

Protecting Children's Rights through an international Treaty on Business and Human Rights

Advocacy paper • International Commission of Jurists • May 2022

Introduction

In its resolution 26/9 of 26 June 2014, the UN Human Rights Council (HRC) established the Open Ended Intergovernmental Working Group (OEIGWG) with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights.¹ The Working Group had its first session in 2015 and one session in each following year, most recently in October 2021. A first draft international treaty, prepared by the Chairmanship, was prepared for the 2018 session and has been revised three times since then.² When concluded, this will be the first international human rights treaty in the field of business and human rights and will have a great impact on the rights of the child.

Participation of civil society organizations has been instrumental in the opening of the UN process towards a treaty and in garnering support for its work. Since early in the process, a group of child rights organizations have gathered to coordinate their support and input. As a product of this coordination, DKA and ICJ undertook a child rights-based assessment of the Revised Draft Treaty (2020), which was followed by a complementary analysis in 2021.³ The present paper builds on those analyses.

Business activities and challenges to the rights of the child

Children are in constant interaction with business enterprises throughout their lives. They can be consumers, children of workers, targets of advertising or be workers themselves, often subject to abusive labour practices. They sometimes suffer exploitation, including sexual exploitation and abuse in online and offline environments. Business activities may have positive and negative impacts on the realization of children's rights. As such, children are also businesses' stakeholder in the community.

The positive effects of business activities need to be enhanced and the negative impacts be avoided, discouraged, or repaired. Business conduct that amounts to human rights abuses need to be redressed, and the businesses responsible must be held accountable. States have a crucial primary duty in the protection of children. But national protection frameworks and institutions are limited by the advance of economic globalization and their impacts across frontiers. Increasingly, companies have become part of and dependent on global value chains: they produce, trade and sell goods and services using networks of economic units across several jurisdictions. Legal protection frameworks in one country or region may not be applied or be effective in other countries where production units are located. Even within national frontiers, national frameworks often pay scant attention to places and situations where children and other groups in vulnerable positions are at risk.

These challenges engendered the drive to establish the OEGWG, given the pressing need for global collective action in the form of an international instrument with global legally binding standards that tackle the key problems derived from a

¹ UN Human Rights Council (HRC) Resolution A/HRC/RES/26/9 on the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights", available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9 For information on the sessions of the OEIGWG, see <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/GWGOntnc.aspx>

² The latest [Third revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises](https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf), may be found at: <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf>

³ DKA- ICJ The 2020 UN revised draft of a legally binding instrument on business and human rights
A child rights-based analysis, 2020; Update to child rights based analysis, 2021

globalized economy. The global legally binding instrument that emerges should take full account of children's rights and the values and principles on which they are grounded. The Convention on the Rights of the Child outlines four principles States should bear in mind during negotiations:

- The obligation of States to respect and ensure the rights set forth in the Convention on the Rights of the Child to each child within their jurisdiction without discrimination of any kind (article 2);
- The best interests of the child as a primary consideration in all actions concerning children (article 3, paragraph 1 and CRC General Comment No. 14);
- The States parties' obligation to ensure to the maximum extent possible the survival and development of the child, understood as a holistic concept (article 6 and General Comment No. 7); and
- The child's right to express his or her views freely in "all matters affecting the child", those views being given due weight (article 12 and CRC General Comment No. 12).

An international treaty is necessary as a tool for global collective action through international cooperation to tackle problems such as child labour, economic or sexual abuse and exploitation, and other commercial harmful practices resulting from business transnational activities, domestically and across borders. It should set common standards of prevention, protection and remedy, including in its extraterritorial dimension, and enable national and international oversight by intergovernmental and civil society organizations.

To achieve this general objective, an international treaty should at least have the following characteristics.

1. A global treaty should take full account of the diverse circumstances and places where children's rights are at risk by business activity

A global treaty on business and human rights will be the first global legally binding instrument to tackle prevention, legal liability and redress in respect of business human rights abuses and it is vital it incorporates a right of the child perspective as part of a human rights approach. This means that the scope of application of the treaty's provisions should be broad enough to address the main sources and situations at the roots of actual or potential risks for the rights of the child. Children and their rights are at risk within national frontiers and across jurisdictions. And children's rights may be impacted by any company, small, medium or large size, national and transnational, including those active in the informal sector.

This global treaty should incorporate a child rights perspective that takes into account the special and dependent status of children. Childhood is a unique period of development, which means that any violation or abuse of children's rights may result in severe, irreversible, long-lasting or lifelong or even transgenerational impact and damage. Children may also be more likely impacted by violations or abuses against their parents' or caregivers' human rights. For all these reasons, children need a heightened level of protection.

Key Message for States

The current proposal of the treaty (Third Revised Draft) adopts a broad jurisdictional scope encompassing, in principle, all types and sizes of business enterprises, transnational and national, and in all contexts. It would be important that such broad scope is maintained without prejudice of the special treatment that certain situations or sector companies deserve.

States measures to address small businesses in the informal sector

“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.” (CRC General Comment 16, para 36)

Because work that entails economic exploitation and is hazardous or interferes with children’s education or harms their health or physical, mental, spiritual, moral or social development, is often found, albeit not exclusively, within the informal and family economies, States must regulate working conditions and ensure safeguards to protect children in those sectors. (CRC General Comment 16, para 37)

2. A global treaty should provide States and companies with adequate tools to prevent violations

Prevention is a necessary component of a strategy for the realization of the rights of the child. Both States and businesses should adopt measures to prevent the occurrence of violations and abuses. There are a variety of tools and modalities available to States and businesses to help prevent the negative impacts. Those tools and measures should contain a child rights perspective and be tailored to provide the specific protection required for certain groups of children and certain children’s rights.

For instance, the State authorities should establish effective oversight and monitoring of the delivering of essential services by private actors, adopt laws and policies to help regulate informal economic sectors to prevent hidden violations and support the creation of working conditions within companies to allow parents and caregivers pay adequate attention to children or to adopt measures to prevent abuses abroad of businesses under their jurisdiction.⁴ States should also carry out or require businesses to carry out of child rights impact assessments.

Businesses should also take measures to avoid committing abuses or contributing to them. They have a responsibility to carry out human rights due diligence (including the identification of actual or potential risks, impacts, prevention, mitigation, and publicly reporting those measures). Currently there is a wave of national laws aiming at requiring businesses to carry out human rights due diligence in their operations, and an international treaty should reflect that movement drawing also from its strengths and weakness. Business enterprises should also take remediation of their negative impacts through grievance procedures available to all potentially affected, including children.

Key Message for States

An international treaty should assign special importance to preventive strategies, because it is always preferable to prevent than to have a violation or abuse that will require a remedy. The current draft treaty under discussion contains an article (6) on prevention, which is positive, but needs to include other measures beyond mandatory human rights due diligence. These measures could include the obligation to incorporate conditions in business contracts with States, promotion of internal early warning systems and a clear place for child rights impact assessments. It should also pay special attention to the consultation and participation of relevant stakeholders including children and the publicity of the process.

⁴ CRC General Comment No. 16, para 21, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf> para 34, 37, 54 and CESCR GC 24

Child rights impact assessments and human rights due diligence

“Ensuring that the best interests of the child are a primary consideration in business-related legislation and policy development and delivery at all levels of government demands continuous child rights impact assessments. These can predict the impact of any proposed business-related policy, legislation, regulations, budget or other administrative decisions which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of laws, policies and programmes on children’s rights.”
(General Comment 16, para 78)

The Committee on the Rights of the Child often recommends countries to conduct child rights impact assessments. In its Concluding Observations after reviewing the Periodic Report of Australia in 2021, the Committee recommended Australia: “Require companies to undertake assessments, consultations, and to make full public disclosure of the environmental, health-related and children’s rights impacts of their business activities and their plans to address such impacts”
(Committee on the Rights of the Child, Concluding Observations, Periodic Report of Australia, para. 17, 2021 CRC/C/AUS/CO/5-6)

Following landmark precedents from France and Germany, the European Union is currently preparing a directive aimed at establishing an EU-wide obligation for Member States to require companies to carry out a human rights due diligence process. This requirement should include key elements of a child rights approach.¹ In Brazil, a new draft framework law on business and human rights (PL 572/2022) needs to incorporate a child rights approach to due diligence and impact assessments as well.

3. A global treaty should provide for child-sensitive remedy and reparation

International human rights law requires access to effective remedies and reparations when violations and abuses of children’s rights occur. Accountability processes and mechanisms for States and business activities are necessary part of the reparative framework for violations and abuses. Accountability is also important for deterring future violations.

Procedures to ensure justice and reparation for children’s rights violations and abuses need to be child-sensitive. Because abuses of their rights may cause greater damage to children than to adults, access to justice and remedy should be “facilitated and reinforced”.⁵ Therefore, greater efforts should be made to overcome the particular obstacles to justice that children face, including physical, psychological, social and/or cultural barriers, lack of information on accessing justice and remedies, and of financial means and lack of legal capacity, legal standing or even legal identity.

In the case of violations or abuses resulting from business activities or operations, the Committee on the Rights of the Child has highlighted the following arrangements as being particularly important:

- a) Child-sensitive mechanisms – criminal, civil or administrative – should be in place and “known by children and their representatives, [and be] prompt, genuinely available and accessible”. Civil remedies for damages are a common avenue for victims of abuse, including children. They should also be available and accessible.
- b) Children and their representatives “should be allowed to initiate proceedings in their own right and have access to legal aid and the support of lawyers legal aid providers in bringing cases against business enterprises to ensure equality of arms;”
- c) Children’s privacy should be respected and protected;
- d) Children “should be kept informed of progress at all stages of the process, giving due weight to the child’s maturity and any speech, language or communication difficulties they might have”;
- e) The possibility of making collective complaints, such as class actions and public interest litigation, “as a means of increasing accessibility to the courts for large numbers of children similarly affected by business actions;”

⁵ See the report of the Special Rapporteur on the independence of judges and lawyers on the protection of children’s rights in the justice system, A/HRC/29/26, 2015, para 30, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_26_ENG.DOCX

- f) Reparation should take into account that the effects of abuses of children’s rights “can be irreversible and result in lifelong damage”, “be timely to limit ongoing and future damage to the child or children affected” and include, where relevant, medical and psychological assistance, legal support and measures of rehabilitation as well as guarantee of non-recurrence.”

Key Message for States

The current third revised draft treaty addresses aspects of access to justice and reparation in several articles (notably in articles 4 and 7). The draft recognizes the need for age-sensitive approaches and collective reparations, but more clear language is needed to call for child-sensitive justice processes.

Article 7 addresses specific obstacles to justice, but also needs to address the issue of the burden of proof in civil proceedings by creating more equality between the parties and allowing complainants access to information in the exclusive hands of companies when necessary. This article also creates the duty to provide access to legal assistance in legal proceedings and other measures such as access to information, which should be maintained. It is in this article that the key elements for a child-responsive justice recommended by the CRC should be incorporated.

Child- sensitive procedures available and accessible

The CRC recommends that States focus attention on “removing social, economic and juridical barriers so that children can in practice have access to effective judicial mechanisms without discrimination of any kind” (GC 16 para 68).

Brazil’s Law 8.069/90 on children and adolescents, provides (Art. 141.§ 2) that in legal actions within the competence of the Children and Youth Justice litigants are exempted from costs and emoluments, except in the case of bad faith litigation. This benefit extends to all cases under the jurisdiction of the court on children and youth and only for children and adolescent claimants in the proceedings. The Supreme Tribunal of Justice understands that the guarantee is specific to the children and adolescents that appear in the processes, and not to other entities. (Brazil STJ, REsp 983.250/RJ)

4. A global treaty should protect and guarantee the rights of the child across a company value chain

Global value chains have become a key feature of current large and even medium size companies across the globe. Some companies have value chains that include thousands of producing or servicing units scattered across many countries and loosely organized in various tiers of a supply chain and/or in horizontal networks of contractors and partners of all kinds.

Through the UN Sustainable Development Goals (SDGs), States have committed to end child labour by 2025 and forced labour and human trafficking by 2030 (SDG 8.7). The practice of child labour, including forced labour or even slavery trafficking and sexual exploitation of children, persists in some of the units that are part of these value chains. Workers’ discrimination and inadequate working conditions are also frequent in various levels of the supply chain. Most of this is organized in an opaque way, and external monitoring is not possible because the information is typically not made public. These deficiencies are present not only in the context of value chains, but also at the level of domestic business units. However, the most glaring gaps are in relation to value chains. Within value chains there remain high levels of forced,

trafficked and migrant labour. According to the latest global estimates, 152 million children are in child labour and 25 million adults and children are in forced labour, including in global supply chains.⁶

While most hazardous forms of child labour are prohibited under international law (Article 3 (d) of ILO Convention No. 182),⁷ the practice generally increases with every economic global crisis such as the one generated by the COVID-19 pandemic. A global treaty that aspires to tackle the negative consequences of global value chains on the rights of the child should tackle the specificities of these value chains in terms of prevention, accountability and remedy.

Key Message for States

It is important that the draft treaty provisions relating to prevention and human rights due diligence, remedy and company legal liability address and apply also to the various actors in the company value chain. The current orientation of the draft in its articles 6 and 8 in that regard should be maintained and enhanced.

Remedies in the value chain

The CRC has recommended that Australia:

“Ensure the legal accountability of Australian companies and their subsidiaries for violations of children’s rights, including in relation to environment and health, committed within the State party or overseas by businesses domiciled in its territory, and establish mechanisms for the investigation and redress of such abuses”

5. A treaty should be based on consultation and participation by children children need to be heard

The principle of the children’s **right to be heard** in all matters affecting them is one of the foundational principles of the Convention on the Rights of the Child and is also applicable in the context of business activities.⁸ Children, including children who may face multiple forms of discrimination or vulnerability, for instance as members of minority or indigenous groups and or because they have disabilities, child rights defenders, should be heard when business related legislation or policies that may affect them are being developed. They should be heard in “judicial proceedings and mechanisms of conciliation and arbitration that concern abuses of children’s rights caused or contributed to by business enterprises” or in consultations led by businesses with communities that may be affected by a potential business project.⁹

Children’s participation must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.

⁶ ILO, UNICEF, IOM, OECD, Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains, 2019. Pp. 7-12

⁷ ILO Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999

⁸ CRC General Comment No. 12, the right of the child to be heard, 2009, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en

⁹ For details on the specific obligations related to the indigenous child’s right to be heard, see Committee on the Rights of the Child, General Comment No. 11 on indigenous children and their rights under the Convention (CRC General Comment No. 11), 2009, paras 38-39, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f11&Lang=en.

⁴⁶ CRC General Comment No. 9, para 32 and 48, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f9&Lang=en

⁴⁷ CRC General Comment No. 16, para 21, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

The requirement of consultation and participation are widely lacking in current company approaches and laws. Such consultation is particularly challenging in the context of supply chains and specific sector and/or groups such as indigenous children.

Key Message for States

The current draft treaty should maintain the language on consultation and participation in relation to human rights due diligence, but this element needs to be included more consistently in other areas. For instance, it should include an obligation to put in place necessary measures to consult all relevant stakeholders, especially groups that are usually forgotten or that is harder to reach out to, such as children, in the design of remedies and reparations, in the justice system and other preventative measures.

6. A treaty should protect and empower children to monitor and hold business accountable

Children are characteristically disempowered in the context of businesses operations, not least because of their dependence and level of development. They access less easily information on company groups or global business with extensive value chains and how they are organized and operate. Because of their dependent status they have also less autonomous capacity to take action, organize, voice their claims and address authorities.

The treaty should consider the specific status of children and their needs. It should include provisions to strengthen children's development, knowledge and autonomy. It should empower children to seek information about the activities of companies and hold accountable by granting right to action (legal standing) or take action to help and protect other children.

Key Message for States

The current draft treaty recognizes that children suffer the distinctive and disproportionate impact of business-related human rights abuses and the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders; and the structural obstacles for obtaining remedies for these persons (preamble para 13). Article 6 on due diligence includes consultations with stakeholders bearing in mind the heightened risk to certain groups including children. The provisions on access to information can also help empower children or their parents /caregivers to mobilize and claim their rights. The proposed Fund for Victims (article 15) will also strengthen their legal and financial position. These and other similar measures should be supported in this treaty.

Enabling and protecting human rights defenders and children to take action

In India, six girls were rescued from a hotel operating with no child protection policy in place. It was found that some members of the staff accepted bribes in exchange for offender's secrecy. Community members reached out to civil society organizations for help and they responded promptly, together with the police, and rescued the girls, provided them with support, and arrested the offenders. However, the hotel that facilitated the sexual exploitation of children through its staff was not held liable.

Children victims of sexual exploitation and their families are not well-protected after they file complaints. They can be threatened and harassed to recant or settle. The reason that they often retract statements is because in some countries there is no security protection available to them after giving a statement. They have a reasonable fear of physical and mental harm, threats. Victims' needs need to be adequately addressed and to empower and protect children.

The way forward

Organizations working to promote and protect the rights of the child should mobilize to support the conclusion of this treaty. For that purpose, it is essential that States commit to participate in the current OEIGWG negotiations actively and constructively. NGOs can:

- Identify and approach relevant national authorities, such as Ministries of Foreign Affairs, Justice or Finances, as well as responsible Geneva-based diplomats, to convey their concern for the gaps in protection of human rights and children's rights in the context of business activities and express support for a UN treaty
- Explicitly request the adoption by the government of a decision to participate constructively and in good faith in the negotiation process in the UN. The national position should reflect a child rights-based approach.
- Request to be involved in the process and be consulted as well as other civil society groups, including organizations, trade unions and academia in the country on the contents of the national position in negotiations. You should advocate the inclusion of the points made in this paper.
- Convene meetings and coordinate with other civil society groups to address the government and other actors more effectively.
- Consider participating in the annual sessions of the OEIGWG in Geneva, Switzerland.

Contact: Ingrid.Pintaritsch@dka.at

SUMMARY

SIX KEY MESSAGES FOR STATES

- 1 The current proposal of the treaty (Third Revised Draft) adopts a broad jurisdictional scope encompassing, in principle, all types and sizes of business enterprises, transnational and national, and in all contexts. It would be important that such broad scope is maintained without prejudice of the special treatment that certain situations or sector companies deserve.
- 2 An international treaty should assign special importance to preventive strategies because it is always preferable to prevent than to have a violation or abuse that will require a remedy. The current draft treaty under discussion contains an article (6) on prevention, which is positive, but needs to include other measures beyond mandatory human rights due diligence. These measures could include the obligation to incorporate conditions in business contracts with States, promotion of internal early warning systems and a clear place for child rights impact assessments. It should also pay special attention to the consultation and participation of relevant stakeholders including children and the publicity of the process.
- 3 The current third revised draft treaty addresses aspects of access to justice and reparation in several articles (notably in articles 4 and 7). The draft recognizes the need for age-sensitive approaches and collective reparations, but more clear language is needed to call for child-sensitive justice processes. Article 7 addresses specific obstacles to justice, but also needs to address the issue of the burden of proof in civil proceedings by creating more equality between the parties and allowing complainants access to information in the exclusive hands of companies when necessary. This article also creates the duty to provide access to legal assistance in legal proceedings and other measures such as access to information, which should be maintained. It is in this article that the key elements for a child-responsive justice recommended by the CRC should be incorporated.
- 4 It is important that the draft treaty provisions relating to prevention and human rights due diligence, remedy and company legal liability address and apply also to the various actors in the company value chain. The current orientation of the draft in its articles 6 and 8 in that regard should be maintained and enhanced.
- 5 The current draft treaty should maintain the language on consultation and participation in relation to human rights due diligence, but this element needs to be included more consistently in other areas. For instance, it should include an obligation to put in place necessary measures to consult all relevant stakeholders, especially groups that are usually forgotten or that are harder to reach out to, such as children, in the design of remedies and reparations, in the justice system and other preventative measures.
- 6 The current draft treaty recognizes that children suffer the distinctive and disproportionate impact of business-related human rights abuses and the need for a business and human rights perspective that considers specific circumstances and vulnerabilities of different rights-holders; and the structural obstacles to obtaining remedies for these persons (preamble para 13). Article 6 on due diligence includes consultations with stakeholders bearing in mind the heightened risk to certain groups including children. The provisions on access to information can also help empower children or their parents/caregivers to mobilize and claim their rights. The proposed Fund for Victims (article 15) will also strengthen their legal and financial position. These and other similar measures should be supported in this treaty.