019, the European Commission pledged zero tolerance towards child labour in European Union trade policy. The United States of America (USA), Europe and other developed countries are threatening to boycott products from developing and middle-income countries which they suspect to have been produced with children. For example, sec § 1502 of the US Dodd-Frank Act requires US States to certify minerals that are from a conflict free area of the Democratic Republic of the Congo. This provision was necessary because of concerns that the exploitation and trade of conflict minerals by armed groups is helping to finance conflict in the DRC region and is contributing to an emergency humanitarian crisis. Recently, the United States has banned the importation of tobacco from Malawi due the use of child labourers in tobacco production and is threatening to do the same to cocoa from Ghana and Côte d’Ivoire.

France: Corporate Duty of Vigilance Law

In 2019, six civil society organisations filed a lawsuit in France against French oil company Total, for allegedly failing to comply with the duty of vigilance law in their mining project in Uganda. Total denied the allegations. Total is the main operator of a mega oil project in Lake Albert and Murchison Falls, a protected natural park in Uganda. Total planned to drill over 400 wells, extracting around 200,000 barrels of oil per day. A pipeline would be built to transport the oil. Allegedly these operations would impact communities and nature in Tanzania and Uganda. The plaintiffs brought the lawsuit under the 2017 French Corporate Duty of Vigilance law. This is the first case tested under the new rules. The law requires large French companies to establish and implement “reasonable vigilance measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and



on the environment.”

The plaintiffs argued that the vigilance plan published by Total is inadequate because it does not reference its Ugandan project and therefore violates the French law. The court had to decide whether the corporation should be forced, with potential financial penalties, to review its vigilance plan and acknowledge the impact of its oil activities on local communities and the environment. On 15 December 2021, France's Supreme Court ruled in favour of the claimants, rejecting the jurisdiction of the commercial courts and recognizing the jurisdiction of the civil court. The civil court will now hear the merits of the application. The case is ongoing.

On January 1, 2023, the Lieferkettensorgfaltspflichtengesetz (Lieferkettengesetz or LkSG) came into effect in Germany. Known in English as the German Supply Chain Due Diligence Act (SCDDA), the law mandates companies with offices in Germany to conduct due diligence on their supply chains to protect human rights and the environment. With up to 800,000 euros in fines, restricted market access, and the potential for lawsuits, compliance will be an immediate imperative. Norway and Switzerland also have legislative measures in place and Belgium is reported to be contemplating this too.¹⁰⁶

4.2 European Union Proposal for a Directive on corporate sustainability due diligence

On 23 February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence.¹⁰⁷ The aim of this Directive is to foster sustainable and responsible corporate behaviour throughout global value chains, and to anchor human rights and environmental considerations in companies' operations and corporate governance.¹⁰⁸ Under the Proposal, businesses will be required to identify and, where necessary, prevent, end or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on

106 <https://www.cov.com/en/news-and-insights/insights/2022/01/business-and-human-rights-developments-and-what-to-watch-for> (accessed 5 April 2023).

107 European Commission, "Corporate sustainability due diligence" available at https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en

108 Ibid.

the environment, for example pollution and biodiversity loss.¹⁰⁹

For businesses, these new rules will bring legal certainty and a level playing field. It will create better awareness of companies' negative environmental and human rights impacts.¹¹⁰ For consumers and citizens, the Proposal will safeguard protection of human rights, including labour rights; a healthier environment for present and future generations; increased trust in businesses; and better access to justice for victims.¹¹¹ For developing countries, such as in Africa, the Proposal will ensure better protection of human rights and the environment. It will also increase stakeholder awareness on key sustainability issues; improve sustainability-related practices; and improve living conditions for people.¹¹²

4.3 Illicit Financial Flows

Illicit Financial Flows (IFFs) are "illegal movements of money or capital from one country to another." These flows are considered to be illicit when the funds are illegally earned, transferred, and/or used. IFFs can be broadly generated in three ways:

1. Commercial practices – manipulation of trade transactions for the purposes of disguising wealth and profits, evading taxes, customs duties and levies. This covers 'trade misinvoicing' (discussed below further).
2. Criminal activity – stemming from the drugs trade, human trafficking, illegal arms dealing, trade in pornography and CSAM, and smuggling of contraband.
3. Corruption – the proceeds of bribery and theft by government officials.¹¹³

One of the most direct impact of IFFs on national tax revenue is that that when money flows across borders secretly, it cannot be taxed. If properly declared, such monies would be taxable through income taxes, customs duties or trade tariffs, thus building

109 European Commission, "Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains" available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145

110 Ibid.

111 Ibid.

112 Ibid.

113 "Making a killing: How tax scams are robbing poor countries of life-saving healthcare" (Save the Children International, 2015).



national coffers for public service provision.¹¹⁴ Save the Children recommends ensuring that critical information generated from transparency measures such as country-by-country reporting and beneficial ownership registries fully supports increased accountability by being available for public scrutiny. A major part of solving the tax conundrum lies with national governments themselves. They need to build capacity in relevant institutions, such as customs and tax revenue authorities, which make it possible to identify trade misinvoicing and act as an effective deterrent against tax dodging.

Transfer mispricing is probably the most important issue as far as international taxation is concerned, since transfer-pricing is used for tax avoidance. In fact, it is the main way in which big corporations shift profits out of a country into tax havens. The corporations simply misprice the goods that they are exporting. Over the past several years, global south countries have repeatedly called for the establishment of an intergovernmental tax body under the auspices of the United Nations to fix the international tax system and lead the setting of global tax standards. Recently, this call was reiterated by the Conference of African Ministers of Finance, Planning and Economic Development.¹¹⁵

At the conclusion of the fifty-fourth session that was held on 16 and 17 May 2022, in Dakar, Senegal the ministers endorsed the resolutions that had been approved by the Committee of Experts of the Conference of African Ministers of Finance, Planning and Economic Development of the Economic Commission for Africa. Under the section on “Curbing illicit financial flows and recovery of lost assets” the resolutions included a promise to strengthen their efforts to implement a “comprehensive and unambiguous tax policy” and improve capacity in combating tax-motivated illicit financial flows.

IFFs prevents states from achieving human development goals. In the health care sector, for example, about 800 000 children are in dire need of palliative care in Southern Africa, with only 5% of this number being able to get the needed care.¹¹⁶ Consequently, some children may not be able to get the needed public health care due lack of government resources to provide needed training and prescription drugs.

114 Save the Children above.

115 <https://www.uneca.org/events/54th-session-of-the-economic-commission-for-africa/54th-session-of-the-economic-commission> (accessed 10 October 2022).

116 Ibid.

For example, a 10% increase in tax revenue leads to a 17% increase in public health spending in low-income countries.¹¹⁷ Inadequate resources in the public health system impacts upon the dignity of a person.

The Impact of Corruption on Children in Africa study was developed by the group of Child Focused Organisations (CFAs) based in Addis Ababa with the support and partnership of the African Union Advisory Board on Corruption (AU-ABC) and the ACERWC.¹¹⁸ It is the first study to consider the impact of corruption upon the fulfilment of children's rights, with particular attention to the impact of corruption on two key sectors for children: education and health. The study argues that if African governments could reduce the amount of money lost to corruption, they would be able to recruit and pay all the health workers and teachers required to meet African and global development targets by 2030. Potential tax revenues that have been lost through IFFs could have had a transformative impact on the lives of African children, especially if sufficient resources had been invested in the health sector. Estimates by Save the Children (2015) show that the potential tax lost in Africa (US\$15 billion per annum) is enough to hire 1.8 million health workers. For specific African countries, the lost revenue would be sufficient to cover substantial health care costs. The study cites research from Malawi showing that in 2013/14, the country lost US\$275 million through IFFs and this was equivalent to 75 per cent of the US\$358 million required to fill the financing gap for the provision of a minimum health care package. Similarly, the study notes for Kenya, that the amount of tax revenues lost due to IFFs is enough to reduce child mortality by more than one half.¹¹⁹

Where not properly managed, bilateral, trade and investment treaties could become tools for illicit financial flows, tax evasion and extreme forms of tax avoidance. The unequal bargaining power between most African states and their bilateral treaty partners, the potential for enabling corruption in terms of which African states entered

117 B. O'Hare, "Tax and the Right to Health" (2018) 20(2) *Health and Human Rights Journal* 57–63.

118 https://au.int/sites/default/files/documents/36766-doc-the_impact_of_corruption_on_children_-_final_report.pdf

119 As above p 38.



into such agreements for short term gains,¹²⁰ combined with the intricacies, uncertainties and mismanagement of the system by unsustainable business interests, all work in collaboration to result in a system that has facilitated the illicit outflow of funds from Africa.¹²¹ The patterns, and channels of IFFs, tax evasion and tax avoidance range from highly complex and technical systems to basic strategies. Some circumstances engage tax haven destinations linked to an intricate network of intra-company transactions. There are also other situations of smuggling of large sums of cash across land borders and through airports on private and chartered aircraft.¹²²

It has been recommended that governments from all regions of the global south step up south-south cooperation and prioritise their long-standing demand for a universal, intergovernmental tax negotiation process at the UN including articulating express statements of support for the recent call by African ministers for a UN tax convention to build political momentum.¹²³

Case study

US Company Columbia Gem House has denied accusations from Malawi that it owes more than \$300bn in unpaid taxes on minerals extracted in the country. In a letter dated 26 July, Malawi's Attorney-General Thabo Chakaka Nyirenda accused the firm of evading duty on sales of rubies and sapphires mined at its Chimwadzulo Mine in Ntcheu since 2008. Fin24 reports that the latter alleges that Nyala Mines Limited, which it describes as a Columbia Gem House subsidiary, paid taxes of just \$600 against projected \$24bn revenues from their Malawian operation. The firm denied any link to the alleged case.

(Reported: Legalbrief, 5 August 2022)

120 Nicholas Peacock, Hannah Ambrose, "South Africa terminates its bilateral investment treaty with Spain: second BIT terminated, as part of South Africa's planned review of its investment treaties" (21 August 2013) available at <https://www.lexology.com/library/detail.aspx?g=daf93855-71f9-425e-92d3-5368d104f8ff> (accessed 29 July 2022).

121 Asha Ramgobin, "A human rights-based approach to addressing illicit financial flows from Africa" A (draft) study of the African Commission on Human and Peoples' Rights. P 22.

122 UNECA, "Illicit financial flows: Report of the High-Level Panel on illicit financial flows from Africa" (2015) 32 available at <https://repository.uneca.org/bitstream/handle/10855/22695/b11524868.pdf?sequence=3&isAllowed=y> (accessed 29 July 2022).

123 Ibid.

According to Amnesty International,¹²⁴ the most significant reform of the international tax system in decades has been the new global tax deal agreed in October 2021. The deal has the stated aims of ensuring that multinational enterprises (MNEs) pay a fair share of tax wherever they operate and earn profits, whilst seeking to bring more stability to international fiscal policy. However, many experts have criticised aspects of the deal and how it has been arrived at. To that end, future periodic reviews of the deal by the OECD should seek to strengthen it where it is found to be failing to ensure that MNEs pay their fair share of taxation, especially with respect to low income states.

The growth of digital business models has disrupted fiscal systems. There is a broad consensus that the current international tax norms, when applied to digitalised business models, prevent countries from taxing MNEs adequately. Digitalisation means that MNEs are increasingly able to sell goods and services in countries without setting up the kind of corporate structures that would allow them to be taxed under existing rules.¹²⁵ Most significantly, many digital businesses have no physical presence in a market jurisdiction which can make it subject to taxation, and therefore none of the routine profit will be allocated there. To partially compensate for these deficiencies, the African Tax Administration Forum, a regional intergovernmental network that aims at improving tax systems in Africa, has recommended that at least 35% of residual profit should be allocated to market jurisdictions. An even more radical but simpler solution could be to allocate a percentage of all MNEs' global profits to source countries - but to date, wealthier countries have rejected this approach.

“Even if the 15% global tax rate which is set out in Pillar 2, which has been widely criticised by experts as being too low, is ultimately implemented, it could raise an additional \$275 billion of global revenue. However, it has been calculated that the G7 countries alone, with just 10% of the world's population, would take more than 60% of this revenue given the current locations of MNEs. Moreover, given that most countries in Latin America and Africa had average corporate tax rates of 26% and 27% respectively in 2020, a global minimum rate of around 15% would do little to reduce

124 Submission by Amnesty International to the independent expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights (June 28, 2022).

125 Financial Integrity for Sustainable Development Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda, February 2021, p 10.



incentives for profit-shifting from high tax to low tax jurisdictions.”¹²⁶

Illicit financial flows have continued to ravage the world's economies with developing countries disproportionately suffering the negative effects of the phenomenon, especially in the post-Covid-19 era. The State of Tax Justice 2021 showed that countries are losing a total of \$483 billion in tax a year to global tax abuse committed by multinational corporations and wealthy individuals. Developing nations are disproportionately affected by tax-related IFFs.¹²⁷

Illicit financial flows punch holes in the public purse across the African continent. Over the past five decades, Africa has lost in excess of US\$ 1 trillion in illicit financial flows (USD 50 billion each year). According to the African Union / Economic Commission for Africa's High-Level Panel on Illicit Financial Flows, the continent lost approximately USD 1 trillion between 1980- 2008. This amount dwarfed Africa's receipts of overseas development assistance during this period and also exceeded foreign direct investment into Africa. The multiplier effect of these losses from Africa mean loss of jobs, income, decent education and basic infrastructure. The major perpetrators are multinational companies operating in Africa's extractive sector- oil, gas and minerals. These activities pose a major threat to sustainable development and security across the continent.¹²⁸

4.4 Trade misinvoicing

Transfer pricing looks at the transactions within multinational groups to see if the prices being charged for the goods or services truly reflect the market value. As the price of intra-group transactions can be manipulated, multinational groups can use it as a means to shift profits from high tax to low tax jurisdictions. Ensuring the prices are market value is the current mechanism to curb such practices.

\$15 billion is lost in tax revenue in sub-Saharan Africa from trade misinvoicing. That

126 <https://www.amnesty.org/ar/wp-content/uploads/2022/06/IOR4057712022ENGLISH.pdf>

127 <https://taxjusticeafrica.net/wp-content/uploads/2022/06/English-Statement.pdf>, (accessed 24 October 2022).

128 Tax Justice Network Africa, available at: <https://taxjusticeafrica.net/outreach/stop-the-bleeding-campaign>, (accessed 8 July 2022).

is equivalent to the cost of 1.8 million health workers.¹²⁹ In Mozambique, \$187 million of potential tax lost annually is equivalent to 10% of government revenue. This money could fill the financial gap in its national health plan, enabling major improvements to maternal and new-born health services that could save the lives of more than 30,000 children and 2,000 mothers each year.¹³⁰ Developing countries are more reliant on taxes raised through corporate activity than wealthier countries, where personal income tax fills a much more substantial part of the tax base.

Transfer pricing itself is a perfectly legal accounting method for multinational corporations. Though often necessary for risk management, such as harmonizing supply chains, legal obligations, and management structure, the flow of goods, services, and money across borders between multinational corporations' subsidiaries can enable companies to avoid taxes in some jurisdictions by shifting taxable profits (usually to where the tax rate is lower.) Although most transfer pricing does not result in money changing hands—rather, it is only noted in the multinational corporations' books—it can have devastating effects on developing countries who cannot afford the due diligence to ensure they are not being cheated out of revenue.

Leading studies on the extent of profit shifting have estimated multinational corporations to be shifting between US\$900 billion to US\$1,100 billion a year. That corresponds to around 40 per cent of the profits made abroad by multinational corporations. The corresponding tax revenue losses range from US\$90 to US\$307 billion a year from direct profit shifting. Multinational corporations, especially those with complicated chains of production like extraction companies, can set transfer prices at any link in that chain between which assets—tangible or intangible—shift between subsidiaries.¹³¹

In part, the global community's failure to curtail illicit transfer pricing comes from the lack of information surrounding its prevalence and methods. The problem is vast but its overall reach is unclear. Opening books for large companies, including measures to implement country-by-country reporting, is a critical first step: only then can

129 Making a killing: How tax scams are robbing poor countries of life-saving healthcare (Save the Children International, 2015).

130 Save the Children above.

131 https://taxjustice.net/wp-content/uploads/2021/11/State_of_Tax_Justice_Report_2021_ENGLISH.pdf p 29



repercussions for abusive behaviour be effectively imposed and tax policies altered as necessary to hold multinational corporations accountable for paying their fair share. The United Nations Committee of Experts on International Cooperation in Tax Matters is such a global mechanism, and has developed important tools and guidelines as to how countries can work together on tax issues, most recently, the 2011 revised version of the United Nations FACTI Panel recommendations.

The global financial system must be reformed, redesigned and revitalised so that it conforms to four values –accountability, legitimacy, transparency, and fairness. These values can lay the foundations for concrete actions by States, businesses and others towards financial integrity for sustainable development.¹³²

4.5 Corruption

Businesses are complicit in furthering endemic corruption on the continent. This applies not only within Africa, but globally, trading countries also resort to bribery to receive deals from public officials and governments. Companies are after mining rights, major construction projects as well as other deals. Several Chinese companies, including the China Energy Fund Committee, the telecommunications firm ZTE, and the China Roads and Bridge Construction Company, have been accused of bribing senior government officials in Chad, Uganda, Zambia and Kenya.¹³³ Between 2010 and 2012, the DRC reportedly lost over US\$1.36 billion from the under-pricing of mining assets that were sold to offshore companies.¹³⁴ The US government indicted three former government officials and five business executives from Mozambique over an alleged USD 2 billion fraud and money laundering scheme, which also involved USD 200 million in alleged bribes. In Spain an investigation was launched in 2014 into DEFEX, a company that promotes and exports goods and services, including weapons, accusing it of bribery and money laundering in connection with several countries including Angola and Cameroon. In Australia, it was reported that several

132 Financial Integrity for Sustainable Development Report of the High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda ([available at https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/603560520c476959ea33b17a_FACTI_Report_ExecSum.pdf](https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/603560520c476959ea33b17a_FACTI_Report_ExecSum.pdf)).

133 <https://www.transparency.org/en/news/where-are-africas-billions> (accessed 26th July 2022).

134 As above.

high profile companies are being investigated for bribing high ranking officials to win mining licenses in Sierra Leone and the Republic of Congo.¹³⁵ And well known is the egregious example of Equatorial Guinea, which saw 25 luxury vehicles belonging to the former ruler Teodoro Obiang's son seized in 2018, as well as USD 35 Million.

According to Transparency International, weak domestic institutions have allowed the movement of ill-gotten gains out of the region, and have failed to check corruption. Tackling this could be a key to poverty alleviation on the continent. Establishing public registers naming the owners of companies is another recommendation. Countries that are destinations for stolen money also have a key role to play in combatting illicit financial flows.

The ACERWC has commented on the impact of corruption and misuse of resources on the fulfilment of children's rights. In 2018, in its Concluding Observations with respect to Malawi, it recommended that the State party should take immediate measures to combat corruption and strengthen institutional capacity to effectively identify and investigate cases of corruption and prosecute the perpetrators.¹³⁶

In Concluding Observations directed to Angola, the ACERWC said "[w]hile noting some of the measures undertaken by the State party, as indicated by the Delegation during the dialogue, the Committee remains very concerned about the impact of corruption and mismanagement of funds on the delivery of social services to children and their families. Therefore, the Committee urges the State party to undertake a sustained effort to prevent and address cases of corruption by effectively holding individuals as well as entities accountable for their actions."¹³⁷

Case Study Namibia: Fishrot scandal¹³⁸

In November 2019 the Fishrot scandal broke in Namibia. FISHCOR, Namibia's state-owned fishing company, allegedly transferred fishing quotas from private Namibian

135 As above.

136 ACERWC Concluding Observations Malawi (2018) para 9.

137 ACERWC Concluding Observations Angola (2017) para 7.

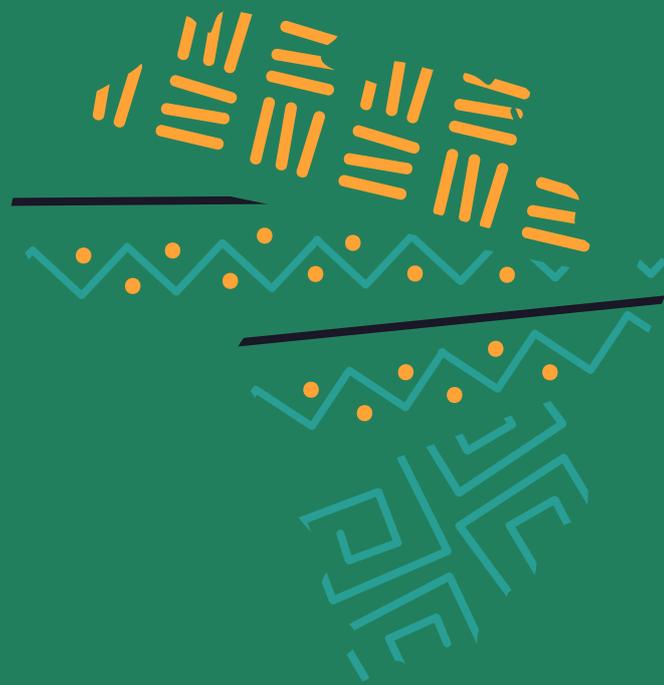
138 ISS Today, "Namibia's Fishrot trial will test the scales of justice", available at: <https://issafrica.org/iss-today/namibias-fishrot-trial-will-test-the-scales-of-justice#:~:text=The%20expos%C3%A9%20alleges%20that%20the.FISHCOR%20and%20African%20Selection%20Fishing> (accessed 28th October 2022).

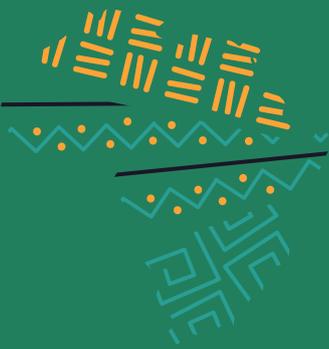


companies to other local companies in which the politicians involved had interests.

These latter companies were affiliated to Iceland's largest fishing corporation Samherji, which allegedly paid about US\$10 million in bribes to SWAPO leaders for preferential access to Namibia's rich fishing waters. Samherji allegedly also used other dodges to avoid paying taxes in Namibia by registering its operations in tax havens like Mauritius and Cyprus, investigative reporters found.

So just about everyone got a cut of the Fishrot pie. Except for ordinary Namibians.





PART 5:

SPECIFIC SECTORS

PART 5: SPECIFIC SECTORS

This part reviews specific areas of business activity in Africa. While not purporting to be strictly comprehensive of all conceivable sectors, it covers the main areas of concern or areas where some progress has been made.

5.1 Mining

According to the United Nations, Africa is home to about 30 percent of the world's mineral reserves, 12 percent of the world's oil and 8 percent of the world's natural gas reserves. The continent also holds 40 percent of the world's gold and up to 90 percent of its chromium and platinum – both valuable metals. Most of the electronics we use today are based on a number of minerals – from aluminium to zinc. In 2021, some 1.5 billion smartphones were sold around the world – up from 122 million units in 2007. As of 2020, nearly four in five (78 percent) people own a smartphone. More than half of a mobile phone's components – including its electronics, display, battery and speakers – are made from mined and semi-processed materials. Lithium and cobalt are some of the key metals used to produce batteries. In 2019, about 63 percent of the world's cobalt production came from the Democratic Republic of Congo. Tantalum is another metal used in electronic equipment. Tantalum capacitors are found in mobile phones, laptops and in a variety of automotive electronics. The DRC and Rwanda are the world's largest producers of tantalum. Together they produce half of the world's tantalum. Petroleum and coal are among the most abundant minerals for 22 out of Africa's 54 countries. As of 2019, Nigeria produced most of the continent's petroleum (25 percent), followed by Angola (17 percent), and Algeria (16 percent). Metals including gold, iron, titanium, zinc and copper are the top produced minerals for 11 countries. Ghana is the continent's largest producer of gold, followed by South Africa and Mali. Industrial minerals such as diamonds, gypsum, salt, sulphur and phosphates are the main commodity for 13 African countries. The DRC is Africa's largest industrial diamond producer, followed by Botswana and South Africa. Botswana ranks number one in Africa for the production of gem-quality diamonds – used for jewellery. At \$125bn per year, South Africa generates the most money from its mineral resources.



Nigeria comes in second with \$53bn per year, followed by Algeria (\$39bn), Angola (\$32bn), and Libya (\$27bn). These five countries produced more than two-thirds of the continent's mineral wealth. Africa produced about 5.5 percent of the world's minerals worth some \$406bn.¹³⁹

The Democratic Republic of the Congo has significant unexploited minerals including gold, cobalt and high-grade copper reserves. At the same time, there exist considerable security challenges heightened by a lack of robust infrastructure¹⁴⁰ and employment of children in dangerous work environments which portends significant harm to their welfare.¹⁴¹ These challenges are further complicated by the involvement of children in the global extractive supply chain. The DRC provides a striking example of the link between mineral exploitation and protracted conflict, indirectly encouraged by corporate actors.¹⁴² For example, Anvil Mining Limited, a multinational company, is reported to have aided and abetted the attacks on Kilwa, a small town in the province of Katanga in the DRC, by providing operational and logistical support to the Congolese armed forces.¹⁴³ Furthermore, the DRC's conflict-prone political economy illustrates the impact of illicit natural resource exploitation that has gone on for far too long.¹⁴⁴ This has not only resulted in the pillaging of the country's extractive resources,¹⁴⁵ but has also led to severe rent seeking practices.¹⁴⁶

In a commissioned study on children's rights and the mining sector, it was found

139 Source: Al Jazeera (www.aljazeera.com/news/2018/2/20/mapping-africas-natural-resources#:~:text=Metals%20including%20gold%2C%20iron%2C%20titanium,commodity%20for%2013%20African%20countries) (accessed 9 August 2022).

140 ITA, 'Democratic Republic of the Congo – Country Commercial Guide' available at <https://www.trade.gov/country-commercial-guides/democratic-republic-congo-mining-and-minerals> (accessed 7 July 2022).

141 Gamze Erdem Türkelli, *Children's Rights and Business: Governing Obligations and Responsibility* (2020) 160.

142 O. Abe, A. Ordor, 'Addressing Human Rights Concerns in the Extractive Resource Industry in Sub-Saharan Africa using the Lens of Article 46 (C) of the Malabo Protocol' (2018) 11 (2) *Law and Development Review*, 843-865.

143 See Jean Katende, *Report on Human Rights Violations Committed in Kilwa in the Month of October 2004*, Publication of the African Association for the Defense of Human Rights (Asadho/Katanga, 2005) 8. These facts led to Communication 393/10 IHDR Vs Democratic Republic of the Congo before the African Commission on Human and People's Rights, Decision on merits 2016

144 See generally Reps. of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, S/2001/357 (April 12, 2001), S/2002/ 565 (May 22, 2002), S/2002/1072 (Nov 13, 2001), S/2002/1146 (Oct. 16, 2002) and S/2003/1027 (Oct. 28, 2003).

145 Abe and Ordor (above).

146 See Philippe Le Billion, *Wars of Plunder: Conflicts, Profits and the Politics of Resource*, (New York, Columbia University Press, 2012), pp. 151–157. [discussing the use of private military companies to secure natural resource rich areas in return for payment in form of mineral resources].

that mining activities impacted children mostly in the formal and large-scale mining sector.¹⁴⁷ These impacts arise because of conflict minerals, development induced displacement, and labour-related impacts. Artisanal and small-scale mining (ASM) activities were seen as the most prevalent form of engagement of child miners. For instance, multinational companies periodically procure minerals from ASM operations. These procurements involve substantial risks around working conditions and child rights. ASM by nature has heightened risks of human rights abuses, including child labour, sexual exploitation, physical and emotional violence.¹⁴⁸ In a recent report, ASM in Katanga, DRC, involves the employment of “child miners, who can experience serious health effects, abuse by security guards and illegal taxation.”¹⁴⁹ Children are frequently involved in assistance services such as “mineral sorting and processing, transport, and provision of water and food.”¹⁵⁰

The trade of minerals from eastern DRC, and the attendant guerrilla warfare this has perpetrated, is well documented in literature.¹⁵¹ The employment of children in the DRC’s mining sector has increased over the years with about 40 percent of the population in mining sites being children, working either as miners or providing one support service or another.¹⁵² A 2016 report maintained that the DRC government has systematically restricted ASM to industrial and semi-industrial mining. Several ASM miners in a bid to circumvent the provisions of the law end up working in unregulated

147 UNICEF, Children’s Rights and the Mining Sector, UNICEF Extractive Pilot (March 2015), available at: https://media.business-humanrights.org/media/documents/files/documents/UNICEF_REPORT_ON_CHILD_RIGHTS_AND_THE_MINING_SECTOR_APRIL_27_0.pdf (accessed 15 June 2022).

148 UNICEF, “Child Rights and Mining Toolkit”, available at: <https://www.unicef.ca/sites/default/files/2019-01/Child-Rights-and-Mining-Toolkit.pdf> (accessed 20 July 2022).

149 Amnesty International, “Democratic Republic of Congo: “This is what we die for”: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt” (January 19, 2016), available at: <https://www.amnesty.org/en/documents/afr62/3183/2016/en/> (accessed 22 July 2022).

150 UNICEF, ‘Child Rights and Mining Toolkit’ (January 2017) p 90.

151 Abe and Ordor (above) p 15. James Tsabora, ‘Illicit Natural Resource Exploitation by Private Corporate Interests in Africa’s Maritime Zones During Armed Conflict’ (2014) 54(1) *Natural Resources Journal* 184.

See generally Reps. of the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC, S/2001/357 (April 12, 2001), S/2002/ 565 (May 22, 2002), S/2002/1072 (Nov 13, 2001), S/2002/1146 (Oct. 16, 2002) and S/2003/1027 (Oct. 28, 2003).

152 World Bank, Democratic Republic of Congo: Growth with Governance in the Mining Sector. Washington, DC. Report No. 43402-ZR, p 58, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/8072/434020Revised010Box327409B01PUBLIC1.pdf?sequence=1&isAllowed=y> (accessed 23 October 2022).



sites or on unauthorized industrial mining sites.¹⁵³ ASM miners include children as young as seven who hunt for “rocks containing cobalt in the discarded by-products of industrial mines, and who wash and sort the ore before it is sold.”¹⁵⁴ The children interviewed in the report described the physically demanding nature of the work, working up to 12 hours a day, carrying heavy loads, and earning less than \$2 dollars a day.¹⁵⁵ Sadly, children who could afford to attend school and get some basic education, sometimes worked for about 12 hours during weekends, school holidays, and during the school term.¹⁵⁶ Despite the provision of free and compulsory primary education for all children under the DRC Child Protection Code (2009), some of the interviewed children said they had to work since their parents could not afford school fees.¹⁵⁷ No doubt, lack of state funding necessitates schools charging parents school fees which goes to cover costs such as salaries, uniforms and learning materials.¹⁵⁸

Case Study: A Day in the Life of an Artisanal Miner- in Democratic Republic of Congo

The workday starts early at the artisanal mining camp; sometimes it continues for 12-14 hours a day, 7 days a week... the work is extremely arduous and often dangerous; numerous deaths occur in mine shafts due to cave-ins or suffocation. Proper hygiene and sanitary facilities and practices do not exist. In many cases, the artisanal miner must bring his children onto the mining site because they have nowhere else (e.g. school) to go and because an extra pair of small hands are especially good at getting into small crevasses. Work at the site is highly specialized, with diggers (men), carriers, crushers, and washers (mostly women and children).¹⁵⁹

153 Amnesty International, ‘Democratic Republic of Congo: “This is what we die for”: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt’ (January 19, 2016), available at: <https://www.amnesty.org/en/documents/afr62/3183/2016/en/> (accessed 22 October 2022).

154 Ibid.

155 Ibid, 6.

156 Ibid.

157 Ibid

158 Ibid.

159 World Bank, “Democratic Republic of Congo

Growth with Governance in the Mining Sector” (May 2008) Report No. 43402 – ZR, p 59 available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/8072/434020Revised010Box327409B01PUBLIC1.pdf?sequence=1&isAllowed=y> (accessed 18 July 2022).

Due to the potential for conflict which extractive resources generates in Africa, children in mining communities are mostly impacted by violent conflict perpetrated by armed groups and guerrilla warlords. A child born into conflict could spend its childhood in that situation. Conflict situations impact children's mental, emotional and physical upbringing and can have a "devastating impact on human nutrition by threatening livelihoods and compromising food security, health and the ability of caregivers to provide for the young."¹⁶⁰

Children are subjected to recruitment as child soldiers, sexual violence, abduction, and murder.¹⁶¹ In 2017, cases of recruitment and use of child soldiers doubled in the DRC,¹⁶² while mineral conflict also saw an increase in attacks on schools and hospitals.¹⁶³ This has complicated the realization of children's rights to education and health. Further complicating sustainable extraction of minerals is the "presence of children in mining sites and the use of child labour."¹⁶⁴ Children continue to be engaged in the "mining of gold, cassiterite (tin ore), coltan (tantalum ore), and wolframite (tungsten ore)."¹⁶⁵ Due to the involvement of child soldiers and child labour, mineral conflict impacts the rights of children to attain basic education, including availability and accessibility. Where children have to work in mines -full time or part time - to support their education, or work, they miss the opportunity to attend school. As a result, they risk dropping out of school.

The environmental impact of mining results in land and sea pollution affecting birth rates. The long-term effects result in children born with some form of deformity or another, low life expectancy rates, outbreak of diseases, and an increase in infant and maternal mortality rates.¹⁶⁶ Children working in the mines are further impacted by air

160 UNICEF, "Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World", available at: <https://www.refworld.org/docid/4a389ca92.html> (accessed 18 July 2022).

161 Office of the SRSG, 'Children and Armed Conflict: The Six Grave Violations against Children During Armed Conflict: The Legal Foundation', October 2009 ((Updated November 2013) <WorkingPaper-1_SixGraveViolationsLegalFoundation>

162 UNGA, "Children and armed conflict", A/72/865, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/151/09/PDF/N1815109.pdf?OpenElement> (accessed 18 July 2022).

163 Ibid, 2/42

164 Türkelli (above) p 165.

165 Bureau of International Labour Affairs, "Child Labour and Forced Labour Reports, Congo, Democratic Republic of the (DRC)", available at: <https://www.dol.gov/agencies/ilab/resources/reports/child-labour/congo-democratic-republic-drc> (accessed 20 July 2022); see also Türkelli (above) p 166.

166 Türkelli (above) p 169.



pollution such as silica dust, and other forms of chemicals.¹⁶⁷ Access to effective and immediate health care is low, or non-existent in conflict prone areas.

The impact of business activities in the DRC has led to some judicial interventions. In *RAID vs. Das Air*,¹⁶⁸ a United Nations Panel of Experts alleged that about 82 multinational companies, mostly UK based companies, subject to the OECD Guidelines on Multinational enterprises, violated the Guidelines for their direct and indirect responsibilities in illegal exploitation of natural resources in the DRC. It was found that elites and businesspersons fuelled the conflict in order to retain their control over the country's vast natural resources. DAS entered into administration before the case was adjudicated. However, the National Contact Point (NCP) concluded that DAS Air "breached the human rights provision, failed to undertake due diligence with regard to its supply chain, and the company's contention that it did not know the source of the minerals it was transporting was rejected given its "intimate understanding of the situation and the conflict."¹⁶⁹ Similarly, in *Global Witness vs. Afrimex*,¹⁷⁰ the United Nations Panel of Experts alleged that 85 OECD-based companies violated the provisions of the Guidelines in their operations in the DRC. They alleged that "elite networks" of state and non-state actors fuelled the mineral conflicts in order to maintain their control of the country's vast natural resources. The complaint further alleged that Afrimex's trade in minerals significantly heightened the violent conflict and severe human rights abuses in the DRC. In its final assessment, the UK NCP found that Afrimex "did not comply with Chapter II (General Policies) and Chapter IV (Employment and Industrial Relations) of the Guidelines."¹⁷¹ Despite the pendency of this complaint, Afrimex continued purchasing minerals from the armed groups in the Eastern part of the DRC.¹⁷²

167 UNICEF, "Children's rights and the Mining sector", (above) p 13.

168 OECD Watch, *RAID vs DAS Air* (28 June 2004), available at: <https://www.oecdwatch.org/complaint/raid-vs-das-air/> (accessed 25 July 2022).

169 Ibid. see also STATEMENT BY THE UNITED KINGDOM NATIONAL CONTACT POINT (NCP) FOR OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (NCP): *DAS AIR* (17 July 2018), available at: <https://www.oecd.org/corporate/mne/44479531.pdf> (accessed 25 July 2022).

170 OECD Watch, *Global Witness v. Afrimex* (20 February 2007), available at: <https://www.oecdwatch.org/complaint/global-witness-vs-afrimex/> (accessed 25 July 2022).

171 Ibid.

172 Ibid.

The CRC Committee has expressed concern about the impact of mining activity on children's rights in Guinea.¹⁷³ The Committee did note the ongoing reform being undertaken by the State party to better adapt its legal, policy and institutional framework to continuing international investment in the mining sector. However, the Committee was deeply concerned about:

- (a) "The lack of clear regulations and of a specific mechanism for monitoring the activities of mining companies, including international companies and operators of illegal mines, that are likely to have a negative impact on children's rights;
- (b) The negative impact of legal and illegal mining operations on the living conditions of children, such as the high prevalence of child labour including the worst forms of child labour, sexual abuse and prostitution, high dropout rates from school, the expropriation of land, exposure to harmful substances and other health hazards, environmental degradation and deforestation, and forcing children to walk long distances to find clean drinking water;
- (c) The insufficient enforcement of article 130 of the Mining Code (2011) which regulates relations between private mining enterprises and local communities, and the lack of inclusion of a legal obligation to consult and share revenues with local communities in contracts between the State party and international mining companies that were concluded in the 1970s and 1980s;
- (d) The general insecurity that children living in mining areas are exposed to on account of regular violent protests by local populations as well as excessive use of force by security forces which caused the death of one child in April 2017."

Recommendations included that the Government of Guinea ensure that the mine operators responsible for such exploitation are promptly prosecuted with commensurate sanctions; that they require companies to undertake periodic child-rights impact assessments; and that they establish regulations on the procedure for, and scope of, compensation for dispossessed families.

In Burkina Faso, worsening economic conditions in the agricultural sector, coupled with a recent gold rush, have encouraged families to look for new income opportunities and resulted in children working in dangerous conditions in gold mines, an activity

173 CRC/C/GIN/CO/3-6 (Feb 2019).



that itself can be highly destructive for the environment.¹⁷⁴

In Nigeria, abnormally high rates of death and illness among children since early 2010 caused alarm in Zamfara State in the north of the country.¹⁷⁵ Over 200 children reportedly died as a result of acute lead poisoning from the processing of lead-rich ore for gold extraction taking place inside houses and compounds. Investigation by the joint UNEP/OCHA Environment Unit detected high levels of lead in groundwater, surface water and soil, and mercury in the air.¹⁷⁶ The multiagency response involved intensive treatment for the most severe cases of children under five, the decontamination of homes and villages, and the remediation of affected wells.¹⁷⁷

The Mining Slag Dump (Black Mountain) in Kitwe in Zambia led to the deaths of about ten people, where a Zambian dump for copper mining waste collapsed.¹⁷⁸ The incident was largely due to the activities of informal “artisanal” miners who re-excavate copper and other metals from the Black Mountain waste site.¹⁷⁹ Despite closure, mine contamination in Kabwe region has led to high lead levels and lead-contaminated soil.¹⁸⁰ The Vedanta case which was eventually decided in the UK courts arose out of an action brought by Zambian citizens, members of a rural farming community, in the Chingola District of Zambia over toxic emissions from the Nchanga Copper Mine and water pollution by the subsidiary's copper mining operations which led to adverse impacts on land and their livelihoods.¹⁸¹ In *Vedanta Resources PLC & another*

174 ILO: Vulnerabilities to child labour. Geneva: International Labour Organization, 2022.

175 UNEP, “Annual Report 2011”, available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/8053/-UNEP%202011%20Annual%20Report-20121086.pdf?sequence=5&%3BisAllowed=y%2C%20French%7C%7Chttps%3A/wedocs.unep.org/bitstream/handle/20.500.11822/8053/-UNEP%202011%20Annual%20Report-20121086-french.pdf%3Fsequence%3D6&%3BisA=> (accessed 18 October 2022).

176 Ibid.

177 Ibid.

178 See Reuters, “Ten killed in collapse at Zambian copper mining dump” *Reuters* (20 June 2018), available at: <https://www.reuters.com/article/us-zambia-mining/ten-killed-in-collapse-at-zambian-copper-mining-dump-idUSKBN1JG1H3> (accessed 26 July 2022)

179 Ibid

180 Human Rights Watch, “We have to be worried: The Impact of Lead Contamination on Children's Rights in Kabwe, Zambia” (23 August 2019), available at: <https://www.hrw.org/report/2019/08/23/we-have-be-worried/impact-lead-contamination-childrens-rights-kabwe-zambia> (accessed 26 July 2022).

181 See Human Rights Commission, Zambia, “The Corporate Responsibility to Respect Human Rights: The Case of mining and agriculture sectors in Zambia” (August 2020). See also *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)*, [2019] UKSC 20.

v Lungowe and others (Respondents),¹⁸² the claimants were a group of Zambian citizens who resided in four rural communities within the Chingola District of Zambia. They were poor, peasant farmers who relied on watercourses which provide their only source of water for drinking, for their livestock and as irrigation for their crops. They claimed that defendant's Nchanga Copper Mine caused toxic emissions, affecting their health and farming activities, which had been damaged by the repeated discharges of toxic matter from the mine into the watercourses.¹⁸³ The UK Supreme Court held that a parent company domiciled in England could be liable for the harms caused to community members impacted by the activities of its subsidiary in Zambia. The case was essentially decided on procedural grounds as to whether the case could proceed in English courts.

In James Nyasulu et al., v. Konkola Copper Mines Plc,¹⁸⁴ the High Court of Zambia held that there was a "lack of corporate responsibility" when the mining company polluted the Chingola community's main source of water. The court also enjoined foreign investors to adhere to environmental benchmarks.

Zambia recently appeared before the CRC Committee.¹⁸⁵ The Committee noted that children in Kabwe are especially at risk of exposure to lead poisoning because they are more likely to ingest lead dust when playing in the soil, their brains and bodies are still developing, and they absorb four to five times as much lead as adults. The consequences for children who are exposed to high levels of lead and are not treated include reading and learning barriers or disabilities; behavioural problems; impaired growth; anemia; brain, liver, kidney, nerve, and stomach damage; coma and convulsions; and death. After prolonged exposure, the effects are irreversible. Lead also increases the risk of miscarriage and can be transmitted through both the placenta and breast milk.¹⁸⁶

The continuous exposure of children in Kabwe to high levels of lead in the soil and dust

182 [2019] UKSC 20. On appeal from: [2017] EWCA Civ 1528

183 Ibid.

184 2007/HP/1286.

185 CRC/C/ZMB/CO/5-7 14 (June 2022).

186 HRW, available at: <https://www.hrw.org/report/2019/08/23/we-have-be-worried/impact-lead-contamination-childrens-rights-kabwe-zambia> (accessed 5 July 2022).



around the former mine and in the mining waste was commented upon, as well as the delays in implementing the World Bank-funded project to clean up lead-contaminated neighbourhoods.

The Committee also reflected on the effects of mining in Kitwe and other provinces, and the increase in mining activities in the absence of a comprehensive and effective legal, regulatory and compliance framework to prevent and respond to human rights violations. It said that the request of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes to conduct a country visit has been pending since 2008.

Recalling its General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights and the Guiding Principles on Business and Human Rights, the Committee recalled its previous concluding observations and urged the State party, amongst others, to develop and implement without further delay a sustainable and comprehensive programme for lead remediation, particularly of all contaminated schools, play areas, health centres and other public areas, including containment and removal of mining waste, conduct regular monitoring of soil and air lead levels in Kabwe and to take steps to ensure that children who receive treatment are not returned to contaminated areas; to ensure that small-scale mining operations, including all private operations for reprocessing minerals, are carefully scrutinized, licensed and regularly monitored by the Government for compliance with national laws and regulations, for human rights and environmental impacts, including through environmental and social impact assessments; and to designate a government lead on enhancing corporate social responsibility in Zambia and to consider instituting measures to ensure that corporate revenue derived from the mining sector supports implementation of the Sustainable Development Goals, including through profit-sharing and effective taxation. Also, Zambia was encouraged to implement expeditiously the recommendations that it supported during the third cycle of the Universal Periodic Review, develop a national action plan on business and human rights and implement it together with the Guiding Principles on Business and Human Rights. Zambia was also recommended to address the high incidence of child labour in agriculture, artisanal mining and domestic service and other forms of child labour and institute further measures to increase school enrolment and prevent

dropout; and to strengthen the labour inspectorate and the district and community child labour committees.¹⁸⁷

In 2012, Lonmin, a British company, sacked 12,000 miners after a prolonged strike over wages and failure to adhere to labour standards.¹⁸⁸ This action then 'led to sporadic strikes across the South African mining sector'.¹⁸⁹ Apart from the needed wage increase, the local community had been despoiled through the activities of Lonmin: youth unemployment was high, and the miners were contracting silicosis and tuberculosis.¹⁹⁰ The subsequent strike action resulted in the death of 34 miners who were shot dead by the South African police on 16 August 2012.¹⁹¹

Human Rights Watch has documented the use of hazardous child labour in gold or diamond mining in Ghana, Mali, Nigeria, Tanzania, and Zimbabwe. Other independent investigations have documented hazardous child labour in gold mines in Burkina Faso, Uganda, and the Democratic Republic of Congo.¹⁹² Findings from Swedwatch's investigation in the DRC indicate that large numbers of children work in the country's diamond mines, seemingly several thousands, and are exposed to abuses and violations of their rights. Girls and young women in mining areas are particularly exposed to sexual violations and forced marriage, and are not provided with psychosocial support. The work in the mines severely impacts girls' and boys' education and deprives them of the chance to create a better future. The DRC government is not sufficiently addressing these problems. Swedwatch interviews indicate that few (if any) mine sites in the diamond region have been visited as part of a due diligence process by any foreign companies. Mostly these emanate from artisanal mines. Today, as little as 0.1 percent of the world's diamonds are considered untradeable as per the Kimberley

187 Para 40.

188 For a detailed discussion of the Marikana incident, see Edward Webster, "Marikana and Beyond: New Dynamics in Strikes in South Africa" (2017) 8(2) *Global Labour Journal* 139; M. Power, M. Gwanyanya, "Massacre at Marikana" (2017) 25 *Int'l Journal on Human Rights* 61.

189 Abe (above), 139.

190 See SAPA, "Lonmin an example of exploitation" *Business Report* (17 August 2012), available at: <https://www.iol.co.za/business-report/companies/lonmin-an-example-of-exploitation-1365221> (accessed 10 June 2022).

191 See Marikana Commission of Inquiry, *Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North-West Province* (2015), available at: https://www.gov.za/sites/default/files/gcis_document/201506/38978gen6993.pdf (accessed 30 May 2022).

192 Human Rights Watch, "The hidden cost of Jewelry" (February 8, 2018), available at: <https://www.hrw.org/report/2018/02/08/hidden-cost-jewelry/human-rights-supply-chains-and-responsibility-jewelry> (accessed 15 October 2022).



Process Certification Scheme (KPCS) – the only sustainability certification available for diamonds with significant reach. This report argues that the KPCS obscures the true human rights problems within today's diamond trade. Based on the findings from the DRC, it argues that the KPCS must be restructured or replaced in order to protect the people who are bearing the true cost of the diamond trade.¹⁹³ Diamond supply chains are tainted by gross human rights violations, including those committed against children. Diamonds originating from western and central Africa are of particular concern, and it is to date not possible to guarantee that they are excluded from European supply chains.

Swedwatch's recommendations include some addressed to the European Union and its member states, including that they establish laws requiring companies headquartered or domiciled within their borders to investigate, and publicly report on, their diamond supply chains in accordance with international standards such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and the UN Guiding Principles on Business and Human Rights.

South Africa has struggled with the effects of abandoned closed mines which significantly impacts children and vulnerable people. In Ermelo, Mpumalanga province, a 17-year-old and his 14-year-old friend drowned in an abandoned coal mine in Wesselton community.¹⁹⁴ The drowning highlights the threats of disasters from unrestricted access to unrehabilitated mines and a government's inability to address these threats. Children see such abandoned mines as swimming pools, placing local residents, mostly children who do not have many choices with leisure avenues, at heightened risks of death.¹⁹⁵ Coupled with this is the fact that Acid Mine Drainage (AMD) – a by-product of the lack of appropriately remediated mine sites – causes increased water acidity which makes it unsafe for human consumption and leads

193 Swed Watch, "Childhood Lost", available at: http://www.swedwatch.org/wp-content/uploads/2016/12/83_swedwatch_drc_diamonds_0.pdf (accessed 13 July 2022).

194 Human Rights Watch, "The Forever Mines: Perpetual Rights Risks from Unrehabilitated Coal Mines in South Africa" (5 July 2022), available at: <https://www.hrw.org/report/2022/07/05/forever-mines/perpetual-rights-risks-unrehabilitated-coal-mines-south-africa> (accessed 20 June 2022).

195 Sne Masuku, "Two KZN children drown in open mine clusters abandoned by mining company" (29 December 2020), available at: <https://www.iol.co.za/dailynews/news/two-kzn-children-drown-in-open-mine-clusters-abandoned-by-mining-company-48601404-0feb-477c-be31-1dfa9757160f> (accessed 27 July 2022).

to high chemicals in the body, ultimately impacting human health.¹⁹⁶ These impacts lead to diarrhoea and dehydration, with children more adversely affected.¹⁹⁷ It is important to stress that AMD results in severe and lasting toxicity to human users and the environment. Consequently, the presence of contaminants in drinking water threatens human existence and these chemicals impact children greatly, causing “skin irritation, kidney damage, neurological conditions, and cancer.”¹⁹⁸ At the Witwatersrand Gold Fields, Mpumalanga and Kwazulu Natal coalfield, the presence of AMDs caused significant damage to women and children.¹⁹⁹

About 15, 000 children work as artisanal gold miners in Uganda.²⁰⁰ Some of them combine this work with schooling while others do not attend school at all. Their desire to go back to school drives them to the perilous trade of ASM. In Busia district of Uganda, there are reports that lack of resources and deprivation drive child rights violations such as child neglect, while parents and care givers spend time in the mines leaving their children unattended.²⁰¹ These parents are eventually exposed to hazardous chemicals and toxins which affect mortality rates, thus turning their young children into orphans at an early age. Due to the informal nature of ASM, migrant children face rights violations such as “criminal acts, limited access to social infrastructure as well as exposure to HIV infection.”²⁰²

196 Simpson, et al., “Competition for Land: The Water-Energy-Food Nexus and Coal Mining in Mpumalanga Province, South Africa” *Frontiers in Environmental Science*, available at: <https://www.frontiersin.org/articles/10.3389/fenvs.2019.00086/full> (accessed 27 July 2022).

197 Christine Colvin and Angus Burns, “Coal and Water Futures in South Africa,” *World Wildlife Foundation* (2011) 46, available at: <https://www.wwf.org.za/?7000/coal-and-water-report> (accessed 27 July 2022).

198 Human Rights Watch (above).

199 P Manders, L Godfrey, & P Hobbs, ‘Acid Mine Drainage in South Africa’ *Briefing Note CSIR Natural Resources and the Environment* (2009).

200 Anne Lydia Sekandi, ‘Keeping children out of hazardous gold mines in Busia’ (29 October 2019), available at: <https://www.unicef.org/uganda/stories/keeping-children-out-hazardous-gold-mines-busia> (accessed 25 July 2022).

201 Ibid.

202 UNICEF et.al. ‘Children’s Rights And Business Principles Uganda’ available at https://www.unicef.org/uganda/media/8626/file/CRBP%20-%20Executive%20Summary_261020.pdf (accessed 25 July 2022).



In a report on the mica mining in Madagascar,²⁰³ it was found that about 47 percent of Malagasy children between the ages of 5 and 7 years were engaged in child labour.²⁰⁴ Most working children (about 87 per cent) are involved in agriculture. But around 86 000 children were involved in the mining sector.²⁰⁵ Despite the litany of laws and policies in Madagascar, there has been weak implementation of these laws. A close estimate of 22 percent of children, aged 5 and 14 years did not attend school in 2016,²⁰⁶ due to costs associated with teachers' salaries, uniforms, even though education is free in Madagascar.²⁰⁷

The study found that the country was the fourth largest mica exporter worldwide in 2015, and that since 2015 it had even overtaken India as the biggest global exporter of sheet mica, the grade of mica that is used extensively in the electronics and automotive industries. The weak government oversight of the mining sector increases the possibility that children may be exploited as a labour source. Although illegal or unregulated trading of mining products provides income for many poor families, it may also contribute to regional instability and violence in the south, thereby posing an indirect threat to child rights.

Child labour in mining is considered to be one of the Worst Forms of Child Labour. The vast proportion of mica is exported to China.²⁰⁸ Probably half of the conservatively estimated 20,000 people involved in mica mining, and half of the estimated 1,600 people working in mica sorting in Madagascar, are children.²⁰⁹ Conditions and consequences for children are harsh:

203 Mica stands for a group of different minerals that form in distinct layers and that are highly reflective. Mica is "lightweight, flexible, strong, resistant to high temperatures and temperature changes, able to insulate, withstand high voltages, absorb or reflect light and protect against ultraviolet light. It is used in the production of paints, soil conditioners, and smartphones. See further: Sanne van der Wal (SOMO), 'Child Labour in Madagascar's MICA Sector' (November 2019) available at https://www.terredeshommes.org/wp-content/uploads/2020/01/td0163_wt_mica_madagascar_rapport_v3_web.pdf (accessed 25 July 2022).

204 Sanne van der Wal (above).

205 US Department of Labour, 'Findings on the Worst Forms of Child Labour – Madagascar' available at https://www.dol.gov/sites/dolgov/files/ILAB/child_labour_reports/tda2017/Madagascar.pdf (accessed 25 July 2022).

206 Ibid.

207 US Department of State, 'Country Report on Human Rights Practices for 2018' available at <https://www.state.gov/wp-content/uploads/2019/03/Madagascar-2018.pdf> (accessed 25 July 2022).

208 P 26.

209 P 35.

“Young children, for example, just showed their hands and feet, which were marked by wounds from the work around the mica mines. Overall, many children are more or less exposed to the same harsh working conditions and risks as adults every day. They complain of back pain because they must bend to pick up mica from the ground or when they extract mica from the mines. They complain of headaches because of the heat and the lack of water or oxygen. Children report having muscle pain due to the repetitive and hard work carrying heavy loads, using crowbars and lifting hammers.”²¹⁰

The condition of living at the mica mines extremely impacts workers, including children. People who work and live in the mining communities are exposed to dusty environments, and particles of mica, which could have long lasting effects on their lungs and general well-being.²¹¹ Children who are exposed to the same hazardous work environments as adults, suffer from cruel, detrimental and risky working conditions, earning less than a \$1 per day.²¹² Some examples of the children’s lived experiences are below:

Case study: Frederic’s story

Frederic is only 8 years old but he is already working in a sorting company like his big brother. He performs the same sorting activities as the adult workers, with the same materials in the same environment. Similar to his young colleagues, his hands are marked by traces, wounds and scars of repetitive work to remove calcite. Like his peers, the little boy’s appearance also shows signs of food insufficiency and a worrying state of health that accompany his hard work and life: thinness, a bloated belly and coughing. Just like two of his peers, he works in the company either in the morning or in the afternoon, according to the school’s schedule. He explained that he comes from a very poor family. This is why he is forced to work

210 P 36.

211 Sanne van der Wal (above).

212 Ibid.



*at the company, like the others, to be able to eat. Despite the difficulties in his life and that of his family, he hopes to be able to realise his dream of becoming a teacher.*²¹³

Case study: Felicia's story

*Felicia is a 13-year-old girl who works in a sorting company in Amboasary. She lives with her mother and eight siblings. She explained that she has never attended school. In the sorting company where she works, she does all the sorting tasks adult workers engage in as well. In addition, just like them, she complains about the harshness of her tasks. From Felicia's statements, it is clear that accidentally hurting oneself comes with the job... "every day we hit the mica and our nails are all damaged." Like the other children in the group, she is not in good health; she coughs a lot and talks about her deplorable nutrition. Very often, she leaves early to work at the company on an empty stomach and can only eat at night if she can find something to eat. During the day she drinks water to suppress the feeling of hunger: 'If we do not have any food, we only drink water'. As she does not go to school, she works from Monday to Sunday, without rest, from 7 a.m. to 3 p.m. Felicia is conscious of the harsh reality of her life and is aware of the fact that things may never improve for her.*²¹⁴

Children also work in the mica sorting companies, as is the case with Felicia (above). Children earn less than adults because their work pace is slower and payments are based on the number of kilos sorted. It was observed that, even if young children work as hard as they can every day, their salary is not enough for them to afford enough food. The lack of nutrition is an issue where poverty leaves its most obvious footprint. Although food shortages affect many in the mica mining areas, their negative impact is particularly harmful to the health and development of children. Habits and food consumption may vary from place to place, depending on the availability of food

213 Sanne van der Wal (above).

214 Ibid, p 38.

products and families' financial possibilities. While chronic malnutrition affects almost 4 out of 10 children under 5 years of age in Madagascar, the MICS 2018 shows that acute malnutrition, or wasting, prevails in 7 to 8 per cent of the children under the age of five in the three mica mining regions. In a number of mica mining sites, young girls were found to be sexually exploited. The rights of many children in the mining communities are at stake. They go to work from a young age on an empty stomach and do not have the chance to go to school, play or rest.

In Tanzania, the pollution of water sources by cyanide and mercury was particularly dangerous to the women and children who collected it for household and livestock use in rural communities.²¹⁵

In Guinea, where bauxite is mined, dozens of farmers from 16 villages located near mines, ports and mining roads described how mining companies have expropriated ancestral farmlands without adequate compensation or in exchange for financial payments that do not replace the benefits families and communities derived from the land. ²¹⁶“They’ve expanded into our fields, the areas we depended on for food. And now much of our fertile land has been taken from us,” said a community leader from Boundou Waadé, a village surrounded by five CBG mines. “The company has destroyed our means of subsistence.” Although Guinea’s bauxite boom provides much-needed tax revenue for the government, thousands of jobs, and profits to mining companies and their shareholders, it has profound human rights consequences for the rural communities that live closest to mining operations. Mining companies take advantage of the ambiguous protection of rural land rights in Guinean law to expropriate ancestral farmlands without adequate compensation or for financial payments that cannot replace the benefits communities derived from land. Damage to water sources that residents attribute to mining, as well as increased demand due to population migration to mining sites reduces communities’ access to water for

215 World Bank, “Gender dimensions of artisanal and small-scale mining: a rapid assessment toolkit” (2012), available at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/644761468157780524/gender-dimensions-of-artisanal-and-small-scale-mining-a-rapid-assessment-toolkit>, (accessed 10 October 2022).

216 Human Rights Watch, “What do we get out of it” (October 4 2018), available at: <https://www.hrw.org/report/2018/10/04/what-do-we-get-out-it/human-rights-impact-bauxite-mining-guinea> (accessed 9 July 2022).



drinking, washing and cooking. Women, who are primarily responsible for fetching water, are forced to walk longer distances or wait for long periods to obtain water from alternative sources. The dust produced by bauxite mining and transport smothers fields and enters homes, leaving families and health workers worried that reduced air quality threatens their health and environment.

5.2 The Energy Sector

Debates on the human costs of large hydroelectric power projects and whether they are truly cleaner sources of energy have been ongoing for a while. The human costs of these projects have had significant impacts on children in Africa. For example, the Bujagali Hydropower project in Uganda has brought to the fore allegations about violations of children's rights. Perhaps the most significant interference of hydroelectric projects with human rights is the massive resettlement of people from ancestral lands and homes.

5.2.1 Bujagali Hydropower Project (BHP) - Uganda

Bujagali Hydropower Project (BHP) is a hydroelectric power station that harnesses the energy of the Bujagali Falls in Uganda. It was designed as a 250 MW power generating facility to cure Uganda's acute electricity shortage.²¹⁷ The BHP is situated about eight kilometres downriver from the present Owen Falls Hydropower Project, which controls the flows into the Victoria Nile from Lake Victoria and developing a gross head of approximately 22 meters.²¹⁸ Project development commenced in 2007 and was completed in 2012.

Initially, AES Nile Power (AESNP) Company from the United States and Madhvani Group from Uganda, were to be the project developers. However, in 2001, a World Bank Inspection Panel found AESNP to have serious "performance shortfalls in the dam implementation in relation to social, economic and environmental aspects, including

217 World Bank, "Bujagali Private Hydropower Development Project", available at: <https://projects.worldbank.org/en/projects-operations/project-detail/P063834> (accessed 26 July 2022); Power Technology, "Bujagali Falls Hydropower Dam, Jinja, Uganda" (17 January 2013), available at: <https://www.power-technology.com/projects/bujagali/> (accessed 26 July 2022).

218 Stantec, "Sustainable power from the Victoria Nile River", available at: <https://www.stantec.com/en/projects/united-kingdom-projects/b/bujagali-hydroelectric-power> (accessed 26 July 2022).

evidence of corruption and failure of financial disclosure to the World Bank Group.”²¹⁹ AESNP subsequently withdrew from the project. The project was re-started in 2005 after the Ugandan government separated the project into two funded but connected projects: The Bujagali Hydropower Project (BHP) – to construct and operate the dam and power plant, financed by the African Development Bank (ADB), World Bank and other lenders; and the Bujagali Interconnection Project (BIP) – to be managed by the Uganda Electricity Transmission Company Ltd, to be financed by the ADB, Japanese Bank for International Cooperation finance. In July 2014, the plant began management operations with Bujagali Energy Limited,²²⁰ while Italian firm, Salini Impregilo became the project developer.²²¹

The project initially faced some challenges,²²² with project sponsors withdrawing and environmentalists threatening to frustrate the project.²²³ For example, the World Bank’s IFC’s Procedure for Environmental and Social Review of Projects noted with concern the potential of the project causing “significant adverse environmental and/or social impacts that are sensitive, diverse or unprecedented.”²²⁴ Subsequent Environmental Impact Assessments also indicated potential impacts on the environment, and possibility of land displacement.²²⁵

A Resettlement Action Plan (RAP) for the project determined that the “rights of children and women within the displaced households” would be safeguarded under the Ugandan Constitution and the Lands Act (1998).²²⁶ The RAP also recommended the conducting of prior consent of the local communities before any land displacements

219 FIVAS, “Unsettling Business, Social Consequences of the Bujagali Hydropower Project”, available at: https://fivas.org/wp-content/uploads/2016/04/fivas_unsettlingbusiness_skjerm.pdf (accessed 26 July 2022)

220 Environmental Justice Atlas, “Bujagali hydropower project, Uganda” (18 December 2015), available at: <https://ejatlas.org/conflict/bujagali-hydropower-project-uganda> (accessed 26 July 2022)

221 Ibid.

222 David Pallister, “Africa dam’s passage ‘eased by bribes’” *The Guardian* (3 November 2003), available at: <https://www.theguardian.com/uk/2003/nov/03/davidpallister> (accessed 26 July 2022).

223 Sasha Lilley, “AES Backs out of Bujagali Dam Project” *CorpWatch* (28 August 2003); Richard Reid, *A History of Modern Uganda* (2017) pp. 287-288.

224 World Bank, “Bujagali HPP – Project Information Document” (Report No. PID8803), 2001. P. 10.

225 ESG International Inc, WS Atkins International for AES Nile Power, “Environmental Impact Assessment,” E464 Vol.2 (March 2001) p 145.

226 Türkelli (above) 199.



would occur.²²⁷ When dispossession does occur, the Plan noted that women and children were more at heightened risks of being dispossessed of their properties, including land.²²⁸ While the project was evaluated against international environmental treaties to determine its compliance, there was no assessment of the project against social impacts contained under Uganda's international obligations, including human rights. For example, because women were responsible for daily chores, such as food preparation, childcare, fetching firewood, they were at a disadvantage in owning land or settling down.²²⁹

The BHP was heavily criticized for the negative impacts of resettlement on children. During the initial phase of the project, it was discovered that promises of electricity, clean water, schools, health care centres, markets and roads never materialized.²³⁰ The local communities were never consulted prior to displacement or resettlement, neither were they informed of their choices.²³¹ Lack of access to clean and portable water resulted in the girl child having to travel long distances to fetch water. This impacted school attendance and exposed children to sexual violence.²³² Furthermore, access to education was extremely limited, even though this had been promised under the resettlement package. The available Universal Primary School was about five kilometres from the resettlement village, which created challenges for children to access the school.²³³ Some schools had to be privatized to keep running costs afloat, preventing residents of the resettlement from accessing education due to costs, while the quality of education was problematic due to lack of supplies, space, salaries for qualified teachers, and access to children with disabilities was more limited.²³⁴ The Bujagali Project significantly affected the local communities as they were not consulted, adequately informed about their rights, neither were they paid adequate

227 ESG International Inc, WS Atkins International for AES Nile Power, "Bujagali Project Hydropower Facility Resettlement and Community Action Plan" (March 2001) p 18.

228 Ibid, p. 57

229 Türkelli, (above) 202.

230 Phiona Nampungu, Diana Kasabiiti, 'The Impact of Involuntary Resettlement on Children', available at: <https://consultations.worldbank.org/sites/default/files/consultation-template/review-and-update-world-bank-safeguard-policies/submissions/naminyafinalreport.pdf> (accessed 26 July 2022).

231 Ibid.

232 Ibid, p 10

233 Ibid.

234 Ibid, p 11-12.

compensation as a result of land dislocation, and any resettlement arrangements.²³⁵ Thus, the Bujagali Project significantly impacted children’s right to information, the right to express their views, and their rights to health and education.²³⁶

The lack of clear guidance and direction on how projects of this nature could impact rights and welfare of children further contributed to deprivation of these rights. Most of the complaints against businesses involved in this project revolved around “consultation and disclosure, environmental impact assessment”, and questions of adequate compensation and resettlement.²³⁷ Quality assessment processes and project evaluators noted that the project could potentially heighten climate change risks, reduce cultural and spiritual value-based system, and have a cumulative impact on the cascade of dams.²³⁸

While developmental projects such as the BHP result in land depreciation, the duties of women in terms of attending to the wellbeing of their family do not reduce. In the very few meetings conducted by project proponents, women are not usually allowed to be present. Besides, women are still discriminated against in respect of access to land and property ownership. Furthermore, children work under hazardous or exploitative labour conditions and are involved in illegal oil refining or artisanal mining.²³⁹

5.3 Oil and Gas sector

Nigeria is the 12th largest producer of petroleum in the world, the 8th largest exporter, and has the 10th largest proven reserves.²⁴⁰ Undoubtedly, it is Africa’s largest oil-producing country with more than 36 billion barrels of proven oil reserves. Petroleum plays a large role in the Nigerian economy, accounting for forty percent of GDP and

235 NAPE, “Facts about violated WB and AfDB Policies in the Controversial Bujagali Project: A civil society Perspective” (January 2008) p 20 in Türkelli, G., *Children’s Rights and Business: Governing Obligations and Responsibility* (2020) p 207.

236 Türkelli (above) 208.

237 Türkelli (above) 215; FIVAS (above) p 13.

238 FIVAS (above) p 3.

239 Abe, 2022 (above) p 201.

240 US EIA, “Nigeria”, available at: <https://www.eia.gov/international/analysis/country/NGA> (accessed 10 October 2022; Adelfemi Isumonah, “Armed Society in the Niger Delta” (2013) 39(2) *Armed Forces & Society* 331-358



eighty percent of government earnings.²⁴¹ The main environmental challenge in the Niger Delta comes from oil spills, gas flaring and deforestation, while the highest visible consequence of numerous oil spills has been the loss of mangrove trees that were once a source of both fuel woods for the indigenous people and a habitat area's biodiversity.

The consequences of oil exploration in the fragile Niger Delta communities and environment have been immense. Local communities have seen little if any improvement in their standard of living while suffering serious damage to their natural environment. The region experiences multiplier consequence of years of environmental degradation, which has impacted livelihoods and denied communities of socio-economic rights such as access to clean drinking water. Every year, tons of oil spill damage the environment and devastate the lives of the local communities. Between 1970 and 2000, there have been about 7,000 oil spills in the Niger Delta region of Nigeria.²⁴² While Shell admitted to spilling 14,000 tonnes of oil in 2009, it blamed this on vandalism, theft, sabotage by militants, and a minimal amount by decaying infrastructure.²⁴³

Shell is the main operator of Nigeria's onshore oil and gas exploration, and has struggled for decades to prevent, and mitigate the effects of oil spill in Nigeria. Recently, Shell was ordered to pay a Nigerian community \$111m (£80m) over an oil spill more than 50 years ago.²⁴⁴ Though Shell maintained the spillage was caused by third parties, it did not offer any proof to this, rather it commenced a series of unsuccessful appeals.²⁴⁵

241 Environmental Resources Managers Ltd, Niger Delta Environmental Survey Final Report Phase I; Volume I: Environmental and Socio-Economic Characteristics (Lagos: Niger Delta Environmental Survey, September 1997)

242 UNDP, "Human Development Report: Niger Delta Human Development Report" (1 January 2006), available at: <https://hdr.undp.org/system/files/documents/nigeriahdrreportpdf.pdf> (accessed 22 June 2022); John Vidal, "Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it" *The Guardian* (29 May 2010) available at: <https://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 23 June 2022).

243 Ibid

244 BBC News, "Shell pays \$111m over 1970s oil spill in Nigeria" (11 August 2021) available at: <https://www.bbc.com/news/world-africa-58181836> accessed 25 June 2022.

245 Ibid.

5.4 The Niger Delta

The Niger Delta consists of the nine coastal states of Nigeria. It is the delta of the River Niger and sits directly on the Gulf of Guinea on the Atlantic Ocean.²⁴⁶ The region is vastly endowed with oil and gas but has gained international traction over environmental degradation and oil pollution resulting from extractive companies' oil spills.²⁴⁷ The Delta is home to about thirty million people and forty ethnic groups.²⁴⁸ Much of the gas extracted in this region is flared, at a rate of approximately 70 million m³ per day. This is equivalent to 41% of African natural gas consumption and forms the largest single source of greenhouse gas emissions.²⁴⁹ The Niger Delta inhabitants have had to live with environmental catastrophes for decades. Their forest and farmlands are covered in crude oil leaked from the pipelines of international oil companies. Drinking wells are polluted and fishermen can no longer sustain their families, significantly impacting children and women mostly.

Case study: Ruptured ExxonMobil Pipeline

A ruptured ExxonMobil pipeline in the state of Akwa Ibom spilled more than a million gallons into the delta over seven days before the leak was stopped. Local people demonstrated against the company but say they were attacked by security guards. Community leaders are now demanding \$1bn in compensation for the illness and loss of livelihood they suffered. Few expect they will succeed. In the meantime, thick balls of tar are being washed up along the coast.

Within days of the Ibeno spill, thousands of barrels of oil were spilled when the nearby Shell Trans Niger pipeline was attacked by rebels. A few days after that, a large oil slick was found floating on Lake Adibawa in Bayelsa state and another in Ogoniland. "We are faced with incessant oil spills from rusty pipes, some of which are 40 years old," said Bonny Otavie, a Bayelsa MP.²⁵⁰

246 Unyimeh Umoh et. al., "Glycerol dialkyl glycerol tetraether signatures in tropical mesotidal estuary sediments of Qua Iboe River, Gulf of Guinea" (2022) 170 *Journal of Organic Chemistry* 104461.

247 Bubaraye Dakolo, *The Riddle of the Oil Thief* (2021) pp 117–170.

248 M. Allaby et. al, *The Encyclopedia of Earth: A Complete Visual Guide* (2008).

249 Vidal (above).

250 Ibid.



5.5 Oil spillage

Oil spillage could be accidental or intentional. Accidental oil spills happen through a variety of factors including illegal oil releases from platform or ships, for instance from flushing of the ship's tanks, and release from ageing pipelines. Oil pipeline vandalism, sabotage and ships illegally washing out their tanks at sea are few examples of intentional sea pollution.

Oil spill is the release of a liquid petroleum hydrocarbon into the environment due to human activity and is a form of pollution. Most human-made oil pollution comes from land-based activity, but public attention and regulation has tended to focus most sharply on seagoing oil tankers.²⁵¹ The most crucial environmental effect of oil spill is its adverse effect on the health and livelihoods of the local community. Oil, being an extremely toxic substance, becomes a potential source of danger to human health when it gets mixed with water, which is used by the people for domestic purposes such as drinking.

Oil spillage and gas flaring are some of the greatest causes of environmental degradation in Africa. Through their activities, international oil companies seriously threaten the livelihood of local communities due to the various forms of oil-generated environmental pollution, destruction of farming and fishing, and lack of clean, drinking water. The presence of these companies has had adverse effects on the local economy and society, including loss of prosperity, price inflation, and increased risk of sexual exploitation.

In Nigeria, the National Oil Spill Detection and Response Agency (NOSDRA) stated that between 1976 and 1996, more than 2.4million barrels of spilled oil polluted the environment: "Oil spills and the dumping of oil into waterways has been extensive, often poisoning drinking water and destroying vegetation. These incidents have become common due to the lack of laws and enforcement measures within the existing political regime."²⁵² Local communities frequently protest against the lack of

²⁵¹ Impacts of oil spills along the Nigerian Coast (The Association for Environmental Health and Sciences.

²⁵² NOSDRA, "About Oil Spills in Nigeria" available at <https://nosdra.oilspillmonitor.ng/about.html> ; Ibid.

implementation of these laws, and demand action against oil companies for faulty equipment that leads to oil spills. An Amnesty International report noted that women, men and children in the Niger Delta have to drink, cook with, and wash in polluted water;²⁵³ they eat fish contaminated with oil and other toxins (if they are lucky enough to still be able to find fish); and the land they use for farming has been contaminated.²⁵⁴ After oil spills, the air they breathe reeks of oil, gas and other pollutants, they complain of breathing problems, skin lesions and other health problems, but their concerns are not taken seriously by the Nigerian government and oil companies. Instead, they provide the communities with almost no information on the impacts of the pollution.²⁵⁵ In a 2018 study, Amnesty International noted that between 2008 and 2009, there were two massive oil spills in the fishing town of Bodo in Nigeria. Thick black oil leaked into rivers and creeks for weeks, killing fish and robbing people of their livelihoods. Shell Ltd, the operator of the leaking pipelines, repeatedly understated the volume of oil spilled – and offered the community only a paltry amount of compensation – about \$4000.²⁵⁶ Shell acknowledged it had made false statements about the size of the spills and settled out of court, paying the community £55 million in compensation.²⁵⁷ Since 2014, Eni has reported 820 spills in the Niger Delta, with 26,286 barrels or 4.1 million litres lost. Since 2011, Shell has reported 1,010 spills, with 110,535 barrels or 17.5 million litres lost. That’s about seven Olympic swimming pools.²⁵⁸ The report further notes that Shell and Eni continuously fail to operate responsibly and in line with Nigerian law and international best practice standards.²⁵⁹ Consequently, these companies’ failures have resulted in worse pollution in the Niger Delta, which has a negative impact on the rights of the people living there.

In late 2004, oil leaked into a local farmer’s house in Goi village and connected with a

253 Amnesty International, “Petroleum, Pollution and Poverty in the Niger Delta” (June 2009), available at: <https://www.amnesty.org/en/documents/AFR44/017/2009/en/> (accessed 16 July 2022).

254 Ibid.

255 Ibid.

256 Amnesty International, “Niger Delta Negligence: How 3500 activists are taking on two oil giants”, available at: <https://www.amnesty.org/en/latest/news/2018/03/niger-delta-oil-spills-decoders/> (accessed 6 July 2022).

257 Ibid.

258 Ibid.

259 Amnesty International, “Nigeria: Negligence in the Niger Delta: decoding Shell and Eni’s poor record on oil spills” (16 March 2018), available at: <https://www.amnesty.org/en/documents/afr44/7970/2018/en/> (accessed 6 July 2022).



cooking fire. The village, its oil-seeped creek and the surrounding mangrove forests, erupted into flames.²⁶⁰ Over a course of three days, more than 23,000 litres of oil had spilled and nearly 40 acres of mangrove forest had burned, poisoning the land and fishponds that were the lifeblood of the village.²⁶¹ Two years dragged by before government agencies began clean-up efforts around Goi. "We were eating, drinking, and breathing the oil."²⁶² By 2010, six years after the initial leak, Goi was still too polluted to sustain its residents. The Nigerian government ordered them to abandon their homes and permanently evacuate Goi. By then, most of the villagers, including the Dooh family, had already moved away, scattered across nearby towns.²⁶³ Shortly after this incident, residents of Oruma village, about 90 miles of Goi village witnessed an estimated 63,600 litres of oil spilled in their community.²⁶⁴

The history of extractive resource exploitation in the Niger Delta is a long, complex, and often painful one that has metamorphosed in an intractable way. Extractive projects affect the environment before any oil or gas is produced. These are complicated, multi-faceted projects, with several stages, comprising land survey, land clearance, site preparation, construction and infrastructure development, oil drilling and development of transportation network. Once oil is discovered and production commences, other challenges emerge. One of these challenges has been oil spills created during oil production, disposal of water, and gas flaring. These challenges and activities impact the environment and human lives tremendously.

While oil production no longer occurs in Ogoniland, crude and refined oil products transit the region via pipelines.²⁶⁵ Shell pipeline and infrastructure from upstream production areas runs to the export terminal at Bonny, while the pipelines from Bonny terminal to Port Harcourt refinery and from Port Harcourt refinery to Umu Nwa also pass through Ogoniland.²⁶⁶ In a comprehensive environmental assessment undertaken by the

260 Jess Craig, "The village that stood up to big oil – and won" (1 June 2022) available at: <https://www.theguardian.com/environment/ng-interactive/2022/jun/01/oil-pollution-spill-nigeria-shell-lawsuit> (accessed 15 June 2022).

261 Ibid.

262 Ibid.

263 Ibid.

264 Ibid.

265 UNEP, (2011), "Environmental Assessment of Ogoniland", available at: https://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf (accessed 9 July 2022).

266 Ibid.

United Nations Environment Programme (UNEP) in Ogoniland, Nigeria, UNEP's field observations and scientific investigations found that oil contamination in Ogoniland is widespread and severely impacting many components of the environment.²⁶⁷ The report revealed that the activities of Shell and other oil companies have systematically contaminated the vast majority of Ogoniland, seriously impacting children, women and well-being. The extent of environmental degradation as evidenced in the report can be summarized as follows: large-scale evidence of contamination of land and underground water courses, high levels of harmful substances and pollutants such as benzene found in community drinking water, residues of harmful substances still found on sites claimed to have been cleaned by the oil companies, and the failure of the oil companies to operate according to Nigerian standards or any recognized global standard.²⁶⁸

The Ogoni people continue to live in this polluted environment despite the fact that oil exploration has ceased for decades. Because Ogoniland has high rainfall, delay in remediating oil spillage leads to oil being washed away into farmland and into the creeks. When oil reaches the farmland, crops and other plants are impacted and eventually die. The death of crops and plants affects communities' access to food and a healthy environment.

In a particular site, Ejama-Ebubu in Eleme local government area, the UNEP study found heavy contamination present forty years after an oil spill occurred, despite repeated clean-up attempts.²⁶⁹ The report also found that hydrocarbon contamination was found in water taken from 28 wells at 10 communities adjacent to contaminated sites. At seven wells, the samples are at least 1,000 times higher than the Nigerian drinking water standard of 3 µg/l.²⁷⁰ Despite information that their drinking water may have been contaminated, local communities continued to use the water for drinking, and other domestic activities since they lacked any alternative.

Due to the extensive oil contamination, the Ogoni community and its environs

267 Ibid, p 35.

268 Ibid.

269 Ibid, 9.

270 Ibid, p 11



have been exposed to petroleum hydrocarbons in outdoor air and drinking water, sometimes at elevated concentrations.²⁷¹ Community members, mostly children and women, have lived with this pollution throughout their lives. Quite worrisome is the fact that community members at Nisisioken Ogale, and many other communities, are drinking water from wells that is contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization (WHO) guideline.²⁷²

No doubt, oil exploration in Ogoniland has resulted in severe environmental degradation, oil pollution and grave injustices to the people of Ogoniland.²⁷³ The various human rights violations show a long overdue restoration of host communities to Nigeria's extractive projects.²⁷⁴ The report noted that most of the contamination – soil, water, air, is from crude oil and is very extensive. Consequently, the study concludes that the environmental restoration of Ogoniland is possible, but it will require \$1 billion for the first five years and between twenty-five to thirty years to complete any environmental restoration in Ogoniland, once ongoing pollution is stopped.²⁷⁵

Due to the extent of contamination in the Niger Delta region, various clean-up approaches must be devised, ranging from active intervention for cleaning the topsoil and replanting mangrove to passive monitoring of natural regeneration.²⁷⁶ The report also recommended that the restoration of the natural habitats be viewed as a large-scale pilot project in which multiple approaches to clean-up and restoration, once proven, can be replicated elsewhere as needed in the Niger Delta.²⁷⁷ There must be joint efforts between oil companies, government and local authorities to end illegal activities, including sensitization activities that emphasize the “disproportionate environmental footprint of artisanal refining (borne by all sections of the community) and spell out training, employment and livelihood incentives that will encourage people away from participating in this illegal activity.”²⁷⁸

271 Ibid, p 10.

272 Ibid, p 8.

273 Ibid.

274 See further, *Mercy Makpor, Regina Leite, “The Nigerian Oil Industry: Assessing Community Development and Sustainability”* (2017) *International Journal of Business and Management*, 66.

275 Ibid, at pp 15, 211.

276 Ibid, p 12

277 Ibid.

278 Ibid, p 211.

Case study: 2 SPDC suspended facilities – Bomu Manifold, K-Dere, Gokana LGA - Nigeria

The Bomu Manifold is situated to the east of K-Dere and Kpor in Gokana LGA. The manifold covers an area of 5,000 square metres. It is surrounded by a 3-metre high wire-mesh fence with two separate gates, both of which are wide enough to provide access for heavy machinery. The area inside the fence is visibly heavily polluted with crude oil, which is seeping through the fence and contaminating several thousand square meters of soil outside the complex. There is no trench or perimeter drain system around the manifold.

A primary school and a local community health-care centre are located some 300 meters to the north-west of the manifold and an abandoned house lies about 100 meters to the south. Local community members reported that a fire had occurred in April 2009 following an oil spill on the Trans-Niger Pipeline, which transports 120,000-150,000 barrels per day through Ogoniland. Other spills in the manifold occurred in October 1990 (twice), February and March 2001 and January and October 2003.

Most of the manifold area inside the fence is covered in oily residues, soot and ash. Oil is seeping from the concrete seal through the fence into the surrounding area. The extent of the contamination covers the manifold area itself and an additional 19,000 square meters of land outside the manifold. Of this, some 9,000 square meters are heavily polluted, the concentration of oil on the surface above saturation, resulting in an oily sheen on pools of standing water and a strong oily smell. While the site is currently fenced, environmental contamination is migrating laterally and vertically. Crude oil is being washed off into surrounding fields.²⁷⁹

To effectively carry out its statutory functions, Nigeria's Department of Petroleum Resources is required to ensure that petroleum industry operators do not degrade the environment during their operations. Thus, the Department has been developing environmental guidelines and standards. One of these is the Environmental

²⁷⁹ UNEP Report (2011), "Case study 2 SPDC suspended facilities – Bomu Manifold, K-Dere, Gokana LGA" p 115.



Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) (2002),²⁸⁰ which “establishes guidelines and standards for the environmental quality control of the Petroleum Industry taking into account existing local conditions and planned monitoring programmes.”²⁸¹ Furthermore, EGASPIN provides that an “operator shall be responsible for the containment and recovery of any spill discovered within his operational area, whether or not its source is known. The operator shall take prompt and adequate steps to contain, remove and dispose of the spill.”²⁸² It is therefore the responsibility of oil companies to take every reasonable step to remediate oil spillage even in the event there has been sabotage. In addition, Nigeria’s Petroleum Production and Distribution (Anti-Sabotage) Act,²⁸³ defines sabotage as intent to obstruct or prevent the production or distribution of petroleum products.²⁸⁴ This includes destroying or damaging materials, premises or utilities for oil bunkering and theft, pipeline vandalism, fuel scooping, operating illegal oil refineries and pipeline rupture.

When oil spillage occurs or environmental degradation arises, MNEs are always quick to attribute it to sabotage. However, these companies have the expertise to prevent, mitigate and address human rights violations, and to prevent further sabotage. Additionally, where the fault cannot be traced to the firm, firms should still be involved in solving social problems related to their activities. Shell’s inability to remediate oil spillage led to the environmental degradation of Ogoni land. It is not only for the good of the community, but also in the interests of the company for it to be involved in socially responsible projects.²⁸⁵ Furthermore, the Criminal Justice (Miscellaneous Provision) Act²⁸⁶ seeks to control sabotage of oil pipelines by criminalizing sabotage.²⁸⁷

In Nairobi, Kenya, on 12th September 2011, over 100 people were killed, and several others were hospitalized after an explosion and fire ripped through the slum of

280 Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2002) [‘EGASPIN’]

281 DPR, Nigeria, Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (2002) available at <https://ngfcp.dpr.gov.ng/media/1066/dprs-egaspin-2002-revised-edition.pdf>

282 Ibid, section 4.1

283 No. 35, 1975.

284 Ibid, section 1.

285 See generally D. Jijelava, F. Vanclay, “How a large project was halted by the lack of a social Licence to operate: Testing the applicability of the Thomson and Boutilier model” (2018) 73 *Environmental Impact Assessment* 31.

286 Cap C39, Laws of the Federation of Nigeria (2004)

287 Sections 3(1) (a), (b); 3(2) (a), (b); 5(a), (b).

Mukuru-Sinai in Nairobi, Kenya.²⁸⁸ A UNEP environmental emergency assessment report concluded that the fire was not caused by pipeline explosion as initially stated, but by an industrial accident that caused a large amount of petrol to enter a storm water drainage system.²⁸⁹

5.6 Gas flaring

Gas flaring is the burning of unwanted gas through a pipe (also called a flare). Flaring is a means of disposal used when there is no way to transport the gas to market and the operator cannot use the gas for another purpose.²⁹⁰

The negative effects of gas flaring cannot be quantified. It has potentially harmful effects on the health and livelihood of the local communities, as it releases a variety of poisonous chemicals.²⁹¹ The social and environmental costs of gas flaring are extensive. They include destruction of wildlife and biodiversity, pollution of air and drinking water, degradation of farmland and damage to aquatic ecosystems.²⁹² Rather than depending on kerosene or firewood, further depleting the forest, natural gas could serve as a veritable source of sustainable energy. In fact, it could generate megawatts of electricity that is in dire need for most Africans.²⁹³

Gas flaring and pipeline leakages have certainly damaged the resources that previously sustained the Niger-Delta communities who farmed and fished in the now unproductive environment.²⁹⁴ This is compounded by the fact that international oil companies rarely complete clean-up of the numerous and often massive oil spills, neither do they

288 UNEP, "Annual Report 2011" available at: <https://wedocs.unep.org/bitstream/handle/20.500.11822/8053/-UNEP%202011%20Annual%20Report-20121086.pdf?sequence=5&%3BisAllowed=y%2C%20French%7C%7Chttps%3A//wedocs.unep.org/bitstream/handle/20.500.11822/8053/-UNEP%202011%20Annual%20Report-20121086-french.pdf%3Fsequence%3D6&%3BisA=> (accessed 9 June 2022).

289 Ibid.

290 UNEP (2011), p 237.

291 C. Nwaoha, D. Wood, "A Review of the Utilization and Monetization of Nigeria's Natural Gas Resources: Current Realities" (2014) 18 *Journal of Natural Gas Science and Engineering* 424.

292 Eman A. Emam, "Environmental Pollution and Measurement of Gas Flaring" (2016), *International Journal of Scientific Research in Science, Engineering and Technology* 252. [noting that gas flaring is a major contributor to air pollution and acid rain]

293 Abe (2022), p 112

294 Ibid



compensate affected communities. Flaring is not only wasteful, but also releases large amounts of methane, which has very high global warming potential. While flaring in developed countries has decreased, in Nigeria it has grown proportionately with oil production. For instance, Nigeria loses “about 1.2 trillion standard cubic feet of gas annually” – a quantity that could ‘generate over 12,000 megawatts of electricity.’²⁹⁵

Gas flares can have potentially harmful effects on the health and livelihood of children in particular, as they release a variety of poisonous chemicals. The extremely high levels of CO₂ and methane gases that are released to the atmosphere also impact climate patterns beyond the local level.²⁹⁶ These chemicals can aggravate asthma, cause breathing difficulties and pain, as well as chronic bronchitis amongst many children in the Delta.

A recent derivative and side effect of gas flaring and illegal oil refineries is the production of soot which is deposited on building roofs of neighbouring villages. Whenever it rains, the soot is washed off and the black ink-like water running from the roofs is believed to contain chemicals which adversely affect the fertility of the soil. Many of these Niger-Delta communities claim that nearby flares cause acid rain which corrodes their homes and other local structures, many of which have metal roofing. Almost no vegetation can grow in the area directly surrounding the gas flare due to the tremendous heat it produces.²⁹⁷ In addition, acid rain is taking its toll on the Niger Delta region. It not only deprives people of drinkable rainwater and stunts crop growth; it is also affecting peoples’ homes.²⁹⁸

Gas flaring is also contributing to loss of biodiversity. The Niger-Delta has the third

295 E. Ojjiagwo, C. Oduoza & N Emekwuru, “Economics of Gas to Wire Technology Applied in Gas Flare Management” (2016) *Engineering Science and Technology*, 2109.

296 National Geographic, “The Greenhouse effect and our planet”, available at: <https://education.nationalgeographic.org/resource/greenhouse-effect-our-planet> (accessed 10 July 2022).

297 D. Wheele, “Shell, Nigeria and the Ogoni: A study in Unsustainable Development” (2001), 9 *Sustainable Development*, 74-80.

298 Ann Godwin, “Again, soot spike in Rivers raises fresh health concerns” *The Guardian* (14 January 2021), available at: <https://guardian.ng/features/again-soot-spike-in-rivers-raises-fresh-health-concerns/> (accessed 15 June 2022).

largest mangrove forest in the world, and the largest in Africa.²⁹⁹ Mangrove forests are important for sustaining local communities because of the ecological functions they perform and the many essential resources they provide including soil stability, medicines, healthy fisheries, wood for fuel and shelter, tannins and dyes and critical wildlife habitats.³⁰⁰ Oil spills are contaminating, degrading, and destroying mangrove forests. The construction of infrastructure for oil facilities is done with little or no regard for environmental consideration. To facilitate road construction, waterways are frequently diverted to the detriment of fish populations. Sudden and drastic changes to the local environment by oil companies are sometimes accompanied by direct loss of human life. The diminished productivity and viability of local economies due to the environmental and social degradation caused by oil exploitation has affected virtually every area of life.

To curb uncontrolled gas flaring, the Nigerian government enacted the Associated Gas Reinjection Act,³⁰¹ which seeks to provide against indiscriminate flaring of gas. However, the government imposed a penalty of \$3.50 per thousand standard cubic feet (SCF) of flared gas on a defaulting company.³⁰² Besides, in repealing the Associated Gas Reinjection Act, the Petroleum Industry Act (2021) allows the flaring of gas to a limited extent.³⁰³ This approach does not prohibit gas flaring but assumes that defaulters would be encouraged to reduce or control flaring.

Efforts to reduce or stop gas flaring has led to a court action. In *Jonah Gbemre v SPDC and Ors*,³⁰⁴ the plaintiff on behalf of himself and representing the Iwherekhan Community in Delta State sued the defendants for the continued flaring of gas under the provision of section 3 (2) (a) (b) of the Associated Gas Re-injection Act,³⁰⁵ and

299 Aroloye O. Numbere, "Mangrove Habitat Loss and the Need for the Establishment of Conservation and Protected Areas in the Niger Delta, Nigeria", available at: <https://www.intechopen.com/chapters/70413> (accessed 10 July 2022).

300 Ibid.

301 Cap A5 Law of the Federation of Nigeria, 2004.

302 Editorial Board, "End gas flaring or stop oil production" *The Guardian* (31 March 2016), available at: <https://guardian.ng/opinion/end-gas-flaring-or-stop-oil-production/> (accessed 15 September 2022)

303 The exemption applies in cases of emergency, where the Commission allows the flare, for instance, as required for facility start up or strategic operational reasons, including testing, and as an acceptable safety practice established under regulations. See further, Abe (2022) p 113.

304 Unreported suit No: FHC/B/CS/53/05 decided by the Federal High Court, Benin City on November 14, 2005.

305 Cap A5 Law of the Federation of Nigeria, 2004.



section 1 of the Associated Gas Re-injection (Continued Flaring of Gas) Regulations under which the continued flaring of gas in Nigeria may be allowed. The plaintiff claimed these provisions are inconsistent with his right to life and or dignity of the human person enshrined in sections 33 (1) and 34 (1) of Nigeria's Constitution (1999). The Court directed that the respondents be restrained from further flaring of gas in the applicant community. The court ruled that gas flaring must stop in the Niger-Delta community as it violates guaranteed constitutional rights to life and dignity, and that the "damaging and wasteful practice of flaring cannot lawfully continue."³⁰⁶ Articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights also enjoins states to guarantee rights to life, health, and satisfactory environment for its citizens.

Case study: The Kwale/Okpai Gas Plant - Nigeria

*The Kwale/Okpai Gas Plant, which started on-stream production in 1987, was designed to curb gas flaring. The project, which was designed to reduce gas flaring from oil and gas explorations, involves a process whereby gas previously flared at the Kwale Oil-Gas Processing Plant (OGPP) is transported through a pipeline to the Okpai combined gas cycle turbine power plant – in order to generate electricity. Despite its nobility, the project has negatively impacted the host communities. The project suffers from a lack of transparency in its bidding, approval, and execution phases; a lack of stakeholder participation and free, informed consultation; and a lack of transparent environmental impact assessment.*³⁰⁷

5.7 Illegal Oil refineries (oil bunkering)

Oil bunkering involves illegal diversion of oil from pipelines and storage facilities. Due to the way and manner it is carried out, it often leads to accidents and environmental pollution. Oil refineries have a complex setup of pipelines and tanks within a carefully designed plant. Normally constructed under private-public partnerships, these

306 Ibid

307 Abe (2022), p 74.

investments are capital intensive and technologically advanced. To circumvent these technicalities, illegal refineries have sprung up whereby local refiners pilfer crude oil from the already established pipelines from international oil companies such as Shell, AGIP, and Total, diverting those crude reserves to where it will be refined at an uncontrolled and very high temperature.³⁰⁸ These illegal refineries have led to several deaths, blasts, and environmental pollution. For example, an explosion from an illegal oil refinery in south-eastern Nigeria led to the death of about 100 people, including women and children.³⁰⁹ In Rivers state, Nigeria, about 25 people, including minors, were killed in an explosion and fire at an illegal oil refinery.³¹⁰ These catastrophic explosions have continued to constitute national disaster. The rise in illegal refineries have been a reactive approach from local communities to extractive companies for environmental pollution and their lack of social investments in their communities. No doubt, theft and vandalism of pipelines have contributed to colossal pollution in the Niger-Delta region.

Illegal bunkering leads to the loss of billions of dollars in public funds. These funds could be utilized to provide social and economic services. For instance, they could be used to establish schools, hospitals and other essential services in the neglected riverine areas. The UNEP report found that illegal refiners endanger lives and causes environmental devastation in Ogoniland and neighbouring areas.³¹¹

5.8 Judicial decisions on gas flaring and oil spills

Several cases have been instituted against gas flaring, oil spills and sabotage. In *Akpan v Shell Petroleum Development Company of Nigeria Ltd (SPDC) & Royal Dutch Shell Plc*,³¹² two major oil spills from Shell Petroleum Development Company's (SPDC) oil

308 Alexander Onukwue, "Nigeria's illegal oil refineries keep killing people" *QuartzAfrica* (25 April 2022), available at: <https://qz.com/africa/2158492/nigerias-illegal-oil-refineries-keep-killing-people/> (accessed 10 September 2022).

309 Ibid.

310 Tife Owolabi, "At least 25, including minors, died in illegal refinery blast in Nigeria" Reuters (24 October 2021), available at: <https://www.reuters.com/world/africa/least-25-including-minors-died-illegal-refinery-blast-nigeria-2021-10-24/> (accessed 10 June 2022).

311 UNEP (2011), p 9.

312 C/09/337050 / HA ZA 09-1580 (2013).



wells between 2006 and 2007 were the source of contention before the courts. These oil wells were situated in the plaintiff's village and vicinity. For some years, the oil wells were not used for production as they were mainly exploratory wells. The District Court of the Hague found that under Nigerian law, SPDC committed a specific tort of negligence against Akpan by insufficiently securing the wellhead of the IBIBIO-I well prior to the two oil spills in 2006 and 2007 near Ikot Ada Udo in Nigeria against the sabotage that was committed at that time in an easy manner, and ordered SPDC to compensate Akpan for the damage he suffered as a result. Under Nigerian law, a finding of sabotage as the cause of an oil spill, by a court, does not lead to the liability of the operator.³¹³ Based on the Dutch conflict of law rules, the Dutch District Court applied Nigerian law and found that the two oil spills of 2006 and 2007 were caused by sabotage triggered by third parties. As a result of this finding, the court held that SPDC was not liable for damage caused by the two oil spills,³¹⁴ since, under Nigerian law, an operator cannot be liable for sabotage caused by third parties.

In *Shell Petroleum Development Company Nigeria Ltd v Farah*,³¹⁵ the court awarded N4.6 million naira damages against the appellants for damage to land as a result of an oil spill from its facility, aside from the compensation for the crops and economic trees which the company had earlier paid. The court also held that the amount payable in compensation was the current market value of the property damaged, including interests and loss of earnings and use. In *Shell Petroleum Development Company v Chief G.B.A Tiebo VII & 4 Ors*,³¹⁶ the polluter was held liable for the resultant damage to the environment. Also, in *Mobil Producing Nigeria Unlimited v Lagos State Environmental Protection Agency & Ors*,³¹⁷ the Federal Environmental Production Agency was asked to compel the oil company to pay compensation to those affected by an oil spill caused by its operation.

In *Okpabi v Royal Dutch Shell Plc*,³¹⁸ a set of claimants who lived in Nigeria's Niger Delta brought claims against Shell Nigeria, alleging that Shell's persistent oil leaks from the

313 OPA (n 98).

314 Akpan (above) 20.

315 [1995] 3, NWLR (Pt. 382), 580

316 [2005] All FWLR (Pt. 265), 990.

317 [2001] 8, NWLR, (Pt. 715), 489

318 [2021] UKSC 3.

pipelines caused serious water and ground contamination. This case was initiated in England against the parent company and the Nigerian based subsidiary, apparently on the premise that adequate justice may not be obtainable in Nigeria. They alleged that Shell Nigeria failed to prevent the oil spills or to remediate the impact of their activities and were in “breach of a duty of care owed to them not only by the subsidiary but also by the parent company, the latter on the basis that it exercised a high degree of control, direction and oversight in respect of the subsidiary’s pollution and environmental compliance and the operation of its oil infrastructure.”³¹⁹ The claimants had sought damages from the English court due to serious and ongoing environmental pollution caused by oil spills which could be traced to Shell’s facilities in their community. The UK Supreme Court, ruling procedurally on jurisdictional grounds, held that the claimant’s case, which was not doubted or shown to be “demonstrably untrue”, established the fact that “there were real issues to be tried” before the UK court.³²⁰ Consequently, the Court concluded that it was a triable issue, based on the extent of control and de facto management, that the parent company owed a duty of care to the claimant Nigerian citizens with regards to alleged environmental harm and human rights violations by Shell, Nigeria. As indicated, this decision was primarily based on a jurisdictional issue and the merits of the case remain to be determined.

5.9 Agriculture

Child labour has been identified in several African countries relating to tea plantations. These include Rwanda, Kenya, Tanzania, Malawi, Uganda and Cameroon.³²¹ Tea companies can capture close to 90% of the value of tea, while tea workers receive just 1-2%, with most earning well below a survivable living wage.³²² Well-resourced multinational corporations dominate the sector. The tea industry is characterised by a high degree of concentrated corporate power and ownership, with an estimated 85% of global tea production sold by multinational corporations which capture the lion’s

319 Ibid.

320 Ibid.

321 <https://www.verite.org/project/tea-3/> (accessed 14 July 2022).

322 “Trouble brewing: The need for transparency in tea supply chains” (December 2021) available at: https://media.business-humanrights.org/media/documents/2021_Tea_Report_v4.pdf (accessed 14 July 2022).



share of profits due to the structure of the tea supply chain.³²³ The tea industry is highly vertically integrated compared with coffee or cocoa value chains. The top four tea companies in the UK together account for more than 60% of total sales in the country with Unilever/ekaterra* (PG Tips, Lipton, Pukka etc.) and Tetley also dominating global tea sales. This translates to an extraordinary level of influence over other actors in the chain, including logistics companies, suppliers and intermediaries. Unilever/ekaterra*, the world's biggest tea company, buys 10% of the world's black tea alone.³²⁴ The buying side of the chain is highly concentrated, with few players and large volumes. "Blending, packaging and marketing/retailing are the most profitable parts of the chain, and largely conducted in the buying countries, while the least lucrative parts of the chain, i.e. growing and primary production, happen in production countries, with some exceptions."³²⁵

The tea production sector in Africa is often characterised by unregulated working hours, which creates additional care burdens for parents. Thus, parents working in the tea plantation in Nyabihu district of Rwanda have had to deal with combining work with parental responsibilities. The lack of childcare services meant that parents had to go to work with the children because they had no one to take care of their children at home. According to one respondent in a study commissioned by UNICEF, "It was tough and stressful for us and for them as some days they would even get drenched in the rain while their mothers were plucking tea."³²⁶ Children were undernourished as some parents struggled to cater and feed for the family and at the same time work on the plantations. However, the construction of a tea plantation based Early Childhood Development (ECD) centre is assisting the parents' children and "enabling the company and pluckers' increased productivity as a result."³²⁷ Tea and rights violations are dealt with further below in the section on remedies.

While supply chain transparency is widely understood and accepted as a necessary

323 As above.

324 As above.

325 As above.

326 Pamela Mudakikwa, "Childcare services at tea plantations - a win for everyone" (27 October 2021), available at: <https://www.unicef.org/rwanda/stories/child-care-services-tea-plantations-win-everyone> (accessed 19 July 2022).

327 Ibid.

first step towards accountability in the apparel sector, similar movement from tea companies has yet to gather pace.³²⁸ The lack of legally binding regulation at the national and transnational level has left a significant governance gap, with no meaningful way to hold companies liable or provide redress to those denied their rights to decent working and living conditions.

Nevertheless, some good practice can be noted. The Tea Association for Malawi (TAML) has for many years maintained its stance towards the elimination of child labour by putting in place mechanisms aiming at promoting and protecting children's rights in the tea growing districts. TAML endeavours to make sure that children remain in school and their health and mental wellbeing is safeguarded.³²⁹ Under the "Accelerating action for the elimination of child labour in supply chains in Africa (ACCEL Africa) project" TAML pledged to establish a Child Labour Monitoring System amongst TAML members and smallholder tea growers, and established a Child Labour Compliance Taskforce, as well as developing a Child Labour Compliance Monitoring plan and capacitating the taskforce members on child labour monitoring and conducting sensitization to raise awareness as regards child labour in the tea supply chain. Additionally, collective bargaining saw salary increases of up to 13% for workers, and increased maternity leave for eligible women.

To address child labour in supply chains on the African continent, the ILO launched the Accelerating Action for the Elimination of Child Labour in supply chains in Africa (ACCEL) project in 2018. Intervening in six different African countries (Malawi, Côte d'Ivoire, Mali, Uganda, Egypt and Nigeria) and in five different supply chains (gold, cocoa, tea, coffee and cotton), the ILO focuses mainly on the lowest tiers of the supply chain where child labour is the most widespread. However, other tiers of the supply chain are also targeted through working with informal networks, supply, production, and national and international markets.³³⁰

Eleven African countries came together to present good practices and discuss opportunities for intra-African South-South collaboration during the ACCEL Regional Conference: Knowledge Sharing for Partnerships on the Elimination of Child Labour in

328 As above.

329 <https://www.teamalawi.org/post/taml-for-a-child-labour-free-tea-industry> (accessed 6 April 2023).

330 https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/documents/genericdocument/wcms_874013.pdf



Supply Chains, held in Abidjan, Côte d'Ivoire on 22-23 February 2023. The Conference was attended by employers' and workers' representatives, ministries of labour, ministries of education, the African Union, agritech companies, NGOs, and ILO specialists in diverse areas. This event has set in motion a new wave of intra-African South-South collaboration, where countries can work together to replicate and adapt successful strategies in their own contexts.³³¹ In Africa, cotton is almost exclusively grown by smallholder farmers, and there are very few large plantations. The cotton plant loves warmth: it needs about 200 days of sunshine in the season to flourish and bear fruit. For that reason alone, it does well in the dry or humid savannahs of Africa.³³² The top exporters of cotton (neither carded nor combed) from sub-Saharan Africa in 2018 were Burkina Faso, Côte d'Ivoire, Sudan, Benin, and Mali.³³³ The typical size of cotton farms in West Africa is under three hectares. Employment in the cotton sector is significant for top-producing countries; in Benin, some estimates put employment in the cotton sector at nearly 30 percent of total employment. Cotton is estimated to provide seven percent of total employment in Burkina Faso and 17 percent of employment in Mali.

According to the U.S. Department of State's 2019 Trafficking in Persons Report, cotton is produced with forced labour or forced child labour in Cameroon, Mali, and Togo. The U.S. Department of Labour's 2018 List of Goods Produced by Child Labour or Forced Labour³³⁴ notes forced labour in Benin and Burkina Faso.

Child labour is typically not prevalent in countries with mechanized cotton production, but due to the smallholder nature of cotton farming in Africa in countries such as Zambia, Benin, Burkina Faso, and Mali, children often work on their families' plots. Some children may be involved in worst forms of child labour if they are exposed to dangerous conditions including long hours, heat, and pesticides, and forego their

331 https://www.ilo.org/africa/technical-cooperation/accel-africa/WCMS_869668/lang--en/index.htm (accessed 6 April 2023).

332 Cotton Made in Africa, available at: <https://cottonmadeinafrica.org/en/african-cotton/> (accessed 14 July 2022).

333 Verite, "Trafficking Risk in Sub-Saharan African Supply Chains", available at: <https://www.verite.org/africa/explore-by-commodity/cotton/> (accessed 26 July 2022).

334 BILA, "List of Goods produced by Child Labour or Forced Labour", available at: <https://www.dol.gov/agencies/ilab/reports/child-labour/list-of-goods> (accessed 10 October 2022).

education. Benin, for example, reportedly has low rates of school attendance in cotton growing regions. In Egypt, an estimated one million children aged between seven and twelve work to manually remove pests from cotton plants each year. For periods of up to ten weeks every year, they work for eleven hours a day, seven days a week. Reported abuses include exposure to pesticides, beatings from foremen and overwork. Physical and sexual abuse of child cotton labourers has also been widely reported.³³⁵

Labour recruiters have been noted particularly in Burkina Faso. A 2006 study found that recruiters visited villages in Burkina Faso promising boys cash or goods (such as bicycles or clothing) for following them to employment at cotton producing regions either domestically within Burkina Faso or internationally in Benin. Some of these recruiters were farmers looking for labour on their own or their neighbors' farms, but others were independent recruiters. Some children working for farmers may not be paid until the end of the harvest cycle, which may compel them to remain in their jobs, even if they are being mistreated or want to go home. Payment is sometimes deferred even longer, potentially beyond the first year, and wages are often much less than promised, sometimes not paid at all.

Cotton work can be hazardous, particularly for children. Workers can face exhaustion and heat stroke. Workers can also be exposed to harsh chemicals as cotton uses more insecticide than any other crop, making up 16 percent of global use. Exposure to these chemicals can cause tremors, nausea, weakness, blurred vision, extreme dizziness, headaches, depression, and even paralysis or death. In ginning, children work without protective equipment, inhaling contaminated air, which leads to respiratory problems.³³⁶

Côte d'Ivoire is the largest producer of cocoa in the world. It contributes more than 40% of world production.³³⁷ A UNICEF Report identified four areas of children's rights that are mostly impacted by business activities. These areas are adequate standard

335 SOMO (Centre for research on multinational corporations), Fact sheet on child labour in the garment supply chain (2014).

336 As above.

337 UNICEF, "Promoting the Rights of children in the Cocoa Producing Areas in Côte d'Ivoire", available at: <https://open.unicef.org/sites/transparency/files/2020-06/Cote-d-Ivoire-TP5-2018.pdf> (accessed 15 July 2022).



of living, child protection from all types of violence and exploitation, education, and child survival.³³⁸ There were incidents of poor living conditions in informal settlements, child labour and trafficking, and violence against children increased significantly.³³⁹ Insufficient pre-school and early childhood development constituted barriers to accessing primary and post primary education.³⁴⁰ Poverty impacts the children in cocoa growing communities directly by restraining families' capacity to pay for school and health care related expenses, purchase food and invest in sustainability of their farms.³⁴¹ Furthermore, women and girls are affected by inadequate education, restricted authority over family decisions, huge burden of fetching firewood from streams and rivers which exposes young girls to sexual violence and sometimes, unwanted pregnancy.³⁴² In addition, children of cocoa farmers are vulnerable to child labour, exploitation, and violence.

Smallholder farmers form the backbone of cocoa production in Côte d'Ivoire, where between 800,000 and 1.3 million small-scale cocoa producers work in plots that average 2–5 hectares in size.³⁴³ While myriad local farmers, sellers and traders are involved with production and marketing in the cocoa supply chain, processing and manufacturing are largely done by global players in facilities outside the country. The small-scale and informal sector faces multiple difficulties, including weak negotiating power at the farmer level, fluctuating global cocoa prices, and limited international coordination of agricultural policies, as well as low crop yields from small-sized plots, aging trees and escalating deforestation. These issues have both direct and indirect impacts on children, as described in the following sections. Many of the challenges facing children are rooted in inter-generational poverty. Although cocoa is considered

338 Oomes, Nienke, et al., "Market Concentration and Price Formation in the Global Cocoa Value Chain: Final report", SEO-report no. 2016-79, SEO Amsterdam Economics, Amsterdam, 15 November 2016, p. 57.

339 UNICEF, "Children's Rights in the Cocoa-Growing Communities of Côte d'Ivoire", available at: <https://sites.unicef.org/csr/css/synthesis-report-children-rights-cocoa-communities-en.pdf> (accessed 15 July 2022).

340 Ibid.

341 Ibid.

342 Ibid.

343 Cocoa and children's rights in Côte d'Ivoire (UNICEF 2018 Synthesis report on children's rights in the cocoa growing communities of Côte d'Ivoire). The International Labour Organization estimates that 2.1 million children work in cocoa production in Ivory Coast and Ghana. Around two-thirds of the cocoa produced worldwide comes from Africa. Nestle is trying to polish its image in cocoa farming by building classrooms for children in cocoa-growing areas.

to be a better option than subsistence farming or alternative livelihoods in poorer northern areas or neighbouring countries, several studies estimate that average cocoa farmer daily income is among the lowest of all producing countries and falls within the range of US\$0.50–\$1.25.

To bring multinational companies to justice, victims of child labour have taken one of the largest exploiters of cocoa – Nestle - to court in the United States. In *Doe v Nestle*,³⁴⁴ the United States Court of Appeal had to deal with the question of whether the defendant corporation assisted and encouraged child slavery, by aiding Ivorian farmers. The case was instituted by former child slaves who were forced to harvest cocoa in Ivory Coast.³⁴⁵ The defendant corporation had denied liability – claiming that it was not liable for the acts of its subsidiary and argued that if there was any incidence of child slavery, such incidence would relate to the Ivorian farmers and not the company per se, because the company never dealt directly with the farmers.³⁴⁶ When the case got to the Supreme Court,³⁴⁷ the Court found that all the conduct alleged - forced labour, providing training, equipment, and financial incentives to farmers - occurred in Ivory Coast. Ruling on procedural grounds, the Court concluded that the plaintiffs must establish that the conduct must have occurred in the United States, even if other conduct occurred abroad.³⁴⁸

Allegedly, integrated value chain development projects have significant potential for contributing to the prevention and elimination of child labour through good quality agricultural and rural development investments, but if they do not include child labour safeguards, they may inadvertently underpin child labour in target communities. According to the FAO and World Bank, “[i]nvestments are not child labour neutral and agricultural investments must, at a minimum, include child labour risk assessments to ensure that programmes are not child labour blind and that appropriate safeguards can be put in place.”³⁴⁹ The World Bank Integrated Cocoa Value Chain Project, builds on existing and past efforts to improve the cocoa value chains in Ghana and Côte d’Ivoire.

344 No. 10-56739. D.C. No. 2:05-CV-05133- SVW-JTL.

345 Abe, 2022 (above) p. 121.

346 Ibid

347 *Nestle USA, Inc. v. Doe et al*, 593 U. S. No. 19–416.

348 Ibid.

349 FAO and WB. 2021. The role of international financial institutions and development banks in eliminating child labour in agriculture. Background paper. Rome, FAO. <https://doi.org/10.4060/cb7363en>



The project is aligned with the forthcoming national development plan through the alignment of project objectives with the national development plan. Although COVID-19 has made the consultation process challenging, the project has been developed through close engagement and consultation with networks of diverse stakeholder groups (e.g. government, private sector, civil society, international partners, etc.).³⁵⁰ The subprojects aimed at tackling child labour are not an “add-on”; but an integral element of Project Component 1: Improving cocoa productivity and production sustainability along with, for example, rural infrastructure (roads, electricity and water) and initiatives aimed at improved agricultural practices (such as the replacement of old or disease-impacted cocoa trees and promoting agro-forestry).

“Integrating interventions that target the elimination of child labour into the core of the project enables a comprehensive approach to tackle the root causes of child labour. It also enables monitoring project impact on child labour along with monitoring supply chain developments, and agricultural productivity and sustainability. Importantly, the integration of child labour issues in the investment programme is underpinned by a strong focus on data and evidence collection, analysis and use. This focus on improved information management and monitoring will allow continuous monitoring of the child labour risks and implementation and adjustment to safeguards in an effective manner.”³⁵¹

Case study: Tony's Chocolonely supply

Winner of the 2022 Anti-Slavery award, this Dutch chocolate company operates with 5 key principles to end modern day slavery in the cocoa production supply chain. They purchase their cocoa directly from partner cooperatives Kapatchiva, Ecojad, Socoopacdi and ECAM in Ivory Coast and ABOCFA, Asetenapa and Asunafo in Ghana

- *Tony's uses only traceable cocoa beans, sourced from farmers and co-operatives directly. This involves making sure that the manufacturer knows who produced*

350 FAO and WB note 292 above p18.

351 FAO and WB above p 18.

the beans, where and under which social and environmental conditions.

- *It involves paying prices that enable cocoa farmers to run their farms and make a living without resorting to exploitative and child labour.*
- *It promotes strong, professionalised farming co-operatives.*
- *It ensures that farmers and cooperatives get at least a 5 years' commitment to the price they will receive, ensuring income security and their ability to make sound investment decisions.*
- *It requires investing in agricultural skills and farming knowledge, which in turn lead to improved productivity and quality.*

Many children under 18 work in hazardous conditions on tobacco farms in Zimbabwe, often performing tasks that threaten their health and safety or interfere with their education. Adults involved in tobacco production—both small-scale farmers and hired workers—face serious health and safety risks, but the government and tobacco companies are failing to ensure that workers have sufficient information, training, and equipment to protect themselves. Hired workers on some large-scale tobacco farms said they were pushed to work for excessive hours without overtime compensation, denied their wages, and forced to go weeks or months without pay.³⁵²

Tobacco companies also have an important role in respecting human rights in Zimbabwe's tobacco sector. Many major global tobacco product manufacturers, such as British American Tobacco, and leaf merchant companies like Alliance One International and Universal Leaf Tobacco who supply to other major manufacturers, purchase tobacco in Zimbabwe. Human Rights Watch contacted these companies and 28 others regarding human rights concerns in tobacco farming in Zimbabwe and requested information about the policies and systems the companies have in place to identify, prevent, and address human rights abuses in their supply chains. Most companies, including nearly all of the major global tobacco companies, said they have detailed human rights due diligence policies in place and gave overviews of their efforts to conduct training on and monitoring of those policies in Zimbabwe. But Human Rights Watch's research, however,

352 Human Rights Watch, "A Bitter Harvest", available at: <https://www.hrw.org/report/2018/04/05/bitter-harvest/child-labour-and-human-rights-abuses-tobacco-farms-zimbabwe> (accessed 5 July 2022).



found that small-scale farmers and hired workers on some large-scale tobacco farms faced abuses that these policies intend to prevent and remedy. Their research suggests companies are generally not doing enough to prevent and address human rights abuses throughout the supply chain.

None of the companies contacted for their report prohibit children from all contact with tobacco, including handling dried tobacco, which Human Rights Watch research in Zimbabwe and other countries has linked to respiratory symptoms, such as coughing, sneezing, difficulty breathing, or tightness in the chest, and other adverse health impacts on children. Human Rights Watch interviewed 14 child tobacco workers, aged 12 to 17; in addition, many other interviewees told Human Rights Watch that children work on tobacco farms in Zimbabwe. More than half of the 64 small-scale farmers interviewed for this report said that children under 18 worked on their tobacco farms—either their own children or family members, or children they hired to work on their farms. About half of the hired adult tobacco workers interviewed said children under 18 worked with them, either also as hired workers, or informally assisting their parents, who were hired workers. Children's participation in tobacco farming contributed to absenteeism from school and made it difficult for students to keep up with schoolwork.

Children working on tobacco farms in Zimbabwe are exposed to nicotine and toxic pesticides. They sometimes work for very long hours handling green or dried tobacco leaves. The children interviewed for the Human Rights Watch report described sickness while working in tobacco farming, including specific symptoms associated with acute nicotine poisoning and pesticide exposure.

According to the US Department of Labour, the Zimbabwean government carried out 866 labour inspections at worksites in 2016 and documented 436 child labour violations in all sectors that year. The Department of Labour maintained that the Zimbabwean government lacked sufficient labour inspectors to enforce labour laws effectively.

Human Rights Watch recommendations include:

- Revising the list of hazardous occupations for children set out in the 2001 amendment to the Children's Act, or enact a new law or regulation, to explicitly prohibit children from working in direct contact with tobacco in any form
- Vigorously investigating and monitoring child labour and human rights

violations on tobacco farms, including small-scale farms.

- Conducting regular and rigorous monitoring in the supply chain for child labour and other human rights risks, and engage entities with expertise in human rights and child labour to conduct regular third-party monitoring in the supply chain.

In December 2022, UN Experts warned that large numbers of children working on tobacco farms in Malawi remained out of school.³⁵³ It was also noted that a large number of children working on these farms had not returned to school post Covid-19. The experts called for strengthened monitoring, enforcement and business accountability on an urgent basis to prevent human rights violations.

Since 2013, banks have invested a total of nearly US\$100 million in the palm oil company Feronia and its subsidiary Plantations et Huileries du Congo S.A. (PHC) (together “the company”), which operates three oil palm plantations spanning over 100,000 hectares in northern Congo. These banks – BIO, from Belgium; CDC Group, from the United Kingdom; DEG, from Germany; and FMO, from the Netherlands – are among the ten largest bilateral development financial institutions in the world, controlling billions of dollars in investments across more than 2,000 projects in developing countries. Human Rights Watch found that the banks have failed to ensure that the palm oil companies they finance in Congo are respecting the basic rights of the people who work and live on or near their plantations. Human Rights Watch found that lack of proper oversight by the banks has enabled Feronia and its subsidiary PHC to commit abuses and environmental harm that infringed upon health and labour rights. The plantations’ palm oil mills also routinely dump untreated industrial waste and may have already contaminated the only drinking water source of local communities.

The company’s palm oil mill dumps its effluents on the Momboyo River, a tributary of the Congo River. Half of the active ingredients in the nine pesticides that PHC uses in its plantations are considered hazardous by the World Health Organization (WHO), including some that may cause severe damage to the eyes. Three of the pesticides contain active ingredients that are considered cancer-causing by the WHO or other

353 Press statement issued by the Office of the High Commission on Human Rights, 21 December 2022.



recognized health authorities.³⁵⁴

“At the Yaligimba plantation, the company dumps its waste in a narrow channel beside the Mindonga workers’ camp, a settlement behind their palm oil mill. The effluents produce a putrid smell and fumes that pervade hundreds of homes on each side of the channel where workers live with their families. The stream of effluents continues its course for five kilometres before flowing into a natural pond. There, women and children bathe and wash their clothes and cooking utensils.”³⁵⁵

According to Human Rights Watch, while the Congolese government has primary responsibility for protecting the rights of PHC workers, the development banks are also obligated to ensure that the companies they finance are not engaging in abusive practices, an obligation they have failed to meet. This is partly the result of structural failures in the way the banks operate: most of the banks do not assess the potential human rights impacts of the projects they invest in and all do little to disclose relevant information to communities that might be impacted. The banks also do not ensure that affected communities have access to effective remedies when the companies they finance engage in abusive practices.

Workers in all three plantations, both men and women, told Human Rights Watch that their low wages did not enable them to meet even basic needs, and that they could not afford to provide their families three meals a day. Provincial authorities cited lack of resources and staff as the most common cause for deficient monitoring, highlighting the need for national authorities to provide adequate resources at the local level.³⁵⁶

Child labour has been noted in Liberian rubber production. Because of the quota system, many families employ their children in order to reach the daily quota. Additionally, because of the poor quality of education and high school fees, many parents prefer to have their children working on the plantation over attending school. Researchers found that plantation workers, including children, face significant health risks.

According to the Rapid Assessment Survey on the Situation of Child Labour in Rubber

354 Human Rights Watch, “A Dirty Investment”, available at: <https://www.hrw.org/report/2019/11/25/dirty-investment/european-development-banks-link-abuses-democratic-republic> (accessed 12 July 2022).

355 As above p 8.

356 HRW (above), note 350.

Plantations in Liberia conducted by ANPPCAN, over 70% persons living in rubber plantations were children, with 52% being males and 18% being females. The ages of working children range from 5-17 with more boys of age groups 10-14 engaged in child labour. The CRC Committee also in its Concluding Observations perceived that companies and businesses accept children to help their parents meet their contract production quotas under hazardous conditions.³⁵⁷ The ACERWC recommended Liberia to take measures against companies that recruit children under the working age.³⁵⁸

5.10 Fisheries and aquaculture

The top exporters of fish, crustaceans, and mollusks from sub-Saharan Africa in 2020 were Mauritania, Namibia, South Africa, Senegal, and the United Republic of Tanzania. In West Africa alone, the marine fisheries sector contributes an estimated 10-30 percent of GDP for countries including Mauritania, Senegal, Guinea-Bissau and Sierra Leone. An estimated six to seven million people in West Africa are employed in artisanal fisheries and aquaculture (capture fishing, fish farming, fish trading, processing, transport, sale of products and associated or related jobs).

According to the U.S. Department of State's 2020 List of Goods Produced by Child or Forced Labour, child or forced labour is reported in the fishing/seafood sector in the following sub-Saharan African countries: Ghana, Kenya, Tanzania, and Uganda. In addition to those listed, the U.S. Department of State's 2021 Trafficking in Persons Report also notes that traffickers force adults and children to work in the fishing/seafood industry in South Africa, Senegal, Mauritania, Angola, Gabon, Cameroon, and Sierra Leone.³⁵⁹

The International Labour Organization (ILO) identifies fishing as a highly hazardous sector. Fishers routinely face hazards and dangerous conditions of work including rough weather, exposure to the sun and salt water without protective clothing, slippery/

357 CRC/C/LBR/CO-2-4 par 29: "The Committee regrets that multinational companies in the country, notably those operating in the rubber and steel producing industries, are operating in the absence of clear regulatory frameworks to ensure that international human rights, labour, environment and other standards are adhered to in order to protect workers and families and communities affected by their activities. In particular, the Committee is concerned that children are being engaged by their families in hazardous work in order to meet production quotas imposed by the companies, yet data on child employment is not collected and analysed for remedial action...."

358 ACERWC Concluding Observations Liberia (2015).

359 Verite (above), note 330.



moving work surfaces, regular use of knives/other sharp objects, inadequate sleeping quarters, inadequate sanitation, and lack of fresh food/water. In addition, the work itself is highly labour-intensive. When setting nets or hauling a catch, workers may be required to work around the clock for days without breaks. Workers report high degrees of fatigue, which further increases the risk of accidents. In informal fishing, children are involved in diving for fish and may dive without any protective gear, putting them at high risk of injury or death.

The most well documented case study of child labour in African fisheries is that of the Lake Volta region in Ghana. According to the U.S. Department of State, children working in or around the lake are “victims of forced labour, not allowed to attend school, given inadequate housing and clothing, and controlled by fishermen through intimidation, violence, and limited access to food.” Boys as young as five years old are trafficked into working in hazardous positions such as deep diving; while girls perform work on shore including cooking, cleaning fish, and preparing fish for market. A survey of communities in the Volta and Central Regions revealed that traffickers subjected children from nearly one-third of the 1,621 surveyed households into forced labour, primarily in inland fishing and domestic work. Organized traffickers facilitate child trafficking in the fishing industry in Ghana and other West African countries.

5.11 Travel and Tourism

The sexual exploitation of children in travel and tourism (SECTT) can be defined concisely as acts of child sexual exploitation that are embedded in a context of travel, tourism, or both.³⁶⁰ Vulnerable children are trafficked to areas where there is strong demand from tourists and travellers; they are forced or enticed into prostitution at bars, clubs, restaurants and other venues frequented by tourists and travellers; and cell phones and web applications are used to locate them, pressure them, groom them and ultimately subject them to sexual exploitation.³⁶¹

Tourism in Africa has more than tripled in the last 20 years. The figure of international tourists is predicted to climb to 134 million by 2030.³⁶² SECTT has become far more

360 ECPAT Global Study on sexual exploitation of children in travel and tourism (2016) p 48.

361 P 49.

362 P 43.

complex, involving not only tourists but business travellers, migrant/transient workers and ‘volun-tourists’ intent on exploiting children, as well as large numbers of domestic travellers. The ECPAT Global Study confirms that offenders can come from any background and that they do not all fit the stereotypical profile: a white, Western, wealthy, middle-aged male paedophile. Some may be paedophiles, but most are not. Offenders may be foreign or domestic, young or old. Some are women, and a few may be other children. Research for the Global Study indicates that the majority are ‘situational’ offenders – who may have never dreamed of sexually exploiting a child until given the opportunity to do so – rather than preferential offenders. The one thing both types of offenders have in common is ever-greater opportunities to exploit children, especially in environments where corruption is rife and impunity is the rule.³⁶³

Power imbalances that facilitate SECTT are manifested in several ways listed below:

- Economic power: Child abusers provide cash, food, consumer goods or financial help for a child’s family.
- Income power: Employers use their hiring and firing power to threaten children who desperately need income with the loss of their job if they refuse to engage in sex.
- Physical power: Adults are physically stronger than children, but also in the context of armed conflict or the presence of violent gangs, children are bullied into sexual acts for fear of being beaten or killed.
- Gender power: Especially in patriarchal societies, men are empowered and girls are unaccustomed and ill-equipped to resist male domination.
- Power of authority: Government officials, police and members of the military use their influence to take advantage of children sexually, knowing there will be no repercussions.³⁶⁴

Moreover, it has been recorded that as the tourism industry itself undergoes dramatic change with the emergence of new and unregulated forms of accommodation such as AirBnB, and transportation such as Uber and SnappCab, children’s vulnerability is

363 ECPAT Global Study on sexual exploitation of children in travel and tourism p 15.

364 P 56.



also changing. To overlook these manifestations of SECTT risks failure to address new arenas where children are increasingly exposed to potential harm.³⁶⁵

Travel and tourism forms one of the avenues that heightens potential risks to children, as there appears to be a link between the sector and commercial sexual exploitation of children (CSEC). In Africa, services for migrant and travelling workers provide opportunities for offenders (whether preferential or situational) to exploit children. Migrant workers often travel alone or in groups for long periods of time in an atmosphere of relative anonymity and impunity. Locations where large groups of migrant workers come together, such as construction sites, ports and mining zones, are often hotspots for sex trade and the sexual exploitation of children.³⁶⁶

An example that has been given is Zambia. Zambia's economy relies heavily on extractive industries that bring foreign investors and foreign workers to mining and other economic zones. The development of a foreign-led mining industry has been linked with a rise in SECTT, in particular by Chinese contractors and workers. Foreign-financed road construction in both Zambia and Kenya was also identified as a source of demand.³⁶⁷

Countries such as Kenya and South Africa have comparatively well-developed travel infrastructure. Members of the ECPAT International regional network point to Benin, Cameroon, Côte d'Ivoire, Ghana, Kenya, Madagascar, Mauritius, Morocco, Nigeria, Senegal, South Africa, The Gambia and Tanzania (Zanzibar) as major destinations for travelling child sex offenders.³⁶⁸

The CRC Committee recently considered the situation in Cabo Verde.³⁶⁹ Recalling its General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights and the Guiding Principles on Business and Human Rights, the Committee recommended the State party to:

- (a) "Establish and implement regulations to ensure that the business sector, in

365 P 59.

366 P 64-65.

367 As above.

368 ECPAT Global Study on sexual exploitation of children in travel and tourism p 44.

369 CRC/C/CPV/CO/2 Cabo Verde (June 2019).

particular the tourism and extractive industries, complies with international human rights and environmental standards, particularly with regard to children's rights;

- (b) Undertake awareness-raising campaigns with the tourism industry and the public at large on the prevention of sexual exploitation of children in the context of travel and tourism and widely disseminate the World Tourism Organization Global Code of Ethics for Tourism among travel agents and in the tourism industry."³⁷⁰

ECPAT has identified a trend toward the use of new types of infrastructure for SECTT, beyond traditional beach-front attractions. Non-traditional venues include settings associated with "voluntourism" and other child-contact institutions; travel infrastructure linked to national and foreign direct investment; military bases and camps, refugee and migrant detention centres, policing infrastructures and peacekeeping missions; the adult sex trade and entertainment industry; and online platforms, among others.³⁷¹ Foreign direct investment contributes to increased mobility within and across countries, bringing large groups of mostly unaccompanied males into developing regions of Africa.

In 2016 the ACERWC noted that there had been a surge in child commercial sex along the coast of Ghana. The Committee, therefore, recommended that:

- "The Government, in partnership with Civil Society organisations, should launch a comprehensive programme of rescue, rehabilitation and reintegration of existing children who are involved in child labour;
- The State party urgently address the issue of commercial sex along its coastal areas."³⁷²

In South Africa, children are particularly vulnerable due to the tremendous growth

370 Para 22.

371 ECPAT Global Study on sexual exploitation of children in travel and tourism p 44.

372 ACERWC Concluding Observations Ghana (2016) par 31. The Committee noted that children as young as 9 years old are engaging in sex tourism at tourist sites and business centres and there exists no specific legislation to address the sexual exploitation of children who voluntarily engage in prostitution leaving such exploitation being treated as any other (par 35).



of the tourism sector, and a favoured destination globally, in the past decade. The connection between children and the tourist industry presents significant risks that impact the children. For example:

“In 2012, 16 underage girls were rescued from a Durban Point Hotel as a result of a raid conducted by the Durban Organized Crime Unit, the SAPS Dog Unit, the Hawks, members of the Criminal Record Centre, the Child Protection and Sexual Offences Unit, and metro police. Durban Organized Crime Unit’s warrant officer, Cyril Freese, said the 16 rescued girls were all aged between 12 and 18. The 12-year-old girl appeared to be several months pregnant. All the girls had been captive and forced into prostitution, intimidated, and treated very badly for periods of up to two years. It appears some of the girls were held in the hotel with the intent of being sent to other countries for prostitution.”³⁷³

Sex offenders can hide under the banner of the tourism infrastructure to engage in illegal sex with children. Direct and indirect complicity in these crimes involves the travel agencies, transport services, hotel providers, and entertainment venues, including bars, and nightclubs.³⁷⁴ Businesses in tourism industry especially hotels, resorts, travel agencies, transport services, must heighten their due diligence and responsibility in identifying these nefarious activities. The impact on children is not limited to sexual exploitation, child prostitution, but also child labour in hotels.

In Tanzania, the negative impact of tourism, occasioned by the weak enforcement of laws, are frequently connected with poor income, and working conditions of children’s parents in tourism.³⁷⁵ Parents having to work long hours and long distance impacts their ability to cater for their children, mothers, especially finding it difficult to breastfeed their children and infants, due to travel time.³⁷⁶

373 Joan van Niekerk, Katarina Mancama, “Don’t Look Away’ Be Aware and Report the Sexual Exploitation Of Children In Travel And Tourism” (November 2013) available at https://ecpat.org/wp-content/uploads/2021/05/2014-02-12-Report-CSEC-South-Africa-FINAL_0.pdf (accessed 19 July 2022).

374 Ibid.

375 UNICEF, “Assessment of the Impact of Tourism on Communities and Children in Zanzibar”, available at: <https://www.unicef.org/tanzania/media/786/file/Tanzania-Impact-of-Tourism-Zanzibar-2019.pdf> (accessed 27 July 2022).

376 Ibid.

Income from tourism in 2014 was estimated at S\$36 billion in North Africa.³⁷⁷ Morocco is said to be a hotspot for both tourism and sex tourism. A 2007 study conducted in Morocco by Johns Hopkins University concluded that the country is one of the top emerging destinations for SECTT in the region. Two years later, in 2009, Morocco experienced a 6% rise in tourism arrivals, placing it among the top touristic destinations in North Africa.

In a regional study in sub-Saharan Africa conducted by Childfrontiers in 2016, the following countries are most affected by child sex tourism: Benin, Cameroon, Côte d'Ivoire, The Gambia, Ghana, Kenya, Madagascar, Mauritius, Morocco, Nigeria, Senegal, South Africa and Tanzania. Of these, The Gambia, Ghana, Kenya, Morocco and South Africa are considered the more popular SECTT destinations. Nigeria was identified more as a source of child sex tourists in other African countries rather than a destination for SECTT. In addition to conventional tourism venues (hotels, bars etc.) locations where large groups of (single) migrant workers come together, such as construction sites, ports and mining zones, are often hotspots for sex trade and CSEC. The construction of roads and highways by foreigners was also identified as contributing to SECTT in Kenya. According to the report, "young girls are lured to these sites with promises of financial compensation and other incentives." A number of major development projects have been initiated across the country, including flagship projects such as the Thika super highway in Nairobi, SGR and LAPSET in the coastal region, among others. These projects are heavily funded by foreign governments and with their implementation, increased numbers of foreigners now work and live in Kenyan communities. Exploitation of young girls is reportedly widespread in construction project sites and towns neighbouring the project areas.³⁷⁸

Among the key actors involved in SECTT are recruiters, traffickers, pimps and brothel owners, who employ manipulative tactics that may involve deception, violence, drugs, or blackmail, to lure or coerce marginalised youth into sexual exploitation, in exchange for money or in-kind compensation. Street children were found to be the most exploitable target in Egypt.³⁷⁹

377 Global study on sexual exploitation of children in travel and tourism: Regional Report, ChildFrontiers (2016) p 33.

378 ChildFrontiers as above p 23.

379 ChildFrontiers as above p 34.



The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (the Code) has been signed by numerous hospitality groups in Africa, including groups operating in Rwanda, South Africa, Mauritius, Madagascar, and Seychelles. The 6 criteria of the code are outlined as follows:

- To establish a policy and procedures against sexual exploitation of children;
- To train employees in children's rights, the prevention of sexual exploitation and how to report suspected cases;
- To include a clause in contracts throughout the value chain stating a common repudiation and zero tolerance policy of sexual exploitation of children;
- To provide information to travellers on children's rights, the prevention of sexual exploitation of children and how to report suspected cases;
- To support, collaborate and engage stakeholders in the prevention of sexual exploitation of children; and
- To report annually on their implementation of Code related activities.³⁸⁰

Unfortunately, greater scrutiny at leading hotels has driven SECTT offenders to use guesthouses, private rentals and low-budget hotels.³⁸¹ Only one member of the Code could be traced for North Africa, namely a company operating in Cape Verde. However, some countries have made strides towards addressing SECTT. Egypt implemented a "charter of honour" for tourism workers and the Moroccan Committee of Responsible Tourism adopted a national charter of responsible tourism.³⁸²

The UNWTO Framework Convention on Tourism Ethics, the first international convention of UNWTO, was adopted, in the five official languages of the Organization, by the UNWTO General Assembly at its 23rd session held in San Petersburg, Russian Federation, September 2019, through resolution A/RES/722(XXIII). Although not legally binding, the Code features a voluntary implementation mechanism through

380 The Code, "Join us to end the sexual exploitation of children in travel and tourism", available at: www.thecode.org (accessed 9 June 2022)

381 P 46.

382 P 35.

its recognition of the role of the World Committee on Tourism Ethics (WCTE),³⁸³ to which stakeholders may refer matters concerning the application and interpretation of the document. It constitutes a comprehensive set of basic principles aimed at guiding different stakeholders, such as Governments, the private sector and civil society, towards responsible and sustainable tourism development. Its objective is to minimize the negative impact of tourism on the environment, cultural heritage and communities while maximizing its benefits.³⁸⁴ The Ethics Convention states that “[t]ourism activities should respect the equality of men and women; they should promote human rights and, more particularly, the individual rights of the most vulnerable groups, notably children, the elderly, persons with disabilities, ethnic minorities and indigenous peoples.”³⁸⁵ Further,

“the exploitation of human beings in any form, particularly sexual, especially when applied to children, conflicts with the fundamental aims of tourism and is the negation of tourism; as such, in accordance with international law, it should be energetically combated with the cooperation of all the States concerned and penalized without concession by the national legislation of both the countries visited and the countries of the perpetrators of these acts, even when they are carried out abroad.”³⁸⁶

In 7 May 2018, over 60 participants representing the private sector, government, CSOs, the UN and the media, gathered in Durban, South Africa, for the Africa Conference on Child Protection in Travel and Tourism. Amongst these were Ethiopian Airways, Air Mauritius, The World Airlines Club’s Association which also represented The International Air Transport Association (IATA), the Regional Tourism Organisation of Southern Africa (RETOSA), Accor Hotels, UNICEF, Save the Children, ECPAT Members

383 Established in 2003, the World Committee on Tourism Ethics (WCTE) is an independent and impartial body under the aegis of the World Tourism Organization (UNWTO), a specialized Agency of the United Nations responsible for the promotion of responsible, sustainable and universally accessible tourism. Currently (until 2025), the WCTE is chaired by South African Dr Phumzile Mlambo-Ngcuka, who is former United Nations Under-Secretary-General and Executive Director of UN Women. The Committee also includes a representative from Egypt.

384 Report of the World Tourism Organization on the implementation of the Global Code of Ethics for Tourism to the UNGA (A/75/254) (27 July 2020).

385 Article 5(2).

386 Article 5(3).



from seven countries, and Childline South Africa. One speaker reported that there were (in 2018) currently 37 members of The Code in Cape Verde, Egypt, Ethiopia, Kenya, Madagascar, Mauritius, Mozambique and South Africa, and it is hoped that this number will grow.

South Africa has signed the UNWTO Global Code of Ethics for Tourism, which is not only addressed to governments, but also the travel industry, communities and tourists. The Global Code of Ethics aims to help maximise the sector's benefits while minimising its potentially negative impact on the environment, cultural heritage and societies across the globe. As such everyone is responsible for children's engagement with the tourism industry.

As travel and tourism picks up after the Covid-19 pandemic, attention is once again fixed on the risks to exploitation and sexual abuse children are exposed to particularly in the context of orphanage tourism and orphanage trafficking. The Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material has therefore initiated the preparation of her next thematic report to the 78th session of the UN General Assembly, to be presented in October 2023 on this issue.

Voluntourism is defined as "organised and packaged tourist trips with a duration of a few hours to a year, in which the main purpose is to volunteer." The volunteer provides their 'work' within the destination free of charge. The concept of 'voluntourism' generally includes an element of international travel.³⁸⁷ While volunteering is a valuable way to contribute to society and does not itself cause the sexual exploitation of children, such packaged and unsupervised voluntourism trips provide an avenue for offenders to access vulnerable children, which poses threats and harm to the child's physical, emotional and cognitive development. Together with Latin America and Asia Pacific, Africa accounts for a substantial chunk of the voluntourism industry.

5.12 Transport

Projects associated with transport and logistics can pose major risks to human and children's rights. For instance, transport hubs can attract workers seeking to engage

387 <https://bettercarenetwork.org/news-updates/jobs-opportunities/call-for-input-addressing-the-exploitation-and-sexual-abuse-of-children-in-the-context-of-travel-and-tourism> (accessed 10 April 2023).

children in transactional sexual activities. Construction of transport links may also disrupt livelihoods and pose challenges to local communities.

The Uganda Transport Sector Development Project (UTSDP) was designed to advance the connectivity and effectiveness of the transport sector through an enhanced national road network, developed capability for road safety management, and improved transport sector management.³⁸⁸ The project also sought to connect rural villages and communities to the national road network, thereby improving access to socio-economic rights. Despite the ingenuity in the project, it has raised serious questions on the potential for human rights risks associated with the transport sector. For example, on December 21, 2015, the World Bank cancelled funding for the project due to violations related to workers' rights, social and environmental concerns, and serious allegations of sexual misconduct and abuse by contractor staff.³⁸⁹ In 2017, the Bank lifted suspension of work on some parts of the project after considering the assessment, and progress made by Uganda National Roads Authority (UNRA) in addressing some of the allegations brought against it.³⁹⁰

On 11 September 2015, the Bank's Inspection Panel received complaints from affected community members of the Bigodi and Nyabubale-Nkingo communities in Uganda, through a local CSO, Joy for Children Uganda (JFCU), requesting the Bank to investigate cases of "sex with minors and teenage pregnancy by road workers, increased sex work, the spread of HIV/AIDS, sexual harassment of female employees, child labour, school dropouts, lack of compensation and inadequate compensation, fear of retaliation, lack of participation, poor labour practices, and lack of adequate road and workplace health and safety measures."³⁹¹ Due to the nature of serious allegations brought against the transport sector, the World Bank, in collaboration with the Ugandan government, supported the affected local communities, by addressing the

388 World Bank, "Uganda Transport Sector Development Project", available at: <https://projects.worldbank.org/en/projects-operations/project-detail/P092837> (accessed 27 July 2022)

389 Ibid.

390 World Bank, "Uganda Transport Sector Development Project: Fact Sheet (Updated)" (7 June 2017), available at: <https://www.worldbank.org/en/country/uganda/brief/uganda-transport-sector-development-project-fact-sheet> (accessed 27 July 2022)

391 World Bank, "Panel Cases: Uganda: Transport Sector Development Project - Additional Financing", available at: <https://www.inspectionpanel.org/panel-cases/transport-sector-development-project-additional-financing> (accessed 27 July 2022)



needs of children at risk and ensuring they were protected from retaliation.³⁹² The Bank also supported Uganda's efforts to produce an Emergency Child Protection Response Program which seeks to fortify community structures to "better address the needs of children at risk in the affected communities."³⁹³ The collaboration with community leaders also raised the community alertness to threats facing children as a result of the project. Furthermore, a Gender-Based Violence (GBV) Task Force was created to bolster the Bank's response to cases of GBV confronted as part of its operations.

5.13 Pharmaceutical industry

Pharmaceutical companies subsidize most medications for developing countries. To attract these subsidies, there is the demand for countries to lessen regulatory capacities. In sub-Saharan Africa, only Kenya, Nigeria, and South Africa have a relatively sizable industry, with dozens of companies that produce for their local markets and, in some cases, for export to neighboring countries.³⁹⁴

5.13.1 Pfizer testing in Nigeria

In *Abdullahi v. Pfizer*,³⁹⁵ a group of Nigerian minors and their guardians sued Pfizer in the United States District Court for the Southern District of New York. Plaintiffs alleged that "they suffered grave injuries from an experimental antibiotic administered by defendant Pfizer Inc. (Pfizer) without their informed consent."³⁹⁶ On 29 August 2001, plaintiffs brought this action under the Alien Tort Claims Act, 28 U.S.C. § 1350, to recover damages for Pfizer's alleged violations of their fundamental human rights, and international law.

Pfizer, a pharmaceutical company, conducted drug trials for an experimental antibiotic

392 Ibid

393 Ibid.

394 <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/should-sub-saharan-africa-make-its-own-drugs> (accessed 9 April 2023).

395 562 F.3d 163 (2d Cir.2009)

396 Ben Goldacre, *Bad Pharma: How Drug Companies Mislead Doctors and Harm Patients* (2012) pp 117-118.

called Trovan in northern Nigeria in 1996 during an outbreak of bacterial meningococcal meningitis. To test its new antibiotic, trovafloxacin (Trovan), Pfizer gave 100 children at the local hospital Trovan and gave another 100 children the gold-standard anti-meningitis treatment, ceftriaxone, a cephalosporin antibiotic, the established antibiotic to treat bacterial meningitis, at lower doses to allude to the success of Trovan.³⁹⁷ The allegation was that Pfizer gave the children a substantially reduced dose of the ceftriaxone (specifically, 33 mg/kg) relative to that described on the US FDA-approved prescribing information, as this was done to skew the test in favor of its own drug. Pfizer claimed that the dose used was sufficient even though a clinical trial performed by Médecins Sans Frontières recommended a dose of 50–100 mg/kg.³⁹⁸ Pfizer did not receive consent from the patients or their parents to take the experimental drug, inform the patients or their parents of the experimental nature of the study, or that the effective drug to treat bacterial meningitis was being administered in the same hospital. Five children given trovafloxacin died, and six children who took the reduced doses of Ceftriaxone also died. Several other children were left with permanent impairments such as being left blind, deaf, paralyzed, or brain damaged.

The US District Court granted Pfizer's motion to dismiss, for failure to state a claim under the Alien Tort Claims Act. However, the United States Court of Appeals for the Second Circuit ruled that the Nigerian victims and their families were entitled to bring a suit against Pfizer in the United States under the Alien Tort Statute. Pfizer subsequently settled the case out of court with a \$75 million settlement that was subject to a confidentiality clause.³⁹⁹

5.13.2 HIV/AIDS testing in Zimbabwe.

HIV/AIDS is a major public health issue in Zimbabwe, and it has been reported to

397 Jacqui Wise, "Pfizer accused of testing new drug without ethical approval" (2001) 322(7280) *BMJ* 194

398 Organisation mondiale de la Sante, "Application for addition of 1g form of ceftriaxone to the complementary list of the WHO model list of essential medicines", available at: https://web.archive.org/web/20100717130836/http://archives.who.int/eml/expcom/expcom14/ceftriaxone/ceftriaxone_ERI_application_final.2.pdf (accessed 18 July 2022)

399 Goldacre (above).



hold the highest number of cases in sub-Saharan Africa.⁴⁰⁰ The government is taking increased steps to curb the rapid rise and implement treatment strategies to address the prevalence of cases in the epidemic.⁴⁰¹ This has led to some decline occasioned by vigorous information dissemination about the epidemic, increased condom usage in the population, a reduced number of sexual partners, as well as an increased knowledge and support system through successful implementation of treatment strategies by the government.⁴⁰² Vulnerable populations disproportionately impacted by HIV/AIDS in Zimbabwe include women and children, sex workers, and the LGBTQ+ population.⁴⁰³

Women living with HIV/AIDS undergo a significant number of obstacles due to socio-cultural constraints, and oftentimes gender norms prevent women from accessing healthcare services.⁴⁰⁴ Furthermore, infants are at risk of contracting the virus through mother-to-child transmission when HIV-positive mothers breastfeed without undergoing antiretroviral therapy.⁴⁰⁵ A 2017 study indicated that “almost 80% of all infant infections [were] attributed to roughly 20% HIV-positive pregnant and breastfeeding women not retained on antiretroviral therapy.”⁴⁰⁶ However, progress has been made in recent years, as the number of children aged 0–14 living with the virus is estimated to be at 84,000 which is notably lower than men aged 15 and over living with HIV/AIDS (490,000) or women (730,000).⁴⁰⁷

HIV treatment by pharmaceutical companies has had a troubled history in Zimbabwe. For example, some HIV-positive African subjects were selected for AZT trials conducted

400 Be in the Know, “At a glance: HIV in Zimbabwe”, available at: <https://www.beintheknow.org/understanding-hiv-epidemic/data/glance-hiv-zimbabwe> (accessed 22 June 2022).

401 Ibid.

402 UNAIDS, “2016 Progress reports submitted by countries”, available at: <https://www.unaids.org/en/dataanalysis/knowyourresponse/countryprogressreports/2016countries> (accessed 27 July 2022)

403 Ceri Evans, et. al., “Mortality, HIV transmission and growth in children exposed to HIV in rural Zimbabwe” (2020) 72(4) *Clinical Infectious Diseases* 586–594.

404 Morten Skovdal, “When masculinity interferes with women’s treatment of HIV infection: a qualitative study about adherence to antiretroviral therapy in Zimbabwe” (2011) 14(1) *Journal of the International AIDS Society* 29.

405 Elizabeth McCarthy et. al., “Modeling the Impact of Retention Interventions on Mother-to-Child Transmission of HIV: Results from INSPIRE Studies in Malawi, Nigeria, and Zimbabwe” (2017) 75(2) *Journal of Acquired Immune Deficiency Syndromes* S233-S239.

406 Ibid.

407 UNAIDS, “Zimbabwe”, available at: <https://www.unaids.org/en/regionscountries/countries/zimbabwe> (accessed 18 July 2022).

by U.S. physicians and the University of Zimbabwe. These trials were conducted without the subjects' informed consent,⁴⁰⁸ and they were funded by the Centers for Disease Control (CDC), World Health Organization (WHO), and the National Institutes of Health.

The project involved testing of over 17,000 women for a medication that prevents mother-to-child transmission of HIV/AIDS. The subjects were not adequately informed of the testing methods, effectiveness, possible dangers, or the nature of the placebo in testing conditions.⁴⁰⁹ Most of the women received a placebo that did not work, making transmission possible. Consequently, about 1000 babies contracted HIV/AIDS. The CDC later ended the testing in 1998 after they had obtained more detailed information from another trial in Thailand.⁴¹⁰

Depo-Provera, a contraceptive injection, was clinically tested on black Zimbabwean women in the 1970s.⁴¹¹ Upon approval, the medication was used as a birth control measure to reduce the population of black women in Zimbabwe.⁴¹² Women on white-run commercial farms were coerced into accepting Depo-Provera.⁴¹³ The medication was subsequently banned.

5.13.3 Vaccine inequality

While vaccinations have significantly added to decrease in morbidity and mortality among children, inequality still persists in handling and administration.

Africa has one of the highest rates of infant mortality globally. In 2018, the continent had an average of "under-five mortality rate of 78 deaths per 1,000 live births, which

408 Benjamin Meier, "International protection of persons undergoing medical experimentation: Protection the right of informed consent" (2002) 20(3) *Berkeley Journal of International Law* 513-554.

409 Ibid.

410 Ibid.

411 Harriet Washington, *Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present* (2007).

412 Ibid.

413 Amy Kaler, "A Threat to the nation and a threat to the men: the banning of Depo-Provera in Zimbabwe, 1981" (1998) 24(2) *Journal of Southern African Studies* 347.



translates to 1 in 13 children dying before their fifth birthday.⁴¹⁴ One of the main causes of reduced mortality is lack of access to vaccines. Safeguarding access to vaccination for all children meets Goal 10 of the SDGs.⁴¹⁵

Mitigating inequalities in access to child vaccination demands cautious evaluation, monitoring, and directed interventions. A recent study in sub-Saharan Africa found that from 55,102 children aged 12 to 23 months in 25 sub-Saharan African countries, only “56.5% of the children received full vaccination; 35.1% received incomplete vaccination; while 8.4% of children received zero doses.”⁴¹⁶ About 43.5% of children in countries surveyed missed their vaccination, while there were differences in vaccination commitment in some countries.⁴¹⁷ For example, in Ghana, Burundi, and Rwanda, more than 77% of children received full vaccination; but coverage was less than 40% in Ethiopia, Nigeria, Angola, Chad, and Guinea.⁴¹⁸

The COVID-19 pandemic may have aggravated the prevailing importunate and severe inequalities in obtaining vaccinations. For instance, Africa accounted for less than 1% of the worldwide doses delivered.⁴¹⁹ However, the continent received less than 2% of the 3 billion vaccination doses provided globally.⁴²⁰ As of 5 July 2021, only 36.5 million people had received at least one dose of the COVID-19 vaccine.⁴²¹ Regular vaccination disruptions due to the pandemic were more disadvantageous for underprivileged families in remote or rural areas in low-income and middle-income countries.⁴²² Furthermore, the absence of vaccination facilities due to vaccine stock

414 United Nations Inter-Agency Group for Child Mortality Estimation (UN IGME). *Levels & Trends in Child Mortality: Report 2019, Estimates developed by the United Nations Inter-Agency Group for Child Mortality Estimation*, United Nations Children's Fund, New York, 2019. New York. Children's Fund; 2019.

415 United Nations, *The Sustainable Development Goals Report* (2016).

416 Firew Tekle Bobo, et. al, “Child vaccination in sub-Saharan Africa: Increasing coverage addresses inequalities” (2022) *Vaccine* 143.

417 Ibid.

418 Ibid.

419 WHO, “Less than 10% of African countries to hit key COVID-19 vaccination goal” (28 October 2021), available at: <https://www.afro.who.int/news/less-10-african-countries-hit-key-covid-19-vaccination-goal> (accessed 15 July 2022).

420 European Investment Bank, “Activity Report 2021”, available at: <https://www.eib.org/en/publications/activity-report-2021> (20 June 2022)

421 Africa Union, “Outbreak Brief 77: Coronavirus Disease 2019 (COVID-19) Pandemic”, available at: <https://africacdc.org/download/outbreak-brief-77-coronavirus-disease-2019-covid-19-pandemic/> (accessed 20 June 2022).

422 Firew Tekle Bobo (above) p 143

outs is an established and tenacious drawback across sub-Saharan African health systems.⁴²³ Studies also show that parents might become unenthusiastic to return for vaccinations if they miss work, 'have to travel long distances to facilities, experience long waiting times, and fail to receive services.'⁴²⁴

5.13.4 Poisoning

One of the most egregious violations of children's rights took place recently in The Gambia. Police in Gambia announced they are launching an investigation into the deaths of 66 children, amid growing concern over imported medicines and cough syrup. Most of the victims died from acute kidney failure. The news came a day after President Adama Barrow promised to boost health measures including better quality control over imported medicines, amid mounting concern that imported cough syrups caused the deaths. The WHO issued an alert over four cough and cold syrups made by a pharmaceutical firm in India. Laboratory testing found unacceptable levels of potentially life-threatening contaminants, the WHO said, adding that the products may have been distributed beyond the West African country. Health authorities in Gambia had on 23 September 2022 ordered a recall of all medicines containing paracetamol or promethazine syrup. In a statement, Barrow announced a raft of measures to avoid future tragedies, including the creation of 'a quality control national laboratory for drugs and food safety'. He also promised to update the nation's drugs-related laws to ensure regulation could prevent any such incidents in the future.⁴²⁵

423 J. Rainey, et. al., "Reasons related to non-vaccination and under-vaccination of children in low and middle income countries: Findings from a systematic review of the published literature, 1999– 2009" (2011) 29(46) *Vaccine* 8215–21.

424 M. Favin, et. al, "Why children are not vaccinated: a review of the grey literature" (2012) 4(4) *Int Health* 229–38.

425 Editorial, "Kidney Failure kills scores of children in the Gambia and Indonesia" *The Economist* (October 27 2022), available at: <https://www.economist.com/asia/2022/10/27/kidney-failure-kills-scores-of-children-in-the-gambia-and-indonesia> (accessed 27 September 2022).



5.14 Construction

Governments have made significant investments in upgrading or developing infrastructure in recent times. Chinese companies constitute a significant percentage of those constructing roads, railroads, seaports and airports, according to UNDP.⁴²⁶

In 2020, Angola made moderate advancement in efforts to eliminate the worst forms of child labour, including in the construction sector. The government approved a consolidation of existing legislation related to child labour, including hazardous labour and child trafficking, which was incorporated into the Penal Code. In addition, the government increased the number of labour inspectors in the country by over 140 inspectors and conducted an intensive campaign to increase birth registration and the issuance of identification cards, resulting in the registration of 1,098,694 Angolans. However, children in Angola are subjected to the worst forms of child labour, including in commercial sexual exploitation, sometimes as a result of human trafficking. Children also perform dangerous tasks in construction.⁴²⁷ The 2015–2016 Survey on Multiple Health Indicators found that 23 percent of children, ages 5 to 17, engage in child labour in Angola, which is higher in rural than in urban areas.

Child labour remains a serious issue in Uganda. At least two million children aged 5-17 are engaged in child labour with 1.7 million below 14 years of age, and 507,000 involved in hazardous work (ILO/IPEC & UBOS, 2013). The proportion of children in hazardous work was more than double in urban areas (61 percent) as compared to the rural (23 percent) (ILO/IPEC & UBOS, 2013). Children are reported to be involved in the construction sector where children are involved in manual labour.⁴²⁸

426 <https://www.undp.org/sites/g/files/zskgke326/files/2022-10/Baseline%20Assessment%20BHR%20Report%20EN%20-%20web.pdf> (accessed 9 April 2023) at p 17.

427 BILA, "Child Labour and Forced Labour Reports", available at: <https://www.dol.gov/agencies/ilab/resources/reports/child-labour/angola> (accessed 13 July 2022).

428 Global NAPS, "Uganda – Children's rights", available at: <https://globalnaps.org/country-issue/uganda-childrens-rights/> (accessed 13 July 2022). One of the children consulted for this study was working making bricks for construction.

Poor practice in construction projects can imperil children's lives. On Monday 25th September, a six story building collapsed in Kirigii in Kenya's Kiambu county that killed five people, including two children. This happens after dozens of people died in building collapses in Kenya, including at least three in 2019 and 46 in a 2016 disaster. It is alleged that the construction industry has been marred with unscrupulous dealings that are compromising the quality of buildings. Corruption has allowed developers to cut corners or bypass laws. Allegedly because of the costs of obtained development approval, and the time it takes, some developers are circumventing the system or use "quacks".

Source: Voice of America 29 September 2022 and Legalbrief 29 September 2022.

5.15 The informal sector

Evidence from national household surveys with data on both informality and child labour undertaken in 22 Sub Saharan Africa countries sheds additional light on child labour and informality in the specific context of Sub-Saharan Africa. Virtually all working children in Sub Saharan Africa (99%) aged 10-14 years work in the informal sector, mostly in agriculture. Older, 15 to 17 year-old, working children, who are legally entitled to work in non-hazardous jobs, are as likely as their younger peers to be in informal employment. Only about 1 per cent of children in this age range are in formal employment. By contrast, more than 9 per cent of 18 to 50 year-olds are in formal employment, meaning that the transition to the formal employment only begins after entry into adulthood at the age of 18. The predominance of informal employment for working children does not seem to vary substantially by area of residence (i.e., urban or rural) or by sex.

The evidence shows that children belonging to households with adult family members working in the informal economy are more likely to work than children from households with adults engaged in the formal economy. The predominance of family work also emerges clearly from the evidence from the 22 countries.⁴²⁹ About 84 per cent of working children aged 10 to 14 years, and 76 per cent of working children aged 15 to 17 years,

⁴²⁹ Burkina Faso, Burundi, Cameroon, Chad, DRC, Gambia, Ghana, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Namibia, Niger, Senegal, Sierra Leone, Tanzania, Togo, Uganda, Zambia and Zimbabwe.



work alongside an adult household member in the same type of job. According to the ILO, the dynamics and drivers of informality are manifold and often context-specific, meaning that a multidimensional policy approach to addressing informality is required that can be adapted to specific national and local contexts.⁴³⁰ However, they highlight that extending the reach of social protection to informal economy workers and their families is a key element. And, since agriculture is the sector where the intersection between child labour and informality is most pronounced, the formalisation of the agricultural production constitutes a key overarching priority.

Some features of agricultural work may present additional challenges for controlling the way it is carried out, especially among children. It may be:

- > seasonal – agricultural labour demand depends on production cycles and seasonal movements of animals;
- > informal – many economic activities in agriculture are, by law or practice, not registered or insufficiently covered by formal regulations;
- > hazardous – agricultural work often involves the use of hazardous tools or equipment, and toxic substances such as pesticides, and agricultural workers can also be exposed to extreme weather conditions, rough seas, biological hazards, long/irregular working hours, or carrying heavy loads;
- > under-regulated – workplaces can be in remote locations or fragmented, or concealed for illegal purposes, making law enforcement difficult (FAO and ILO, 2017a).

Source: FAO Framework for ending child labour in agriculture (2020)

While child labour is most widespread in informal work in agriculture, there are numbers of other sectors in the informal economy in which child labour has an important presence. Among these are artisanal mining, including of gold, cobalt, mica and coal; brick kilns; manufacturing; street work; and the very large number, especially of girls, still engaged in child labour in domestic work.⁴³¹ This was commented upon in relation to Burundi in the ACERWC Concluding Observations, where the Committee stated its concern about children being recruited as domestic workers and subjected to long working hours and heavy works despite the legal prohibition of night works for children.⁴³² Djibouti recently appeared before the CRC

430 ILO above at p 14.

431 ILO: Vulnerabilities to child labour. Geneva: International Labour Organization, 2022.

432 ACERWC Concluding Observations Burundi (2017) par 49.

Committee. The Committee recommended that Djibouti significantly increase the human, technical and financial resources allocated to the Ministry of Labour in order to regularly and effectively implement laws and policies on child labour, in particular with regard to domestic work by girls, and prosecute perpetrators.⁴³³

The FAO-WHO International Code of Conduct on Pesticide Management recognizes children as one of the vulnerable groups for pesticide exposure. The Code of Conduct is voluntary, but establishes a minimum international standard for monitoring the standards of governments and the pesticide industry.⁴³⁴ The 2013 revision of the International Code of Conduct on Pesticide Management widened the provisions regarding the protection of children from pesticide exposure.

One of the most recent and relevant knowledge products on the sector is an ILO report for the Economic Community of West African States (ECOWAS) region in Africa (ILO, 2014) which shows that in Burkina Faso, 34.7 percent of the total workforce in forestry/logging comprises children in the 5–14-year age group, while in Guinea, the same age group accounts for 36.5 percent.⁴³⁵

Child labour in Egypt has been common over the years, especially street-based child workers.⁴³⁶ Children without Shelter was a unique programme implemented by the Ministry of Social Solidarity (MoSS) in close coordination with specialised NGOs such as the Hope Village Society (HVS), and the Banati Foundation (BF), which works with abused girls. Children without Shelter included the provision of training for personnel in governmental and non-governmental organisations in the planning, implementation and monitoring of specialised programmes. Practitioners (including social workers and police) were trained on how to manage and deal with children in street situations (boys and girls), especially those who had been sexually exploited and/or had borne a child as a result of sexual exploitation. The programmes proved effective over time, as they employed innovative methods of building trust through activities that changed the attitudes of both police and children in street situations towards each other. The objective of Children without Shelter was focused on the withdrawal, rehabilitation

433 CRC/C/DJI/CO/3-5 (22 June 2022) par 41(c).

434 FAO Framework for ending child labour in agriculture, (2020) p 47.

435 FAO Framework p59,

436 International Labour Organization, Emerging Good Practices in the Elimination of Child Labour in the Middle East and North Africa, Amman: International Labour Organization, 2021, p19.



and reintegration of children in street situations into their families and communities. The programme utilised 17 mobile units – charter buses equipped with material and staff – to reach children in street situations in the areas where they tend to congregate (tourist sites, city centres, etc.). The mobile units were deployed to major Egyptian cities and provided psychosocial and nutritional support for children while working to reintegrate them into their families and communities. A second component of the programme upgraded government-run shelters providing similar services for children who were unable to return to their families and communities.

Case study: Impact of the 2017-2020 Children without Shelter programme

- Increased public awareness of children in street situations (due to extensive programmes and encouragement of small public contributions);
- The removal of 14,975 children from street-based work, along with 5,121 families with new-born children in street situations (referred to as second generation children in street situations), and the provision of appropriate educational and socio-economic services through the MoSS, local community schools, and NGOs;
- The return of 578 children to their families directly through the work of mobile unit teams;
- The provision of transitional shelter for 1,710 abandoned children, of whom 1,199 have been reconnected and reintegrated into their families, with ongoing efforts to achieve stable and safe outcomes for other children;
- Of those in transitional shelters, 868 children were returned to formal or non-formal education, while 758 were enrolled in vocational training programmes; and
- Special programmes were created for both girls and boys, whether in mobile units or in transitional institutions (governmental and non-governmental).

In Morocco, it has long been common for girls under the age of 16 years to perform

domestic work for their families, or for others. As in many countries in the region, the core factors include absence of legislation and enforcement, as well as poverty, and poor access to education, electricity and water, especially in rural areas. The rural population is particularly susceptible to child labour.⁴³⁷ After advocacy commenced in 2006, in 2016, the country endorsed Law 19-12 on domestic work in general and child domestic work in specific, developing special executive measures by 2018 to ensure implementation of the new law. Efforts to regulate the domestic work sector and combat child labour in domestic work have been supported by the ILO.

The new law requires written contracts and establishes 18 as the minimum age for domestic workers, with a phase-in period of five years, during which girls between 16 and 18 are allowed to work. It limits working hours for 16- and 17-year-olds to 40 hours a week. It guarantees 24 continuous hours of weekly rest, and a minimum wage equal to 60 per cent of the minimum wage for jobs covered under the country's labour law. However, the ILO cautions that the Moroccan case highlights the importance of blending together legislation with adequate social protection and educational support, showing that improvements to infrastructure can mitigate poverty in areas where child labour is prevalent.

Case study: The Moroccan case

- Child labour, especially in domestic work, can be reduced via multiple and parallel interventions, including development of legislation; community / stakeholder advocacy and sensitisation; development of infrastructure (building / renovation of schools); and improvement of roads, ensuring access to water and electricity and provision of school needs.
- Dealing with difficult forms of child labour – such as domestic work which is largely invisible and removes children from the oversight of their families – requires persistence and dedication.
- Young girls need to be specifically covered in programmes that acknowledge their unique social and cultural challenges.

437 International Labour Organization, *Emerging Good Practices in the Elimination of Child Labour in the Middle East and North Africa*, Amman: International Labour Organization, 2021, p24.



- Special attention needs to be given to at-risk children, especially girls, during COVID-19, whether through online communication, education, or direct community-based work and home visits to beneficiaries.

As regards Niger, the CRC Committee noted that “child domestic workers are exposed to long hours of work without any rest day and with little pay. Such children are often subjected to physical and verbal abuse and sometimes sexual abuse.” The Committee recommended Niger to strictly regulate and enforce the law with regard to domestic work by children; strengthen labour inspectorates and monitoring mechanisms in the formal and informal sectors and make data on the number of inspections and violations publicly available.⁴³⁸

In Mauritania, child labour affects around 24,516 children aged between 5 and 17 years (37.6 per cent). Around 26.3 per cent work in dangerous conditions. The prevalence of child labour is higher in rural areas (45 per cent) than in urban areas (27 per cent). This child labour trend is on the rise between 2007 and 2015, where it rose from 21.1 per cent in 2007 to 23.4 per cent in 2011 and 37.6 per cent in 2015, respectively. The typology of child labour can be summarized as follows: child shepherds, child farmers, girl domestic workers, child beggars, child garage helpers, girl street vendors, child carters, and child fishermen.⁴³⁹

At least 43% of Nigerian children are trapped in various forced labour environments despite international conventions banning it, the International Labour Organization has said. The country head of the global body, said the children as young as 5-10 years are being used as labour, mostly in private establishments and homes.⁴⁴⁰

A report “Child labour and the youth decent work deficit in Tanzania”⁴⁴¹ indicates that 4.2 million Tanzanian children remain trapped in child labour. Children in child labour are

438 CRC/CO/NER/3-5 (2018) Para 43.

439 Measurement, Awareness Raising, and Policy Engagement project (MAP16) in Mauritania (ILO, 2021).

440 Business and Human Rights Resource Center, “Nigeria: ILO says least at 43% of the children population trapped in child labour, including in private businesses”, available at: <https://www.business-humanrights.org/en/latest-news/nigeria-ilo-says-least-at-43-of-the-children-population-trapped-in-child-labour-including-in-private-businesses/> (accessed 13 July 2022)

441 International Labour Office, Fundamental Principles and Rights at Work Branch (FUNDAMENTALS) - Geneva: ILO, 2018.

concentrated in agricultural work within the family unit. Nearly 95 percent of children in child labour are in the agricultural sector and nearly 93 percent in unremunerated family work. Children in child labour aged 5–13 years log very long hours, increasing their exposure to workplace hazards and limiting their time for study and leisure. Weekly working hours average 20 hours for the 5–13 age group as a whole, rising to 25 hours for children over the age of 11 years. It should be noted that these figures are averages that mask alarming numbers of children who must endure much longer hours: some 445,600 children work for over 40 hours per week and 206,000 for over 50 hours per week (this excludes time spent performing household chores).⁴⁴²

The degree to which work interferes with children’s schooling is one of the most important determinants of the long-term impact of early work experience. Reduced educational opportunities constitute the main link between child labour, on the one hand, and youth employment outcomes, on the other. Clearly, if the exigencies of work mean that children are denied schooling altogether or are less able to perform in the classroom, then these children will not acquire the human capital necessary for decent work upon entering adulthood.⁴⁴³

About 8 percent of children in the compulsory schooling age group of 7–13 years, 1,450,000 children in absolute terms, are out of school. What factors lead to children being left out of the school system? Feedback from children themselves points to the importance of both supply- and demand-side factors (almost 40 percent of children who have never attended school or have dropped out cite that school is either too far away (21 percent) or too expensive (17 percent). An additional 26 percent either refuse to go to school (22 percent) or are “satisfied” with not attending school, suggesting that lack of interest in studying is also an important motive.

Tanzania lacks a comprehensive social protection programme that would provide social protection services in times of economic or social crisis. Very few of those participating in the informal economy are covered by social security schemes. A new National Strategy on Elimination of Child Labour (2018-2022) was launched to guide national efforts against child labour. The Strategy is framed within an overall vision of a Tanzania in which children live free from child labour and its worst forms while

442 P xi.

443 P xii.



enjoying their rights in a safe environment. The National Strategy identifies seven strategies to eliminate child labour:

1. Enhancing compliance with labour standards;
2. Strengthening multi-sectorial coordination and collaboration;
3. Strengthening household income by empowering men, women and child headed households;
4. Integrating comprehensive social protection systems;
5. Improving access to alternative forms of education to all vulnerable children;
6. Institutionalized mechanisms on rehabilitation and social integration for children withdrawn from child labour and its worst forms; and
7. Enhancing public awareness on impact of child labour and its worst forms.⁴⁴⁴

Cameroon's capital, Yaoundé, is teeming with young vendors. Most of them are children between the ages of 7 and 14, and they occupy major intersections and markets — often working until late at night. Kevin and Lea are among the hawkers selling their wares in Yaoundé's populous neighbourhoods during the school vacations. "I sell water to help my parents pay for my exercise books for the new school year," 8-year-old Kevin told Deutsche Welle. "And I sell peanuts to pay for my school supplies," added 10-year-old Lea. Chantal Zanga, a school principal, is concerned.⁴⁴⁵

"I'm against the street trading that children do," said Zanga. "The child has a right to protection. If we send them to the streets, who will protect them?"⁴⁴⁶ Distressed child street vendors face daily dangers from traffic, weather and sexual violence, according to UNICEF in 2022.

On the streets of Maiduguri in Nigeria's Borno State, many children work at the request of their parents. "My father brought me here to learn tailoring," a young boy told Deutsche Welle. "Sometimes, I earn 150 nairas (\$0.36/€0.35)." According to the ILO, 43% of Nigerian children aged between 5 and 11 are child labourers.

444 P xvii.

445 DW, "World Day Against Child Labour: More African children working", available at: <https://learnerman.dw.com/en/world-day-against-child-labour-underage-workers-on-the-rise-in-africa/a-61772211#> (accessed 28 July 2022).

446 Ibid.

Human Rights Watch research⁴⁴⁷ indicates that an estimated 100,000 talibé children living in residential daaras across Senegal are forced by hundreds of Quranic teachers, or marabouts, to beg daily for money, food, rice or sugar.⁴⁴⁸ Some teachers force the children to beg for set quotas of money, enforced by often-severe beatings. The report also documented numerous forms of neglect and endangerment threatening talibés' health and safety. Long hours on the streets begging put talibés at risk of car accidents and assault. Due to the lack of food and medical care at many daaras, talibés often suffer from malnutrition or untreated illnesses, in some cases leading to child deaths. Others have been injured or killed in daara fires when the marabout was absent. The issue of working talibé children formed the basis of the ACERWC finding in a communication brought against Senegal in 2015.⁴⁴⁹

The ACERWC observed in relation to Ghana that particularly concerning was the issue of migrant children, some as young as 6 years, who are engaging in labour in busy markets without permanent residence which leaves them sleeping on the streets, exposing themselves to exploitation and some resorting to prostitution.⁴⁵⁰

The ACERWC has commented on the involvement of children in herding in respect of Lesotho. In its concluding observations in 2016 it said "[t]he Committee notes with appreciation the adoption of the guidelines for employment of herd boys. However, the Committee is concerned that parents force their boys to work on the farm and to herd cattle which exposes children to extreme weather conditions, dropout from schools, attacks by animals and gangsters. The Committee recommends that the State party implements the guidelines."⁴⁵¹

447 Human Rights Watch (2019), available at: <https://www.hrw.org/report/2019/06/11/there-enormous-suffering/serious-abuses-against-talibe-children-senegal-2017-2018> (accessed 12 July 2022).

448 In its concluding observations to Guinea, the ACERWC noted similarly that boys placed in Koranic schools are sometimes forced to beg on the streets and surrender the money earned to teachers.

449 Centre for Human Rights, University of Pretoria, together with La Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Government of Senegal. At the ACERWC's 29th Session held in May 2017, in Lesotho, the Centre for Human Rights and RADDHO, presented a joint submission on the implementation of the ACERWC's 2014 decision. The Implementation Unit of the Centre for Human Rights briefly highlights below some of the measures undertaken so far by the government of Senegal in implementing the ACERWC's decision, based on available information. Amongst the findings were that Senegal has also developed a draft law regulating daaras (projet de loi portant statut des daaras) with a view to integrate the daaras into the formal education sector. However, this law is only a draft and has been under review. The draft law regulating the status of daaras was developed between 2015 and 2016 and concluded around January 2017 but was yet to be adopted by Parliament.

450 ACERWC Concluding Observations Ghana (2016) para 16.

451 ACERWC Concluding Observations Lesotho para 61.



Addressing the initial report of Somalia⁴⁵² in June 2022, the CRC Committee expressed serious concerns about the reports that:

- (a) Almost half of the children between the ages of 5 and 14 engaged in child labour, working long hours, being underpaid or denied their wages, and being subjected to violence and sexual exploitation;
- (b) Absence of government social workers and the absence of structured mechanisms to support children in street situations, and reliance on community-based and kinship processes to support them. In its reply to the List of Issues, Government had stated that in January 2020 the Ministry of Women and Human Rights Development initiated "A Rapid Assessment on Drug use Among Children Living and Working in Major Cities in Somalia". Preliminary findings of the assessment indicate that the majority of these children are boys who perform menial tasks such as shoe shining, washing cars, cleaning dishes in restaurants, cleaning business premises, while girls perform domestic work.⁴⁵³

Clearly, the involvement of children in informal sector activities, including working on the streets, represents a difficult problem for governments to address. Key solutions probably involve increased access to social security and cash transfer problems, continued efforts to improve access to education, and robust child protection systems.

5.16 Advertising and social media

Advertising and the regulation of the digital space are oftentimes the responsibility of agencies, Ministries or entities that are unconnected to children's rights directly. Children's rights are in jeopardy when digital content is not monitored or controlled. Use of technology and advanced information technology could compromise or put children at heightened risk of exploitation and online abuse. For example, where not monitored effectively, exposure to the advertisement of unhealthy foods could increase the levels of childhood obesity, contributing to lasting health implications. While there have been efforts at addressing these challenges of how businesses impact the rights and welfare of children, practical realization shows evidence to the contrary.

452 CRC/C/SOM/CO/1 (22 June 2022)

453 Para 112.

The spread of digital media in Africa, used by children, has contributed to potential risks for children, such as exposure to CSAM, online bullying, exposure to violent content and hate speech, and so forth. Sexting (distribution of sexually explicit messages or images) can render children liable to prosecution (e.g. for distribution of child pornography), and further sanctions, such as being placed on sex abuse registers. Girls, in particular, may be vulnerable to solicitation online by older men who exploit their youthful age and inexperience. Violation of children's information privacy can occur with the collection, storage and processing of children's personal data, especially if this occurs without their understanding or consent. Digital practices, such as automated data processing, profiling, behavioural targeting, mandatory identity verification, information filtering and mass surveillance are becoming routine, and may result in arbitrary or unlawful interference with children's right to privacy; this may have adverse consequences on children, which can continue to affect them at later stages of their lives.⁴⁵⁴ Legally, much of the regulation of the communications sector is diverse, split between communications authorities, data protection regulators, and broadcasting authorities. Sometimes, some protections appear in a children's code, though this is usually not comprehensive.

Most countries have one or another form of regulatory authority relating to the communications sector. Tanzania has a Communications Regulatory Authority (TCRA), which is responsible for regulating the telecommunications and broadcasting sectors in Tanzania.⁴⁵⁵ This body is also responsible for issuing licenses to online content service providers and internet service providers. With a view to prevent and manage cybersecurity incidents, the TCRA has developed a Computer Emergency Response Team (CERT).

In Mauritius, the Information and Communication Technologies Act 2001 (as amended), establishes the ICT Authority (ICTA).⁴⁵⁶ ICTA is responsible for, among other things, democratising access to information taking into account the quality, diversity and plurality in the choice of services available through the use of information and

454 Centre for Human Rights and Raoul Wallenberg Foundation "Children's Right to Privacy in the Digital Sphere in the African Region, University of Pretoria, 2022. The country reports referred to hereafter are taken from this publication.

455 To learn more about TCRA, visit <https://www.tcra.go.tz/> (accessed 12 June 2021).

456 To learn more about ICTA, visit <https://www.icta.mu> (accessed 12 June 2021).



communication technologies.⁴⁵⁷ Also, the Mauritian Cybercrime Online Reporting System (MAUCORS) has been developed as a secure channel for reporting cybercrimes, including offensive or illegal contents such as pornographic materials, child sexual exploitation material, sexually explicit contents, promotion of racism and terrorism, hate speech, violence and graphic content, and spam.⁴⁵⁸ Despite its publication of the law relating to data protection in 2018, the entry in force of this personal data protection law is subject to the actual installation of the authority in charge of protection of personal data which, until April 2021, was not yet established.

In Burkina Faso, Internet and ISPs are regulated by the Electronic Communications Regulatory Authority (ARCE), established Law No. 061-2008 / AN of 27 November 2008 on the general regulation of Communications networks and services in Burkina Faso. ARCE is an independent administrative institution with legal personality and financial autonomy, placed under the administrative supervision of the Prime Minister. Access to information is regulated by the National Authority for Access to Public Information (ANAIP), created by Law No. 051 on access to public information. ANAIP is an independent administrative authority with legal personality and management autonomy, funded by the State.⁴⁵⁹

Data protection is regulated by the Commission de l'Informatique et des Libertés (CIL) / Commission for Computing and Liberties, which is an independent administrative authority, created by the Personal Data Protection Act. CIL has a power to control public and private organizations, and a power of sanction and denounce the prosecution of offenders to its establishing law. CIL also regulates the protection of personal information, in accordance with section 2 of the Personal Data Protection Act. It is operational since December 2007.⁴⁶⁰

In response to whether the state blocks or filters or compel service providers to block or filter, internet content in Malawi, Freedom House record that "the current government does not block or filter content aside from child sexual abuse images."⁴⁶¹

457 Children's rights to privacy and digital technology in Africa: Mauritius country report (copy on file with the author) May 2021 p7.

458 Mauritius report as above p8.

459 Children's right to privacy in the digital sphere: Burkina Faso report (copy on file with the author) May 2021, p 4.

460 Burkina Faso report as above p 4.

461 Children's rights to privacy and digital technology in Africa: Malawi country report (copy on file with the author) (May 2021) p 7.

In Benin, while there is no specific law on cybersecurity, its national cybersecurity measures, mainly the improvements under the National Agency for the Security of Information Systems (ANSSI), have notably earned it to be ranked the 8th African country on the Global Cybersecurity Index.⁴⁶² In Uganda, the Ministry of ICT and National Guidance oversees the ICT sector and provides the framework to guide implementation. The Ministry is supported by various regulatory agencies, including the Uganda Communications Commission (UCC) – regulating the telecommunications sector, and the National Information Technology Authority Uganda (NITA-U) –regulating the IT sector.

In Benin, data regulation is ensured by the Personal Data Protection Authority (APDP), an independent national administrative authority responsible for ensuring that the processing of personal data is carried out in accordance with the provisions of Book V of the Digital Code of 2018. This Authority is empowered to conduct investigations or initiate proceedings in the Digital Code of 2018 to ensure the “respect for privacy in general on the territory of the Republic of Benin.” Thus, it also covers both the State and the private sector, and ensures the regulation of personal information, including that of children.⁴⁶³

In Cameroon, the main regulator of the internet, telecommunications and access to information is ANTIC, the National Information and Communication Technology Agency. Its duties include ensuring the ethical use of ICT, consumer protection and privacy, as well as regulating and monitoring activities that relate to the security of information systems and electronic communications networks. There is no specific data protection authority, so this also falls to ANTIC.⁴⁶⁴

In Egypt, telecommunications services and ISPs are regulated by the National Telecommunication Regulatory Authority (NTRA) under the Telecommunication Regulation Law (Law No. 10 of 2003).⁴⁶⁵ The authority is subordinated to the ministry

462 Children’s rights to privacy and digital technology in Africa: Benin country report (copy on file with the author) (May 2021) report p 2.

463 Children’s rights to privacy and digital technology in Africa: Benin country report (copy on file with the author) (May 2021) report p 4-5.

464 Children’s rights to privacy and digital technology in Africa: Cameroon country report (copy on file with the author) (May 2021) p 2.

465 To learn more about the NTRA, visit <https://www.tra.gov.eg/en/> (accessed 12 June 2021)



of communications and information technology (MCIT).⁴⁶⁶ The Data Protection law established the Data Protection Centre and is affiliated to the Ministry of Communications and Information Technology, MCIT.

In 2020 and 2021, several regulations and guidelines were issued in Kenya, including:

- Data Protection Impact Assessment guidelines;
- A Guidance Note on Consent;
- A complaints management manual;
- Data Protection (compliance and enforcement) regulation;
- Data Protection (registration of data controllers and data processors) Regulations; and
- Data Protection (general) Regulations.

On the matter of regulatory authorities, the DPA makes provision for the establishment of the Office of the Data Protection Controller. This Office fulfils numerous functions including:

- Establishing and maintaining a register on the processing of data by data controllers and data processors;
- Providing oversight and ensuring compliance with the DPA; and
- Carrying out investigations of public and private entities to evaluate compliance with the Act.⁴⁶⁷

In Mozambique, there is limited protection of personal information. In relation to breach the Electronic Transactions Law provides that the person or entity responsible for processing electronic data must protect personal data against risks, losses, unauthorized access, destruction, use, modification, or disclosure.

⁴⁶⁶ Children's rights to privacy and digital technology in Africa: Egypt country report (copy on file with the author) (May 2021) p 7.

⁴⁶⁷ Children's rights to privacy and digital technology in Africa: Kenya country report (copy on file with the author) (May 2021) report p 8,

From a regulation perspective, in 2020, the Mozambique Control Unit of the Telecommunications Traffic ('UCTT') was established by the Communications Regulatory Authority ('INCM'). The UCTT is dedicated to telecommunications traffic control, management of SIM card registrations, and the protection and security of telecommunications networks against cyber-attacks. It is also responsible for ensuring the data protection of telecommunications users.⁴⁶⁸ It appears that INCM is the most prominent regulatory body in the context of ICT related matters.

In Morocco, the National Regulatory Agency telecommunications, ('ANRT'), is a government body created in 1998 under Law no 24-96 to regulate and liberalize the telecommunications sector.⁴⁶⁹ The Commission of the Right of Access to Information was created by Law 31.13 of 12 March 2018 on Access to information. Its mandate, articulated in Article 22 of Law 31.13, is to ensure the proper exercise of the right of access to information. Morocco has a data protection authority, the Commission nationale de contrôle de la protection des données à caractère personnel, ('CNDP'). The Commission is governed by Law 08 of 18 February 2009, relating to the protection of individuals with respect to the processing of personal data and by its Implementation Decree 2-09-165 of 21 May 2009.⁴⁷⁰

In Nigeria, the Nigerian Communications Commission ('NCC') regulates ISPs.⁴⁷¹ The National Information Technology Agency ('NITDA') regulates access to information and data protection in general. The regulation extends to public institutions as well as the private sector. Data subjects may report breaches of privacy to NITDA. The Cybercrime Act prohibits child pornography and grooming but makes no specific mention of children's right to privacy.⁴⁷²

The Nigerian Data Protection Regulation of 2019, based on the European GDPR, has been enforced quite vigorously.⁴⁷³ The National Data Protection Regulation Implementation Framework of Nigeria classes a 'child' as anyone under 13 and requires that those

468 Children's rights to privacy and digital technology in Africa: Mozambique country report (copy on file with the author) (May 2021) p 6.

469 <https://www.anrt.ma/en/>

470 Children's rights to privacy and digital technology in Africa: Northern Africa report (copy on file with the author) (May 2021) p 23.

471 <https://www.ncc.gov.ng/>

472 Children's rights to privacy and digital technology in Africa: Nigeria country report (copy on file with the author) (May 2021) p 3.

473 As above p 6.



whose activity targets children 'shall ensure its privacy policy is made in a child-friendly form with the aim of making children and their guardians have clear understanding of the data processing activity before grant of consent.' It also encourages organisations that offer services to children to consider whether their information is presented in a clear way that a child would understand.⁴⁷⁴

In Tunisia, the National Telecommunication Instance is the regulator for all telecommunications and internet-related activities in Tunisia.⁴⁷⁵ The 2004 personal data protection law provides for the establishment of the National Authority for the Protection of Personal Data, which came into being in 2009. According to Article 76 of the law, its mandate is mainly to provide private entities with authorization, receive complaints about privacy violations, notify the public prosecutor and make official recommendations on issues related to data protection without any enforcing powers.⁴⁷⁶ High Independent Authority for Audio-visual Communication, established by Decree-Law 116 of 2011, has warned and sanctioned Television and radio stations about the broadcasting of inappropriate content for children and required changes of the material and diffusion hours. The authority also intervened in cases of non-respect for child privacy on multiple occasions and required stations to stop the broadcasting of the objectionable programs and remove of material from their websites and social media pages. HAICA receives complaints and relies also on its internal monitoring observatory. Its decisions can be challenged in courts.⁴⁷⁷

The ACERWC General Comment No 7 notes that "there is a gap in holding internet service providers accountable, as some countries have no specific obligation to report child sexual abuse material (CSAM) to authorities for investigation and there is no consistent definition of what constitutes CSAM. There is a very poor culture of cyber security. There are few African States who have enacted laws to protect themselves from cyber insecurity and often they do not implement them unless they face cyber-attacks; they are reactive rather than proactive. There are also 30 States in Africa who have no law or policy on cyber security, not even a draft. Furthermore, not all countries in Africa have set up cybercrime law enforcement units. Some countries remain to

474 As above p 3.

475 Children's rights to privacy and digital technology in Africa: Northern Africa report (copy on file with the author) (May 2021) p 44.

476 As above p 45.

477 As above p 51.

ratify the UN CRC Optional Protocol on the sale of children, child prostitution and child pornography.”⁴⁷⁸

In the advertising and print media industry, there is oftentimes self- regulation of participants through Codes, rather than legislation which is enforced by the State directly. Examples are:

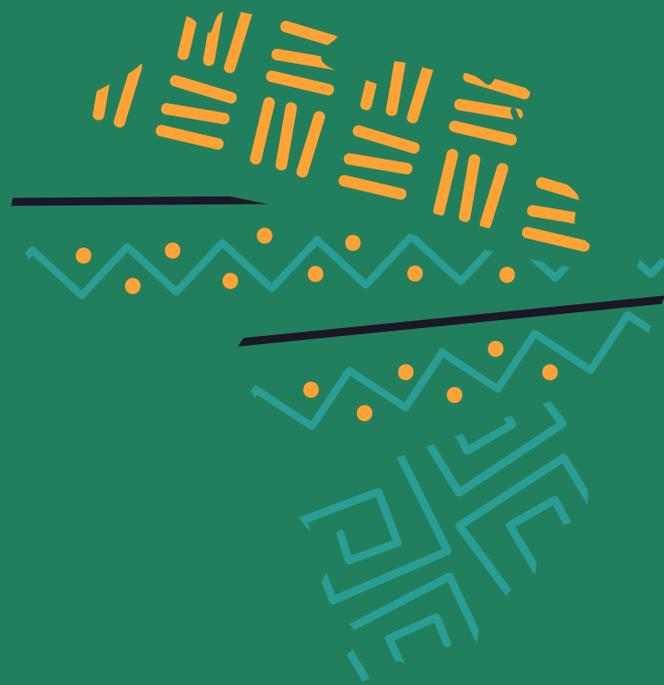
- Kenya, where the Code of Advertising Practice prohibits advertising which exploits a child’s credulity, or which contains physically, mentally, or morally harmful content;
- Tanzania, where The Media Council of Tanzania has a Code of Ethics for Media Professions which offers guidelines to media advertising agents and the relevant portion for these purposes declares that children may not be used “... exploitatively in advertisements that concern adults. Also, children should not be exposed to products that are harmful”. The Code further places restrictions on content, prohibiting any portal of violence and aggression in advertisements aimed at children. Advertisements with menacing or horrific themes, unsafe acts, pictures or sound likely to disturb children, or that encourage anti-social behaviour by children are also prohibited;
- Zimbabwe, there is a self-regulatory body, the Advertising Standards Authority (ASAZIM), which has a Code of Standards drafted on the basis of the International Code of Advertising Practice prepared by the International Chamber of Commerce. Members of ASAZIM are required to adhere to the Code, but the Code does not address marketing to children;
- Nigeria has a Nigerian Code of Advertising Practice (Advertising Code), Advertising Practitioners Council of Nigeria (APCON) Vetting Guidelines, Federal Competition and Consumer Protection Act (FCCPA) and Standards Organisation of Nigeria Act 2015 (SONA) are in place. APCON is the main body that regulates advertising, while NCC monitors whether the telecoms sector complies with advertising rules, and can impose sanctions on service providers; and

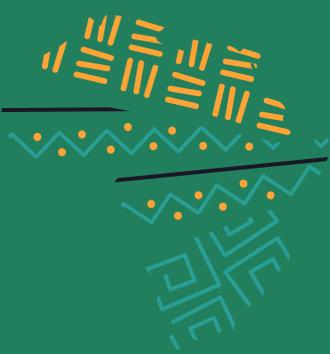
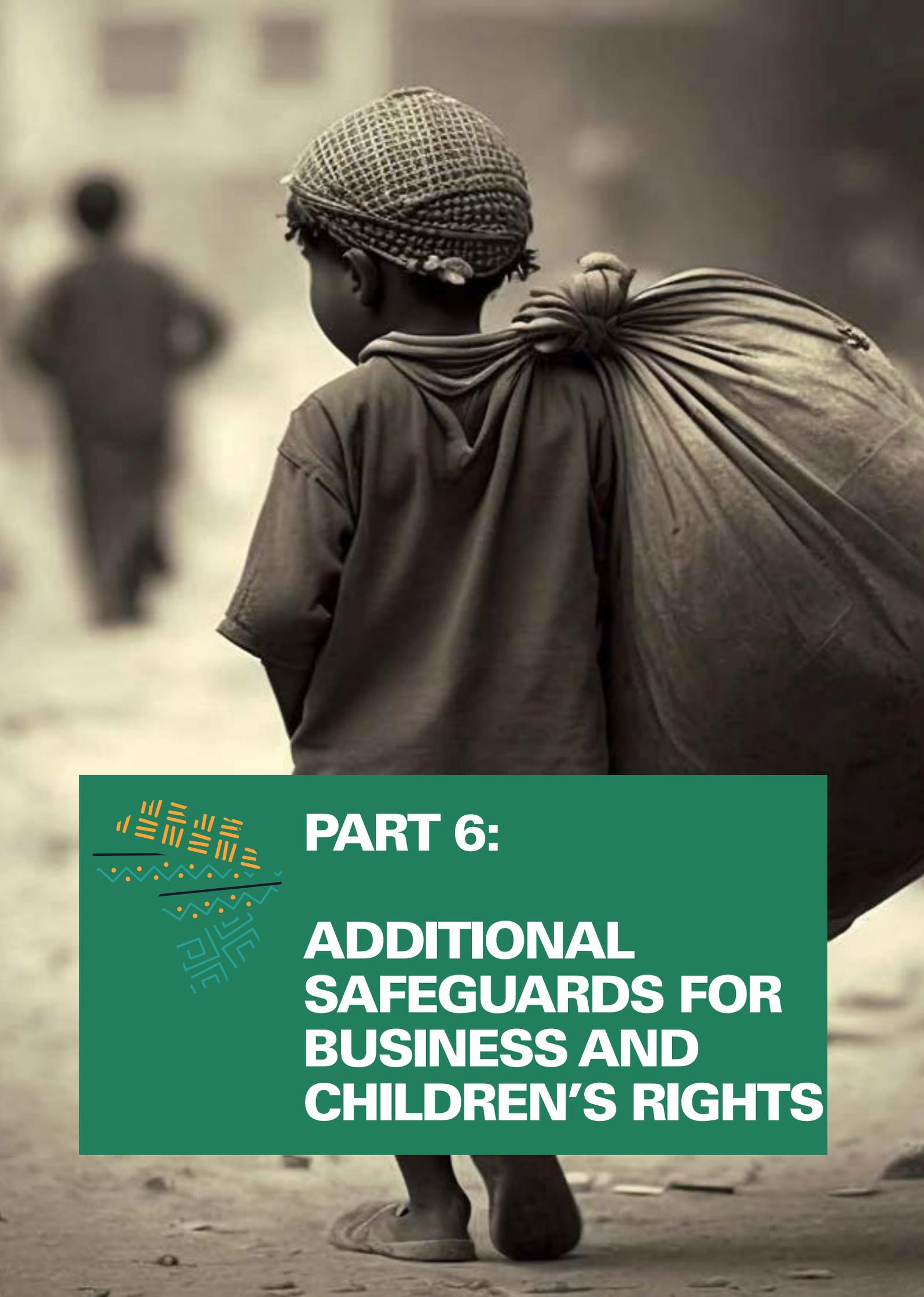
478 ACERWC, General Comment No 7 on Article 27 of the ACRWC “Sexual Exploitation”, available at: https://www.acerwc.africa/sites/default/files/2022-09/General-Comment-on-Article-27-of-the-ACRWC-English_0.pdf (accessed 20 October 2022) para 17.



- Mauritius, there is the Code of Advertising Practice, developed by the Independent Broadcasting Authority in terms of the Independent Broadcasting Authority Act, which includes a chapter on the protection of children. The chapter provides several protections including the following:
 - A prohibition on advertisements on a programme intended for children which may result in physical, mental, moral or emotional harm to them.
 - Advertisements must not lead children to believe that unless they acquire or use the product advertised they will be inferior in some way
 - Advertisements must not misguide minors towards obvious abuse or excess.
 - Care and restraint are recommended when showing naked or partly undressed children in advertisements.
 - In no circumstances should gambling advertisements target minors.
 - Any situation in which children are to be seen in television advertisements should be carefully considered from the point of view of safety.

However, there remain countries with incomplete or partial protection of children's rights, both in the context of digital media and advertising. Included in these are the DRC and Burkina Faso.





PART 6:

ADDITIONAL SAFEGUARDS FOR BUSINESS AND CHILDREN'S RIGHTS

PART 6: ADDITIONAL SAFEGUARDS FOR BUSINESS AND CHILDREN'S RIGHTS

6.1 National Action Plans on Business and Human Rights

Some African countries have made progress in developing National Action Plans (NAPs) on business and human rights, which also include children's rights.⁴⁷⁹ Whilst Kenya and Uganda were first, more than ten other African countries have initiated the development of NAPs. The UN Working Group on Business and Human Rights strongly encourages all States to develop, enact and update periodically a national action plan on business and human rights. This was echoed at a regional conference on business and human rights, held in Maputo Mozambique in December 2022.

Kenya was the first African country to develop a draft national action plan on business and human rights. National action plans ideally provide a structured and comprehensive framework for anchoring national regulation of business conduct in relation to human rights.⁴⁸⁰ The Kenyan NAP stipulates national policy priorities on BHR, with a focus on five substantive themes: (1) Land and Natural Resources; (2) Revenue Transparency; (3) Environmental Protection; (4) Labour; and (5) Access to Remedy. There is also a chapter on monitoring and implementation. Children are mentioned only twice, in relation to access to education and the prohibition of child labour, although there is no doubt that children's access to their rights will benefit from (e.g.) revenue transparency and combatting illicit financial flows (as discussed above), as well as environmental protection and an improved regulatory environment for labour.

During the 2nd Universal Periodic Review (UPR) in 2016, one of the recommendations to Uganda was to develop an action plan on Business and Human Rights to implement the UNGPs. A Regulatory Impact Assessment (RIA) was conducted to determine the best way to address human rights violations by business activities. The development of a NAP on BHR was recommended as the most suitable way to proceed. A Technical Working Committee was created to guide the NAP process. Membership of the

479 For an overview, see <https://www.undp.org/sites/g/files/zskgke326/files/2022-10/Baseline%20Assessment%20BHR%20Report%20EN%20-%20web.pdf> (accessed 24 March 2023).

480 The Kenya national action plan on business and human rights – a case study on process, lessons learned and ways forward (Danish Institute for Human Rights, November 2020). See the NAP at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/NationalPlans/2019_FINAL_BHR_NAP.PDF (accessed November 2022).



committee comprised of individuals from government ministries, departments and agencies, CSOs and development partners. Consultations were conducted to obtain the business community (including business actors and trade unions)'s points of view on business and human rights. The five-year NAP adopted in 2021 focuses on eight thematic areas that were identified during the consultations: Land and Natural Resources; Environment; Labour rights; Revenue transparency, Tax exemptions and corruption; Social service delivery by private actors; Consumer protection; Access to remedy; and women, vulnerable and marginalized groups. The Ugandan NAP on BHR aims to provide a comprehensive framework to coordinate efforts across sectors to ensure respect for human rights in business operations, not just the workplace.⁴⁸¹ Children's rights, the ACRWC and the CRC are expressly referred to in the NAP.

A strategic workshop on business and human rights was conducted by the Tanzania National Human Right Institution (NHRI), The Commission for Human Rights and Good Governance (CHRAGG), and the Danish Institute for Human Rights (DIHR), in August-September 2021. The workshop was conducted as part of the Responsible Business Conduct in Sub-Saharan Africa Project of the Danish Institute for Human Rights. The three-day workshop was attended by 18 participants from CHRAGG, including the Honourable Chairman, Vice Chairman and Commissioners.

In July 2022, Ghana published a National Baseline Assessment (NBA) with the support from donors. The NBA focused on the petroleum, telecommunications, mining and finance sectors. On 28 November 2022, at the 11th UN Forum on Business and Human Rights, Ghana announced its commitment to launch a NAP by July 2023.⁴⁸²

Such initiatives are worthy of replication in other State parties

6.2 Analyzing the ways companies address children's rights in their business activities

6.2.1 Afrifresh – South Africa

Afrifresh is a South African producer and exporter of fresh fruit. The company specializes

481 <https://globalnaps.org/country/uganda/> (accessed 31 October 2022). According to this website, Nigeria, Ghana, Liberia and Morocco are busy developing such plans.

482 <https://globalnaps.org/country/ghana/#:~:text=The%20NBA%20focused%20on%20the,within%20the%20national%20legal%20framework> (accessed 9 April 2023).

in table grapes and citrus (grapefruits, oranges, soft citrus, and lemons), and has buyers in more than 50 countries. Women represent close to 50% of Afrifresh's casual workforce. The company provides on-site accommodation to full-time workers and temporary accommodation to seasonal workers. While many female workers leave their children with grandparents, for those who have to bring them with them to the workplace, the company has set up five crèches for children aged up to five years old. Each crèche is registered with local authorities and has trained workers taking care of five to ten children each. Service is either free or accessible at a small fee, and parents cover the cost of food. Generally, workers are satisfied with the service, especially with the effect it has in stabilizing their working day and improving their children's development.⁴⁸³

6.2.2 Safaricom – Kenya

Safaricom is a telecommunications company and the largest company in Kenya. It operates two crèches on-site in Nairobi, offering free services for employees' children between three months to seven years. Parents bring their own food, clothes, and diapers. Safaricom covers operating costs and contracts an external provider to operate them. Initially, employees paid for these services, but when they were under-utilised, it offered them for free of charge. This unlocked the company's ability to attract worker demand, and reduced childcare-related absenteeism and workplace disruption.⁴⁸⁴

In 2019, Safaricom conducted a comprehensive children's rights risk assessment utilizing the UNICEF Mobile Operators' Child Rights Self-Assessment Tool (MO-CRIA). Following the assessment, the company committed to a number of actions, namely, to hold suppliers accountable and ensure they do not employ children in any part of their value chain; avoid using children in advertising and portray children positively when

483 Giulia Salmaso, et. al, "Business Case for Employer-Supported Childcare. Lessons from the tea sector in Rwanda and recommendations for scale and sustainability" (October 2021) p.9, available at: <https://www.unicef.org/rwanda/media/3536/file/Business%20Case%20for%20Employer-supported%20Childcare.pdf> (accessed 28 July 2022); IFC, "Tackling Childcare: The Business Case for Employer-Supported Childcare", available at: https://www.ifc.org/wps/wcm/connect/cd79e230-3ee2-46ae-adc5-e54d3d649f31/01817+WB+Childcare+Report_FinalWeb3.pdf?MOD=AJPERES&CVID=IXu9vP- (accessed 28 July 2022).

484 Ibid.



it becomes necessary to use them in advertising; and corporate social investment initiatives which focus on children's health, education and empowerment.⁴⁸⁵ Safaricom also extended its maternity leave allowance to four months - longer than the statutory three months – and offers a flexible six months when mothers return to work.⁴⁸⁶

6.2.3 Nyabihu Tea Factory – Rwanda

The construction of a tea plantation based Early Childhood Development (ECD) Centre by the Nyabihu Tea Factory, is assisting parents, children and 'enabling the company and plucker's increased productivity as a result.'⁴⁸⁷ Within proximity to the tea plantation, the ECD centre, managed by trained caregivers and staff, attends to children whose parents are working in the plantation. The Centre feeds the children, keeps them warm, and teaches the children new songs, poems, and other educational instructions while their parents are working. Before the ECD centre was established, a parent, Haramorimana Yelin, stated that she would only pluck between 20 and 30 kilogrammes per day, but with the ECD centre in place, she can pluck up to 45 kilogrammes, increasing her productivity.⁴⁸⁸ The centre has helped improve the nutrition and school readiness of children.

About 16 tea companies in Rwanda have established child-friendly centres, where close to 2,000 children between the ages of six months to six years benefit every day.⁴⁸⁹ No doubt the establishment of these ECDs means less attrition of trained pluckers, improved company-community relations, increased productivity and enhanced corporate reputation for the company.⁴⁹⁰

485 Safaricom, "Towards reducing inequalities, 2019 Sustainable Business Report" p. 64, available at: https://www.safaricom.co.ke/sustainabilityreport_2019/ebook/files/assets/common/downloads/2019%20Sustainable%20Business%20Report.pdf?uni=3b6bd6e9e7598063c37c6cfa5694970 (accessed 22 July 2022).

486 Ibid, p. 69.

487 Pamela Mudakikwa, "Childcare services at tea plantations - a win for everyone" (27 October 2021), available at: <https://www.unicef.org/rwanda/stories/child-care-services-tea-plantations-win-everyone> (accessed 22 July 2022).

488 Ibid.

489 Ibid.

490 Ibid.

6.3 Remedies for rights violations

First, it remains the duty of State parties to set in place the required regulatory frameworks to address the interface between children's rights and businesses operating in their territory.

Remedies are '[a] means through which a right is either enforced or the violation of a right is prevented, redressed or compensated'.⁴⁹¹ Courts can make a variety of decisions or orders. For instance, they can order restitution; order the issuing of public apologies; make findings that duty-bearers acted wrongfully and prescribe actions to be taken to remedy this; and bring perpetrators of human rights violations to justice.⁴⁹² They can make declarations of rights, declarations that a law, policy or practice is unconstitutional, and impose mandatory and structural interdicts.⁴⁹³ Reparations are means used by a State in breach to repair the consequences of a violation.⁴⁹⁴ The major forms of reparation include restitution,⁴⁹⁵ compensation,⁴⁹⁶ rehabilitation,⁴⁹⁷ satisfaction,⁴⁹⁸ and guarantees of non-repetition.⁴⁹⁹ The use of restitution serves to restore to their original state before the violations occurred. This may include the restoration of the enjoyment of rights such as the restoration of liberty; the return to one's place of residence; restoration of employment; and return of property.⁵⁰⁰ Compensation, on the other hand, deals with economically assessable damage.

491 Black's Law Dictionary, 6th ed (1990) 1294. Some of the material that follows in this article draws from a paper presented in 2019 at the University of the North West by Dr Robert Nanimbo, senior lecturer, University of the Western Cape and a current member of the ACERWC.

492 African Child Policy Forum (2020). Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa. Addis Ababa: p 15.

493 Note 24 above at p 30-31.

494 Diana L. Shelton, Remedies in International Human Rights Law 2 ed 2005 7.

495 Rule 19 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law (Adopted by Resolution A/RES/60/147 at the 60th session, Agenda item 71(a) of the General Assembly 21 March 2006).

496 Rule 20.

497 Rule 21. Rehabilitation as a form of reparation includes medical, psychological, legal and social service

498 Rule 22.

499 Rule 23. The Basic Principles recommend the use of guarantees of non-repetition; largely aimed at requiring the State to take steps to ensure the prevention of the re-occurrence of the violations. These have been used by some international human rights bodies including the Rome Statute of the International Criminal Court.

500 A/RES/60/147, article 9, para. 19.



Rehabilitation deals with the medical, psychiatric, psychological and related care for victims.⁵⁰¹ In addition to their being victim-specific, remedies may aim to prevent the recurrence of rights violations by, for example, ordering changes in the law. Remedies in international law are governed by either procedural or substantive connotations.⁵⁰²

There are obvious channels to pursue for a remedy for a child rights violation at the international level, including bringing a communication to the ACERWC where a State party to the ACRWC is in breach of its treaty obligations.⁵⁰³ Cases may also be brought at the level of regional courts such as ECOWAS. An example would be South Africa's failure to rehabilitate environmental dangers caused by mining, and Zambia's failure to provide remediation also as regards mines, discussed earlier in this report. These avenues could provide substantive relief for victims, as in Institute for Human Rights and Development in Africa and Finders Groups Initiative on behalf of TFA v Cameroon,⁵⁰⁴ where (amongst others) the ACERWC awarded monetary compensation to the tune of "50 million CFA for the pain, suffering and harm to the complainant's dignity, including physical, mental and emotional trauma."⁵⁰⁵ An impediment might be the need to exhaust local remedies. Furthermore, since businesses are not State parties, actions cannot be commenced against them in this way at the regional or international level (absent using tort law abroad, as in some cases referred in this report).

A breach of human rights as such is not usually a form of harm recognised in national tort laws. However, an abuse of human rights may also give rise to a tort claim where the abuse causes physical injury or damage to property, for instance. Framing human rights abuses as tort claims may present a valuable means of providing redress and accountability for rights-holders. The availability of tort claims may also contribute to fulfilling the state's duty to ensure access to an effective remedy under human rights

501 Ibid, article 9, para. 21. The victim may be a direct or indirect victim. For instance, Principle 8 of the Basic Principles states that 'victim' comprises not only direct, but also indirect victims. Victims may include the immediate family members or dependents of the direct victim who suffered the harm (article 9, para 8).

502 Before the substantive and procedural aspects are engaged, it should be noted that various international instruments recognise this right. For instance, Article 9(5) ICCPR provides that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". The same is in Article 5(5) ECHR and Article 85(1) Rome Statute of the International Criminal Court.

503 See in general J Sloth-Nielsen "Remedies for child rights violations in African human rights systems" 2023 De Jure (forthcoming).

504 Communication No. 006/Com/002/2015.

505 Cameroon decision para 81.

treaties. On the other hand, tort claims may not fully capture or offer the best or an appropriate remedy for the wrong done to an individual when their human rights are abused. Tort-based remedies do not usually seek to identify root causes or provide a mechanism to resolve patterns of abuses beyond the case in question.⁵⁰⁶

There is, then the question of statutory liability: In most states, businesses can be liable for breaches of specific statutory duties imposed on them, for instance, by national laws on health and safety, environment, data protection or privacy, and discrimination. When a due diligence law is passed, whether a company performs due diligence as required under it may become a relevant factor in evaluating its fulfilment of such statutory duties. As a specific type of statutory liability, consumer protection laws may prohibit false advertising, misleading and deceptive conduct by companies, and the production, sale or distribution of dangerous, fake or defective products.

Exceptionally, however, the law may establish “strict liability” offences where no fault on the part of a defendant is needed. Such offences, which are narrowly defined or limited in advance to specific factual circumstances, are found in the areas of product liability, defamation and infringement of intellectual property rights, for example. Strict liability might be attached to grave harms, such as child labour, forced labour or discrimination.

Strategic litigation⁵⁰⁷ in domestic or, increasingly, foreign courts, is a much talked about and debated avenue for those seeking a remedy. A few examples relevant to Africa have been cited above but for the sake of completeness two are mentioned here.

506 For a variety of reasons, holding parent companies liable for subsidiaries and “lead companies” liable for abuses at the “bottom” of a supply chain may be legally challenging. The immediate perpetrators of human rights abuses may be separated from parent or “lead companies” by many layers of contracting, ownership and geographical distance, for instance. In such a scenario, defendants are likely to argue that the requirements of causation and foreseeability, amongst others, are not met. Indeed, this approach has been taken by defendants even where harms occurred in the first tier of their supply chain.

507 See in general African Child Policy Forum (2020). Training Manual on Strategic Litigation and Individual Complaints Mechanisms for Children in Africa. Addis Ababa: p 15.



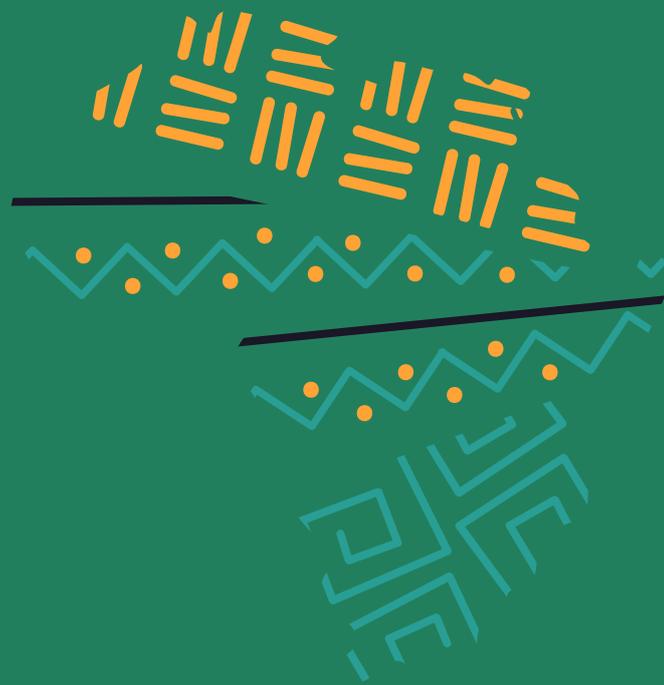
Case Study: Vedanta Resources Ltd's case.

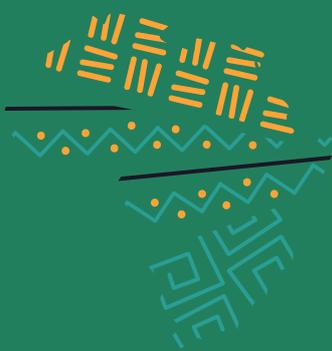
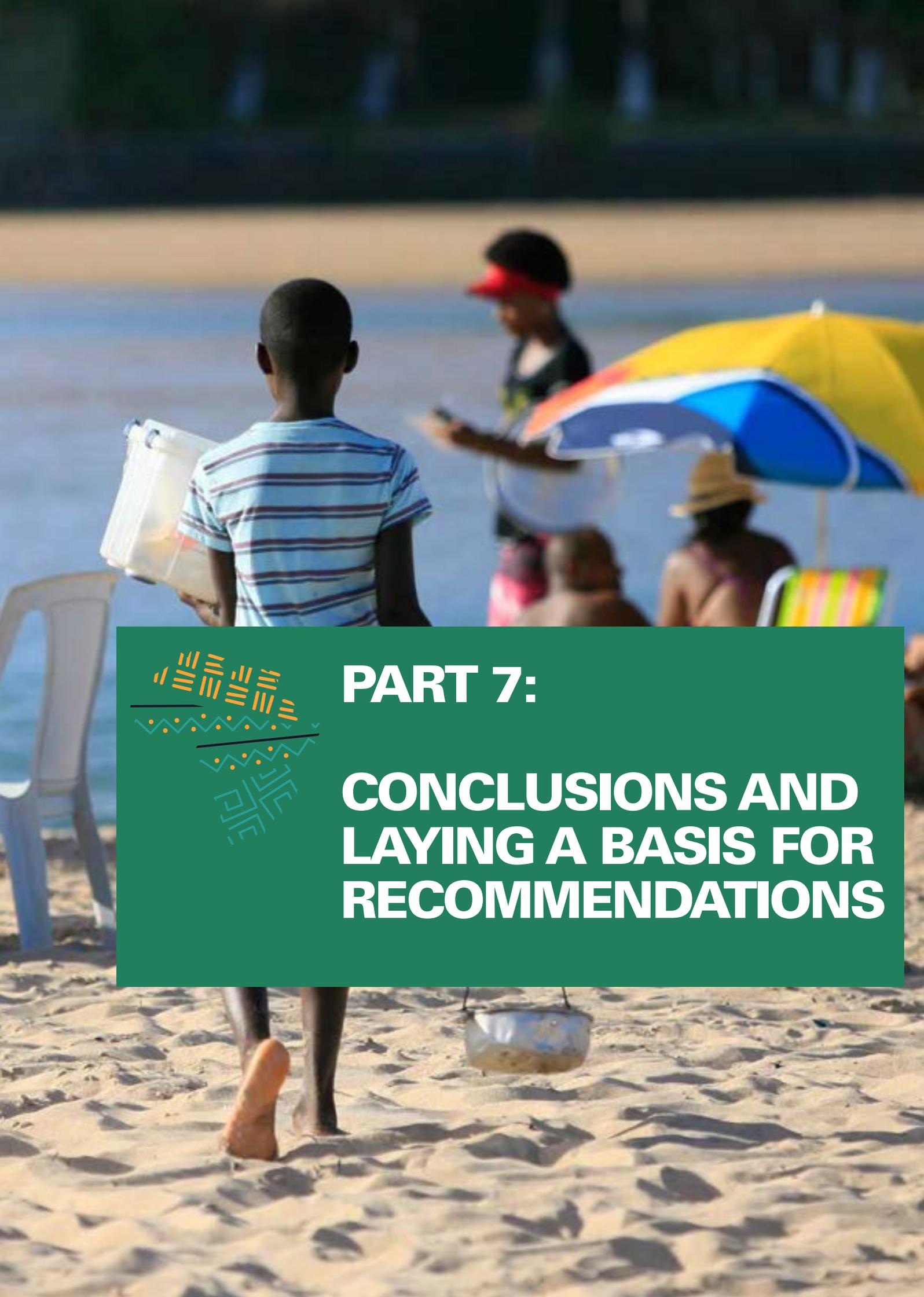
A legal claim was brought by more than 2,500 Zambian villagers against Konkola Copper Mines Plc and its parent company, UK-based Vedanta Resources. The claimants included 643 children. The claim, issued in 2015, centred on pollution from the Nchanga Copper Mine, run by Konkola, with 16,000 employees in Zambia, the country's biggest private employer. Vedanta, one of the largest mining companies in the world, bought a controlling share in Konkola, in 2004. The claimants alleged that the pollution severely impacted the lives of people living in nearby villages Shimulala, Kakosa, Hippo Pool and Hellen where the primary source of income is farming and fishing. It was claimed that toxic effluent discharge from the mine damaged local land and waterways used for irrigation and the use of polluted water for drinking, washing and bathing caused residents severe health problems. The court noted that: "Without admission of liability, Vedanta Resources Limited and Konkola Copper Mines Plc confirm that they have agreed, for the benefit of local communities, the settlement of all claims brought against them by Zambian claimants represented by English law firm Leigh Day."

As regards Malawi, women plantation workers are suing their employer Lujeri and UK parent company PGI in the UK courts alleging systemic sexual harassment & abuse.⁵⁰⁸ The claims included 22 cases of sexual harassment, 13 cases of sexual assault, 11 cases of coerced sexual relations and 10 cases of rape. Half of the workers were working in macadamia orchards. Many workers reported they had lost their jobs or faced wage deductions due to the abuse, and the majority feared reporting the abuse in fear of losing their jobs or facing retaliation.

As regards the last possibility, complaints may be brought to national human rights commissions (NHRIs) alleging infringements to children's right by organs of the state or by businesses. Remediation or compensation may be one outcome of this, where the NHRI concerned has such statutory powers.

508 Business and Human Rights Resource Centre, "Malawi: Women plantation workers are suing their employer Lujeri and UK parent company PGI in the UK courts alleging systemic sexual harassment & abuse", available at: <https://www.business-humanrights.org/en/latest-news/malawi-women-plantation-workers-are-suing-their-employer-lujeri-and-uk-parent-company-pgi-in-the-uk-courts-alleging-systemic-sexual-harassment-abuse/> (accessed 15 October 2022).





PART 7:

CONCLUSIONS AND LAYING A BASIS FOR RECOMMENDATIONS

PART 7: CONCLUSIONS AND LAYING A BASIS FOR RECOMMENDATIONS

This study has identified a multitude of hazards for children in the context of business, which imperil the fulfilment of their rights. These range from life threatening events such as poisoning with contaminated pharmaceuticals, to environmental degradation caused by the oil (and other) industries. Far too many children are engaged in child labour, with figures pointing to an increase in the incidence of child labour over the last five years. Children are engaged in hazardous occupations and too many very young children are having their health and education imperilled by involvement in labour related activities.

The answer is not necessarily to be found in legal regulation, as most if not all countries on the continent set a minimum age for work in accordance with the ILO Convention 172. Moreover, labour laws are not in short supply (though a detailed examination of these is not going to be a useful exercise for the purposes of this report). Rather, the main recommendations are twofold: implementation and enforcement of existing standards, which remains weak throughout Africa; and ongoing engagement between governments and the business sector to forge solid partnerships to promote human and children's rights in each sector. Improved access to social security for children and their parents could be a key factor in diminishing the need for children to work, especially in family businesses. It must be emphasized that child labour is the product of systemic inequalities and unfair trading conditions, especially endemic poverty. As long as vulnerable families are unable to achieve a decent living, ending child labour will remain difficult. Better incomes, quality schooling, addressing discrimination, exploitation and abuse, awareness of child rights, legal interventions and social changes are all necessary factors to combat child labour. However, in the current worsening economic climate, without drastic action by member states, the likelihood exists that greater and greater numbers of children will be drawn into child labour.

Only six countries, being Ghana, Kenya, Mozambique, South Africa, Uganda, and Zambia, have constitutional provisions that mandate business respect for human rights. Consequently, African countries should provide constitutional provisions that oblige businesses to respect human rights. Additionally, sectorial legislation should reflect human rights provisions that protect women, children, and vulnerable members



of the public. For example, section 39 of Uganda's Land Act (1998) provides for the consent of spouses and children before any land transaction relating to land where the family derives sustenance. Section 27 also safeguards the rights of women, minors, and persons with disabilities in decisions that relate to customary land. States can enact new laws that integrate children, business and human rights. Existing laws must be periodically reviewed to ensure they are able to adapt to contemporary challenges.

While these findings underpin the recommendations which follow in Part 8, some remaining issues are detailed, also as a basis for the recommendations.

7.1 The African Continental Free Trade Area (AfCFTA) Agreement and implications for children's rights and business in Africa

The Lagos Plan of Action signed in 1980 created an avenue for the African Union (AU) to establish the African Economic Community through a free trade area,⁵⁰⁹ customs union and a common market amongst the fifty-five African Member States.⁵¹⁰ This was aimed at achieving greater cohesion and economic integration within the continent.⁵¹¹ These initiatives resulted in the ratification of the Continental Free Trade Area (AfCFTA) Agreement,⁵¹² an agreement to make intra African trade easier, competitive, minimization of tariff and non-tariff barriers and gradual elimination of ninety percent tariffs over a period of time.⁵¹³

The Agreement seeks to "create a single market for goods, services, facilitated by

509 See the Treaty Establishing the African Economic Community, Lagos Plan of Action for the Economic Development of Africa 1980–2000 4 (1980); Adopted on 3 June 1991; entered into force on 12 May 1994.

510 See the Preamble and Art. 3 of the 'Agreement establishing the African Continental Free Trade Area (AfCFTA)'.

511 See also the Statement of the Chairperson of The African Union Commission, Moussa Faki Mahamat at the Tenth Extraordinary Session of the Assembly of the Union on the African Continental Free Trade Area, Kigali, Rwanda (21 Mar. 2018) calling the Agreement the fourth ambitious integration initiative of the continent alongside the AEC, AU and AUDA-NEPAD, available at: https://au.int/sites/default/files/speeches/34028-sp-kigali.cfta_21.march_18.final.pdf (accessed 30 July 2022).

512 See Oyeniyi Abe, Sewa Taye, "The 'Flexibility' Standard in the African Union and its Ramification for the Implementation of the African Continental Free Trade Area (AfCFTA) Agreement" (2021) 16(2) *Global Trade and Customs Journal* 80.

513 AU, Report to the Specialized Technical Committee on Trade, Industry and Minerals: Progress on the African Continental Free Trade Area (AfCFTA) for the Period from May 2016 to Dec. 2018, 2& 3 (AUC/DTI/AfCFTA/STC/Rep/D).

movement of persons in order to deepen the economic integration of the African continent and in accordance with Agenda 2063; create a liberalized market for goods and services through successive rounds of negotiations; contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State parties and RECs; promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State parties” amongst other objectives.⁵¹⁴ The Agreement entered into force on 30 May 2019.⁵¹⁵ As at May 2022, 43 countries have deposited their instruments of AfCFTA ratification, while 54 countries have signed the Agreement.⁵¹⁶

Current negotiations and deliberations around AfCFTA have not sufficiently considered the importance of human rights implications of AfCFTA.⁵¹⁷ Trade liberalization has huge, varied influences on numerous socio-economic groups due to unequal access to assets, credit and economic opportunities. Children and women who constitute a larger percentage of informal cross-border traders “particularly face acute challenges to participating in welfare-enhancing trade.”⁵¹⁸ In a work place environment, diverse categories of employees can face differential effects of trade liberalization, depending on the sector of employment. For instance, trade liberalization in the agricultural industry could raise some concerns on livelihoods and food security, where child labour and unpaid or payment below minimum wage is made.

While AfCFTA recognises the importance of human rights for the development of international trade and economic cooperation,⁵¹⁹ it does not contain any specific

514 Article 3 of AfCFTA.

515 TRALAC, “African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents”, available at: <https://www.tralac.org/resources/by-region/cfta.html> (accessed 30 July 2022).

516 Tralac, Status of AfCFTA Ratification, available at: <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 30 July 2022)

517 AfCFTA negotiations are scheduled in phases. Phase I centered on trade in goods and services, which led to the production of the AfCFTA. Current negotiations in Phase II covers three broad areas: Investment, Intellectual Property rights, and Competition Policy. Phase III covers will include discussions on e-commerce. Some aspects of Phase I negotiations are still ongoing. Such aspects include State parties’ specific commitments on key priority areas including business services, communications, finance, tourism, and transport.

518 UNECA, “Report: The Continental Free Trade Area (CFTA) in Africa – A Human Rights Perspective” p. 3, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf (assessed 30 July 2022) [‘UNECA-AfCFTA’].

519 Preamble to the Agreement.



provision on children, human rights and the obligations of businesses.⁵²⁰ The Agreement mentions 'women' once, where it enjoins State parties to mobilise resources, and implement measures to improve "the export capacity of both formal and informal service suppliers, with particular attention to micro, small and medium size; women and youth service suppliers."⁵²¹ Most African economies are run on an informal basis. Several informal cross-border traders, largely women and children, live in dangerous environments. They are frequently exposed to risky or unsanitary working conditions and cases of child labour, illegal migration, sexual violence, and lack of access to socio-economic rights are widespread. Furthermore, income generated from informal cross-border trade is oftentimes inadequate for meeting family needs such as water, food, health, and children's educational fees.

In negotiating, drafting, and adopting the remaining phases of the AfCFTA Protocols, it is important that discussions consider human rights impact of trade and services on children and women in Africa, especially when informal trade drives African economies mostly. Such discussions must be inclusive, participatory and consider the input of children and women. A human rights-based approach to trade reinforces the accountability of businesses. In addition, business' human rights obligations require States to ensure that children and women's rights are protected and respected so as to eradicate "discrimination, inequalities, and practices that negatively affect" these rights.⁵²²

Almost all African countries have ratified international human rights instruments on children's rights. However, very few, if any, have adopted policies or enacted laws that protect children from the impact of business activities. AfCFTA could be a veritable tool in this regard. Protection of women and children under trade agreements can lead to speedy economic growth. Research has shown that "trade policies do not necessarily have the same impact on men and women" and that these differences "can influence

520 Interactions with the AfCFTA Secretariat via email considered the issue of child labour as a major concern, and that AfCFTA process must take this into account. However, the general guidance from AfCFTA leadership is to "avoid discussing issues of human rights and environment in the AfCFTA, because they have political implications beyond our control".

521 Article 27 (2) (d) of AfCFTA.

522 UNECA-AfCFTA (above) p. 15.

trade policy outcomes” even where a different objective is desired.⁵²³ Consequently, trade agreements such as the AfCFTA must recognize the rights of children and the human rights obligations of businesses.

Hopefully, specific reference to children and human rights obligations will be incorporated under the Protocol on Investment to guarantee achievement of the Agenda 2063 and responsible business practices in Africa. Also, a Human Rights Impact Assessment (HRIA) is needed to verify actual or potential human rights impact of trade activities under AfCFTA, which will guide further negotiations and encourage “equitable, poverty-reducing and human rights-consistent outcomes.”⁵²⁴

Article 28 provides that the AfCFTA be subject to review every five years upon its entry into force, to “ensure effectiveness, achieve deeper integration, and adapt to evolving regional and international developments.”⁵²⁵ Expectantly, this Article could create a pathway for considering the integration of, and provide clarity for, specific children’s rights obligation of businesses.

7.2 Safeguarding

Child safeguarding refers to all of the actions a company takes to keep all children they come into contact with safe – and includes the proactive measures put in place to ensure children do not come to harm as a result of any direct or indirect contact with the company. Child safeguarding encompasses the prevention of physical, sexual and emotional abuse, neglect and maltreatment of children by employees and other persons whom the company is responsible for, including contractors, business partners, visitors to premises and volunteers.⁵²⁶ A child safeguarding policy provides companies with a formal approach to managing this duty of care. In addition to its primary role, ensuring the well-being of children, a good child safeguarding policy

523 Ibid, p. 16.

524 UNECA-AfCFTA (above) p. 37.

525 Article 28 of AfCFTA.

526 Child safeguarding toolkit for business (UNICEF 2018, New York)



also protects the company, its employees and its reputation. Child protection is an important part of safeguarding and refers to the actions a company takes to address a specific concern that a particular child is at risk of significant harm due to her or his contact with corporate actors, business partners, products or services.

AIRLINE SETTLES CASE ALLEGING PILOT'S ABUSE OF CHILDREN

In 2016, an airline settled a case regarding the abuse of 38 children aged 5–18. The case centred on the actions of a pilot who allegedly abused children over the course of 2001–2013 while volunteering at company-sponsored orphanages in Kenya and Uganda. The prosecution argued that the company could be held vicariously liable for the pilot's actions and that the airline had a duty of care for the children abused in company-sponsored orphanages.

The airline agreed to the settlement, but denied liability. In response, lawyers for the victims said, "This settlement should send a message to organizations which send their employees to work or volunteer with children. They need to ensure proper safeguards are in place to prevent such horrific acts."

If the airline had an effective safeguarding programme in place, this abuse could have been prevented. For example, if appropriate recruitment, training and procedures for engagement at the orphanage, as well as reporting structures for flagging concerns had been in place, the pilot might never have been recruited by the company or allowed to engage directly with children.

Child safeguarding toolkit for Business (UNICEF New York, 2018) p 8.

The UNICEF Child Safeguarding Toolkit outlines six steps that companies should pursue in developing a safeguarding policy. These are risk assessment; gap analysis (to map the relevant policies and processes already in place-this enables the business to understand the extent to which child safeguarding has been integrated into its risk management approach); policy commitment; creating and rolling out an implementation plan (including awareness raising and training); establishing a reporting structure to process concerns; and taking action when a concern is raised.

In General Comment No 5 (General Measures of Implementation and systems strengthening for child protection) the ACERWC advised that "State parties should

ensure that CSOs and International Organisations that work directly with children must be required to adopt child safeguarding policies. Persons who have abused children should be prevented from working with them, including in civil society organisations, even as volunteers.”⁵²⁷

7.3 Child Participation

Child participation is one of the four key pillars of a children’s rights approach. Accordingly, children should be consulted in the development of National Actions Plans on business and human rights, as in other domains where their interests and the activities of business intersect. It is incumbent upon States to facilitate this.

The consultation with working children on 19 October 2022 for the purposes of this study yielded useful contributions.⁵²⁸ The children were engaged variously as a seamstress, brick maker, agricultural worker, vendor in the market, apprentice mechanic, and waitress in a restaurant, to mention a few sites of work. Some recommendations include:

- That their employers access materials (tools, fabrics for seamstresses) to enable them to learn to do their jobs;
- That Ministries must engage with capacity building of working children;
- That expensive fees for stalls at marketplaces be waived for child vendors;
- That their health be prioritised and conditions for children who work in agriculture be improved, such as by being given protective wear;
- That work allowances should be increased;

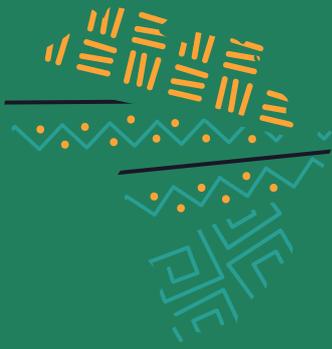
527 ACERWC 2018, par 6.7

528 Convening the consultation was the African Movement of Working Children and Youth, a youth led organisation working in 28 countries in Africa. They have 342,727 members and focus on four key priorities: Protection (informing educating and empowering working children and youth; voice (raising voices amongst authorities and policy makers to promote and support the respect for children’s rights; skills building (to transform from victims into actors via experience sharing; and civic participation (advocacy for the participation of children in all civil spaces and community engagement in decision making). Source: Brief on the African Movement of Working Child and Youth.



- That parents and communities should be educated about their responsibilities towards children;
- That the ACERWC should develop materials to support the above; and
- That they should be given greater recognition as working children, and be better appreciated.





PART 8:

RECOMMENDATIONS



PART 8: RECOMMENDATIONS

8.1 States

African Union Member States should:

- a. Develop National Baseline Assessments as these are instrumental to identifying and addressing how businesses impact the rights and welfare of children.⁵²⁹ States should therefore encourage a survey of business induced human rights violations, assess their key laws and regulations that guide the conduct of businesses to identify the extent to which they address human rights impacts on children, their enforcement, institutional arrangements, gaps, and recommendations;
- b. Develop NAPs on children, business and human rights as this is critical to realizing the SDGs, UNGPs, and other human rights impacts on children. The NAPs must set out the expectations of governments, its agencies and businesses at the same time outlining key priorities and commitment towards the implementation of children, business and human rights principles.⁵³⁰ The NAPs must include pathways towards implementation, how the priorities will be measured and evaluated, periodic review, independent expert to monitor progress in implementation. The NAPs should be for an initial period of five years.

The NAPs must develop procedural guidelines for businesses, individuals and communities in their negotiations for land access and acquisition. These guidelines will ensure and safeguard the participation of women, and children. The Plans must provide guidance on how children's rights should be considered in the process of developing NAPs and what the content of focus should be

⁵²⁹ For instance in its response to the questionnaire circulated to member states, Libya cited lack of evidence and knowledge on what needs to be done, lack of business and human rights principles, guidelines, and standards; limited financial resources; lack of skilled manpower; lack of technical skills and expertise on business and human rights; poor co-ordination among relevant sectors; attitudes of policy makers and businesses and unavailability of adequate data on business' impact on children's rights.

⁵³⁰ Burkina Faso in their response to the questionnaire cited as a good practice having legal provisions requiring all companies of a certain size to set up a social service and the existence of a department responsible for coordinating and monitoring specialized social services, including those of companies.



- when setting priorities for action on children's rights. States can adopt the checklist provided in a joint report provided by UNICEF, Danish Institute for Human Rights, International Corporate Accountability Roundtable (ICAR);⁵³¹
- c. Provide adequate funding for the development of NAPs. Lack of financial resources will complicate the process for obtaining adequate information as a baseline for drafting the NAPs. The provision of funds and other resources will also guarantee the appointment of technical experts on children, business and human rights that will assist in the development of NAPs;⁵³²
 - d. Provide free and compulsory education for all children and re-integrate into the school system children whose education has been disrupted because of their involvement in ASM or child labour activities;
 - e. Proactively identify and stop all forms of corruption which deprive children from fulfilling their rights, including their rights to education, health and protection';
 - f. Identify remedies and responses to potential child rights violations by businesses, including through strategic litigation, improved regulation by States, and enactment of legislation;
 - g. Systematically collect, monitor and make available information on child labour complaints as well as the types and numbers of inspections conducted, citations issued, prosecutions undertaken, and penalties applied in relation to child labour violations;

531 See further Cathrine Poulsen-Hansen, 'Children's Rights in National Action Plans (NAPs) on Business and Human Rights' available at [https://sites.unicef.org/csr/files/Childrens_Rights_in_NAPs_WEB\(1\).pdf](https://sites.unicef.org/csr/files/Childrens_Rights_in_NAPs_WEB(1).pdf); see also See also, UNICEF, 'Obligations and Actions on Children's Rights and Business: A practical guide for States on how to implement the United Nations Committee on the Rights of the Child's General Comment no. 16' https://sites.unicef.org/csr/css/CSR_GC_OBLIGATIONS_AND_ACTIONS_FINAL_AUGUST05.pdf The checklist is anchored on 8 indicators: governance; resources; stakeholder mapping; participation; National Baseline Assessment; scope; content; priorities; transparency; follow-up.

532 The Guidance on NAP process follows a five-phase process, which consists of fifteen steps. The process is as follows: Phase 1: Initiation; Seek and publish a formal Government commitment; Create a format for cross-departmental collaboration and designate leadership; Create a format for engagement with nongovernmental stakeholders; Develop and publish a work plan and allocate adequate resources. Phase 2: Assessment and consultation; Get an understanding of adverse business-related human rights impacts; Identify gaps in State and business implementation of the UNGPs; Consult stakeholders and identify priority areas. Phase 3: Drafting of initial NAP; Draft the initial NAP; Consult on the draft with interested stakeholders; Finalize and launch the initial NAP. Phase 4: Implementation; Implement actions and continue cross-departmental collaboration; Ensure multi-stakeholder monitoring; Update: Evaluate impacts of the previous NAP and identify gaps; Consult stakeholders and identify priority areas; Draft updated NAP, consult on, finalize, and launch it. See Se UN Working Group on Business and Human Rights, "Guidance on National Action Plans on Business and Human Rights UN Working Group on Business and Human Rights" (November 2016), https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNWG_NAPGuidance.pdf

- h. Effectively collaborate with, and guarantee the independence of National Human Rights Institutions;
- i. Introduce a requirement for businesses to carry out human rights' due diligence and human rights impact assessments before approval of licenses/permits to businesses;
- j. Ensure that corporate regulatory frameworks on due diligence, non-financial disclosures, transparency, remediation, and legal responsibility integrate child rights, and are implemented in an accessible and child- friendly manner. Government procurement contracts should be disbarred from being awarded to bidders who are not in compliance with labour laws, which includes children rights. ⁵³³Adequate resources should be allocated to ensuring monitoring, implementation, and access to remedies for children and their representatives;
- k. Collectively begin the process of developing a treaty on children, business and human rights, which is Africa focused and in line with African realities. The proposed Treaty could capture issues like victim compensation, adequate and effective remedies, business obligations and their duty to respect human rights;
- l. Speedily ratify the Malabo Protocol which guarantees corporate criminal liability;
- m. Review current trade and investment agreements, including the AfCFTA, and bring them into compliance with the Constitution and international human rights standards and also ensure that they are not used to facilitate illicit financial flows and tax evasion by businesses;
- n. Ensure that businesses do not encroach on the land rights of its citizens. Where land displacement occurs, adequate compensation and sustainable relocation must be enforced;
- o. Guarantee effective access to remedies for victims of corporate induced human rights violations. This can be achieved by the speedy administration of justice for all cases bordering on BHRs as well as reduced cost of access to justice;
- p. Set up independent monitoring and accountability mechanisms to enforce compliance with the children's, business and human rights principles; and
- q. Consider the translation of children, business and human rights principles into AU Law and into some African languages for greater sensitisation.

533 Seychelles responded in their questionnaire that this is being practiced.



8.2 Business Enterprises

Businesses should:

- a. Adopt the Children's Rights and Business Principles and periodically report on compliance efforts.⁵³⁴ Furthermore, businesses should recognise that "the best interests of the child" is fundamental to children's rights. Hence, businesses should explicitly and comprehensively integrate children's rights and business principles into their conduct;
- b. Integrate robust human rights impact assessments (HRIA) and human rights due diligence (HRDD) processes into their business practice to prevent, mitigate, and remedy the human rights impact associated with their operations and supply chains as it affects children's rights. This is crucial to avoiding legal, regulatory, and reputational risks, gaining responsible investors' trust, and securing a long-standing social license to operate. Furthermore, HRIA and HRDD processes should be premised upon a clear understanding of the local context, effective stakeholder consultation, and communities' free, prior, and informed consent;
- c. Include children's rights considerations in environmental, social and governance (ESG) assessments to inform investment decision-making, as well as in stewardship activities to improve the children's rights performance of their investee companies;
- d. Ensure that adequate training and periodic capacity development programmes are instituted as a cultural norm within the organization. In particular, senior management must be adequately equipped with sufficient information on children, business and human rights principles and provide mechanisms for monitoring compliance in line with human rights standards;
- e. Adopt a rights-based approach in implementing children's rights and business principles, especially those in the extractive sector. Adequate remedies must be provided for those impacted by their activities including compensation, and continuous engagement. Businesses should also consider joining sectorial

⁵³⁴ The organisation Global Child Forum benchmarks business compliance with human rights. Only very few companies operating in Africa are currently featured on their database, so this could be one avenue for reporting. See www.globalchildforum.org.

institutions,⁵³⁵

- f. Provide accurate data and reporting mechanisms on causes and impact of their activities and how it impacts children's rights and welfare. Business risk to children across value chains should be a conventional and systemic part of business impact assessment and sustainability reporting;
- g. Develop and communicate to both suppliers and the general public a supply chain policy for products emanating from conflict affected zones. This policy must indicate that child labour has not been employed;
- h. Develop human rights policies, codes of conduct, and sustainability plans anchored on children's rights and business principles, and provide indicators for adherence to those codes and policies;
- i. Promote operational wide awareness programmes to employees, staff, supply chains, and third parties associated with the business, on children, business and human rights, sustainable practices and labour rights in host communities;
- j. Critically engage and consult with local communities through inclusive and participatory approaches, understand local customs and traditions, and provide adequate and timely information about their projects;
- k. Guarantee living wages and maternity leave for women, and safeguard the rights of workers;
- l. Adopt child-friendly business policies and practices, and support programmes to provide learning and skilling opportunities for children and young people, to enable them to earn a decent living to escape multi-dimensional poverty;
- m. Adopt and implement family-friendly policies including employment income protection, paid leave and care for family members, flexible working arrangements, and access to quality emergency childcare;
- n. Provide decent work for young workers, parents and caregivers;
- o. Ensure the protection and safety of children in all business activities and facilities;
- p. Ensure that products and services are safe, and seek to support children's rights through them.

535 For example, those in the tourism industry must adopt the Code of Conduct for the Protection of Children from Sexual Exploitation in the Travel and Tourism (The Code), and the UNWTO Framework Convention on Tourism Ethics. Also, adequate security must be provided in abandoned coal mines to prevent public access, including by restricting access through fencing and erecting warning signs at abandoned mine sites.



- q. Use marketing and advertising that respects and supports children's rights;
- r. Prohibit the employment of underage children, either as direct employees or in the supply chain;
- s. Establish operational level non-judicial grievance mechanisms within the company; and
- t. Take steps to integrate specific child rights indicators into their standards and principles that guide the behaviour of their member companies.

8.3 National Human Rights Institutions (NHRIs)

NHRIs should:

- a. Propose amendments to existing legislation, especially corporate, child labour and security laws, anchored in human rights principles and standards;
- b. Increase internal capacity to promote and sensitize the citizens on the provisions of the broader Policy Framework outlined in this report. There is currently a critical lack of knowledge or awareness on the existence of CRBP. NHRIs should be empowered to review investment agreements and identify human rights implications of those agreements; and
- c. Undertake proactive investigations into specific risk areas for businesses.

8.4 Civil Society Organisations (CSOs)

CSOs are critical to implementing children's rights and business principles. They should:

- a. Increase awareness campaigns, policy and advocacy, research, analysis, and information dissemination on the UNGPs, and CRBPs. These awareness campaigns must involve the Offices of Ombudsman and Maladministration/Corruption, and focus on civic participation, and women's rights gender justice in the informal sector;
- b. Monitor corporate compliance with business and human rights principles, and

- businesses' approach to adopting these principles;
- c. Mobilise rights holders to demand accountability from member states on steps to curb corporate excesses;
 - d. Engage with host communities to identify priority areas and inform business practices in that regard; and
 - e. Facilitate engagement and dialogue between States, businesses, host communities, chambers of commerce, and other stakeholders.



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