

**The application of due diligence responsibility
to child labour in mineral supply chains: a
rights holders' perspective**

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Dissertation submitted in fulfilment of the requirements for the
degree *Masters of Law in Private Law* at the North West
University

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DECLARATION

I, Laura Kabukabu Lisita, identity number ZP002324 and student number 21422079, hereby declare that this dissertation titled "The application of due diligence responsibility to child labour in mineral supply chains: a rights holders' perspective" is my own original work. The dissertation is hereby humbly submitted to the North-West University (NWU), in fulfilment of the requirements for the LLM in Private Law degree. This dissertation has not been submitted anywhere before.

LAURA KABUKABU LISITA

Date: 08-12-2017

ACKNOWLEDGEMENTS

I want to thank God almighty for giving me the strength and courage to persevere under the toughest circumstances.

I want to thank the Faculty of Law at the North West University, South Africa for their unwavering financial support throughout the course of my study.

I extend my utmost gratitude to my supervisor Doctor Hein Lubbe, for his steadfast supervision, guidance and support.

My sincerest appreciation goes to Professor Willem van Genugten, Extraordinary Professor of International Law at the North-West University South Africa, for his expert insight in the brief moments of interaction.

My gratitude also goes to Professor Nicola Jägers and Professor Bas Rombouts from Tilburg University in the Netherlands, for extending their expert insight to me during my stay as an exchange student.

I also want to extend my utmost appreciation to the late Professor Roger Blanpain from Belgium, because of him, I was able to attend a short course at the International Labour Organisation in Geneva which greatly influenced the scope of this dissertation.

My deepest appreciation goes to my mother Florence and my late father Michael, for instilling the value of education in me at a very young age.

I would like to thank my family, for their relentless motivation, support and encouragement.

ABSTRACT

Title: The application of due diligence responsibility to child labour in mineral supply chains: a rights holders' perspective

Key words: Child labour, mineral supply chain, weak governance and conflict zone, corporation, third party relationships, due diligence responsibility, Guiding Principles/normative framework, OECD Guidelines

This dissertation presents an exploratory and interpretive literature study on the extent of the application of due diligence responsibility to child labourers as rights holders in the mineral supply chain. Worldwide, one million children work in hazardous mining conditions referred to as the worst forms of child labour. The incidence of child labour today more prominently occurs within the confines of complex and fragmented corporate global supply chains. The international community has widely recognised this dilemma, as a result, corporations now have a due diligence responsibility duty to respect the rights of the child to be free from economic exploitation in their global supply chain activities. In doing so, they have an obligation to identify, prevent, mitigate and remedy child labour impacts in the supply chain. The Guiding Principles/normative framework and the OECD Guidelines are recognised as the two most prominent standards that strongly require corporations to enforce this duty.

While corporations have a due diligence responsibility duty to respect the rights of the child, specific to child labour impacts in the mineral supply chain, a due diligence responsibility gap nonetheless exists. Child labour in mineral supply chains occurs at the very bottom of the supply chain. Children in such contexts are therefore invisible children cut out from immediate due diligence responsibility action. As duty bearers of due diligence responsibility, corporations also normally tend to this duty from a corporate risk approach. They thereby fail to promote the rights holders' perspective for child labour in activities as such mining. The due diligence responsibility gap for child labour in the mineral supply chain is also

enhanced by limited information on the relation between due diligence responsibility and the effective realisation of the rights of the child to be free from child labour in the mineral supply chain.

The presence of a due diligence responsibility gap leads to an investigation on the extent to which this duty applies to child labourers as rights holders in the mineral supply chain and whether it can be used to realise the rights of the child to be free from economic exploitation. The investigation of the study eventually leads to the conclusion that due diligence responsibility as a duty to only respect the rights of the child cannot effectively realise the rights of the child in supply chain activities. It should be accompanied by duties which also require corporations to protect and fulfil the rights of the child in the supply chain.

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LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
Albany LR	Albany Law Review
ATCA	American Alien Tort Claims Act
Boston College Int'l and Comp LR	Boston College International and Comparative Law Review
Brooklyn JIL	Brooklyn Journal of International Law
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CLMRS	Child Labour Monitoring and Remediation System
Columbia J Transn'l L	Columbia Journal of Transnational Law
CRC	Convention on the Rights of the Child
CRIAs	child rights impact assessment
CRIN	Child Rights International Network
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
FARDC	Forces Armées de la République Démocratique du Congo (Armed Forces of the Democratic Republic of the Congo)
FLA	Fair Labour Association
FNI	Nationalist and Integrationist Front
Fordham JCFL	Fordham Journal of Corporate and Financial Law
George Washington ILR	George Washington International Law Review
Harvard ILJ	Harvard International Law Journal
Houston JIL	Houston Journal of International Law
HRLR	Human Rights Law Review

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJHR	International Journal of Human Rights
ILO	International Labour Organisation
ILR	International Labour Review
ILSA	International Law Students Association
ILSA J Int'l & Comp L	ILSA Journal of International & Comparative Law
Int'l J Labour Research	International Journal of Labour Research
IPEC	International Programme on the Elimination of Child Labour
J Indian L Inst	Journal of Indian Law Institute
Melbourne JIL	Melbourne Journal of International Law
MNE	Multinational Enterprise
MNEs	Multinational Enterprises
NCP	National Contact Point
Netherlands QHR	Netherlands Quarterly of Human Rights
NGO	Non-governmental organisation
Northwestern JIHR	Northwestern Journal of International Human Rights
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
Penn State ILR	Penn State International Law Review
PNG	Papua New Guinea
RAID	Rights and Accountability in Development

SEC	Securities and Exchange Commission
SOCOMI	Société de Commercialisation des Minerais
Sur IJHR	Sur International Journal on Human Rights
Texas ILJ	Texas International Law Journal
TNCs	Transnational Corporations
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund
U Baltimore JIL	University of Baltimore Journal of International Law
US	United States
Vanderbilt J Transn'l L	Vanderbilt Journal of Transnational Law
Virginia JIL	Virginia Journal of International Law

CHAPTER 1

Introduction

1.1 Background and context of the study

Globally today, 1 million children aged between 5 and 17 years old are trapped as child labourers in mining activities.¹ Shockingly, this human rights predicament of our time occurs within the confines of an established state-centered international human rights law system. In their preface to the book *child labour in a globalised world*, Nesi, Nogler and Pertile² argue that child labour, including the worst forms of it, has surprisingly maintained a high profile on the international agenda throughout the years. This is despite vigorous efforts having been made at the international level to abolish the practice completely.

In protecting children's human rights, the *United Nations (UN) Convention on the Rights of the Child (CRC)*³ and the core International Labour Organisation (ILO) conventions on child labour; *C138 on the Minimum Age for Admission to Employment*⁴ and *C182 on the Worst Forms of Child Labour*,⁵ have specifically been instrumental in calling for the elimination of child labour. Lieten⁶ contends that although attention has been brought to child labour through the conventions, today, the practice has simply reinvented itself. Now, more than ever, child labour can be accessed further down in corporate global supply chains. Affirming Lieten's concern, the 2017 *Buenos Aires Declaration on Child Labour, Forced Labour and Youth Employment* as well as the Committee on Decent Work in Global Supply Chains, noted that the presence of child labour was acute in the

¹ ILO 2017 <http://www.ilo.org/ipec/areas/Miningandquarrying/>; OECD 2016 <http://www.oecd.org>.

² Nesi, Nogler and Pertile (eds) *Child labour in a globalized world* xi.

³ UN Convention on the Rights of the Child (1989).

⁴ ILO Minimum Age Convention, C138 (1973).

⁵ ILO Worst Forms of Child Labour Convention, C182 (1999).

⁶ Lieten "Globalisation and child labour" 12.

lower segments of some global supply chains.⁷ Notwithstanding the benefits which include advancements in technology, communications and transport systems, job creation and economic growth,⁸ it appears global supply chains also present serious human rights concerns.

Surprisingly, there is broad consensus supporting the views above. The ILO states that today's corporate global supply chains are one of the notable contexts which present serious challenges in terms of protecting children from child labour.⁹ In agreement with this position, the Organisation for Economic Co-operation and Development (OECD) argues that the dominance and expansion of corporate global supply chains in international settings has greatly contributed to the surge in adverse human rights impacts like child labour.¹⁰ As observed by Zerk,¹¹ these gross human rights impacts are evident in regions designated as weak governance and conflict zones.¹² Similarly, economic theorists suggest that the advent of economic globalisation, corporate outsourcing of production, raw materials and cheap labour, has boosted demand for child labour in supply chain activities.¹³ Adding to this, because corporate global supply chains are a complex, diverse and fragmented network of multiple workers, producers and suppliers operating across the globe,¹⁴ children are at a higher risk of

⁷ Buenos Aires Declaration on Child Labour, Forced Labour and Youth Employment (16 November 2017); International Labour Conference 105th Session: Reports of the Committee on Decent Work in Global Supply Chains: Resolution and conclusions submitted for adoption by the Conference (2016) para 3.

⁸ International Labour Conference 105th Session: Reports of the Committee on Decent Work in Global Supply Chains: Resolution and conclusions submitted for adoption by the Conference (2016) para 1; ILO *Ending child labour by 2025* 48.

⁹ ILO Global estimates of child labour: Results and trends 2012-2016 48.

¹⁰ OECD "Promoting sustainable global supply chains" 5.

¹¹ Zerk 2013 <http://www.ohchr.org>.

¹² OECD OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas 13.

¹³ Cho *et al* 2015 <https://papers.ssrn.com/>.

¹⁴ ILO *Decent work in global supply chains* 1-2; OECD "Promoting sustainable global supply chains" 5; *International Labour Conference 105th Session: Reports of the Committee on Decent Work in Global Supply Chains: Resolution and conclusions submitted for adoption by the Conference* (2016) para 1.

economic exploitation in such contexts. This notion is supported by the following excerpt:

If Paul lived in a developed country, he would be playing Pokémon Go on his phone in between class. But there is no play or school for this 14 year old. Instead, he spends long days in hazardous mining activities. Paul is one of the 40, 000 children in the Democratic Republic of Congo (DRC) alone, who mine minerals for the batteries that power our smart phones, televisions, computers, cars, airplanes, among other familiar objects. The childhood of children like Paul have been stolen by unchecked, complex global supply chains, of the kind that can frequently lead to human rights abuses mainly in countries designated as weak governance and conflict zones.¹⁵

Sadly, children like Paul have been let down by corporations, including some of the world's largest, which fail to carry out basic checks to ensure that their global supply chains are free from child labour.¹⁶ For example, global mining corporation Afrimex, through its third party relationships operating in the DRC, was implicated in child labour abuses in its mineral supply chain.¹⁷ Global Witness, a Non-governmental organisation (NGO) situated in the United Kingdom (UK), alleged that Multinational Enterprise (MNE) Afrimex, had violated the *OECD Guidelines for Multinational Enterprises*¹⁸ by purchasing minerals from third party relationships in the supply chain that employ child labour. In its 2008 decision, the UK National Contact Point (NCP) of the OECD stated that Afrimex had failed to exercise sufficient due diligence responsibility to eliminate child labour from its supply chain. This meant that Afrimex had a duty to respect the rights of the child and employ the due diligence responsibility principles of "identify, prevent, mitigate and remedy" to combat child labour abuses in its mineral supply chain.¹⁹

¹⁵ Rosenzweig 2016 <https://www.weforum.org>.

¹⁶ Rosenzweig 2016 <https://www.weforum.org>; Amnesty International 2016 <http://www.amnesty.org>.

¹⁷ *Global Witness v Afrimex (UK) Ltd* 20 February 2007 OECD Watch.

¹⁸ OECD Guidelines for Multinational Enterprises (2011).

¹⁹ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd*.

Following the decision in Afrimex, today, the due diligence responsibility duty of corporations has since been cast in stone through the UN's adoption of the *Guiding Principles on Business and Human Rights* (Guiding Principles/normative framework) in 2011.²⁰ Due diligence under the Guiding Principles is founded on the duty to respect human rights and to identify, prevent, mitigate and remedy human rights impacts. At the same time, the OECD Guidelines were in the process of being revised in 2011. They consequently incorporated the due diligence mandate of the normative framework. Together, both soft-law documents represent the most internationally recognised authoritative due diligence responsibility standards of our time.²¹ They also represent the broad international consensus on the need to address human rights violations in global supply chains through due diligence.²² Undoubtedly, these two authoritative guidelines serve as evidence of the fact that due diligence responsibility is fast becoming a key requirement in international settings.

From the above, it appears that not all hope is lost for the child labour problem in corporate global supply chains. Corporations now have a solid obligation to respect the rights of the child to be free from economic exploitation in the supply chain through their due diligence responsibility duty. However, it is argued that the extent to which due diligence responsibility applies to child labourers as rights holders in the mineral supply chain is yet to be fully understood. In other words, there is need to examine whether due diligence responsibility can be used to realise the rights of the child to be free from child labour in the supply chain. Scholars like Harrison²³ view due diligence as the biggest single obligation placed on

²⁰ *UN Guiding Principles on Business and Human Rights* (2011). Hereafter referred to as UN Guiding Principles (2011).

²¹ De Schutter 2015 <https://papers.ssrn.com>.

²² ILO *Ending child labour by 2025* 48.

²³ Harrison "An evaluation of the institutionalisation of corporate human rights due diligence" 4.

corporations in our time. Cullen²⁴ on the other hand views due diligence as an important new concept in international efforts to improve the accountability of corporations for human rights violations. Based on the above, it will therefore be appropriate to investigate the nature of due diligence responsibility and determine what it is expected to achieve for child labour in the mineral supply chain.

1.2 Problem statement and research question

Under international law, the practice of child labour in mineral supply chains is considered to be a serious violation to the rights of the child. Specifically, article 32(1) of the CRC reiterates the right of the child to be protected from economic exploitation. C138 sets a universal minimum age standard for child work at 15 years.²⁵ C182 primarily targets work in mineral supply chains and calls for the complete abolition of the worst forms of child labour, raising the minimum working age to 18 years.²⁶ It should however be noted from the onset that the responsibility for the protection of the rights of the child is traditionally and primarily conceived with reference to states as *de jure* duty bearers. However, in the last decade, this state centered international legal order has been undergoing serious changes. More importance is now being given to the human rights responsibilities of corporations in their global supply chain activities. Writing in his 2006 interim report, John Ruggie noted the following:

Today, it is a global world, a post-second world war era. We now have a variety of global actors for which the state or rather territorial state, is not the cardinal organising principle. These actors are now dominating the international scene. For example, today, there are over 70,000 MNEs, over 700,000 subsidiaries, millions of suppliers spanning every corner of the globe.²⁷

²⁴ Cullen 2016 *George Washington ILR* 743.

²⁵ Article 3(3) of the ILO Minimum Age Convention, C138 (1973).

²⁶ Articles 1 and 2 of the ILO Worst Forms of Child Labour Convention, C182 (1999).

²⁷ Normative framework 2006 Interim Report paras 10 and 11.

To substantiate Ruggie's rhetoric, the economic power of corporations and their ability to operate and expand globally makes them act at a scale and pace that states cannot match.²⁸ According to Narula²⁹ this significantly diminishes the role of the state in protecting human rights. More importantly, the rise in the economic power and global reach of corporations has been coupled with an increase in corporate-related human rights abuses. In particular, corporations who operate in unstable contexts and have complex and fragmented supply chains are more prone to the risk of human rights impacts.³⁰ While child labour in the mineral supply chain is the main point of reference in this study, other examples of corporate-related human rights impacts in supply chain activities include; the most recent Rana Plaza³¹ and Tazreen³² disasters in Bangladesh. Specific to child labour, Nike³³ Nestle,³⁴ and Chiquita,³⁵ have all been implicated in supply chain child labour abuses. In the mineral supply chain, apart from Afrimex, Amnesty International recently reported that child labour exists in the supply chains of some of the world's largest corporations like Apple, Samsung, Sony, Microsoft and Volkswagen, which source cobalt from the DRC for lithium-ion batteries used in the production

²⁸ Ruggie 2006 <http://www.unipd-centrodirittiumani.it/public/docs>.

²⁹ Narula 2006 *Columbia J Transn'l L* 691.

³⁰ Letnar Cernic *Corporate responsibility* 19.

³¹ A number of clothing corporations outsource their labour and clothing from garment factories in Bangladesh. Due to a number of misgivings, including the failure to carry out due diligence in the supply chain, on 24 April 2013, Rana Plaza, an eight-story factory building in Bangladesh collapsed. More than 1000 garment workers, mostly women, were killed and an additional 2000 workers were injured.

³² Just six months before Rana Plaza building collapse, a factory fire at Tazreen fashions also in Bangladesh killed 117 workers and injured 200.

³³ In the mid 1990's Nike was linked to child labour abuses in its supply chain. It allegedly purchased footballs made by child labour in Sialkot, Pakistan. It was estimated that more than 7,000 children between the ages of 7 and 14 were working full-time, stitching footballs. This resulted in high media coverage and reputational damage for the corporation.

³⁴ A number of allegations have been made against Nestlé for aided and abetting the use of child labour in its cocoa supply chain.

³⁵ According to a 2002 Human Rights Watch report, hazardous child labour has found in the banana supply chain of Chiquita Brands International.

of smartphones, computers and electric cars.³⁶ In light of the above, it appears that state action alone is not sufficient to protect human rights. Hence, today, corporations have a critical role to play in promoting respect for human rights in their supply chain activities. Due diligence responsibility is undoubtedly a recognition of this fact.

Due diligence responsibility is premised on the principle of "corporate responsibility to respect human rights". A principle enshrined in the most authoritative due diligence responsibility standards. The 2011 compendium report to the normative framework for example states: corporate responsibility to respect human rights means that corporations should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.³⁷ The due diligence process requires corporations to identify, prevent, mitigate and account for how they address their human rights impacts.³⁸ Having adopted the human rights chapter of the normative framework, Chapter IV of the OECD Guidelines reiterates the duty of corporations to respect human rights. The Guidelines similarly articulate due diligence as the process through which corporations identify, prevent, mitigate and remedy their actual and potential adverse impacts.³⁹ The Guidelines also specifically require corporations to eliminate the worst forms of child labour from their mineral supply chains.⁴⁰ Due diligence responsibility of corporations is, therefore, clearly framed as a response to addressing corporate-related human rights impacts. It recognises corporations as duty bearers, it also recognises those whose rights have been impacted by corporate activities as rights

³⁶ Amnesty International 2016 <http://www.amnesty.org>.

³⁷ UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31 (2011) para 6. Hereafter referred to as Protect, Respect and Remedy Framework (2011).

³⁸ UN Guiding Principles (2011) – Principle 15(b).

³⁹ *OECD Guidelines for Multinational Enterprises* (2011) Chapter II. General Policies para 14.

⁴⁰ *OECD Guidelines for Multinational Enterprises* (2011) Commentary Chapter V. Employment and Industrial Relations para 1(c).

holders. In relation to child labour impacts in the mineral supply chain, it is nonetheless argued that a due diligence responsibility gap exists. This gap is attributed to three core factors:

First, in line with the findings of the Committee on Decent Work in Global Supply Chains, and as alluded to in the Buenos Aires Declaration, child labour impacts in the mineral supply chain mostly occur at the very bottom of the supply chain.⁴¹ Hidden from the spotlight, children like Paul are often not the target of due diligence responsibility action. Second, available evidence suggests that corporations commonly approach due diligence responsibility from a corporate perspective, an effective management of corporate risk. This is opposed to a rights holders' perspective which is consequently an effective management of human rights risks.⁴² Encouraged by the business goal to maximise profits, the contention is that some corporations simply perceive due diligence responsibility as a profit-making venture. Understood in this way, Collins and Guevara⁴³ argue that child labourers in the mineral supply chain can therefore be seen as a reputation risk to corporations. An area of opportunity, source of revenue and growth, rather than human beings with rights that should be respected. A corporate perspective therefore undermines the role of due diligence responsibility and its application to human rights impacts. Third, academic research on child labour in supply chains has mostly been focused on the agriculture sector, for example, in cocoa and tobacco supply chains.⁴⁴ Whilst this is probably owed to the high numbers of child labourers in these sectors,⁴⁵ attention is yet to be brought to the mineral

⁴¹ OECD OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas 65. Savio *Dynamics of oppression and state failure* 43-44.

⁴² Institute for Human Rights and Business *The "State of play" of human rights due diligence* 12-13.

⁴³ Collins and Guevara 2014 *Revue générale de droit* 169.

⁴⁴ ILO *Ending child labour by 2025* 48.

⁴⁵ ILO 2017 <http://www.ilo.org/>. Child labour is primarily concentrated in agriculture. From the total 152 million child labourers, 108 million are in agriculture, that is, 71

supply chain. Inextricably linked to this, whereas research has been conducted on due diligence responsibility, to date, no research has been carried out to examine the interrelationship between due diligence and the right of the child to be free from economic exploitation in the mineral supply chain.

Additionally, while the due diligence responsibility gap is a cause for concern, it further needs to be determined whether due diligence responsibility can achieve the intended goal of realising the rights of the child to be free from economic exploitation. It should be recalled that due diligence is founded on the soft law principle of "respect" only, which clearly exists in isolation of the full range of international human rights law duties to "respect, protect and fulfil" human rights. Authors like Deva⁴⁶ for example, argue that human rights concerns like child labour in the mineral supply chain can only be realised through a responsive approach. This means that corporations should respect, protect and fulfil the rights of the child. In a similar vein, Borges⁴⁷ goes as far as to argue that international human rights law standards regarding child labour may be interpreted as giving direct obligations to corporations to respect, protect, and fulfil children's rights. To counter these arguments, Ruggie⁴⁸ contends that a duty to only respect is bestowed on corporations as duty bearers of due diligence responsibility to stop them from performing *de facto* state roles for which they are ill equipped. In the face of this debate, the effectiveness of due diligence is significantly brought into question. Nevertheless, it is contended that due diligence responsibility to only respect human rights is worthy of consideration because it provides a framework within which to interpret and assess corporate responsibilities for the rights of the child as well as to hold corporations to account for child labour abuses.

per cent of the total number of child labourers. This is in contrast to 12 per cent in the industrial sector which includes mining.

⁴⁶ Deva 2014 *J Indian L Inst* 145.

⁴⁷ Borges 2016 *U Baltimore JIL* 6.

⁴⁸ Normative framework 2006 Interim Report para 29.

Further, this study aims to promote the child rights agenda and advocates for a rights holders' perspective to due diligence responsibility. In the words of renowned child rights advocate, Burns Weston, "to assert the rights of a child to be free from abusive, exploitative, and hazardous work is, thus, to strengthen a child's possibility for a life of dignity and well-being".⁴⁹ Hence, it is argued that where severe human rights impacts like child labour in the mineral supply chain occur, a rights holders perspective should be central to the due diligence process. This means that children should be recognised as persons who have a legitimate claim to the right to be free from economic exploitation in the supply chain. Due diligence responsibility should therefore be responsive to the experiences and expectations of children in the mineral supply chain. A rights holders' perspective also reinforces the proclamation of human rights addressed in the International Bill of Human Rights and other relevant human rights documents. More importantly, it empowers the child labourer and places significant emphasis on corporations as duty bearers of due diligence responsibility to uphold and respect the rights of the child. Failure to enforce this duty, corporations should be held accountable for their acts or omissions.

Overall, in an attempt to bridge the due diligence responsibility gap for child labour impacts in the mineral supply chain, the dissertation aims to achieve the following: (1) It highlights the causes, effects and extent of child labour impacts in the mineral supply chains; (2) it takes the focus away from corporate actors and shows how due diligence responsibility applies to child labourers as rights holders in mineral supply chains; (3) it examines whether due diligence responsibility as a duty to only respect human rights can realise the rights of the child to be free from economic exploitation in the mineral supply chain. Based on these key indicators, the research question that this study seeks to address is: to what extent can

⁴⁹ Weston "Child labor in human rights law" 81.

the due diligence responsibility duty of corporations to respect human rights be applied to child labour in mineral supply chains in order to realise the rights of the child to be free from economic exploitation?

1.3 Study context: Definitions

At this point, it is important to have an understanding of the key terms that are used in this dissertation:

1.3.1 Child labour

Child labour is generally defined as work performed by children which impacts the mental, physical, social, moral and educational well-being of the child.⁵⁰ According to the ILO's most recent statistics, 152 million children, which includes 64 million girls and 88 million boys, work as child labourers globally. Nearly half of this number, approximately 73 million children, work in hazardous conditions. This includes work in mineral supply chains. Such work categorically falls under conditions referred to as the worst forms of child labour.⁵¹

1.3.2 Mineral supply chain

The mineral supply chain refers to the process of bringing raw minerals to the consumer market. It includes multiple networks of workers, producers and suppliers operating around the globe.⁵² It involves the stages of extraction, transportation, handling, trading, processing, smelting, refining, alloying, manufacturing and sale of the end product.⁵³ Child labour mostly occurs at the extraction stage. That is, at the bottom tiers of the supply

⁵⁰ ILO 2017 <http://www.ilo.org/ipecc/facts/>.

⁵¹ ILO Global estimates of child labour: Results and trends 2012-2016 8.

⁵² OECD OECD Due diligence guidance for responsible supply chains of minerals from conflict affected and high risk areas 14.

⁵³ OECD OECD due diligence guidance for responsible supply chain of minerals from conflict affected and high risk areas 14.

chain such as in artisanal mining, an informal low-tech, labour intensive mineral processing and excavation activity.⁵⁴

1.3.3 Weak governance and conflict zone

Child labour in mineral supply chains normally plays out in contexts designated as weak governance and conflict zones. This means investment environments with low human development indicators, widespread corruption, lawlessness, and in which state institutions are not able or are unwilling to assume their proper roles and responsibilities in protecting human rights.⁵⁵

1.3.4 Corporation

The generic term corporation is used in this dissertation to refer to MNEs, also known as Transnational Corporations (TNCs). Both authoritative due diligence standards, the Guiding Principles and the OECD Guidelines, address human rights responsibilities to MNEs. Similarly, as Letnar Cernic⁵⁶ observes, much of the literature on the duty of corporations to enforce due diligence to respect human rights focusses on the responsibilities of MNEs.⁵⁷

1.3.5 Third party relationships

A corporation's supply chain includes entities with whom the corporation has a direct or indirect business relationships. These are referred to as third party relationships. They include suppliers and subcontractors

⁵⁴ OECD OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas 65. Savio *Dynamics of oppression and state failure* 43–44.

⁵⁵ OECD OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas 13.

⁵⁶ Letnar Cernic *Corporate responsibility* 24.

⁵⁷ Letnar Cernic *Corporate responsibility* 24. The central focus on MNEs can be ascribed to the work of the UN, who in the 1980s, dealt with the protection of human rights against corporations investing and operating in the developing countries.

amongst others.⁵⁸ Generally, a corporation can either cause,⁵⁹ contribute,⁶⁰ or be linked to⁶¹ child labour impacts. In mining activities specifically, corporations are mainly linked to child labour impacts through third party relationships.⁶²

1.3.6 Due diligence responsibility

Due diligence as the cornerstone of the corporate responsibility to respect human rights is explicitly recognised in the Guiding Principles and the OECD Guidelines. The dissertation therefore uses the phrase "due diligence responsibility" to denote the duty of corporations to enforce their responsibility to respect human rights through due diligence.

1.3.7 Guiding Principles / Normative framework

The *UN Guiding Principles on Business and Human Rights* are a set of 31 Principles founded on John Ruggie's "Protect, Respect and Remedy" framework. They are interchangeably referred to as the normative framework, owing to their unanimous adoption by the UN Human Rights Council. The second pillar specifically addresses the human rights obligations of corporations to respect human rights. Since due diligence responsibility is founded on this pillar, the dissertation solely focuses on this duty.

⁵⁸ Lambooy 2010 *Netherlands QHR* 438.

⁵⁹ A corporation can cause child labour impacts through its own actions or decisions, that is, where it intentionally employs child labourers.

⁶⁰ A corporation can contribute to child labour abuses in the supply chain for example, through a third party relationship in the supply chain such as a supplier. This can happen for example, where a corporation repeatedly changes product requirements for suppliers without adjusting production deadlines or prices, thus incentivising suppliers to engage with subcontractors who rely on child labour.

⁶¹ A corporation can be linked to child labour impacts through its operations, products or services because it is caused by a third party relationship with which the corporation has a business relationship, for example, procuring raw minerals produced with child labour.

⁶² UNICEF 2015 <http://www.unicef.org>; ILO ILO-IOE Child labour guidance tool for business. How to do business with respect for children's right to be free from child labour 20.

1.3.8 OECD Guidelines

The *OECD Guidelines for Multinational Enterprises* are recommendations addressed by governments to MNEs operating in or from adhering countries. Currently, there are a total of forty-six adhering OECD states. The Guidelines offer complementary guidance for due diligence responsibility in specific sectors. This includes the OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas. The most recent initiative, the practical actions for corporations to identify and address the worst forms of child labour in the mineral supply chains, builds on the guidance for conflict-affected and high-risk areas.

1.4 Aims and objectives

This study aims to critically examine the extent to which due diligence responsibility applies to children in mineral supply chains and to clarify whether it can be used as a tool to realise the rights of the child to be free from hazardous economic exploitation. This aim raises five core objectives:

- (1) To identify and describe the causes, effects and extent of child labour abuses in mineral supply chain activities
- (2) To interpret due diligence responsibility as it applies to child labour from a rights holders' perspective
- (3) To examine due diligence responsibility and its application to child labour under the normative framework
- (4) To examine due diligence responsibility and its application to child labour under the OECD Guidelines
- (5) To evaluate and determine whether due diligence responsibility to respect only can realise the rights of the child to be free from child labour in the mineral supply chains

1.5 Literature review

Owing to its long history, a wide body of literature has been published on child labour. However, today, having recognised the changing tide in international settings, researchers have shown an increased interest in assessing the relationship between child labour and corporate human rights responsibilities. What follows below is a critical exploration of some of the available literature:

Burns Weston is undoubtedly one of the most prominent authors in the child labour discourse. Writing at a time when the number of working children was as at a height of 218 million globally, Weston's thesis advanced a human rights approach to child labour.⁶³ He recognised the problem of child labour as being multidisciplinary, multifaceted and multi-sectoral. Describing it in one word as multidimensional.⁶⁴ Weston further recognised the diminishing influence of the state in international settings, viewing corporate sovereignty as a powerful deterrent to a rights-based strategy for child labour.⁶⁵ According to him, corporations were simply in pursuit of profits and market shares. Hence, they perceived the child labour agenda to be a costly and otherwise inconvenient objective.⁶⁶

Although advancing the rights holders' perspective for child labour, as well as recognising the dominance of corporate actors in international settings, Weston nevertheless wrote at a time before the human rights duties of corporations were cast in stone. Today, while it is a similar world to Weston's, corporations now have the responsibility to respect the rights of the child through due diligence. Faced with this reality, Blitt⁶⁷ rightly contends that a corporation's *modus operandi* of profit making without

⁶³ Weston "Child labor in human rights law" 73.

⁶⁴ Weston "Child labor in human rights law" 78.

⁶⁵ Weston "Child labor in human rights law" 87-88.

⁶⁶ Weston "Child labor in human rights law" 88.

⁶⁷ Blitt 2012 *Texas ILJ* 60.

consideration for human rights impacts like child labour is necessarily and slowly changing. This considerably downplays Milton Friedman's famous objective which solely views corporations as profit making entities.⁶⁸ It subsequently obliterates the corporate perspective which simply views due diligence as a profit making venture. Clearly, this dissertation advances Weston's thesis and Blitt's standpoint through the due diligence responsibility agenda for child labour in the mineral supply chain.

Holly Cullen, another significant author in the child labour domain is well known for her book "the role of international law in the elimination of child labour". Cullen's book, while recognising child labour as a serious human rights issue, focuses on states as duty bearers of human rights responsibilities.⁶⁹ In her most recent work titled "the irresistible rise of human rights due diligence: conflict minerals and beyond" Cullen however shifts her attention to the due diligence duty of corporations. The author refers to due diligence as an important new concept in international efforts which aims at improving the accountability of corporations for human rights impacts.⁷⁰ Cullen further notes that due diligence demonstrates a move away from focusing on conflict minerals, towards constructing the problem as a global supply chain issue.⁷¹ Although Cullen's research is undoubtedly highly relevant, clearly missing from it is a rights holders' perspective.

In contrast to Cullen, although not focusing on due diligence responsibility, Collins nonetheless advances a rights holders' perspective for the rights of the child. In doing so, the author assess the relationship between children's rights and corporate actors. According to Collins's thesis, child rights should be able to influence the roles and efforts of corporations as business enterprises, in a similar way, corporations should respect and support the

⁶⁸ Friedman *The New York Times Magazine* 32-33.

⁶⁹ Cullen *The role of international law* 3.

⁷⁰ Cullen 2016 *George Washington ILR* 743.

⁷¹ Cullen 2016 *George Washington ILR* 744.

implementation of children's rights within their contexts of operation.⁷² While Collins rightly states that the understanding about the relationship between business and children lags behind, she nevertheless contends that overwhelming attention has been paid to child labour.⁷³ To contradict Collin's standpoint, it can be argued that child labour takes center stage for the primary reason that it is an ever evolving problem.

More relevantly, in another article written together with Guevara, Collins specifically considers the role of due diligence responsibility for children's rights. The article titled "some considerations for child rights impact assessment (CRIAs) of business" argues that corporations should develop and carry out CRIAs in order to meet their due diligence responsibility obligations and to identify and respond to potential and actual child rights impacts which emanate from corporate activities.⁷⁴ Recognising it themselves, the authors opt for a broader approach to due diligence responsibility.⁷⁵ They do not focus on a particular sector such as mining or a particular group of children such as child labourers. Thus, whilst their work provides great insight, there is arguably still a need to streamline the focus for a better understanding on the role of due diligence in order to determine what it is expected to achieve for human rights impacts.

Unlike the work of Cullen, Collins and Guevara, Borges and Deva are two notable authors who specifically engage with the problem of child labour in corporate activities. Interestingly however, the writings of Borges and Deva appear to go beyond the remit of the most authoritative due diligence responsibility guidelines. In calling for corporate responsibility to take center stage in realising the rights of the child to be free from economic exploitation, Borges takes a radical approach. She interprets international human rights instruments as giving direct obligations to corporations to

⁷² Collins 2014 *IJHR* 582.

⁷³ Collins 2014 *IJHR* 583, 587.

⁷⁴ Collins and Guevara 2014 *Revue générale de droit* 153, 156.

⁷⁵ Collins and Guevara 2014 *Revue générale de droit* 156.

respect, protect and fulfil the rights of the child.⁷⁶ Like Borges, Deva also offers a critical approach to solving the child labour problem, what he terms as a "responsive responsibility". Deva's responsive responsibility duty calls on corporations to respect, protect and fulfil the rights of the child. In his words, "corporations should not only have a responsibility to respect, but also a responsibility to protect and fulfil the rights of children".⁷⁷ Since due diligence is predicated on the duty to respect human rights, Deva in another sense, sees this obligation as a short-sighted venture in achieving the full realisation of the rights of the child. On the other hand, scholars like Lambooy who recognise its importance, contend that due diligence responsibility is a noteworthy tool which should be used to assess the duty of corporations to only respect human rights.⁷⁸ In the face of these debates, it is necessary to make an assessment on what the duty of due diligence to only respect human rights entails for child labour in the supply chain.

One observer, Mark Viso, has drawn great attention to the problem of child labour in mineral supply chains and gives a stern warning for what lies ahead. According to Viso,⁷⁹ child labour is not only a critical challenge facing the mineral supply chains, it is also on the verge of rising. Viso notes that regions of weak governance and conflict like the DRC for example, are currently on course to providing two-thirds of the world's cobalt supply which is used in the production of modern technologies.⁸⁰ This will undoubtedly be accompanied by the use and demand for child labour. Viso further articulates that child labour in mining is not only a difficult job which is performed under dangerous conditions. It is also among the hardest labour performed by human beings.⁸¹ Viso's standpoint is widely

⁷⁶ Borges 2016 *U Baltimore JIL* 1.

⁷⁷ Deva 2014 *J Indian L Inst* 143.

⁷⁸ Lambooy 2010 *Netherlands QHR* 404-405.

⁷⁹ Viso 2017 <https://www.weforum.org/>.

⁸⁰ Viso 2017 <https://www.weforum.org/>.

⁸¹ Viso 2017 <https://www.weforum.org/>.

acknowledged by the ILO. According to the ILO, while child labour is most widespread in informal work in agriculture, mining is an important sector in which it has a strong presence. Despite the low numbers, child labour in mining is extremely hazardous work.⁸² Putting Viso's words into perspective, due diligence responsibility therefore serves as an urgent response to eliminating child labour impacts from the mineral supply chain.

Overall, the existing body of literature above greatly informs the study at hand. It shows that child labour continues to be seen as a serious human rights problem of our time. At the same time, it reveals the economic power of corporations and the fading role of the state in promoting the rights of the child. While the literature reveals the contentious nature of due diligence responsibility as a duty to only respect human rights, it also suggests that attention should rightly be paid to the role of corporate obligations for child rights responsibilities. Thus, it is now well established from the literature that due diligence responsibility as a standard of expected corporate conduct in achieving respect for human rights is highly relevant for our time. However, the literature assessed has not addressed the due diligence responsibility gap for child labour in mineral supply chains. Although notable authors address the relationship between corporations and child labour, there has been no detailed investigation on corporate due diligence responsibilities for child labour in the mineral supply chain. Thus, the extent to which due diligence responsibility applies to child labourers as rights holders in the mineral supply chains remains unclear.

Based on this, it will be noteworthy to assess the extent to which due diligence responsibility applies to child labour in the mineral supply chain and determine whether it can realise the rights of the child to be free from economic exploitation. Borrowing Weston's rhetoric, the multidimensional

⁸² ILO *Ending child labour by 2025* 27.

problem of child labour should be tackled through innovative and new approaches that offer the promise of accelerating action. It is argued that due diligence responsibility is such an approach. The study primarily focuses on the mineral supply chain simply because child labour in such contexts is extremely severe. Hence, proposed recommendations should serve as a benchmark for child labour in other supply chains.

1.6 Assumption and hypothesis

The assumption is that due diligence responsibility as a standard of expected corporate conduct has gained significant prominence in international settings. This is largely owed to the adoption of the UN Guiding Principles and the acclaimed recognition of due diligence under the OECD Guidelines. Based on this assumption, the hypothesis of the dissertation is that due diligence responsibility can be used to realise the rights of the child to be free from child labour in mineral supply chains.

1.7 Purpose of the study

The purpose of the study is to bridge the due diligence responsibility gap for child labour in mineral supply chains. In doing so, the study examines the extent to which due diligence responsibility applies to child labourers as rights holders in the mineral supply chain and whether it can be used to realise the rights of the child to be free from economic exploitation in the supply chain.

1.8 Significance of the study

This dissertation fills a gap in the literature by providing a critical examination on due diligence responsibility which is tailored to child labour in the mineral supply chain. The study offers some important insights on the role of due diligence as an obligation to respect the rights of the child. The study also contributes to the growing body of literature on corporate responsibilities for children's rights.

1.9 Limitations of the study

Owing to the complexity and vastness of the mineral supply chain, there is hardly any data on the exact numbers of child labourers in the mineral supply chains of corporations. This presents a significant limitation to the study which simply relies on statistics representing the total number of children in mining activities, that is, 1 million children.

1.10 Research methodology

The study employs a qualitative research methodology. This approach uses qualitative literature to investigate the nature of due diligence responsibilities for child labour in the mineral supply chain. The investigation is carried out through the use of primary and secondary sources of information such as text books, academic journal articles, electronic sources, newspaper articles, conference contributions, international human rights law instruments, case law, and soft law instruments on business and human rights. Overall, the study is exploratory and interpretive in nature.

1.11 Chapter outline

This dissertation is comprised of five chapters. The first chapter outlines the problem statement of the study, that is, the due diligence responsibility gap for child labour in the mineral supply chain. The second chapter offers a critical assessment on the application of due diligence responsibility to child labour in mineral supply chains under the normative framework. The third chapter examines the practical application of due diligence responsibility to child labour in mineral supply chains under the OECD Guidelines. The fourth chapter offers a critical evaluation on the due diligence responsibility duty as an obligation to only respect human rights and whether it can realise the rights of the child to be free economic exploitation in the mineral supply chain. The fifth chapter sums up the dissertation and offers recommendations for the problem at hand. It also

offers insight into the future of due diligence responsibility with regard to human rights concerns.

CHAPTER 2

Application of due diligence responsibility to child labour in mineral supply chains: Normative framework

2.1 Introduction

The purpose of this chapter is to examine due diligence responsibility under the normative framework and the extent to which it applies to child labourers as rights holders in mineral supply chains. Although there has been a steady decline in the numbers of child labourers globally, current estimates show that the pace of decline has slowed considerably in the last four years.⁸³ True to this rhetoric, the ILO notes that corporate global supply chains are one of the notable contexts which present serious challenges in terms of protecting children from child labour.⁸⁴ This is arguably a contributing factor in slowing down progress to curb child labour. Economic research goes on to suggest that corporate outsourcing of production, raw materials and cheap labour has boosted demand for child labour in global supply chain activities.⁸⁵ As a result, child labour has now, more than ever, dominated corporate supply chain activities in different sectors of production. For example, the United States (US) Department of Labour states that cocoa from Ivory Coast, rubber from Liberia, tobacco from Brazil, garments from Bangladesh and India, carpets from Pakistan, bananas from Ecuador, electronics from China, and a wide

⁸³ ILO estimates that the global number of child labourers has steadily declined since 2000; from 246 million, 215 million, 168 million and now 152 million. However, the pace of decline has significantly slowed down. From 2012 to 2016 the reduction of children in child labour amounted to only 16 million, representing a 10 percent drop. In comparison, between 2008 and 2012, the level dropped from 215 million to 168 million, that is 47 million or a reduction of 22 percent. The most recent statistics of 152 million represent only one-third reduction recorded during 2008 and 2012.

⁸⁴ ILO Global estimates of child labour: Results and trends 2012-2016 48.

⁸⁵ Cho *et al* 2015 <https://papers.ssrn.com/>; Zutshi, Creed and Sohal 2009 *European Business Rev* 42-43.

range of minerals from the DRC,⁸⁶ are just few of the products with child labour in the supply chain.⁸⁷

From the total number of corporate-related human rights abuses reported in Ruggie's 2006 interim report, it was found that the worst human rights abuses were associated with mining activities.⁸⁸ This is arguably mainly due to the complex set up of the mineral supply chain. If we consider the specific case of child labour, the practice in mining activities is first and foremost mostly associated with regions designated as weak governance and conflict zones like the DRC.⁸⁹ Secondly, child labourers in mining are found at the bottom tiers of the supply chain, in informal, yet labour intensive and hazardous contexts like artisanal mining.⁹⁰ Thus, hidden from the spotlight, children in mineral supply chains are in essence invisible children. They are exposed to the worst forms of child labour abuses which come along with a series of inhumane and degrading human rights violations.⁹¹ Adding to this, the ILO reports that children in hazardous work, which includes mining, make up the majority out of the total number of working children.⁹² Thus, whilst child labour in corporate global supply chains occurs in almost all sectors of production, its most severe form is arguably found in the mineral supply chains.

The position of child labourers in the mineral supply chain was clearly brought to light in the case of Afrimex. British mining corporation Afrimex, because of unscrupulous business practices in its supply chain, was

⁸⁶ The DRC produces a range of minerals, notable amongst them; Cassiterite (tin ore), Coltan (tantalum ore), Heterogenite (cobalt ore), Wolframite (tungsten ore), copper, diamonds and gold are all sourced from the DRC.

⁸⁷ US Department of Labor 2016 <https://www.dol.gov>.

⁸⁸ Normative framework 2006 interim report para 25.

⁸⁹ Zerk 2013 <http://www.ohchr.org>; OECD OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas 13.

⁹⁰ OECD OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas 65. Savio *Dynamics of oppression and state failure* 43–44.

⁹¹ Other forms of abuses can include the use of children as child soldiers, sexual exploitation and child trafficking.

⁹² IPEC *Children in hazardous work* xi.

implicated in the worst forms of child labour abuses. In the decision handed down by the OECDs UK NCP, an issue of primary importance was considered. It was held that Afrimex failed to apply sufficient "due diligence" to its mineral supply chain to prevent the worst forms of child labour abuses. Following the 2008 decision in Afrimex, the due diligence principle has since been cast in stone by the adoption of the UN Guiding Principles in 2011. The Guiding Principles simply solidify the due diligence rationale, which is also recognised in soft law international instruments such as the OECD Guidelines. Under the normative framework, corporations now have a responsibility to use the core principle of "due diligence" to identify, prevent, mitigate and remedy human rights impacts. In carrying out this duty, the normative framework has been found to constitute two parts: It consists of a substantive content which requires corporations to refer to all internationally relevant human rights.⁹³ It also consists of a procedural content which requires corporations to assess the extent of their human rights impacts, integrate the findings, track and report on performance made, remediate and make a policy commitment.⁹⁴

While the author of the normative framework labels due diligence responsibility as a game changer, from "naming and shaming" to "knowing and showing",⁹⁵ the extent of its application to child labourers as rights holders in the mineral supply chain is yet to be fully understood. Given that the normative framework has attained universal acceptance, it therefore serves as an important starting point on which to analyse the application of due diligence responsibility *vis-à-vis* child labour impacts in the mineral

⁹³ UN Guiding Principles (2011) - Principle 12.

⁹⁴ UN Guiding Principles (2011) - Principle 17.

⁹⁵ Human Rights Council - Business and Human Rights: Further Steps towards the Operationalizing of the "Protect, Respect and Remedy" Framework A/HRC/14/27 (9 April 2010) para 80. Hereafter referred to as Normative framework 2010 report. "Human rights due diligence can be a game-changer for corporations: from "naming and shaming" to "knowing and showing". Naming and shaming is a response by external stakeholders to the failure of corporations to respect human rights. Knowing and showing is the internalisation of that respect by corporations themselves through human rights due diligence.

supply chain. Two inter-related arguments are made in this chapter. The first is that child labourers are rights-holders. It is argued that this notion is recognised in the substantive content of due diligence responsibility which promotes the rights holders perspective. The second is that corporations, through the procedural content, can use due diligence responsibility to effect change in the mineral supply chain and realise the rights of the child to be free from child labour.

It is on the backdrop of this introduction that this chapter unfolds. The remaining part of this chapter is categorised into six main parts: Context of child labour in mineral supply chains; context of the application of normative framework due diligence responsibility; substantive content of due diligence responsibility; procedural content of due diligence responsibility; strengths and limitations of normative framework application of due diligence responsibility and; the conclusion of the chapter.

2.2 Context of child labour in mineral supply chains

Generally, child labour occurs at the lower levels of the supply chain, such as in artisanal mining activities. This means that it is dominant at the extraction stage. Thus, children are engaged in labour at arguably the most difficult stage of production. The CRC, together with the ILO core conventions on child labour; *C138 on the Minimum Age* and *C182 on the Worst Forms of Child Labour*, clearly prohibit the practice. Despite this prohibition, current global statistics account for 1 million children, aged between 5 and 17 years old in mining activities.⁹⁶ Sadly, according to OECD reports, this number is increasing.⁹⁷ The United Nations Children's Fund (UNICEF) estimates that more than 100 million children will be trapped in child labour by the year 2020.⁹⁸ In contrast, the ILO projects that 121

⁹⁶ ILO 2017 <http://www.ilo.org/ipec/areas/Miningandquarrying/>; OECD 2016 <http://www.oecd.org>.

⁹⁷ OECD 2016 <http://www.oecd.org>.

⁹⁸ UNICEF 2017 <https://www.unicef.org/protection/>.

million children will be in child labour by the year 2025.⁹⁹ These statistics are representative of a significant and imminent threat to the fundamental human rights of children. Interestingly, they also contrast with Sustainable Development Goal 8.7 which calls for the end of child labour in all its forms by year 2025.¹⁰⁰ More prominently, the rising numbers arguably present a strong likelihood of corporations coming into frequent contact with child labour in the supply chain. This underscores the importance of due diligence responsibility in supply chain activities.

2.2.1 Definition of child labour in mineral supply chains

It should be clear from the start that not all work performed by children is child labour.¹⁰¹ Generally, to be classified as child labour, work performed by children should impact the mental, physical, social and moral well-being of the child.¹⁰² In addition, child labour is regarded as such if work carried out by a child interferes with the child's education in the following ways: (1) work deprives a child of the opportunity to attend school; (2) work obliges the child to leave school prematurely and (3) work requires the child to attempt to combine school attendance with excessively long hours of strenuous work.¹⁰³ Child labour and educational marginalisation are clearly interrelated concepts. Tackling child labour would therefore inherently imply addressing education.

Legally defined in accordance with the ILO's child labour international instruments, child labour is work carried out by children below the minimum working age. This age is set at 15 years, in terms of *Convention*

⁹⁹ ILO Global estimates of child labour: Results and trends 2012-2016 8.

¹⁰⁰ ILO *Ending child labour by 2025* 16.

¹⁰¹ Light work performed by children is generally not regarded as child labour. This includes work such as home working, assisting in a family business or earning pocket money outside school hours and during holidays. This kind of work contributes to the child's development, provides the child with skills and experience, and helps with school- to- work transition.

¹⁰² ILO 2017 <http://www.ilo.org/ipec/facts/>.

¹⁰³ ILO 2017 <http://www.ilo.org/ipec/facts/>.

138 on the Minimum Age.¹⁰⁴ In *Convention 182 on the Worst Forms of Child Labour*, this minimum working age is raised to 18 years.¹⁰⁵ The raising of the Minimum Age in terms of Convention 182 signals a complete prohibition on work which falls under the spectrum of the worst forms of child labour. Such types of work include; slavery, trafficking, bonded labour, forced labour, child soldiering, commercial sexual exploitation, illicit activities and hazardous work.¹⁰⁶ Child labour in mineral supply chains categorically falls under the worst forms of child labour, and it is distinctively referred to as hazardous work.¹⁰⁷

For the purpose of the research at hand, the definition of child labour could also be re-structured to suit its nature in mineral supply chains. Whereas Weston¹⁰⁸ defines child labour as work done by children that is harmful to them or otherwise contrary to their best interests, in the mineral supply chains, child labour can be defined as: work which has the potential to deplete the human and social capital of a child's entire life cycle because it is extremely harmful, dangerous, abusive and exploitative. Although this definition has little variation from Weston's definition as well as the general and legal definitions, its emphasis lies in showing the long-term effects that work in mining activities can have on children.

2.2.2 Causes of child labour in mineral supply chains

An array of factors push or pull children into child labour. Amongst them, traditional and cultural values have been known to play a central role.¹⁰⁹ However, the most important determinant of child labour is attributed to a

¹⁰⁴ Articles 1 and A 2 of the ILO Minimum Age Convention, C138 (1973).

¹⁰⁵ Article 2 of the ILO Worst Forms of Child Labour Convention, C182 (1999).

¹⁰⁶ Article 3 of the ILO Worst Forms of Child Labour Convention, C182 (1999).

¹⁰⁷ Articles 3(1) and 5(3) of the ILO Minimum Age Convention, C138 (1973); A 3(d) of the ILO Worst Forms of Child Labour Convention, C182 (1999).

¹⁰⁸ Weston "Child labor in human rights law" 110.

¹⁰⁹ In some societies, children working alongside adults is considered to be an essential element of child socialisation.

vicious cycle of household poverty.¹¹⁰ The poverty is as a result of deep-rooted economic factors such as; the absence of social protection nets, lack of decent work opportunities for adults and adolescents of working age, lack of access to education and poor state governance which results in a lack of enforcement of child labour laws.¹¹¹ Children are therefore drawn to work in mining activities to sustain their livelihoods and to contribute to the family income.

It is observed from the above paragraph, that child labour therefore presents a complex case concerning two conflicting viewpoints. The right of the child to survival on the one hand and the right of the child to be free from economic exploitation on the other. Whilst proponents of child labour contend that a child should work to secure their right to survival,¹¹² abolitionists dispel this view in favour of the right of the child to be completely free from exploitative economic practices.¹¹³ Proponents like Bourdillon¹¹⁴ state the following:

I join those who argue that children have a right to the benefits arising from work appropriate to their age (whether paid or unpaid), and that vulnerable children are often harmed rather than protected by being prevented from working, and particularly from earning money.

The claim of Bourdillon is that the abolition of child labour will deprive a child of their primary source of income, especially when work is their main source of livelihood. Bourdillon in essence suggests that the abolition of child labour has the potential to create further injustice to the child, such as starvation.¹¹⁵ A practical truth to Bourdillon's argument is that working children, like working adults, are likely to feel a sense of financial freedom

¹¹⁰ ILO 2017 <http://www.ilo.org/global/standards/>; ILO *Rules of the game* 37.

¹¹¹ Mistry 2016 <http://stopchildlabor.org>.

¹¹² The right of the child to survival and development is recognised in A 6(2) of the *UN Convention on the Rights of the Child* (1989).

¹¹³ The right of the child to be free from economic exploitation is recognised in A 32(1) of the *UN Convention on the Rights of the Child* (1989).

¹¹⁴ Bourdillon 2006 *Development and Change* 1201.

¹¹⁵ Sen 2000 *ILR* 122.

and empowerment from the little income earned. For instance, money earned by them can be used for the payment of school fees, purchase of school books, and stationery. However, Bourdillon's assertion is not supported in this dissertation. Sending children to work is undoubtedly one of the world's greatest injustices. The childhood of children should be preserved in its entirety and work should be left for adults.

On the other side of the spectrum, abolitionists argue that there can be no justification for child labour, particularly the worst forms of it.¹¹⁶ Renowned Nobel Laureate, Amartya Sen, argues that the views of proponents like Bourdillon lack clarity. According to Sen,¹¹⁷ it cannot simply be presumed that only one factor, income deprivation, will affect the right of the child to survival. The right of the child to survival is also dependent on other economic, social and educational adjustments being made, especially in cases concerning hazardous and exploitative child labour. Although Sen does not raise an objection to the view of proponents, his caution however, is that "one must not fall prey to unexamined prejudices or premature pessimism".¹¹⁸ Additionally, it is key to point out that through the claims of critical proponents like Bourdillon, attention is undoubtedly drawn to child labour. Bourdillon arguably calls on abolitionists to implement stronger measures that will prevent children from working.

Overall, from the above, two things quickly become clear. Firstly, any action to combat child labour in the supply chain, would arguably be void if it fails to address its underlying causes, particularly poverty. As noted in the ILO's 1944 Declaration of Philadelphia, "poverty anywhere constitutes a danger to prosperity everywhere".¹¹⁹ This would include the threat to

¹¹⁶ The International Labour Organisation specifically argues against child labour, especially the worst forms of it.

¹¹⁷ Sen 2000 *ILR* 122.

¹¹⁸ Sen 2000 *ILR* 122.

¹¹⁹ Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia 1944) para I(c).

corporate prosperity. As observed by Weston and Teerink,¹²⁰ corporations can pay a huge price for having a limited understanding of child labour as a human rights problem. This includes payments of reputational, financial, operational and legal costs which ensue from corporate-related human rights claims.¹²¹ Hence, in line with Weston and Teerink's position, for corporations, understanding child labour as a serious human rights problem should also imply understanding and addressing its underlying causes.

Secondly, corporate action to combat child labour in the supply chain should balance the right of the child to survival and their right to be free from economic exploitation. It is suggested at this point that for child labour in the mineral supply chain, a favourable outcome can be achieved in both cases. Addressing poverty would consequently mean addressing the right of the child to survival. Thus, to ensure their right to survival, corporations with child labour in the supply chain should be willing to offer decent work opportunities to adolescent child labourers aged 15 to 17 years.¹²² For minor child labourers below the minimum working age of 15, there can be no other option but to take them away from exploitative economic practices. However, corporations should equally be willing to offer minor child labourers the opportunity of education. In a bid to prevent the youngest children from entering or re-entering child labour, education should assist them to transition from early childhood to school.¹²³ Although these suggested interventions would generally be perceived as going beyond the remit of corporate action, it is argued that they are of critical importance to preventing child labour practices in corporate supply chain activities. Furthermore, such interventions can be perceived as part of broader corporate social responsibility initiatives.

¹²⁰ Weston and Teerink 2006 *Human Rights and Human Welfare* 3.

¹²¹ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

¹²² ILO *World report on child labour 2015* 39. Decent work for child labour should be understood as non-exploitative labour which offers employment opportunities to youths who are in the school-to-work transition period.

¹²³ ILO *World report on child labour 2015* xxiii-xxiv; ILO *Ending child labour by 2025* 10.

2.2.3 Type of child labour in mineral supply chains

As pointed out, child labour in mineral supply chain activities constitutes hazardous work. In support of this notion, the OECD iterates that there is little, if any work in mining that would not be considered hazardous.¹²⁴ This is due to the fact that work in mining occurs in high risk environments that are extremely dangerous or unhealthy.¹²⁵ Children working in hazardous conditions risk being killed, injured and maimed or being made ill as a consequence of poor safety and health standards, and poor working arrangements.¹²⁶ Thus, hazardous child labour like that in the mineral supply chains rightly falls under the category of the worst forms of child labour. It is due to this reason that the age limit for hazardous work is set at 18 years.¹²⁷ A condition is nonetheless attached to this; where it is shown that the health, safety and morals of children shall be fully protected, the age limit can be lowered to 16 years.¹²⁸

Surprisingly, hazardous child labour is the only form of the worst forms of child labour that has a condition attached to it. While it has not been expressly stated, it could be presumed that this provision particularly concerns adolescent child labourers. In hazardous work alone, current statistics show that adolescent child labourers total 47.5 million.¹²⁹ They account for 40 percent of all those employed in the 15 to 17 years age group.¹³⁰ Thus, the problem faced by adolescent child labourers is twofold; whilst being of concern to the goal of eliminating child labour, they are also a concern for youth unemployment. It is therefore on the basis of

¹²⁴ OECD 2016 <http://www.oecd.org>.

¹²⁵ ILO 2017 <http://www.ilo.org/ipecc/facts/>.

¹²⁶ ILO 2017 <http://www.ilo.org/ipecc/facts/>.

¹²⁷ Article 3(1) of the ILO Minimum Age Convention, C138 (1973); A 2 and A 3(d) of the ILO Worst Forms of Child Labour Convention, C182 (1999).

¹²⁸ Article 3(3) of the ILO Minimum Age Convention, C138 (1973); Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour, R190 (1999) para 4.

¹²⁹ ILO *World report on child labour 2015* 39-40.

¹³⁰ ILO *World report on child labour 2015* 39-40.

addressing youth unemployment that the condition attached to hazardous work is presumed. What comes to light at this point, is the understanding that any form of decent work initiatives for adolescents in the school-to-work transition period, should firstly be premised on the condition of reducing the risk for hazardous work.

2.2.4 Type of child labour activities in mineral supply chains

Work on mining sites begins early in the day and constitutes various forms of activities. Taking the DRC as an example, a typical child labourer in mining activities works on a full-time basis, 5 to 7 days a week and often 8 to 10 hours per day.¹³¹ As 13 year old miner from Kalima narrates, "we get up very early at 06h:00...we arrive around 06h:30-07h:00 and we start digging till we find enough".¹³² In Ghana, 12 year old Kwame shares a similar experience, "I go to the gold processing site at 6 a.m. and come back at 5 p.m."¹³³ Unlike the DRC, Ghana is by definition, not a weak governance or conflict zone.¹³⁴ Kwame's story simply proves that the risk of child labour in the mineral supply chains, although mostly occurring in weak governance and conflict zones, cannot be limited to such contexts.

Taking the issue further, both girls and boys, aged between 5 and 17 years old, carry out work on mining sites.¹³⁵ Younger children, because of their small body frames, extract mineral ore by crawling into poorly ventilated mine shafts without protective clothing like helmets, gloves or boots.¹³⁶ Sieving, washing, crushing, pounding, panning and sorting of the mineral

¹³¹ Thorsen 2012 <http://www.unicef.org>; Hahn, Hayes and Kacapor 2013 <http://www.pactworld.org>.

¹³² Savio *Dynamics of oppression and state failure* 48.

¹³³ Human Rights Watch *Precious metal cheap labor* 4.

¹³⁴ Ghana is one of the world's top 10 gold producers. Many traders and refiners prefer to source gold from Ghana because it is a stable democracy rather than from a conflict affected region like the DRC. However, corporations that do source minerals from Ghana similarly risk coming into contact with the Worst Forms of Child Labour.

¹³⁵ OECD 2017 <http://www.oecd.org>; IPEC *Children in hazardous work* xv-xvi.

¹³⁶ Amnesty International *Profits and loss-mining and human rights* 6; Thorsen 2012 <http://www.unicef.org>.

ore, which requires repetitive body movements of bending, kneeling and squatting, is also normally done by younger children.¹³⁷ In order to recover gold pieces mixed in soil and sediments, children use toxic metals like mercury and cyanide chemicals in the amalgamation process.¹³⁸ The use of mercury, especially for children is so dangerous to the extent that it has been internationally banned through the recent adoption of the *UN Minamata Convention on Mercury* which entered into force on 16 August 2017.¹³⁹ More physically challenging tasks, normally done by older children include digging and transporting of minerals.¹⁴⁰ As witnessed by Savio,¹⁴¹ a number of children dig for minerals in underground tunnels, using adult sized tools much taller than themselves. Bags of mineral ore, gravel or sand, are hauled either on the back or head and transported across a distance, depending on the stretch of the mining site.¹⁴²

Following the extraction process, the minerals are then sold to intermediaries at or near the mining site, and thereafter transported to local trading centres and sold to corporations.¹⁴³ It is through this supply chain trade process that corporations become complicit to child labour abuses. As noted earlier, most of these mining activities are carried out in informal contexts like artisanal mines. Sadly, some of these mines, particularly in weak governance and conflict affected regions like the DRC, are militia controlled.¹⁴⁴ Thus, militia groups sometimes form part of the

¹³⁷ Thorsen 2012 <http://www.unicef.org>.

¹³⁸ IPEC *Children in hazardous work* xv-xvi. After the mercury and gold settle to form an amalgam, then the gold is extracted by vaporising the mercury through heating.

¹³⁹ *UN Minamata Convention on Mercury* (2013). Entry into force 16 August 2017.

¹⁴⁰ Hahn, Hayes and Kacapor 2013 <http://www.pactworld.org>.

¹⁴¹ Savio *Dynamics of oppression and state failure* 44. Savio travelled to the DRC to report on the incidence of child labour in mining.

¹⁴² Amnesty International Profits and loss-mining and human rights 6; Thorsen 2012 <http://www.unicef.org>.

¹⁴³ OECD OECD Due diligence guidance for responsible supply chain of minerals from conflict affected and high risk areas 14.

¹⁴⁴ Militia groups in the DRC are notoriously known to take control of mining regions in order to fuel and finance their operations. Many of them abduct and recruit children to serve as combatants, miners and sex slaves, amongst other duties. Examples of militia groups in the DRC include the Nationalist and Integrationist Front (FNI), an

supply chain and corporations are likely to trade with them in the process. As the UN Global Compact rightly states, this "may result in financial or in-kind support to violent criminal factions".¹⁴⁵ This scenario brings us back to the case of Afrimex. Afrimex did not only fail to apply sufficient due diligence responsibility to prevent child labour abuses in its supply chain. The corporation also allegedly had business relationships with military factions in the DRC.¹⁴⁶ It is therefore highly likely that Afrimex could also have purchased minerals from military factions that use child labour. Some governments, like the United States (US) government for example, go as far as to label minerals sourced from military factions in regions like the DRC as conflict-minerals.¹⁴⁷ Hence, through the Dodd-Frank Act legislation, the US specifically requires mandatory due diligence responsibility from corporations that source from such regions.¹⁴⁸ Overall, for children working in militia controlled mines, the risk to their well-being is even higher; boys are susceptible to being used as child soldiers whilst girls are used as sex slaves.¹⁴⁹ In such contexts, such forms of child labour practices also fall under the spectrum of forced labour, as referred to in *the ILO Forced Labour Convention*.¹⁵⁰

armed group exercising *de facto* control over the Ituri district, Liberation of the Congo (AFDL), National Congress for the Defence of the People (CNDP), *Forces Démocratiques de Libération du Rwanda* (FDLR), Lord's Resistance Army (LRA), March 23 Movement (M23), Mai-Mai militia.

¹⁴⁵ UN Global Compact and PRI *Guidance on responsible business* 14.

¹⁴⁶ According to Global Witness, Afrimex, through its subsidiary corporations *Société Kotecha and Société de Commercialisation des Minerais* (SOCOMI), allegedly paid taxes to the rebel group *Rassemblement congolais pour la démocratie-Goma* (RDC-Goma), a rebel group in the DRC.

¹⁴⁷ Taka 2014 <http://www.salia.org.za>. Taka states that conflict minerals are referred to as such because their control, exploitation, trade, taxation, or protection contribute to, or benefit from the context of armed conflict.

¹⁴⁸ Section 1502 *Dodd-Frank Wall Street Reform and Consumer Protection Act* (2010). Hereafter referred to as Dodd-Frank Act (2010).

¹⁴⁹ Thorsen 2012 <http://www.unicef.org>.

¹⁵⁰ *ILO Forced Labour Convention, C029* (1930) article 2 reads: "for the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not been offered himself voluntarily".

2.2.5 Impact of mineral supply chain activities on child labourers

Childhood is a period of formative physical and psychological development. This makes children more vulnerable to the impact of mining activities. During the period of physical development, children have thinner skin and a larger skin surface. This means that they dehydrate more frequently and easily absorb toxins.¹⁵¹ Children also breathe faster and more deeply during this period.¹⁵² As a result, work in mining will cause them to inhale large amounts of airborne pathogens, mineral dust, and vapour from toxic metals like mercury which attacks the central nervous system.¹⁵³ Mercury can particularly be lethal when absorbed in high quantities.¹⁵⁴ The absorption of toxins, toxic metals and chemicals, can also impair a child's endocrine and enzyme systems, which play a major role in growth and development functions.¹⁵⁵ Severe detrimental effects can also be caused to respiratory organs and the brain.¹⁵⁶

A more radical impact of mining activities on children is death. The OECD reports that mining has the highest fatality rate for children between the ages of 5 and 17 years.¹⁵⁷ Ironically, this is in comparison to agriculture which generally has the highest number of child labourers. According to the ILO, an estimated 22,000 children are killed at work each year.¹⁵⁸ Thus, if we consider mining to have the highest fatality rate, it could be argued that most of these deaths are as a result of the impact of the sectors' activities on children. The major causes of child related deaths in mining are linked

¹⁵¹ ILO *World report on child labour 2015* 50.

¹⁵² World Health Organization 1999 <http://www.who.int/>.

¹⁵³ Child Rights International Network 2017 <https://www.crin.org/>.

¹⁵⁴ World Health Organization 1999 <http://www.who.int/>; OECD 2016 <http://www.oecd.org/>; Child Rights International Network 2017 <https://www.crin.org/>.

¹⁵⁵ ILO *World report on child labour 2015* 50. Because their enzyme systems are still developing, children are less able to detoxify hazardous substances.

¹⁵⁶ ILO *World report on child labour 2015* 50.

¹⁵⁷ OECD 2016 <http://www.oecd.org/>.

¹⁵⁸ ILO 2017 <http://www.ilo.org/ipec/facts/>.

to severe injury or suffocation from the collapse of a mine shaft and breathing difficulties caused by respiratory diseases like silicosis.¹⁵⁹

If they do survive, children may still be affected by long-lasting and irreversible impacts of mining activities. Some of the permanent disabilities include the loss of limbs, muscle injury, joint and bone deformation, blistered hands and feet and eye injuries.¹⁶⁰ These physical impacts coupled with experiences of abuse and violence on mining sites can lead to lifelong disabilities and psychological damage. Overall, the reasons set out above make a case for why child labour in mineral supply chains is considered to be a serious violation of the fundamental human rights of the child. Since the adoption of the UN Guiding Principles, it has been internationally recognised that corporations now have a due diligence responsibility duty to "identify, prevent, mitigate and remedy" human rights abuses like child labour in the supply chain. The extent to which due diligence responsibility under the normative framework can be applied and used to eliminate child labour impacts in the mineral supply chains is examined in the next section.

2.3 Context of the application of normative framework due diligence responsibility

As pointed out in the introduction, due diligence is the cornerstone of the Guiding Principles. It discharges the corporate responsibility to respect human rights. Put differently, under the normative framework, corporate responsibility to respect human rights means to act with due diligence to avoid impacting the rights of others and to address adverse impacts. Thus, due diligence responsibility is both preventive (avoid impacting) and remedial (address adverse impacts) in nature. When defined, due diligence in terms of its dictionary meaning is considered to be "a measure of

¹⁵⁹ OECD 2016 <http://www.oecd.org>; Amnesty International Profits and loss-mining and human rights 6.

¹⁶⁰ OECD 2016 <http://www.oecd.org>.

prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by a reasonable and prudent person..."¹⁶¹ In the 2009 compendium report of the Guiding principles, due diligence is defined as "diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation".¹⁶² In simple terms, due diligence can be referred to as the duty of care reasonably expected from a person discharging an obligation. Since a corporation is in essence not a natural person, it could be inferred that this duty extends to it in its capacity as a legal person. Letnar Cernic¹⁶³ attributes the recognition of corporations as legal person as being derived from ancient Roman law.

2.3.1 Historical perspective of due diligence responsibility

Interestingly, due diligence as a standard of conduct exists in both international law norms and corporate practice. In law, it can historically be traced back to classical Roman law of delict and the English common law of negligence.¹⁶⁴ Due diligence in law was used to assess the conduct expected of a *diligens paterfamilias*, which when translated means the prudent head of a household or a reasonable person, in order to determine fault or *culpa*.¹⁶⁵ Today, the standard is used in international law to define a state's standard of conduct in its attempt to prevent or respond to a violation caused by wrongful acts of third parties.¹⁶⁶ In corporate practice,

¹⁶¹ United Nations *The corporate responsibility to respect human rights* 6. Definition sourced from Black's Law Dictionary, 6th edition.

¹⁶² Human Rights Council- Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework A/HRC/11/13 (22 April 2009) para 71. Hereafter referred to as Normative framework 2009 report.

¹⁶³ Letnar Cernic *Corporate responsibility* 26.

¹⁶⁴ Bonnitcha and McCorquodale 2013 <https://papers.ssrn.com>.

¹⁶⁵ Bonnitcha and McCorquodale 2013 <https://papers.ssrn.com>. The standard of *diligens paterfamilias* is still widely used as a standard of fault in a number of domestic legal systems.

¹⁶⁶ Bonnitcha and McCorquodale 2013 <https://papers.ssrn.com>. For example, in the case of *Velazquez Rodriguez* (SER.C) No 4 (1988), the Inter-American Court of Human Rights considered whether the government of Honduras was responsible for the disappearance of individuals, in circumstances in which it had not been established

due diligence is said to have emerged from securities law.¹⁶⁷ It has been used since as early as the 1990's as a factual investigation process, in which information is gathered in order to analyse risks.¹⁶⁸ Specifically, corporations use due diligence to identify, assess, pre-empt and manage the internal risks of a new corporate transaction such as mergers and acquisitions.¹⁶⁹ It is observed at this point, that due diligence in both law and corporate practice is used to deal with an actual or potential impact or risk. From this, a probable conclusion is that due diligence under the normative framework is a borrowed principle from well-established law and corporate practice.

Bonnitcha and McCorquodale¹⁷⁰ however argue that the Guiding Principles use and confuse two distinct practices of due diligence. As a result, this causes uncertainty about the scope of corporate responsibility to respect human rights. This argument nonetheless goes beyond the scope of this

that those disappearances were directly caused by the government itself. In the courts judgment, it was held that "an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of "due diligence" to prevent the violation or to respond to it as required by the American Convention on Human Rights".

¹⁶⁷ Lubbers, Van Genugten and Lambooy *Inspiration for global governance* 282.

¹⁶⁸ Normative framework 2010 report para 81; Kryczka, Beckers and Lambooy 2012 *European Company Law* 125.

¹⁶⁹ Lambooy 2010 *Netherlands QHR* 408. In Uganda for example, a German coffee producing company established a coffee plantation on land on which people had been evicted prior to the company's acquisition of the land. The High Court In Kampala found the company liable for compensation to the people evicted from the land on the basis that the company did not act with due diligence and neglected to inquire about the conditions under which the land was being made available to them.

¹⁷⁰ Bonnitcha and McCorquodale 2013 <https://papers.ssrn.com>. They argue that due diligence has two different meanings which the UN Guiding Principles confuse. Due diligence should be understood as two separate principles: (1) due diligence as a business process in commercial contexts and (2) due diligence in law which is a standard of conduct expected of an actor to discharge an obligation. They refer to due diligence in law as a strict standard of conduct. This means, even if a corporation has invoked the use of due diligence to prevent a human rights impact, the corporation can still be held to account if an unforeseen impact occurs at a later stage. Their argument is that the UN Guiding principles refer to due diligence as a business process, which lacks the strict standard of conduct to hold corporations accountable for adverse impacts even after the due diligence process has occurred.

chapter. It could also be the case that the Guiding Principles strategically use due diligence on a terminological basis. Corporations might be unfamiliar with human rights responsibilities, but are familiar with due diligence. Thus, it is highly likely that the Principles use the term "due diligence" to appeal to corporations in their duty to respect human rights.

2.3.2 Scope and features of due diligence responsibility

Turning now to its scope and features, due diligence under the normative framework is considered to be a distinct principle for a number of reasons. Firstly, it is an inductive fact finding and ongoing process¹⁷¹ which should consider three main issues: (i) the country context in which a corporation operates. For example, a weak governance and conflict zone like the DRC can pose a higher risk for human rights violations; (ii) the human rights impacts that the corporation may have in the specified country context. For example child labour impacts in mining activities and; (iii) whether a corporation might contribute to the human rights impacts. For example, through its global supply chain relations.¹⁷² Secondly, due diligence under the normative framework is founded on the responsibility to respect human rights, an international standard of expected corporate conduct.¹⁷³ Thirdly, the responsibility to respect human rights through due diligence is said to exist independently from states duties to respect, protect and fulfil human rights. It exists over and above compliance with national laws protecting human rights.¹⁷⁴ Lastly, all corporate entities, regardless of their size,

¹⁷¹ *Human Rights Council- Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5* (7 April 2008) para 57. Hereafter referred to as Normative framework 2008 report; UN Guiding Principles (2011) - Principle 17.

¹⁷² Normative framework 2008 report para 57; Normative framework 2010 report para 81.

¹⁷³ UN Guiding Principles (2011) - Principle 11.

¹⁷⁴ UN Guiding Principles (2011) - Principle 11; Normative framework 2008 report para 23.

ownership, sector, location and structure, are required to comply with all applicable international and national laws protecting human rights.¹⁷⁵

The above factors all influence the due diligence process and can be interpreted as follows: due diligence under the normative framework does not simply end at identifying and managing a corporations internal risks. It is also an assessment of external risks in the supply chain such as those posed by suppliers, subcontractors and other third party relationships. Corporations, through the due diligence process, are under obligation to institute the best practice of respecting human rights by adhering to international standards, even in contexts where the national law is not enforced. No corporation can be exempt from causing, contributing, or being linked to human rights impacts like child labour in the supply chain. Overall, employing the use of due diligence should enable a corporation to achieve full respect for all human rights, regardless of the context of operation.

2.3.3 Activation of due diligence responsibility

Having discussed and interpreted its scope and features, an important question to ask at this point concerns the manner in which the due diligence process is activated under the normative framework. In other words, how should corporations "identify, prevent, mitigate and remedy" human rights impacts like child labour in the supply chain. Here, the preventive and remedial aspect of the due diligence process comes alive. The starting point is reference to the substantive content which is followed by the procedural content. For the substantive content of due diligence, the Guiding Principles state that corporations should look at a minimum, to the International Bill of Human Rights and the *ILO Declaration on Fundamental*

¹⁷⁵ UN Guiding Principles (2011) - Principle 12 and Principle 14.

*Principles and Rights at Work.*¹⁷⁶ These international human rights standards comprise the benchmarks against which other social actors judge the human rights impacts of corporations.¹⁷⁷ The procedural content involves five basic steps; impact assessment, integration, tracking and reporting of performance, remediation and policy commitment.¹⁷⁸

Notably, due diligence responsibility under the normative framework appears to be well framed. If applied and executed thoroughly, it arguably has the potential to combat child labour in the supply chain and realise the rights of the child to be free from economic exploitation. However, a significant point of contestation concerns the framework's substantive content. Some authors argue that referring corporations to all internationally relevant human rights law instruments, is undoubtedly too broad.¹⁷⁹ This argument is made despite the notion that corporations can virtually impact the entire spectrum of human rights.¹⁸⁰ The contestation is that the Guiding Principles should have rather deliberated on a specific list of human rights, particularly the most affected, to which due diligence should precisely be applied.¹⁸¹ For instance, the Child Rights International Network (CRIN), a prominent UK based NGO dedicated to the promotion of the rights of the child noted the following:

It is with great disappointment that we see no ... substantive discussion of the rights particular to children that have long been a matter of international law... it is difficult to imagine the Guiding Principles could

¹⁷⁶ UN Guiding Principles (2011) - Principle 12; Normative framework 2008 report para 58.

¹⁷⁷ Social actors include governments, civil society, public and private investors, corporate victims of human rights abuses, amongst others.

¹⁷⁸ UN Guiding Principles (2011) - Principle 17.

¹⁷⁹ Deva "Treating human rights lightly" 88.

¹⁸⁰ Normative framework 2009 report para 52 states: "the quest to determine a finite list of rights for corporations to respect is a fool's errand because corporations can affect the entire spectrum of rights." Adding on, Normative framework 2010 report para 59 also states: "because corporations can affect virtually the entire spectrum of internationally recognised rights, the corporate responsibility to respect applies to all such rights."

¹⁸¹ Deva "Treating human rights lightly" 88.

- provide any meaningful guidance for states and business enterprises seeking to 'protect, respect and remedy' the human rights of children.

While the omission of the Guiding Principles is especially troubling, a key objection to CRIN's standpoint can nevertheless be made. In support of the framework's position, it is argued that referring corporations to all relevant human rights instruments is simply a projection of the future. What human rights will be the most severely impacted by corporate action next cannot simply be ascertained beforehand. On the other hand, in view of the framework's broadness, it is argued that the work of a human rights scholar or researcher can play an important role. Such persons can precisely identify which human rights are severely impacted by corporate action at a given time and transpose what the normative frameworks' due diligence responsibility entails in relation to the rights identified. Additionally, Blitt¹⁸² rightly holds the opinion that the shortcomings of the framework may potentially be remedied through the Working Group on the issue of human rights and transnational corporations and other business enterprises.¹⁸³ The mandate of the Working Group includes for special attention to be awarded to persons in vulnerable situations, in particular children.¹⁸⁴

Overall, in the "game changer" rhetoric of Ruggie, the due diligence process of the normative framework goes beyond naming and shaming to knowing and showing.¹⁸⁵ Thus, when applied to child labour, the substantive content should guide corporations in their duty to "know" the rights of the child in the supply chain. Whilst the procedural content should guide

¹⁸² Blitt 2012 *Texas ILJ* 54.

¹⁸³ Human Rights Council - Resolution 17/4 Human rights and transnational corporations and other business enterprises A/HRC/RES/17/4 (6 July 2011). Hereafter referred to as HRC Res 17/4 - Working Group. The Working Group was established following the adoption of the normative framework in 2011. It is tasked with ensuring the implementation of the Guiding principles as well as to enhance access to effective remedies for those rights which have been impacted by corporate action.

¹⁸⁴ HRC Res 17/4 - Working Group para 6(f).

¹⁸⁵ Normative framework 2010 para 80.

them to "show" that they respect the rights of the child in the supply chain. Both the substantive and procedural content can therefore be referred to as the "know" and "show" process of due diligence responsibility.

2.4 Normative framework due diligence responsibility in action: Substantive content "know process"

In applying the substantive content of due diligence to child labour in the supply chain, corporations should look particularly to human rights instruments addressing the rights of the child. This means, reference to the International Bill of Human rights, the CRC, and the ILO child labour conventions. This advances the argument that the substantive content recognises child labourers as rights-holders, supporting the rights holders' perspective approach.

2.4.1 International Bill of Human Rights (UDHR, ICCPR and ICESCR)

Together, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), constitute the International Bill of Human Rights. Corporations have a due diligence responsibility to refer to the rights enunciated in the Bill primarily due to two reasons. First, the human rights principles enunciated in the Bill form the foundation of the human rights regime.¹⁸⁶ Borrowing the words of Henkin, a widely renowned contemporary scholar of international law, the

¹⁸⁶ The Bill of Rights recognises the inherent dignity and the equal, inalienable and fundamental rights of all persons which are essential for the pursuance of life as a human being. The Bill was founded on the idea, during the period of World War II, that there are few common standards of decency that can and should be accepted by people of all nations and cultures. Before the era of World War II, how the state treated its own inhabitants was nobody else's business, an axiom of the international system and of international law. The Bill of Rights is the recognition that a state cannot treat its own inhabitants as it chooses. The Bill of Rights has gone on to become a model of standard for many Constitutions of the world and human rights instruments. Almost every new constitution and many old ones incorporate and reference the principles enshrined in the Bill.

Bill of Rights is the "birth certificate" of the human rights movement.¹⁸⁷ Second, many authors agree that the Bill is predicated on peremptory customary international law principles.¹⁸⁸ Adding on, the UDHR refers to human rights, which includes the rights of the child, as fundamental freedoms to which all human beings are entitled.¹⁸⁹ The principles of the UDHR were later concretised by the ICCPR and ICESCR. These two treaties have received wide international acceptance, both having been respectively ratified by 169 and 165 states.¹⁹⁰ According to the UN Office of the High Commissioner for Human Rights (UN OHCHR), the status of ratifications in international law indicates the expression by the state of its consent to be bound by a human rights treaty.¹⁹¹ Evidently, this is representative of the seriousness to which states are willing to commit to human rights responsibilities. Since corporations operate under the jurisdiction of states, this means that they arguably also have a responsibility to comply with human rights norms.

More specifically, article 4 and article 30 of the UDHR can be directly related to the practice of child labour in mineral supply chains. In terms of article 4, no person should be held in slavery or practices similar to slavery. It has been shown previously that some forms of child labour in the mineral supply chain constitute forced labour. This is the case, for example, where militia controlled mines forcibly make use of child labourers. Today, forced labour is considered to be a form of slavery, what is commonly

¹⁸⁷ Henkin 1999 *Brooklyn JIL* 19.

¹⁸⁸ Hinz "Human rights between universalism and cultural relativism?" 5. Customary international law principles are universal, obligatory, and binding on all states and persons. Adding on, customary international law norms bind states to human rights obligations whether or not they are party to a treaty. Although the intended purpose of the UDHR was to serve as a non-binding Declaration, it has been argued that some of its articles have received customary international law status. This includes slavery, genocide, torture, systematic racial discrimination and arbitrary killings are amongst the peremptory norms with customary international law status.

¹⁸⁹ Preamble of the Universal Declaration of Human Rights (1948).

¹⁹⁰ UN OHCHR 2017 <http://indicators.ohchr.org>.

¹⁹¹ OHCHR 2017 <http://www.ohchr.org/>.

referred to as "modern day slavery".¹⁹² Under international law, this practice is a universally prohibited *jus cogens* norm and derogation from such norms can never be allowed.¹⁹³ Notably, some authors go as far as to suggest that the child labour practices like that in the mineral supply chains is itself prohibited as customary international law. Bullard¹⁹⁴ for example, whilst making reference to international law texts, convincingly argues that the worst forms of child labour violate *obligatio erga omnes*,¹⁹⁵ and are therefore crimes against humanity. This means that child labour practices in mineral supply chains breach the obligations that are owed to humanity and have thus achieved customary international law status. Moving on, in terms of article 30, no state, group or person should engage in activities or acts aimed at the destruction of the rights and freedoms set forth in the Declaration. The practice of child labour is a significant destruction of the life and dignity of the child. Corporations impliedly fall under the category of "group or persons" thus, they have a responsibility to use due diligence to contribute to the preservation of the rights and dignity of the child.

An important, yet controversial aspect, which specifically concerns corporations, is found in the preamble of the UDHR. The preamble states that "every individual and every 'organ of society'... shall strive... to promote respect for these rights and freedoms..." It is important to keep in

¹⁹² Anti-slavery 2017 <https://www.antislavery.org>. Forms of modern day slavery include forced labour, bonded labour, human trafficking, child slavery, forced and early marriage.

¹⁹³ UN International Law Commission-Fragmentation of international law: difficulties arising from the diversification and expansion of international law- Report of the study group of the International Law Commission- Finalized by Koskeniemi A/CN.4/L.682 (13 April 2006) para 374. Examples of Jus cogens norms such norms include the prohibition of aggression, slavery, slave trade, genocide, racial discrimination, apartheid and torture.

¹⁹⁴ Bullard 2001 *Houston JIL* 146. Bullard states the following: "due to the emerging patterns of accepted practice and expectation as evidenced by judicial opinions, human rights conventions, United Nations declarations, and secondary materials, the prohibition of child labour arguably has attained the status of customary international law".

¹⁹⁵ *Obligatio erga omnes* are obligations to all mankind, rather than duties owed merely to certain states or nations.

mind that this includes respect and promotion for the rights of the child to be free from economic exploitation in the supply chain. However, whether the use of the phrase "every organ of society" implies that the UDHR directly extends to corporations who are indeed organs of society,¹⁹⁶ is an issue that has been greatly debated.¹⁹⁷ This is so because of the implication attached to the connotation of direct responsibility. Direct responsibility in international law means that corporations would be legally bound to enforce human rights principles encompassed in international human rights law instruments like the UDHR. Failure to do so would result in direct legal accountability.¹⁹⁸ However, it remains the case that under international human rights law, states and not corporations, continue to be seen as the only actors with direct human rights responsibilities. As Vázquez¹⁹⁹ notes, with very few exceptions, international law does not regulate corporate conduct directly. Thus, to state that the preamble applies directly to corporations would be a false presumption. Nonetheless, this arguably does not absolve corporations from human rights obligations. For example, Muchlinski²⁰⁰ is of the opinion that the UDHR's reference to organs of society is an indication that corporations have human rights

¹⁹⁶ Corporations as organs of society serve a social function. Ruggie, in the Normative framework 2009 report para 48 states that corporations duties are embedded in social expectations, that is, the basic expectations that society has of corporations in the fulfilment of human rights, and the corporate responsibility to use due diligence to respect human rights is the baseline norm for all corporations in all situations.

¹⁹⁷ Borges 2016 *U Baltimore JIL* 12. Borges for example, argues that the UDHR is a legal source of direct corporate human rights responsibilities. Borges largely bases her argument on Henkin's interpretation of the UDHR's preamble. According to Henkin, the UDHR's reference to every individual and every organ of society includes juridical persons, it excludes no one, no corporation, no market, no cyberspace, the UDHR applies to them all.

¹⁹⁸ The primary rules of international law are addressed to states only and not corporations. Under the secondary rules of international law, only a state can be directly held accountable for failure to enforce its human rights duties. This is owed to the fact that the state is the primary custodian of human rights. States are therefore required to enact and enforce regulations applicable to corporations.

¹⁹⁹ Vázquez 2005 *Columbia J Transn'l L* 927. Only a small number of international legal norms, primarily those relating to war crimes, crimes against humanity, and forced labour, apply directly to corporations as non-state actors.

²⁰⁰ Muchlinski "The development of human rights responsibilities" 39.

obligations on the basis of their social existence. Ruggie²⁰¹ also refers to corporations as specialised economic organs whose obligation is to use due diligence to promote respect for human rights.

Turning now to the ICCPR and ICESCR, these two instruments to a large extent reiterate the provisions of the UDHR. For corporations with child labour in the supply chain, exercising the substantive content of due diligence responsibility means reference to the ICCPR article 5, article 8 and article 24. Article 5 and 8 re-emphasise the rights of the child not to be subjected to destruction through practices similar to slavery. Article 24 recognises the vulnerable status of children as minors and calls for all members and organs of society to grant them special protection. Interestingly, in comparison to the ICCPR, the ICESCR makes a much stronger reprimand to violators of children's rights. In terms of article 10(3) of the convention, persons who economically exploit children and hamper their normal development should be subjected to legal action. Unsurprisingly, this statement has had much effect in domestic jurisdictions that prosecute corporations for human rights violations. For example, in *Doe v Nestlé*,²⁰² a suit was brought against the corporation Nestlé in the Federal District Court of Los Angeles, US Nestlé allegedly aided and abetted the use of child labour in its cocoa supply chain.²⁰³ Again, in *Flomo v*

²⁰¹ Normative framework 2008 report para 53.

²⁰² *Doe v Nestlé* 748 F.Supp.2d 1057, 1080 (C.D.Cal. 2010).

²⁰³ The plaintiffs alleged that Nestlé aided and abetted child labour practices in the Ivory Coast, the corporation allegedly provided assistance to Ivorian farmers from whom the corporation outsourced cocoa from the plantations where the children worked 12 to 14 hour days without pay, were beaten, whipped, threatened with guns, given scraps of food to eat and were locked in small rooms to prevent their escape. The suit alleged that Nestlé was well aware of the conditions on the plantations but nevertheless ignored the matter. A 2010 BBC investigative report entitled "tracing the bitter truth of chocolate and child labour" corroborated the claims instituted against the corporation. The report alleged that the corporation sourced its cocoa from co-operatives that used child labour. Nestlé was thus complicit to the use of child labour on cocoa plantations in the Ivory Coast, a country in which the use of child labour has been described as a humanitarian tragedy.

Firestone National Rubber Natural Rubber,²⁰⁴ a lawsuit was filed under the *American Alien Tort Claims Act* (ATCA) on behalf of child labourers.²⁰⁵ Like Nestlé, the corporation was also complicit to the worst forms of child labour abuses on its rubber plantations in Liberia. Although these cases do not directly relate to the use of child labour in mineral supply chains, the argument made is that they nevertheless serve as a strong deterrent to corporations with child labour in the supply chain.

2.4.2 *Convention on the Rights of the Child (CRC)*

From the international instruments referred to so far, the CRC is the most comprehensive human rights instrument specifically addressing the rights of the child.²⁰⁶ It has been ratified by 196 states in total, making it the most widely ratified of the core human rights treaties at the international level.²⁰⁷ Adding to that, in General comment no 16,²⁰⁸ the UN Committee on the Rights of the Child²⁰⁹ explicitly refers to the due diligence obligations of corporations in their duty to respect the rights of the child. This makes the CRC an important framework within which to discuss the substantive content of due diligence responsibility for child labour violations in the supply chain.

²⁰⁴ *Flomo et al v Firestone National Rubber Natural Rubber Co* 7th US Circuit Court of Appeals No 10-03675.

²⁰⁵ In the case, Firestone National Rubber Natural Rubber was alleged to have violated international law concerning the worst forms of child labour and other human rights abuses that occurred on its plantation. According to the complainants, supervisors at the Firestone plantation in Liberia encouraged and even required adult workers employed by Firestone to put their children, some as young as six years old to work on the 118,000-acre latex producing rubber tree plantation, so as to meet the corporation's high production quotas.

²⁰⁶ Fodella "Freedom from child labour as a human right" 209.

²⁰⁷ UNICEF *Obligations and actions on children's rights and business* 8.

²⁰⁸ UN Committee on the Rights of the Child- General comment No 16 (2013) on state obligations regarding the impact of the business sector on children's rights (17 April 2013). Hereafter referred to as UN Committee on the Rights of the Child - General comment No 16 (2013).

²⁰⁹ The UN Committee on the Rights of the Child is the specialised body of 18 independent experts tasked with monitoring the implementation of the Convention on the Rights of the Child and clarifying and elaborating the normative content of the obligations in the Convention through General Comments and observations.

The provisions in article 1, article 3 and article 32, specifically relate to the practice of child labour in the supply chain. Article 1 defines a child as every human being below the age of 18 years. This provision is particularly useful to the practice of hazardous child labour in mineral supply chains. As indicated previously, hazardous work is prohibited for all children below this age. In terms of article 3(1), the best interests of the child should be of primary consideration in all actions concerning the child. Article 32(1) reiterates the right of the child to be protected from economic exploitation. For corporations with child labour in the supply chain, the two latter articles can be better understood when read together; in their action to protect the child from economic exploitation, corporations should take the best interests of the child into consideration.

One question that needs to be asked at this point concerns the best interests of the child principle. Put clearly, how can the best interests of the child principle be applied and actualised by corporations with child labour in the supply chain. This question has significant importance attached to it because, to begin with, the best interest of the child principle is one of the four general principles of the CRC.²¹⁰ Adding to that, determining what constitutes the best interests of the child in any given situation has often been an issue of great contention. Here, we can revert back to the debate on the rights of child labourers to survival and their rights to be free from economic exploitation as an example.

Fortunately, a number of authors have deliberated on the best interests principle and what it entails. In implementing the CRC's universally

²¹⁰ UN Committee on the Rights of the Child- General comment No .14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para.1) (29 May 2013) para 1. Hereafter referred to as UN Committee on the Rights of the Child- General comment No 14 (2013). All rights in the CRC are linked and must be considered as a whole. But there are four general principles or overarching rights which are particularly necessary for the fulfilment of all other rights. Non-discrimination (article 2), best interests of the child (article 3), right to life, survival and development (article 6), right to be heard (article 12).

recognised norms, Manza²¹¹ states that the best interests principle allows responsible parties to consider any unique social and cultural obstacles. In her study, Dahlén²¹² refers to the renowned work of Boyden, Ling and Meyers who interpret the best interests principle as a direct expression of a child's health, moral, physical, psychological, cognitive, social and emotional wellbeing. Anything that impedes this wellbeing should be regarded as going against the best interests of the child.²¹³ Interestingly, the interpretation of the authors is closely linked to the definition of child labour in the supply chain. Thus, if we take this into consideration, it becomes clear that the practice of child labour in the supply chain goes against the best interests principle.

In General comment no 14, the UN Committee on the Rights of the Child offers a similar but more elaborative interpretation of the best interests principle. According to the committee, the best interests principle has two basic functions. Firstly, it is a measure that aims at ensuring the full, effective and holistic enjoyment of the rights of the child as recognised in the CRC.²¹⁴ Secondly, in securing the physical, psychological, moral, spiritual integrity and dignity of the child, the best interests principle applies to all actors.²¹⁵ Taking the above discussion into consideration, it becomes evident that corporations are not exempt from applying the best interests of the child principle in any given situation. Therefore, in their due diligence responsibility duty to identify, prevent, mitigate and remedy child labour abuses in the supply chain, corporations should always ensure the best interests of the child.

However, for some corporations, there seems to be a lack of understanding as to what constitutes the best interests of the child in particular cases. For

²¹¹ Manza 2014 *Boston College Int'l and Comp LR* 404-405.

²¹² Dahlén *The negotiable child* 47.

²¹³ Dahlén *The negotiable child* 47.

²¹⁴ UN Committee on the Rights of the Child- General comment No 14 (2013) para 4.

²¹⁵ UN Committee on the Rights of the Child- General comment No 14 (2013) para 4.

instance, in its defence for using child labourers, Firestone National Rubber Natural Rubber applied the best interests principle in a negative manner. The corporation incorrectly argued that because poverty and sub-standard working conditions were prevalent in Liberia, the employment of child labourers on the rubber plantations was in the best interests of the child.²¹⁶ In other cases, corporations have been shown to consider the complete dismissal of child labourers from the supply chain as being in the best interests of the child. This was the case with corporations in the garment industry for example. A problem nonetheless exists here as such a measure would consequently have harsher repercussions on the child. Kinley and Tadaki for instance, refer to the situation in Bangladesh where it was reported that following their dismissal from the garment factories, many child labourers in Bangladesh moved into crime and prostitution.²¹⁷

It is therefore argued at this point that the best way for corporations to institute and promote the best interests of the child principle would be through alternative options which go beyond work as a child labourer or complete dismissal from work. In the specific case of child labour in mineral supply chains, as suggested prior, corporations can offer decent work opportunities for adolescents and education for minors. This standpoint is supported by Deva²¹⁸ who calls on corporations to take positive measures for child labourers through education, decent work and vocational training.

Taking the recognition of children's human rights a step further, the UN Committee on the Rights of the Child expressly makes mention of corporate due diligence responsibility in General comment no 16. In their duty to identify, prevent, mitigate and remedy human rights impacts on the child, the Committee states that corporations have an obligation to

²¹⁶ *Flomo et al v Firestone National Rubber Natural Rubber Co* 7th US Circuit Court of Appeals No 10-03675.

²¹⁷ Kinley and Tadaki 2004 *Virginia JIL* 981.

²¹⁸ Deva 2014 *J Indian L Inst* 145.

undertake "child rights due diligence".²¹⁹ Like the general due diligence process of the normative framework, the Committee recommends for the child rights due diligence process to extend to a corporation's third party relationships in the global supply chain. Adding to this, the committee calls for a stricter child rights due diligence process, that is, where a high risk exists of corporate involvement in child rights violations.²²⁰ This should specifically be the case for example, where the nature of corporate activities is in mining or in operating contexts like weak governance and conflict zones.²²¹

Basically, here, the Committee proposes for a tailor made due diligence process which specifically caters to the rights of the child. Similarly, based on this approach, one could also narrow it down to a child labour due diligence process for child labour violations in the supply chain. Overall, it can be said that the Committee's proposal for a child rights due diligence process is undoubtedly a progressive move. This is based on the reasoning that requiring corporations to apply due diligence responsibility for human rights considerations as a whole, is still a fairly new initiative in international settings. As from the date of writing, only six years have gone by since the adoption of the normative framework. Thus, a child rights due diligence process under General comment no 16 not only enhances the status of the CRC. It also arguably draws attention to corporate-related child rights violations like child labour in the mineral supply chain.

2.4.3 ILO core child labour conventions: Minimum Age Convention (C138) and Worst Forms of Child Labour Convention (C182)

Lastly, under the international mandate of due diligence responsibility, the ILO's child labour conventions arguably serve as the most relevant international instruments for child labour in the supply chain. To give a

²¹⁹ UN Committee on the Rights of the Child- General comment No 16 (2013) para 62.

²²⁰ UN Committee on the Rights of the Child- General comment No 16 (2013) para 62.

²²¹ UN Committee on the Rights of the Child- General comment No 16 (2013) para 62.

brief background here, following the adoption of the *ILO Declaration on Fundamental Principles and Rights at Work*, the effective abolition of child labour was included as one of the four fundamental principles of the ILO.²²² The Declaration is primarily important for the reason that, even if they have not ratified the child labour conventions, all Member States of the ILO are bound to respect the conventions.²²³ To date, C138 has been ratified by 170 states²²⁴ whilst C182 has received 181 ratifications.²²⁵ With India being the latest state to ratify the conventions in June 2017, it can safely be said that almost all children in the world are now covered by the two conventions.²²⁶ Since the ILO exists as a tripartite organisation consisting of governments, workers and employers, it could also be said that the adoption of child labour standards, to a large degree, has been influenced by corporations in their tripartite duty as employers. Thus, whilst the child labour conventions are required to be implemented by Member states, corporations, as non-state members of the ILO, arguably also have a responsibility to uphold these standards.²²⁷ Adding to this, the requirement of due diligence responsibility is seemingly becoming more prominent in international human rights law texts. In the ILO's 2014 protocol to the forced labour convention, article 2(e) requires corporations

²²² *ILO Declaration on Fundamental Principles and Rights at Work (1998)* para 2(c) refers to the effective abolition of child labour. The other three fundamental principles of the ILO listed in para 2 include freedom of association and the right to collective bargaining; the elimination of forced or compulsory labour and the elimination of discrimination in respect of employment and occupation.

²²³ In the presentation of the Declaration, Michel Hansenne, Director-General of the ILO from 1989-1999 writes: Members of the ILO, even if they have not ratified the conventions in question, have an obligation to respect "in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions". The Declaration seeks to achieve this aim by implementing the ILO's unique Constitutional procedure in accordance with which each year, states that have not ratified the core conventions will be asked to submit reports on progress made in implementing the principles enshrined in them.

²²⁴ ILO 2017 <http://www.ilo.org/>.

²²⁵ ILO 2017 <http://www.ilo.org/>.

²²⁶ ILO *Ending child labour by 2025* 22.

²²⁷ ILO Tripartite declaration of principles concerning multinational enterprises and social policy (2017). General Policies para 9.

as private actors, to prevent and respond to risks of forced or compulsory labour through due diligence.²²⁸

Specifically, C138 was adopted for the main purpose of limiting the minimum age for working children. It subsequently set the age limit at 15 years.²²⁹ This corresponds with the age of compulsory school completion, in line with article 2(3) of the convention.²³⁰ The convention is accompanied by recommendation 146 which encourages the progressive raising of the minimum age to a level consistent with the fullest physical and mental development of a child.²³¹ Interestingly, whilst the minimum age can be lowered to 14 years in developing countries²³² or to age 13 and age 12 for what is considered light work,²³³ for hazardous work like that in the mineral supply chains, it is lifted to 18 years.²³⁴ Adding to this, article 5(3) explicitly identifies mining as a sector to which the convention should apply as a minimum. This therefore shows the seriousness attached to the concern for child labour in mining activities.

Whilst C138 sets a universal minimum age standard for child work, C182 is arguably more progressive as it specifically targets work that harms children and falls under conditions referred to as the worst forms of child labour. In terms of C182 article 1, the elimination of hazardous child labour like that in mineral supply chains should be considered as an outright matter of urgency. Complementing this position, article 2 strictly sets the minimum age for hazardous child labour to 18 years. Only in very specific instances, where the health, safety and morals of children are fully

²²⁸ ILO Protocol of 2014 to the Forced Labour Convention, P029 (1930).

²²⁹ Article 3(3) of the ILO Minimum Age Convention, C138 (1973).

²³⁰ *ILO Minimum Age Convention, C138* (1973) views age 15 as the lowest age expectation at which young persons complete their schooling, hence, a correlation exists between the age of completion of schooling and the age of employment.

²³¹ ILO Recommendation concerning the Minimum Age for Admission to Employment, R146 (1973) para 7.

²³² Article 3(4) of the ILO Minimum Age Convention, C138 (1973).

²³³ Article 7 of the ILO Minimum Age Convention, C138 (1973).

²³⁴ Article 3 of the ILO Minimum Age Convention, C138 (1973).

protected, can the age be lowered to 16 years.²³⁵ Recommendation 190 goes on to identify the types of work with potential hazards as:

- (i) Work which exposes children to physical, psychological or sexual abuse;
- (ii) Work underground, under water, at dangerous heights or in confined spaces;
- (iii) Work with dangerous machinery, equipment and tools, or which involves the handling or transport of heavy loads;
- (iv) Work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging their health;
- (v) Work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.²³⁶

Unsurprisingly, the above all appear to be a symptom of what has already been described as constituting the problem of child labour in mineral supply chains.

In principle, both C138 and C182 agree on the minimum age for child labour in mineral supply chains to be set at 18 years. Thus, due diligence responsibility for child labour in the supply chain means being aware of the set minimum ages. However, lately in international settings, there has been debate concerning the minimum age standards. This debate was mostly made in anticipation of the UN Committee on the Rights of the Child's adoption of General comment no 20 concerning the rights of Adolescents, implemented in 2016.²³⁷ Taking the due diligence responsibility analysis further, it will be worthwhile at this stage to engage with the minimum age debate in order to understand the current state of affairs in matters concerning child labour.

²³⁵ ILO Recommendation concerning the prohibition and immediate action for the elimination of the Worst Forms of Child Labour, R190 (1999) para 4.

²³⁶ ILO Recommendation concerning the prohibition and immediate action for the elimination of the Worst Forms of Child Labour, R190 (1999) para 3.

²³⁷ UN Committee on the Rights of the Child- General Comment No 20 (2016) on the implementation of the rights of the child during adolescence (6 December 2016).

A question that often arises in discussions on the minimum age concerns the importance of minimum age standards. Some authors, like Deva²³⁸ for example, argue that minimum age standards on their own are an ineffective method of regulating child labour. Reasons for this are that firstly, minimum age standards are likely to do more harm than good as they would push children into informal unregulated labour.²³⁹ Secondly, it has been said that the blanket prohibition imposed by these standards fails to acknowledge the social, cultural and economic circumstances in which child labour is simply a practical reality.²⁴⁰

The CRIN adds to the minimum age debate by taking a rights-based approach. To begin with, CRIN rightly states that the minimum age for admission to employment is primarily set to provide children with a demonstrated need for protection from significant harm imposed on them by persons in authority.²⁴¹ This harm can be caused for example, by the state,²⁴² parents²⁴³ or corporations who use or are complicit to using children as child labourers. Secondly, CRIN believes that minimum age standards provide a benchmark for presumed capacity or in the particular case of child labour, the incapacity to work.²⁴⁴ In support of this position, Borzaga²⁴⁵ refers to the argument made by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR).²⁴⁶ The

²³⁸ Deva 2014 *J Indian L Inst* 143-144.

²³⁹ Child Rights International Network 2017 <https://www.crin.org/>.

²⁴⁰ Open Democracy 2017 <https://www.opendemocracy.net/>.

²⁴¹ Child Rights International Network 2017 <https://www.crin.org/>.

²⁴² In Uzbekistan for instance, one of the largest cotton exporting countries in the world, the state has been known to put children to work on its cotton farms.

²⁴³ Many cases of child labour occur within the family unit. Parents often require children to work in order to contribute to the family income.

²⁴⁴ Child Rights International Network 2017 <https://www.crin.org/>.

²⁴⁵ Borzaga "Limiting the minimum age" 53.

²⁴⁶ The CEACR forms part of the ILO's regular supervisory system. It is an independent body set up in 1926 to examine the growing number of government reports on ratified conventions. It provides an impartial and technical evaluation of the state of application of international labour standards. The CEACR is composed of 20 jurists who make observations and direct requests, they are appointed by the governing body of the ILO for three-year terms.

CEACR states that children below the minimum age do not have the capacity to make an informed judgment on whether or not they should engage in hazardous work. Hence, in cases of the worst forms of child labour, the age limit is set at 18 years. Last and most importantly, CRIN argues that a minimum age gives recognition to a child as a rights holder. Through minimum age standards, a child acquires an absolute right to be free from economic exploitation.²⁴⁷

Whilst the main contention against minimum age standards relates to the failure to recognise the contexts in which child labour occurs, a more plausible approach, particularly with regard to child labour in the supply chain, would be in line with the CRIN's position. The absence of minimum age standards in corporate global supply chains would arguably increase the risk of economic exploitation for children. Corporations are now more than ever outsourcing production and raw materials from third parties in the supply chain. Evidence from economic research suggests that this has a direct link to the demand for child labour.²⁴⁸ Consequently, without minimum age based restrictions, the risk of child labour in the supply chain would undoubtedly be heightened. Overall, in their due diligence responsibility duty to identify, prevent, mitigate and remedy child labour abuses in the mineral supply chain, corporations should be aware of the set minimum age standards.

2.4.4 Special consideration: Regional mandate: African Charter on the Rights and Welfare of the Child

A number of regional human rights instruments also call for the basic recognition of the human rights of the child in corporate supply chain activities. Special attention should, however, be awarded to the *African*

²⁴⁷ Child Rights International Network 2017 <https://www.crin.org/>.

²⁴⁸ Cho *et al* 2015 <https://papers.ssrn.com/>.

Charter on the Rights and Welfare of the Child.²⁴⁹ This is in consideration of the fact that Africa is the continent with the highest incidences of child labour. Recent global statistics show that 72.1 million child labourers, out of the total number of 152 million, are found in Africa.²⁵⁰ Whilst other continents such as Asia and the Pacific experienced a drop in the numbers of child labourers, Africa shockingly experienced an increase.²⁵¹ In terms of its prevalence, approximately 1 in 5 children are engaged in child labour on the continent.²⁵² The ILO goes on to point out that "a breakthrough in Africa will be critical to ending child labour worldwide".²⁵³ On the other hand, the continent experiences facets of weak governance, conflict and disaster. Taken together, these factors arguably increase the probability of finding higher numbers of child labour in the supply chains of corporations that source minerals from the continent. Due attention should therefore be paid to human rights provisions protecting the rights of the child to be free from economic exploitation on the continent.

Having been ratified by 48 of the 54 Member states, the African Charter is intrinsically modelled on the CRC. The primary difference however, is that the Charter seeks to address the challenges faced by children at the continental level. Such challenges can, for instance, be linked to harmful social and cultural practices which give rise to situations of abuse.²⁵⁴ Like its UN predecessor, the CRC, the Charter in article 2 defines a child as a person below the age of 18 years. Article 4(1) also follows in the footsteps of the CRC and obliges all persons to take the best interests of the child into consideration in all actions concerning the child. With respect to the

²⁴⁹ African Charter on the Rights and Welfare of the Child (1990).

²⁵⁰ ILO 2017 <http://www.ilo.org/>.

²⁵¹ The number of child labourers in Africa increased from 59 million to 72.1 million during the 2012 to 2016 period. In contrast, other continents like Asia and the Pacific experienced in decline in the numbers of child labourers.

²⁵² ILO 2017 <http://www.ilo.org/>.

²⁵³ ILO *Global estimates of child labour* 9.

²⁵⁴ For example, the Charter recognises child marriage as being quite prevalent on the continent. Article 21(2) of the Charter therefore prohibits the practice of child marriage.

practice of child labour in the supply chain, article 15(1) explicitly prohibits economic exploitation of the child in both formal and informal sectors. This provision is based upon the consideration of the ILO's child labour conventions.

The African Charter seemingly advocates for the progression of the rights of the child at the regional level. A concerning issue attributed to in the Charter is nonetheless found in article 31. The article addresses the "responsibility of the child" through the following statement:

Every child shall have responsibilities towards his family and society, the state and other legally recognised communities... The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty; (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need; ... (d) to preserve and strengthen African cultural values in his relations with other members of the society...

From the above provisions, firstly, it is clear that article 31 was intended to replicate article 29(1) of the UDHR which states that "everyone has duties to the community in which alone the free and full development of his personality is possible". The preambles of the ICCPR and the ICESCR similarly also make reference to an individual's duties to other individuals and to the community to which they belong. However, what is concerning is that article 31 goes beyond the remit of the Bill of Rights provisions and oddly puts a responsibility on the child as an individual. Some child rights activists view this as the most elaborate limitation on the rights of the child. Taking her words *verbatim*, UN Special Rapporteur, Keetharuth²⁵⁵ states:

Respect for parents, superiors and elders can be seen as an impediment to the child's participation in decision-making which has an effect on him/her. The family, as the 'natural unit and basis of society' is given prominence. However, this does not take into account the fact that duties

²⁵⁵ Keetharuth "Major African legal instruments" 205. Sheila B Keetharuth, a human rights defender from Mauritius was appointed as the first Special Rapporteur in October 2012 on the situation of human rights in Eritrea.

imposed on the child can be construed as allowing for the exploitation of children by adults, and that the family can also be a space where children's rights are violated.

True to Keetharuth's rhetoric the ILO holds that many forms of child labour practices predominantly occur within the family unit.²⁵⁶ Going further, others also argue that article 31 encourages adult and state rights and privileges against children.²⁵⁷ This can be owed to the reasoning that unlike the Bill of Rights, article 31 specifically diverts responsibility to the individual child. In its defence, Nhenga-Chakarisa nonetheless goes on to state that article 31 provides two inherent limitations to the responsibility on the child as an individual. One is that the duties are subject to age and ability. The other is that the responsibilities of the child are subject to such limitations as may be contained in the charter.²⁵⁸

However, regardless of the set limitations, at a close glance, it appears that article 31 nevertheless has the potential to encourage the practice of child labour. Child labour practices are undoubtedly deeply rooted in African traditions and cultural norms. Thus, reference to the preservation and strengthening of African cultural norms can coincidentally have the unintended effect of legitimising child labour. Adults or persons in authority could use the claim of preserving and strengthening cultural norms as a basis on which to use child labourers. Most importantly, within this ambit, the article would also consequently de-legitimise the due diligence responsibility of corporations as legal persons in authority who have a responsibility to fully respect the rights of the child. Owing to such shortfalls, the normative framework rightly acknowledges that due diligence responsibility should exist over and above compliance with national laws protecting human rights. It can also be added here that due

²⁵⁶ ILO *Global estimates of child labour* 9.

²⁵⁷ Nhenga-Chakarisa 2010 *AHRLJ* 166.

²⁵⁸ Nhenga-Chakarisa 2010 *AHRLJ* 167.

diligence responsibility should also exist over and above ambiguous regional laws that fall short of adequately protecting the rights of the child.

Overall, from the discussion of the human rights documents above, it appears that the substantive content, whilst recognising children as rights-holders, should essentially assist corporations in the identification and prevention process. That is, to identify what constitutes the practice of child labour in mineral supply chains in order to prevent the exploitation of child labourers in the supply chain. However, the substantive content of due diligence responsibility should not be interpreted in isolation. It is to be complemented by the procedural content, which in essence completes the due diligence process. Through the procedural content, corporations are required to take internal action to mitigate and remedy adverse child labour impacts. It is through the procedural content that the rights of the child to be free from child labour in the supply chain can be fully realised. The section below advances this argument. It describes how the procedural content of due diligence responsibility can be applied and used to eliminate child labour in the supply chain in greater detail.

2.5 Normative framework due diligence responsibility in action: procedural content "show process"

The procedural content constitutes five main process which are especially important to examine with respect to their application to child labour in the mineral supply chain. This includes; impact assessment, integration, tracking and reporting of performance, remediation and policy commitment.

2.5.1 Impact assessment

To begin with, the impact assessment process requires corporations to assess the risk of child labour throughout its entire global supply chain.²⁵⁹ In the discussion on the features of due diligence responsibility, this can be linked to the statement "due diligence under the normative framework does not simply end at identifying and managing a corporations internal risks. It is also an assessment of external risks in the supply chain such as those posed by suppliers, subcontractors and other third party relationships". One would quickly be inclined to argue here, that an impact assessment throughout a corporation's entire global supply chain would be unrealistic, if not impossible to carry out. This is in consideration of the fact that global supply chains consist of multiple layers of third party relationships. In its explanation on the intricacies of global supply chains, UNICEF²⁶⁰ rightly states that in such contexts, corporations may not always have full visibility and control, especially in the deeper tiers of the supply chain. Adding on Sarfaty²⁶¹ has observed for example, that specific to mineral supply chains, "when tracing the source of conflict minerals, there are often seven or eight layers in the supply chain between the original artisanal mine and the final packaged good in the consumer sector". Fortunately, such legitimate concerns are not without redress. In terms of the normative framework, a corporation is required to identify general areas throughout its entire global supply chain where the risk of adverse human rights impacts would be the greatest.²⁶² On this basis, a corporation can, for instance, consider certain contexts of operation or certain third party relationships that are likely to pose the most risks.²⁶³ In the case of

²⁵⁹ UN Guiding Principles (2011) - Principle 17 and Principle 18.

²⁶⁰ UNICEF 2017 <https://www.unicef.org/>.

²⁶¹ Sarfaty 2015 *Harvard ILJ* 431.

²⁶² UN Guiding Principles (2011) - Principle 17. This should be done in consideration of certain factors such as; suppliers, clients, operating contexts, the products and services involved.

²⁶³ UN Guiding Principles (2011) - Principle 18.

the mineral supply chain, an impact assessment can therefore be prioritised in contexts of weak governance and conflict like the DRC and at the extraction stage, since child labour predominantly occurs in such contexts and at this stage.

It can often be the case that a corporation may not have any experience with human rights issues, hence carrying out an impact assessment would be a difficult task. For this reason, the normative framework states that in such cases, corporations can draw on the expertise of external human rights experts to assist with the impact assessment process.²⁶⁴ It will be the duty of such persons to catalogue the applicable international human rights standards for the rights at stake, and to project ways in which a corporation can mitigate and remedy the impacts.²⁶⁵ It can be argued that the substantive content of due diligence responsibility for child labour in the supply chain is in essence part of the procedural content's impact assessment process since it makes reference to all internationally relevant human rights standards. Whilst this argument holds true to some extent, it is parted with on the basis that the procedural content of due diligence responsibility also requires corporations to consult and engage with the affected stakeholders identified in the substantive content,²⁶⁶ in this case, child labourers. What quickly becomes clear from this provision, is that the procedural content promotes the right of the child to be heard and to express their views freely, a right guaranteed in article 12 of the CRC. It can also rightly be argued that the normative framework facilitates children's participation in due diligence investigations, one of the principles consonant with a human rights approach.

²⁶⁴ UN Guiding Principles (2011) - Principle 18.

²⁶⁵ UN Guiding Principles (2011) - Principle 18.

²⁶⁶ UN Guiding Principles (2011) - Principle 18. The Guiding Principles interpretive guide states that the purpose of consulting and engaging with affected stakeholders is so to identify whether the corporation of the affected persons have the same or different perspective on what constitutes an impact on their human rights and to determine the significance of the impact.

The normative framework further states that corporate engagement with affected stakeholders is for the basic purpose of understanding the extent to which the rights of affected persons have been impacted by corporate action.²⁶⁷ For this reason, engagement and consultation with affected stakeholders can be attributed to as the most important aspect of the impact assessment process.²⁶⁸ Adding to this, affected stakeholders would arguably also be in a much better position, than any other actors, to express their experiences and opinions on the human rights risks that they are faced with. On the other hand, engagement with affected stakeholders can also benefit corporations themselves. In Malawi, for example, a mining corporation's engagement with child rights stakeholders provided a significant piece of information to the corporation. The child rights stakeholders revealed that the presence of wealth in the corporation's area of operations attracted criminal gangs who were hiring children to syphon fuel from company trucks.²⁶⁹

It is nonetheless contended at this point that direct corporate engagement with child labourers as affected stakeholders in mineral supply chains should be approached with caution. This contestation is not meant to impede the rights of the child to be heard. It is made simply because certain factors, such as age and vulnerability, should always be taken into consideration where children are concerned, a principle recognised in article 5 of the CRC.²⁷⁰ As has been shown, child labourers in mining activities are a particularly vulnerable stakeholder group who fall between the ages of 5 and 17. In such a case, a more feasible approach would

²⁶⁷ United Nations *The corporate responsibility to respect human rights* 43.

²⁶⁸ ILO *ILO-IOE Child labour guidance tool for business* 54-55.

²⁶⁹ UNICEF *Child rights and mining toolkit* 20.

²⁷⁰ Article 5 of the Convention on the Rights of the Child (1989) requires respect for the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present convention.

therefore be to consider the involvement of adults in their capacity as either experts or parents, guardians, care-givers and community leaders, in the engagement and consultation process. As noted in UNICEF's 2017 child rights and mining toolkit, "direct consultation with children always requires engagement with other child rights stakeholders and experts who have an understanding of the issues because the process can do more harm than good if not carried out appropriately and ethically".²⁷¹

2.5.2 Integration

Integration is the appropriate action taken by a corporation to respond to the human rights impacts identified in the impact assessment process. Where child labour has been identified as an imminent or actual human rights impact in the supply chain, a corporation is required to respond in two ways. Firstly, it should systematically assimilate the findings from the impact assessment within the corporate structure.²⁷² The findings can, for example, be addressed by means of a policy statement which specifically outlines the rights of the child in mineral supply chains. Secondly, where it is discovered that a corporation contributes or is linked to child labour impacts, as part of the integration process, the corporation is required to exercise the principle of leverage over its business relationships.²⁷³ Through the principle of leverage, a corporation in essence has a due diligence responsibility duty to effect change in the wrongful practices of its third party relationships that use child labour.²⁷⁴ The principle of leverage is specifically important for the reason that corporations will as a last resort

²⁷¹ UNICEF *Child rights and mining toolkit* 23.

²⁷² UN Guiding Principles (2011) - Principle 19.

²⁷³ UN Guiding Principles (2011) - Principle 19.

²⁷⁴ UN Guiding Principles (2011) - Principle 19. Methods of exercising the leverage principle are numerous. They include, amongst others, capacity building, and amending contracts with suppliers. If a corporation has leverage over its third party relations, it is expected to exercise it. If however the corporation lacks leverage, it should find ways to increase its leverage. This can be done for example, through incentives, sanctions, or collaborating with others to influence the third party's behaviour.

be required to terminate business relationships with third parties that use child labour in the supply chain.²⁷⁵ Moreover, like the impact assessment process, integration can also engage with key stakeholders and child rights experts. According to UNICEF's report on the rights of the child in impact assessments, such engagement should be done with the aim to develop action plans and partnerships on how to support the promotion of due diligence responsibility for the rights of the child within the corporation.²⁷⁶

2.5.3 Tracking of performance

The normative framework recognises that tracking of performance is necessary for the purpose of assessing the effectiveness of a corporation's internal policies and procedures put in place to prevent and mitigate child labour impacts in the supply chain.²⁷⁷ Beyond the framework, the ILO states that tracking of performance is primarily important for two reasons. First, it helps strengthen corporate efforts to prevent potential child labour impacts in the supply chain. Second, where a child labour impact has already occurred in the supply chain, tracking of performance helps to ensure that a corporation provides an effective remedy.²⁷⁸ In terms of the normative framework, successful tracking of performance should be based on both qualitative and quantitative approaches.²⁷⁹ A range of systems to track performance can include for example, audits of third party relationships in the supply chain or surveys with affected external stakeholders.²⁸⁰ Given that child labour in mining activities is found at the

²⁷⁵ UN Guiding Principles (2011) - Principle 19. Exercising leverage over third parties that use child labour in the supply chain is generally a complex matter. Certain factors will have to be taken into consideration when taking a decision to terminate the business relationship. Alongside the severity of the impact caused, other factors include; how crucial the business relationship is to the corporation, whether terminating the relationship with the third party relationship itself would have adverse human rights consequences.

²⁷⁶ UNICEF 2013 <http://www.unicef.org>.

²⁷⁷ UN Guiding Principles (2011) - Principle 20.

²⁷⁸ ILO *ILO-IOE Child labour guidance tool for business* 46-47.

²⁷⁹ UN Guiding Principles (2011) - Principle 20.

²⁸⁰ ILO *ILO-IOE Child labour guidance tool for business* 46-47.

extraction stage, in the lower tiers of the supply chain, in line with the ILO's reasoning, it will be particularly important for a corporation to track its performance with third party business relationships at this stage.²⁸¹

2.5.4 Reporting of performance

Whereas tracking and reporting of performance are usually identified as a single aspect, reporting is in actuality a stand-alone duty. It is an external communication of corporate efforts to affected stakeholders or to internal and external stakeholders who have raised concerns on behalf of the affected stakeholders.²⁸² The reporting process is therefore particularly important because here, corporations have to account for how they address child labour impacts in the supply chain. The reporting process can include for example; in-person meetings with child labourers and their representatives, online dialogues, annual reports, corporate responsibility reports, financial and non-financial reports, amongst others.²⁸³

The reporting process also requires corporations to furnish information that is sufficient to evaluate the adequacy of the corporate response to child labour impacts in the supply chain.²⁸⁴ A matter of concern nevertheless arises here. According to the normative framework, corporations fear that through the reporting process, they may overshare confidential corporate information which competitors may get a hold of and use against them.²⁸⁵ Hence, in solidarity with corporate actors, the Guiding Principles recommend that reporting should be done with due regard taken of corporate confidentiality and other competitive or security concerns.²⁸⁶ Thus, whilst the reporting process offers a measure of transparency and

²⁸¹ ILO *ILO-IOE Child labour guidance tool for business* 46-47.

²⁸² UN Guiding Principles (2011) – Principle 21. Internal stakeholders can include shareholders whilst external stakeholders include civil society organisations.

²⁸³ UN Guiding Principles (2011) - Principle 21.

²⁸⁴ UN Guiding Principles (2011) - Principle 21.

²⁸⁵ UN Guiding Principles (2011) - Principle 21.

²⁸⁶ UN Guiding Principles (2011) - Principle 21; OECD 2016 <http://www.oecd.org>.

accountability to child labourers whose rights have been impacted by corporate action in the supply chain, it similarly takes the interests of corporations into consideration.

In light of the above paragraph, a question that arises at this point concerns corporate transparency in the reporting process. Whether or not corporations can truly be transparent when disclosing information on the extent of their human rights impacts is an issue that has greatly been debated. This is mainly because corporations are often viewed as profit making entities who will use any given opportunity for strategic marketing purposes to increase returns. Renowned economist Milton Friedman,²⁸⁷ states that corporations only have one duty, and that is, to use their resources to engage in activities designed to maximise corporate profits. Basically, Friedman's argument is that corporations must use the reporting process to boost the corporate image and maximise profits. This therefore means that corporations linked to severe human rights impacts like child labour in the mineral supply chain,²⁸⁸ could choose not to fully disclose information on the extent of their impacts if this would affect the goal of profit making. Friedman's argument can closely be linked to Harrison's view. Harrison,²⁸⁹ recognises that the undertaking or commissioning of due diligence responsibility in the supply chain is entirely up to the corporation. It is simply a self-regulatory and voluntary initiative. When this logic is applied to the reporting process, Harrison, in essence, states that corporations have the prerogative of using the reporting process to their advantage. They can therefore merely view the reporting process as an

²⁸⁷ Friedman *The New York Times Magazine* 32-33.

²⁸⁸ According to the Guiding Principles interpretive guide, severity of impacts will be judged by their scale, scope and irremediable character. This means that the gravity of the impact (its scale) and the number of individuals that are or will be affected (its scope) will both be relevant. Irremediability is the third relevant factor, used here to mean any limits on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact.

²⁸⁹ Harrison "An evaluation of the institutionalisation of corporate human rights due diligence" 5.

opportunity to elevate their social responsibility status and to maximise profits.

However, a matter of interest, which arguably counters the above debate is linked to one specific provision of the normative framework. The Guiding Principles state that reporting of human rights impacts should specifically be a "formal process" in cases where corporate contexts of operation or the nature of corporate activity involved poses severe risks of human rights impacts.²⁹⁰ Used in this way, formal, according to the interpretive guide of the normative framework, means a reporting process in which corporations have a due diligence responsibility duty to publicly report on their human rights performance.²⁹¹ Adding on, formal in terms of its dictionary meaning refers to an official or conventional manner of reporting.²⁹² Therefore, in its provision, the normative framework first of all impliedly recognises child labour impacts in the mineral supply chain to be a priority of the formal reporting process, taking into consideration its nature and the contexts in which it predominantly occurs. On a second note, it is argued that reference to a formal process, which has been attributed to as an official requirement, limits the voluntary mandate of the reporting process. In essence, a formal process imposes a restriction on the rationale of non-disclosure of information, specifically where severe human rights impacts have been caused. Thus, where impacts like child labour in the mineral supply chain occur, corporations are arguably under an obligation to disclose information concerning the extent of the impact, regardless of whether or not this affects self-interests like profit making.

2.5.5 Remediation

Where evidence exists of an actual human rights impact, corporations as duty bearers, have a due diligence responsibility duty to offer redress to

²⁹⁰ UN Guiding Principles (2011) - Principle 21.

²⁹¹ United Nations *The corporate responsibility to respect human rights* 60.

²⁹² Oxford dictionary 2017 <https://en.oxforddictionaries.com>.

rights-holders as victims of human rights breaches. While some authors contend that the normative framework requires corporations to remediate all egregious human rights impacts,²⁹³ it should be noted from the onset that generally, corporations are not expected to provide a remedy for impacts that they are merely linked to through third party relations.²⁹⁴ It can be presumed at this point, that this provision is owed to the complex nature of the supply chain. It may be a common occurrence that in some instances, corporations are genuinely unaware of the presence of human rights abuses in the supply chain, due to a lack of transparency on the part of third party relations. Hence, for this reason, the Guiding Principles presumably do not put a responsibility to remedy on corporations who are only linked to human rights impacts through third party relationships. Since child labour impacts in the mineral supply chain are mostly linked to corporations through third party relations, this means corporations can in essence, choose not to remediate the impacts.

Giving corporations an opportunity to opt out of remediation, it is argued, is a major short-sighted venture. To this extent, O'Brien and Dhanarajan²⁹⁵ recognise this failure as the biggest supply chain problem. This is especially true in cases where corporations are linked to severe human rights impacts like child labour violations in the mineral supply chain. From a purely objective perspective, it is contended that given their economic power, corporations linked to supply chain abuses would undoubtedly be in the best position to enforce their due diligence responsibility duty to remedy the impacts.²⁹⁶ More importantly, to simply rely on the notion of "linked to"

²⁹³ UN-Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises A/72/162 (18 July 2017) para 69. Hereafter referred to as Working Group report (2017).

²⁹⁴ UN Guiding Principles (2011) - Principle 22.

²⁹⁵ O'Brien and Dhanarajan 2016 *Accounting, Auditing & Accountability Journal* 551.

²⁹⁶ O'Brien and Dhanarajan "The corporate responsibility to respect human rights" 10. O'Brien and Dhanarajan argue that large corporations usually have the resources on paper to prevent or remediate impacts in line with the Normative framework.

as a basis on which to exclude remediation may not be the best approach. The argument made is that some situations should typically require corporations to remedy the impact. It is proposed at this stage that the decision to require remediation should be based on an assessment of what is referred to here as the "knowledge base". This means for example, that if a corporation is linked to business relations in a region of weak governance and conflict, a common understanding should be required that such regions are rife with human rights abuses. Thus in this case, it must be assumed that a corporation had the knowledge of being linked to potential human rights impacts. Hence, where there is evidence of abuses in its supply chain that is associated with such regions, the corporation must take steps to remedy the impact.

As an illustrative example, the knowledge base principle can be found to have been applied by the UK NCP of the OECD in the case of *Rights and Accountability in Development (RAID) v DAS Air Corporation*.²⁹⁷ Like Afrimex, the case is centered on DAS Air's violation of the OECD Guidelines for failure to apply sufficient due diligence to its supply chain. According to RAID, DAS Air, a UK-based air cargo corporation, had violated the OECD Guidelines because it transported minerals from militia-held areas in Eastern DRC. DAS Air Corporation denied having knowledge of the fact that columbite-tantalite, commonly referred to as coltan, came from rebel areas. The UK NCP dismissed this argument and stated the following:

DAS Air did not try to establish the source of minerals they were transporting from Kigali and Entebbe, stating they were unaware of the potential for the minerals to be sourced from the conflict zone in eastern DRC. The NCP finds it difficult to accept that an airline with a significant presence in Africa including a base in Entebbe would not have been

However, the widespread persistence of abuses questions whether they have the will to do so.

²⁹⁷ *RAID v DAS Air UK NCP*, Statement on DAD Air, 21 July 2008 <http://www.oecdwatch.org>.

aware of the conflict and the potential for the minerals to be sourced from Eastern DRC²⁹⁸

Whilst the case does not explicitly relate to remediation, the UK NCP supports the knowledge base principle by requiring a common understanding to be had in certain contexts of operation. Likewise, this principle can arguably be extended to remediation processes.

Furthermore, it is contended that remediation, specifically for child labour impacts in the supply chain, would not only be in the best interests of the child, but equally in the best interests of the corporation. Three reasons are put forward to support this standpoint. First of all, as indicated by the ILO, corporations must choose to remediate human rights impacts as part of a forward-looking approach to seek to mitigate the risk of such impacts continuing or recurring.²⁹⁹ Corporations should therefore be willing to take up remediation as a means of tight-proofing their reputation and to prevent potential legal claims that may ensue as a result of complicity to child labour abuses. Second, as indicated in the interpretive guide of the normative framework, "a corporation cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable remediation".³⁰⁰ Third, remediation is arguably the most important aspect in the procedural content of due diligence responsibility. As recognised by the UN Committee on the Rights of the Child in General comment No 5³⁰¹ "for rights to have meaning, effective remedies must be available to redress violations". This means that there is a close relationship between the rights of the child to be free from economic exploitation in the supply chain and remediation.

²⁹⁸ *RAID v DAS Air UK NCP*, Statement on DAD Air, 21 July 2008 <http://www.oecdwatch.org> para 49.

²⁹⁹ ILO *ILO-IOE Child labour guidance tool for business* 56-59.

³⁰⁰ United Nations *The corporate responsibility to respect human rights* 63.

³⁰¹ UN Committee on the Rights of the Child General comment no 5 (2003) General measures of implementation on the Convention on the Rights of the Child CRC/GC/2003/5 (27 November 2003) para 24. Hereafter referred to as General comment no 5 (2003).

Going forward, where corporations choose to remediate child labour impacts in the supply chain, the primary manner should be through operational-level grievance mechanism systems. An operational-level grievance mechanism system enables affected stakeholders to directly engage with the corporation and raise concerns about the impact that a corporation's activities has on them.³⁰² As noted by Gotzmann,³⁰³ corporations are expected to participate in or establish operational-level grievance mechanisms as a source of access to remedy for human rights abuses. Like the impact assessment process however, the remediation process for child labour violations in the supply chain can particularly be a challenging task. It not only requires appropriate expertise, but also appropriate operational-level grievance mechanisms suitable for children's needs.³⁰⁴ Where child labourers themselves access the grievance mechanisms, like in normal judicial processes, their safety, identity and privacy must be protected at all times. This is to ensure that they do not experience further abuse from alleged offenders or others.³⁰⁵ However, as contended in the discussion on the impact assessment, owing to their vulnerability and minority status, the best approach would be for adults to access grievance mechanism systems on behalf of children. The UN Committee on the Rights of the Child acknowledges this fact and states that "children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights".³⁰⁶

Overall, remediation in terms of the normative framework should conform to the principles of legitimacy, accessibility, predictability, equitability, transparency and compatibility with human rights standards.³⁰⁷ In compliance with these principles, the framework goes on to state that

³⁰² UN Guiding Principles (2011) - Principle 22.

³⁰³ Gotzmann "Human rights and impact assessment" 30.

³⁰⁴ ILO *ILO-IOE Child labour guidance tool for business* 56-59.

³⁰⁵ UNICEF 2013 <http://www.unicef.org>.

³⁰⁶ General comment no 5 (2003) para 24.

³⁰⁷ UN Guiding Principles (2011) - Principle 31.

operational-level grievance mechanisms should be made publicly accessible and should be as close to the level of impacts as possible.³⁰⁸ In this case, a grievance mechanism for child labour impacts in the mineral supply chain can for example, be set up in artisanal mining communities where the prevalence of child labour is highest. In exercising their due diligence responsibility duty, corporations can also enforce the principle of leverage and require third party relationships like suppliers and subcontractors to participate in the remediation process.³⁰⁹

Particularly for child labour impacts in the mineral supply chain, it is argued that remediation would nonetheless be an ineffective process if it fails to seek the betterment of the child. As stated earlier, child labourers are a vulnerable stakeholder group, they are not only objects of economic exploitation; their work in mining activities also impacts other important rights, such as education. For this reason, it is suggested that operational-level grievance mechanism systems should also address significant barriers experienced by children as part of an effective remedy. To once again elaborate on its importance, where the child is below the minimum working age of 15 years, the goal of remediation should be withdrawal from the mine and to offer an alternative like education. On the other hand, for adolescent child labourers in mining activities, as part of remediation, the corporation can offer decent work opportunities or as the OECD suggests, a vocational apprenticeship training scheme.³¹⁰

Beyond operational-level grievance mechanisms, more traditional remedial measures include national courts, national human rights institutions or any other state-administered or statutory bodies empowered to remediate human rights violations.³¹¹ These measures nonetheless fall out of the scope of due diligence responsibility of corporations. A Specific remedial

³⁰⁸ UN Guiding Principles (2011) - Principle 23.

³⁰⁹ ILO *ILO-IOE Child labour guidance tool for business* 56-59.

³¹⁰ OECD 2016 <http://www.oecd.org>.

³¹¹ UN Guiding Principles (2011) - Principle 22.

measure which forms part of the discussion on due diligence responsibility of corporations can however be found in the OECD Guidelines. The OECD Guidelines are accompanied by NCPs, a unique grievance mechanism set up in OECD states. Through the NCPs, corporations have a due diligence responsibility duty to remedy human rights violations that they have either caused, contributed or have been linked to through third party relationships. The case of Afrimex, which concerns child labour impacts in the mineral supply chain, was brought to the UK NCP. Although Afrimex has already been mentioned a few times in this chapter, it is discussed in greater detail in chapter 3, which considers the application of due diligence responsibility duty under the OECD Guidelines.

One important issue comes to light at this point. Unlike the OECD Guidelines, the normative framework is itself not accompanied by any grievance mechanism. The framework simply relies on corporations, as part of their due diligence responsibility duty, to implement operational-level grievance mechanisms to redress human rights impacts in the supply chain. Nevertheless, although it is itself not a grievance mechanism, it will be of importance to consider the role of the Working Group in remediation processes. In its most recent report, the Working Group addresses the controversies related to remediation processes for corporate-related human rights impacts. To begin with, the report rightly acknowledges the close relationship between rights and remedies. It states herein that rights would be of no value in practice if the holder of the right fails to seek effective remedies from duty bearers.³¹² Clearly, here, the Working Group holds the view that rights holders should be at the heart of remedies. It can thus be said that this statement supports the notion which calls on corporations to remediate all types of human rights impacts, regardless of whether they are merely linked to them or not. Furthermore, in its development of what it refers to as an overarching idea, the Working Group holds the opinion

³¹² Working Group report (2017) para 2.

that rights holders should be central to the entire remediation process.³¹³ In this sense, remediation processes, including operational-level grievance mechanisms, should take both the rights holders and their suffering seriously. Lastly, the Working Group states that remedies should be responsive to the diverse experiences and expectations of rights holders.³¹⁴ This statement also impliedly supports the notion for corporations to seek the betterment of the child as part of remediation processes.

Through the Working Group, it appears that the normative framework seeks to source remedies and offer support to those whose rights have been impacted by corporate action. In the midst of continued pressure for the normative framework to display maximum output,³¹⁵ it is however arguably still early stages for the Working Group to display clear results, present the challenges they face, or even demonstrate the nature of the service they provide for those seeking remedies. Beyond this, it is nevertheless contested that in the absence of a grievance mechanism system under the normative framework, it proves difficult to determine the extent to which due diligence responsibility of corporations can be used as a vehicle to remedy and eliminate human rights impacts like child labour in the mineral supply chain. To highlight the seriousness of this this concern, human rights advocate, David Bilchitz,³¹⁶ in his most recent work, goes as far as to propose for remediation of corporate-related human rights impacts to be enforced through a treaty. This is in order to legally bind corporations in their duty to remedy impacts, a highly contentious issue in the business and human rights domain.

³¹³ Working Group report (2017) para 19.

³¹⁴ Working Group report (2017) para 20.

³¹⁵ Mares "Business and human rights after Ruggie" 2; Amerson 2012 *Fordham JCFL* 930-931.

³¹⁶ Bilchitz "Putting flesh on the bone" 14.

2.5.6 Policy commitment

It should be noted beforehand that under the normative framework, the adoption of a policy commitment is attributed to as the first step in a due diligence process. However, for purposes of having a logical flow, the policy commitment is discussed here as the last aspect in the procedural content of due diligence responsibility. The normative framework refers to a policy statement simply as "a generic term used to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments and expectations".³¹⁷ Put simply, a policy commitment is a public statement through which a corporation is required to articulate its responsibility to respect human rights.³¹⁸ O'Brien and Dhanarajan refer to it more compellingly as a pre-requisite to effective due diligence.³¹⁹ When exercising its due diligence responsibility for child labour impacts in the mineral supply chain, a corporation can for example, integrate a child labour policy which refers to the substantive content of due diligence responsibility, that is, international human rights standards. Through the child labour policy, the corporation will be expected to articulate its public commitment not to tolerate the worst forms of child labour in supply chain activities. The child labour policy commitment can be a stand-alone policy or it can be incorporated into a corporation's code of conduct, or existing policies on corporate social responsibility, sustainability, or other values-related corporate commitments and policies.³²⁰

It has been stated previously, that child labour impacts in corporate mineral supply chains are particularly prevalent in contexts of weak governance and conflict. Hence in such cases, Ruggie³²¹ proposes for corporations to implement an even more proactive child labour policy.

³¹⁷ UN Guiding Principles (2011) - Principle 16.

³¹⁸ UN Guiding Principles (2011) - Principle 16.

³¹⁹ O'Brien and Dhanarajan 2016 *Accounting, Auditing & Accountability Journal* 547.

³²⁰ UN Guiding Principles (2011) - Principle 16.

³²¹ Normative framework 2008 report para 48.

Accordingly, a proactive child labour policy can explicitly reference the age of 15 as the expected minimum age for employment. Taking this point further, with reference to third party relationships, the child labour policy statement should equally explicitly specify the corporation's human rights expectations of its third party relationships and other parties directly linked to its operations, products or services.³²² The statement can for example, include a strict provision in its contracts with third party relationships, which stipulates respect for children's rights in the supply chain. Then again, the policy statement appears to be a starting point from which corporations can apply the principle of leverage to enable respect for human rights in third party relationships. Above all, the child labour policy commitment should be made public and accessible to all interested parties.³²³

Overall, the child labour policy should typically be updated as lessons are learned and it should be a constant reference point for the corporation.³²⁴ In essence, through the policy commitment, corporations should be able to prevent child labour impacts in supply chain activities. As referred to in the discussion of its features, the whole due diligence process which includes both the substantive and procedural content, should not be a once-off occurrence. In order to completely eliminate child labour impacts in the supply chain, it should be an ongoing process. This is in recognition of the fact that child labour impacts have a history of re-occurring, particularly in contexts that can easily be destabilised due to weak governance, conflict or disaster.³²⁵

³²² UN Guiding Principles (2011) - Principle 16.

³²³ UNICEF 2013 <http://www.unicef.org>.

³²⁴ UN Guiding Principles (2011) - Principle 16.

³²⁵ ILO *Global estimates of child labour* 26.

2.6 Strengths and limitations of normative framework application of due diligence responsibility

To reiterate its relevance, the normative framework is particularly important to the discussion on due diligence responsibility for the purpose that to date, it is the only business and human rights document that has been adopted at the UN level. This is in comparison to other internationally relevant standards such as the OECD Guidelines. This means that the normative framework has universal coverage, making it the most important document within which to discuss due diligence responsibility for child labour in the supply chain. Regardless of this fact, the framework is not short of pitfalls. Below is a discussion of the strengths and limitations of the framework, particularly as it relates to its application to child labour impacts in the mineral supply chain.

2.6.1 Strengths

As Letnar Cernic ³²⁶ rightly notes, due diligence responsibility of corporations has been dealt with quite comprehensively under the normative framework. From the discussion of both the substantive and procedural content, four inter-related strengths of the normative framework's application of due diligence responsibility are identified. First, due diligence responsibility under the normative framework is an ongoing process. Through it, corporations should constantly identify, prevent, mitigate and remedy child labour impacts. This means that the normative framework recognises the ever present risk of child labour impacts in corporate supply chain activities. Second, due diligence responsibility is an international standard of expected conduct. This means that the best practice of upholding human rights standards should always be applied in a due diligence process. Third, it extends to third party relationships. Corporations, through due diligence responsibility, are therefore required to

³²⁶ Letnar Cernic *Corporate responsibility* 89-90.

police their supply chains to guard against child labour abuses. Fourth, all corporations, regardless of size, are required to comply with the principles of due diligence responsibility. This puts a maximum expectation on all corporations to enforce the best practice and eliminate severe human rights impacts like child labour abuses in the supply chain. The above factors arguably make due diligence responsibility the ultimate response to the problem of child labour violations in the mineral supply chain.

2.6.2 Limitations

One limitation of due diligence responsibility under the normative framework, particularly as it concerns child labour impacts in the mineral supply chain, is that it is undoubtedly too broad. In line with the CRIN's contention, Collins and Guevara³²⁷ similarly argue that although the framework identifies children as a vulnerable group, as a general human rights document, they rarely consider the specific issues related to children. Hence, owing to its general application, the normative framework does not specifically address due diligence responsibility for child labour impacts. This is in comparison to the OECD Guidelines which cater for sector-specific provisions, including the use of due diligence responsibility for child labour impacts in mineral supply chain activities.³²⁸ Thus, in order to determine the extent to which due diligence responsibility applies to human rights impacts like child labour in the supply chain, one has to concisely make a formal assessment of the framework.

On the second point, as has been recognised prior, due diligence responsibility of the normative framework severely falls short with respect to remediation. Whilst the framework relies on corporate-related remediation processes, it does not itself provide a mechanism for remedying human rights impacts. Again, here, comparison can be made to

³²⁷ Collins and Guevara 2014 *Revue générale de droit* 158.

³²⁸ OECD 2016 <http://www.oecd.org>.

the OECD Guidelines which remediate human rights impacts through NCPs. Lastly, it remains the case though that due diligence responsibility under the normative framework is not legally binding. It is simply conferred as a duty to only "respect" human rights. This means, corporations are not bound to protect children from economic exploitation in the supply chain. In essence, corporations have the choice of implementing due diligence responsibility to eliminate child labour impacts within their supply chains or not. Tied to this, the persisting presence of child labour in mineral supply chains arguably questions the non-binding nature of due diligence responsibility.

2.7 Conclusion

The purpose of this chapter was to examine due diligence responsibility under the normative framework and consider the extent to which it applies to child labourers as rights holders in mineral supply chains. This chapter is predicated on the understanding that the normative framework is the starting point on which to analyse due diligence responsibility for child labour in the mineral supply chain. The theme which concurrently runs throughout the chapter, is that the due diligence responsibility principle which is predicated on the duty to respect human rights, requires corporations to identify, prevent, mitigate and remedy child labour impacts in the supply chain. This has the potential to realise the rights of the child to be free from economic exploitation in the supply chain.

The first significant part of the chapter assesses and describes the extent of the problem of child labour in mineral supply chains. Here, the severity of child labour impacts in mineral supply chains is highlighted. This part emphasises the need for due diligence responsibility and why it should be applied to children in such contexts. The second significant part is an examination of the extent to which due diligence responsibility applies to the identified child labour impacts in the supply chain. After offering a brief synopsis on the nature of due diligence, attention is diverted to the two

pillars of due diligence responsibility, that is, the substantive content and the procedural content. From the analysis of the human rights documents under the substantive content, the argument that due diligence responsibility considers children to be rights-holders has been proved to be correct. Through the substantive content, corporations can potentially identify and prevent child labour impacts in the supply chain.

The due diligence responsibility debate was taken further by a discussion on the procedural content. Here, the argument was that corporations can potentially eliminate child labour impacts from the supply chain through mitigation and remediation processes. This statement has however, only slightly been proved to be correct. Slightly is used here owing to the finding that corporations have the option to choose whether or not they should remediate human rights impacts like child labour in the supply chain, since they are only linked to such impacts through third party business relationships. The main argument of the procedural content is that remediation plays a central role in the due diligence process, failure to remediate is arguably a failure to eliminate child labour impacts from the supply chain. Although the strength of the whole due diligence responsibility process under the normative framework lies in the fact that it is on-going process, evidence from this chapter suggests that its non-binding status continues to be seen as its greatest short-fall. This undoubtedly creates a significant impediment to realising the rights of the child to be free from child labour in the supply chain.

Overall, the chapter contends that due diligence responsibility under the normative framework has authoritative effect which requires corporations to discharge their due diligence obligation and respect the rights of the child in supply chain activities. However, in view of its shortfalls, it is important to note that due diligence responsibility does not end with the normative framework. It is recognised in other international standards, the most important being the OECD Guidelines. The Guidelines do not only

embed the expectation of due diligence responsibility for corporations to identify, prevent, mitigate and remedy child labour impacts in the supply chain. They also offer sector-specific due diligence provisions. This includes provisions related to child labour impacts in the mineral supply chains. The OECD Guidelines also encompass remediation processes for child labour impacts. Thus, in comparison to the normative framework, the OECD Guidelines are arguably more comprehensive, particularly as it concerns child labour impacts in the mineral supply chain. What follows in the next chapter is an analysis of due diligence responsibility as it applies to child labour impacts in the mineral supply chain under the OECD Guidelines.

CHAPTER 3

Practical application of due diligence responsibility to child labour in mineral supply chains: OECD Guidelines

3.1 Introduction

Having dealt with the normative framework, this chapter shifts its focus to the OECD Guidelines. In an attempt to bridge the due diligence responsibility gap, this chapter continues to further examine the extent to which due diligence responsibility applies to child labourers as rights holders in the mineral supply chain under the OECD Guidelines. The statement "practical application" in the title of the chapter is used herein to support the argument that the OECD Guidelines institute a pragmatic approach to due diligence responsibility which is tailored to child labour impacts in the mineral supply chain. This notion is supported with reference to two facts:

The first is that unlike the normative framework, the OECD Guidelines expressly require due diligence responsibility for child labour impacts. In terms of chapter V of the 2011 version of the Guidelines, corporations are required to contribute to the effective abolition of child labour. They should take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.³²⁹ Additionally, the Guidelines also offer complementary guidance on due diligence responsibility specific to child labour impacts in the mineral supply chain. Such guidance can be found in two relevant texts: (1) the OECD's due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and (2) the OECD's practical actions guide for companies to identify and address the worst forms of child labour in the minerals supply chain. The first Guidance identifies child labour in

³²⁹ *OECD Guidelines for Multinational Enterprises (2011)* Commentary Chapter V. Employment and Industrial Relations para 1(c).

mineral supply chains as a serious human rights abuse that may be associated with extraction, trading, handling, and transportation of minerals. The guidance requires corporations not to tolerate, profit from, contribute to, assist with or facilitate the commission of the worst forms of child labour in their supply chain activities.³³⁰ The second is a guide which builds up on the first guidance. The practical actions guide offers direction on due diligence responsibility action which should be taken to respect the rights of the child to be free from economic exploitation in the supply chain.

On the second point, the notion of practical application is used herein in light of the OECD's Afrimex case which instituted the requirement of due diligence responsibility for child labour impacts in the mineral supply chain. Afrimex is the only case which has to date, made a pronouncement on due diligence responsibility for child labour impacts in the mineral supply chain. Thus, it is undoubtedly the cornerstone of the due diligence responsibility principle for child labour impacts in the mineral supply chain. Moreover, as one out of the two most authoritative due diligence responsibility standards, the OECD Guidelines serve as an important pillar on which to analyse the application of due diligence responsibility to child labour in the mineral supply chain.

Based on these key indicators, the main argument made in this chapter is that the OECD Guidelines progressively enforce due diligence responsibility for child labour in the mineral supply chains. The Guidelines undoubtedly have a stronger resolve to promoting respect for the rights of the child. This in essence means that the Guidelines are a more reliable platform for realising the rights of the child to be free from economic exploitation in the mineral supply chain. Beyond the most internationally recognised authoritative standards, the chapter also makes an effort to recognise due

³³⁰ OECD *OECD due diligence guidance*. Annex II Model supply chain of minerals from conflict-affected and high risk areas para 1(iii) 20-21.

diligence responsibility as outlined in other relevant guidelines. The *ILO Tripartite declaration of principles concerning multinational enterprises and social policy*, the UN Global Compact and section 1502 of the US *Dodd Frank Wall Street Reform and Consumer Protection Act*³³¹ are other highly regarded standards that address due diligence responsibility of corporations which is relevant to child labour impacts in the supply chain.

Following the above introduction, the chapter unfolds in the following order: context of the application of OECD Guidelines due diligence responsibility; OECD Guidelines due diligence responsibility in action, the Afrimex case; strengths and limitations of OECD Guidelines application of due diligence responsibility; beyond the most authoritative due diligence responsibility guidelines and; the conclusion of the chapter.

3.2 Context of the application of OECD Guidelines due diligence responsibility

It is a well-known fact by now that due diligence responsibility under the OECD Guidelines widely mirrors that of the normative framework. This is because the Guidelines were revised soon after the adoption of the Guiding Principles and consequently incorporated due diligence responsibility as framed under the normative framework.³³² As a result, the revised version of the Guidelines are expanded in their scope. They include, amongst other things, a new human rights chapter which is consistent with the "Protect, Respect and Remedy" Framework of the Guiding Principles. They also include a new and comprehensive approach to supply chain management which promotes due diligence responsibility in corporate supply chains.³³³ Wouters and Chané³³⁴ note that the updated version offers a new approach to responsible supply chain management that extends beyond a

³³¹ *Dodd Frank Wall Street Reform and Consumer Act* (July 21 2010).

³³² *OECD Guidelines for Multinational Enterprises* (2011) 3.

³³³ *OECD Guidelines for Multinational Enterprises* (2011) 3-4.

³³⁴ Wouters and Chané "Multinational corporations in international law" 244.

corporation's immediate operations to include third party supply chain activities. It can also be said that the revision of the Guidelines emanates from a recognition of the dominating effects of human rights abuses in corporate global supply chains. This leads to the optimistic conclusion that the Guidelines now accommodate and require corporations to resolve human rights impacts like child labour in the mineral supply chain.

In comparison to the normative framework, some argue that due diligence responsibility at the international level is best enforced with reference to the OECD Guidelines.³³⁵ This statement can, however, only be proven to be true following a thorough assessment of the Guidelines. Specific mention of due diligence responsibility under the Guidelines appears twice; first in chapter II on General Policies and second in chapter IV which is the human rights chapter. The specific prohibition of child labour is however, found in chapter V. Employment and Industrial Relations. Additionally, it has been established that the Guidelines offer a complementary guidance on due diligence responsibility for child labour impacts in the supply chain. Thus, in order to understand the context of the application of due diligence responsibility to child labour under the OECD Guidelines, reference should be made to the provisions of the three chapters, as well as the complementary guidance.

3.2.1 Due diligence responsibility under chapter II. General Policies

Six of the General Policies can specifically be interpreted as applying to child labour in mineral supply chains. First, according to paragraph A (2), corporations should "respect the internationally recognised human rights of those affected by their activities". It should be pointed out from the onset that the duty to respect human rights is highly significant to the updated OECD Guidelines. It represents for the first time that corporate conduct is

³³⁵ Letnar Cernic *Corporate responsibility* 314.

ties to human rights through an OECD instrument.³³⁶ The duty to respect human rights also clearly shows support for the substantive content of due diligence responsibility as discussed in chapter 2.³³⁷ Hence, under the OECD Guidelines, corporations are equally required to respect the rights of the child to be free from hazardous economic activities. In doing so, they should make reference to relevant international human rights instruments which includes the CRC, C138 and C182. To further show support for the substantive content, attention can also be drawn to chapter I. Concepts and Principles. The Guidelines in chapter I note that obeying the national law of host countries should be the first obligation of corporations regardless of their context of operation. However, where the domestic laws conflict with the international principles and standards of the Guidelines, corporations should seek ways to honour the higher standards.³³⁸ This means that corporations should first and foremost comply with international human rights principles which promote respect for the rights of the child in line with the Guidelines over and above weak domestic laws.

Second, paragraph A (10) requires corporations to carry out risk-based due diligence. This means that corporations should, for example, incorporate due diligence within their internal risk management systems in order to identify, prevent, mitigate and remedy actual and potential adverse impacts. Similarly, the Guidelines also encompass elements supporting the procedural content of due diligence responsibility which requires corporations to internally address their human rights impacts. Third, paragraph A (11) read together with A (12) specifically applies to child labour impacts in the supply chain. Like the language embraced by the normative framework, the paragraphs bestow a duty on corporations to avoid causing, contributing, or being linked to adverse human rights

³³⁶ Santner 2011 *George Washington ILR* 383.

³³⁷ See chapter 2.4 for an explanation on the substantive content.

³³⁸ *OECD Guidelines for Multinational Enterprises* (2011) Chapter I. Concepts and Principles para 2.

impacts through their own activities, or the activities of their third party relationships. Where human rights impacts occur, the corporation should seek ways to address such impacts. Fourth, paragraph A (13) requires corporations covered by the Guidelines to exercise their duty of leverage and encourage, where practicable, third party relationships to apply principles of responsible business conduct which is compatible with the Guidelines. Last under the General Policies, paragraph A (14) expects corporations to engage with relevant stakeholders, which impliedly includes children. This should be done in order to provide meaningful opportunities for their views to be taken into account in relation to the corporations' activities.

3.2.2 Due diligence responsibility under chapter IV. Human Rights

While due diligence responsibility is briefly mentioned in chapter II on General Policies, the human rights chapter offers a more elaborative explanation and arguably concretises the duty firmly. It is key to reiterate however that the human rights chapter of the OECD Guidelines is in the true sense of the word a replica of the normative framework. Apart from scant diversions in the language used, the chapter heavily draws upon the normative framework. Thus, to avoid repetition, it is dealt with only briefly here, having regard to six important paragraphs which support the due diligence responsibility duty.

When interpreted in the context of child labour impacts in the mineral supply chain, paragraph 1 of chapter IV, read in conjunction with paragraph 2 and 3 states that corporations have a duty to respect human rights. This means that they should not infringe the rights of the child in the supply chain and they should address adverse impacts with which they are involved either within the context of their own activities or in relation to their third party relationships in the supply chain. In the commentary to

these paragraphs, respect for human rights is denoted as a global standard of expected corporate conduct.³³⁹ The commentary also explicitly mentions the specific international human rights instruments that corporations should be guided by in enforcing their duty to respect human rights. This includes the International Bill of Human Rights and the *ILO Declaration on Fundamental Principles and Rights at Work*.³⁴⁰ Although it has been established above that corporations can impact virtually an entire spectrum of rights,³⁴¹ the commentary also recognises that some rights may be at a greater risk in practice. Interestingly, it recognises that children undisputedly fall within this category.³⁴²

With respect to third party relationships in the supply chain, it is observed that the commentary on paragraph 3 oddly puts emphasis on the following: "paragraph 3 is not intended to shift responsibility from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship".³⁴³ With no explicit follow-up explanation, the reason for such an emphasis remains unknown. This assumedly shows that there is controversy around this position. It can, however, be said that this statement aims to put corporations at ease in situations where third party relationships are the sole perpetrators of human rights impacts. Considering this background, the question to be asked is whether the OECD Guidelines are fairly balanced between the protection of human rights or whether they lean more towards protecting the corporation as an entity. A more agreeable approach would have been an emphasis on the need for a vigorous due diligence process to ensure that third party

³³⁹ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 37.

³⁴⁰ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 39.

³⁴¹ See para 2.3.3 for discussion on the entire spectrum of rights.

³⁴² *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 40.

³⁴³ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 43.

relations respect human rights as opposed to simply exonerating the corporation for human rights impacts that it is linked to through such relationships. While this is highly disappointing, the provision nevertheless proves that the extent to which corporations are willing to resolve human rights impacts of their third parties is a highly contentious issue.

To serve as proof of the above, currently, there is ongoing debate with regard to this. Some argue that corporations should be legally subjected to due diligence processes which go beyond soft law norms in order to compel them to oversee the activities of their third party relations to rid human rights abuses like child labour in the supply chain.³⁴⁴ However, others, like Mares for example, argue that resolving such issues is not a straightforward objective and can be more complex in nature.³⁴⁵ Although this debate goes beyond the scope of this chapter, it will be important to point out that Mares makes a more sound call. While many are quick to resort to legally enforceable standards, they tend to overlook the usefulness of soft law approaches like the OECD Guidelines. However, within the realm of soft law approaches it is argued that corporations should be required to have high regard for human rights concerns, whether they are immediate impacts caused by the corporation itself, or whether it is impacts simply linked to the corporation through supply chain relationships. Showing disparity in the assessment of human rights impacts within soft law norms, as is the case in the commentary of paragraph 3, would undoubtedly increase calls for legally enforceable due diligence measures.

Going forward, whilst paragraph 4 requires corporations to embed a policy commitment to show respect for the rights of the child, paragraph 5 explicitly enforces the due diligence responsibility duty. It requires a due diligence responsibility process that is appropriate to the size of the

³⁴⁴ Bilchitz "Putting flesh on the bone" 14.

³⁴⁵ Mares "Legalizing human rights due diligence" 4.

corporation, the nature and context of operations as well as the severity of the human rights impacts concerned. The commentary on the due diligence process further states that due diligence is an on-going process of identifying actual and potential human rights impacts which includes integration, acting upon the findings, tracking responses as well as communicating how the impacts are addressed.³⁴⁶ A key aspect of the commentary on paragraph 5 is that it precisely upholds the rights holders' perspective. The commentary states that due diligence processes should go beyond simply identifying and managing material risks to the corporation itself to include risks to rights holders.³⁴⁷ Thus, whilst paragraph 3 downplayed the rights holders' perspective, this provision arguably makes up for it.

Clearly missing from the due diligence process of paragraph 5 is the reference to remediation. It should be recalled to mind that an important argument made in chapter 2 was that remediation should be viewed as the cornerstone of a rights holders' perspective for due diligence responsibility.³⁴⁸ However, it is worth highlighting at this point that paragraph 6 of the human rights chapter is exclusively dedicated to remediation. In order to remediate human rights impacts like child labour in the supply chain, paragraph 6 requires corporations to have total commitment to remediation processes where they have caused or contributed to the impacts. In the commentary to the paragraph, it is noted that corporate-related human rights impacts are best remediated through operational level grievance mechanisms.³⁴⁹ In a similar vein as the normative framework, the commentary also states that remediation should

³⁴⁶ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 45.

³⁴⁷ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 45.

³⁴⁸ See para 2.5.5 for detailed discussion on the importance of remediation.

³⁴⁹ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 46.

meet the core criteria of legitimacy, accessibility, predictability, equitability, compatibility and transparency.³⁵⁰ Additionally, corporations should engage in dialogue with affected stakeholders with a view to seeking solutions.³⁵¹

Overall, the OECD Guidelines appear to encompass both the substantive and procedural mandate of due diligence responsibility. While this appears to be the case, some authors nonetheless argue that the Guidelines only generally make reference to the substantive content of due diligence responsibility. In another sense, this means that the Guidelines do not strongly enforce the rights holders' perspective for child labour. For instance, Borges contends that the Guidelines do not make specific reference to the relevant ILO Conventions to tackle child labour, that is, C138 and C182.³⁵² However, the author goes on to observe that because the core child labour conventions are contained in the ILO *Declaration on Fundamental Principles and Rights at Work*, it can be presumed that these conventions will be taken into consideration when applying the Guidelines.³⁵³ It can also be noted at this point that Borges fails to point out that the Guidelines expressly make mention of child labour in chapter V on employment and industrial relations. This is alluded to below.

3.2.3 Due diligence responsibility under chapter V Employment and industrial relations

Within the framework of applicable law, regulations, prevailing labour relations, employment practices and applicable labour standards, chapter V 1(c) requires corporations to contribute to the elimination of child labour. In doing so, corporations are required to take immediate and effective measures to abolish child labour. Since it has been shown that some forms

³⁵⁰ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 46.

³⁵¹ *OECD Guidelines for Multinational Enterprises* (2011) Chapter IV Human Rights. Commentary para 46.

³⁵² Borges 2016 *U Baltimore JIL* 25.

³⁵³ Borges 2016 *U Baltimore JIL* 25.

of child labour practices in the mineral supply chain fall under the category of forced labour,³⁵⁴ chapter V 1(d) can also be interpreted as applying to child labour in the supply chain. In terms of this provision, corporations are required to contribute to the elimination of all forms of forced or compulsory labour and to take adequate steps to ensure that such practices do not exist in their operations, including their supply chains. Unlike chapter II and IV, chapter V visibly does not make mention of due diligence responsibility. It can nonetheless be assumed that chapter V impliedly requires the implementation of the due diligence responsibility duty. This is because the statement "immediate and effective measures" arguably extends to the notion of due diligence responsibility. Put clearly, the argument made is that due diligence is an immediate and effective measure that can be used to abolish child labour and realise the rights of the child to be free from economic exploitation. Scholars like Lambooy, whose argument has been dealt with prior undoubtedly support this notion.³⁵⁵ Others like Santner³⁵⁶ similarly argue that the OECD Guidelines as a whole demonstrate the potential for achieving full respect for human rights. On this premise, it can further be argued that as opposed to the normative framework as well as chapter II and IV, chapter V clearly advances the rights holders' perspective for child labour in the mineral supply chain.

3.2.4 Due diligence responsibility complementary guidance

As mentioned in the introduction to this chapter, the OECD Guidelines have practical application to child labour in the mineral supply chain. The Guidelines are complemented by due diligence guidance specific to weak governance zones and specific to child labour in the mineral supply chain. In further advancing the due diligence responsibility rationale for child

³⁵⁴ See para 2.2.4 for discussion on the circumstances under which child labour becomes forced labour.

³⁵⁵ See para 1.5 on discussion of literature review.

³⁵⁶ Santner 2011 *George Washington ILR* 376.

labour in the mineral supply chain, the text of the guidance are especially important to examine.

3.2.4.1 Due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas

The due diligence responsibility rationale for mineral supply chains can be traced back to the early 2000s. At that time, there were a number of specific human rights violations relating to the minerals trade in supply chains linked to regions designated as weak governance and conflict zones, such as the DRC.³⁵⁷ Thus the need for guidance on corporate practices in mineral supply chains was born out of the concern for addressing human rights abuses in the mineral supply chains.³⁵⁸ Remarkably, the milestone decision delivered in the case of Afrimex, which is discussed in much detail below, helped pave the way for the development of the due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas.³⁵⁹ Today, the guidance is viewed as a leading initiative on responsible mineral supply chains.³⁶⁰ The guidance was first developed in 2010 following in-depth engagement from OECD member states and some African states known as the Great Lakes region.³⁶¹ Industry members, civil society, and the UN body were also involved in the process of developing the guidance. The guidance was consequently updated to the third edition in 2016.³⁶²

To begin with, it has been recognised previously that child labour in mineral supply chains predominantly occurs in contexts designated as weak

³⁵⁷ OECD *Implementing the OECD Guidelines* 79.

³⁵⁸ Prenkert and Shackelford 2014 *Vanderbilt J Transn'l L* 30; Harrington 2012 *Albany LR* 503.

³⁵⁹ OECD *Implementing the OECD Guidelines* 79.

³⁶⁰ OECD "Promoting sustainable global supply chains" 20.

³⁶¹ Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia are eleven countries of the Great Lakes Region.

³⁶² OECD *OECD due diligence guidance* 3.

governance and conflict zones, although it is not limited to such contexts.³⁶³ In line with this understanding, the objective of the weak governance zones' guidance is to assist corporations to strongly enforce their due diligence responsibility duty to respect human rights and to avoid contributing to conflict through their mineral sourcing practices.³⁶⁴ The guidance not only builds on the principles and standards of the OECD Guidelines. It specifically aims to promote transparent mineral supply chains and encourage sustainable corporate engagement in the mineral sector. This is with a view to warding off human rights abuses in the supply chain, amongst other things.³⁶⁵ To concretise this objective, the guidance interestingly refers to two definitions of due diligence. First, it defines due diligence as "an on-going, proactive and reactive process through which corporations can ensure that they respect human rights and do not contribute to conflict".³⁶⁶ Second, it defines risk-based due diligence as the steps that a corporation should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing practices.³⁶⁷

The picture that emerges from the definitions is confusingly one of very two different approaches to due diligence responsibility. Since we are already accustomed to the definition of due diligence, it is necessary here to clarify what is meant by risk-based due diligence. Reference can therefore be made to the following provision:

For the purposes of this Guidance, 'risks' are defined in relation to the potentially adverse impacts of a company's operations, which result from a corporation's own activities or its relationships with third parties, including suppliers and other entities in the supply chain. Adverse impacts may include harm to people (i.e. external impacts), or reputational damage or legal liability for the corporation (i.e. internal

³⁶³ See para 2.1, the introduction to chapter 2.

³⁶⁴ OECD *OECD due diligence guidance* 3.

³⁶⁵ OECD *OECD due diligence guidance* 3.

³⁶⁶ OECD *OECD due diligence guidance* 13.

³⁶⁷ OECD *OECD due diligence guidance* 13.

impacts), or both. Such internal and external impacts are often interdependent, with external harm coupled with reputational damage or exposure to legal liability. A corporation assesses risk by identifying the factual circumstances of its activities and relationships and evaluating those facts against relevant standards provided under national and international law, recommendations on responsible business conduct by international organisations, government-backed tools, private sector voluntary initiatives and a company's internal policies and systems. This approach also helps to scale the due diligence exercise to the size of the corporation's activities or supply chain relationships.³⁶⁸

Two things become clear from this paragraph. First, risk-based due diligence appears to be an outward approach to risk. It focuses on addressing a corporation's external risks which it has either created or is linked to through external parties.³⁶⁹ Second, the guidance appears to specifically require risk-based due diligence for mineral supply chains in contexts of weak governance and conflict. Thus risk based due-diligence can be interpreted as the highest standard of corporate conduct which goes beyond ordinary due diligence practices. In this light, the guidance goes on to state the following:

Corporations may face risks in their mineral supply chains because of circumstances of mineral extraction, trade or handling which by their nature have higher risks of significant adverse impacts, such as financing conflict or fuelling, facilitating or exacerbating conditions of conflict. In spite of the fragmented production process in the supply chain, and independent from their position or leverage over suppliers, corporations are not insulated from the risk of contributing to or being associated with adverse impacts occurring at various points in the mineral supply chain. Because of this, corporations should take reasonable steps and make good faith efforts to conduct due diligence to identify and prevent or mitigate any risks of adverse impacts associated with the conditions of mineral extraction and the relationships of suppliers operating in conflict-affected or high- risk areas.³⁷⁰

Further, in terms of Annex I of the guidance, in enforcing their due diligence responsibility duty, corporations should be guided by a five step framework: Step 1 requires corporations to establish a strong corporate

³⁶⁸ OECD *OECD due diligence guidance* 13-14.

³⁶⁹ OECD Watch 2017 <https://www.oecdwatch.org/>.

³⁷⁰ OECD *OECD due diligence guidance* 14.

management system.³⁷¹ Step 2 requires corporations to identify and assess risk in the supply chain.³⁷² Step 3 requires corporations to design and implement a strategy to respond to identified risks.³⁷³ Step 4 requires corporations to carry out independent third-party audit of supply chain due diligence at identified points in the supply chain.³⁷⁴ Lastly, step 5 requires corporations to report on supply chain due diligence.³⁷⁵ The standards set out in the five-step approach of the Guidelines are clearly very similar to that of the Guiding Principles.

Specific mention of child labour is found in annex II of the guidance, that is, the model supply chain policy for a responsible global supply chain of minerals from conflict-affected and high-risk areas. The model supply chain policy requires corporations to not tolerate the worst forms of child labour in their mineral supply chains.³⁷⁶ The guidance identifies the worst forms of child labour as a serious human rights abuse in the supply chain. If there is a presence of such abuses in the course of doing business, corporations are encouraged to immediately suspend or discontinue engagement with their third party relationships.³⁷⁷ Through this provision, the argument that the OECD Guidelines have practical application to child labour has been proven to be true.

³⁷¹ OECD *OECD due diligence guidance*. Annex I Five-step framework for risk-based due diligence in the mineral supply chain para 1.

³⁷² OECD *OECD due diligence guidance*. Annex I Five-step framework for risk-based due diligence in the mineral supply chain para 2.

³⁷³ OECD *OECD due diligence guidance*. Annex I Five-step framework for risk-based due diligence in the mineral supply chain para 3.

³⁷⁴ OECD *OECD due diligence guidance*. Annex I Five-step framework for risk-based due diligence in the mineral supply chain para 4.

³⁷⁵ OECD *OECD due diligence guidance*. Annex I Five-step framework for risk-based due diligence in the mineral supply chain para 5.

³⁷⁶ OECD *OECD due diligence guidance*. Annex II Model supply chain of minerals from conflict-affected and high risk areas para 1(iii).

³⁷⁷ OECD *OECD due diligence guidance*. Annex II Model supply chain of minerals from conflict-affected and high risk areas para 1(iii).

Overall, some authors, like Cullen³⁷⁸ for instance, argue that the guidance contributes to a better understanding of due diligence. This legitimises the due diligence responsibility duty as an international measure for improving corporate accountability especially in high risk regions. To concur with Cullen's argument, the guidance admittedly appears to provide a more detailed account of due diligence responsibility. Ruggie and Nelson³⁷⁹ elevate the guidance to a much higher standard through the contention that it is a *de facto* international standard for due diligence responsibilities of corporations. Although the guidance is highly appraised by some, it has not escaped a scathing attack from others. For example, Hahn, Hayes and Kacapor³⁸⁰ argue that the guidance provides no practical support on how corporations can best address the issue of child labour in the supply chain other than disengagement when it is found to be present. The authors argue that the approach envisaged in the guidance does not offer a realistic solution to addressing the problem of child labour in the supply chain. The authors contend that as a first step, corporations should be assisted in understanding the many facets of child labour. Only then can concrete and actionable interventions be developed which can be used to work toward corporate compliance in a way that is relevant to the context and the specific needs of the mining populations and their children. Basically, Hahn, Hayes and Kacapor propose for child labour to be tackled in a holistic manner, this includes the consideration for broader corporate social initiatives to promote the well-being and sustain the livelihood of the child.

³⁷⁸ Cullen 2016 *George Washington ILR* 744.

³⁷⁹ Ruggie and Nelson 2015 <https://www.hks.harvard.edu>.

³⁸⁰ Hahn, Hayes and Kacapor 2013 <http://www.pactworld.org>.

3.2.4.2 Practical actions for corporations to identify and address the worst forms of child labour in mineral supply chains

It is key to point out that the practical actions guide for child labour is quite a recent initiative in international settings. The guide was published for the first time in May 2017 at the eleventh forum of the OECD on responsible mineral supply chains.³⁸¹ The guide is premised upon the belief that every child has inherent dignity and worth as a human being. As a global priority, the guide aims to eliminate without delay the worst forms of child labour as defined by article 3 of C182.³⁸² Thus, the guide ultimately promotes the rights holders' perspective for child labour. It also undisputedly signifies the growing concern for child labour violations in the mineral supply chain. Taking the words of Giersch and Potheary,³⁸³ the guide is in essence a response to prevent what corporations fear most; association with incidents of exploitation of children in sourcing the material ultimately used to manufacture their goods. In terms of its nature, the guide was developed to build on the due diligence guidance for responsible supply chains of minerals from conflict-affected and high risk areas. Hence, the guide serves as a compass to help corporations navigate their mineral supply chains in order to identify, prevent, mitigate and remedy child labour abuses.

To assist corporations in their due diligence responsibility duty to address the worst forms of child labour in the mineral supply chains, the practical actions guide firstly sets out by providing an explicit definition of child labour. It makes reference to the core child labour conventions as well as the set minimum working age of children in the mineral supply chains, that is, 18 years. While it has already been established that 1 million children carry out work in mining activities, the guide also draws attention to this.

³⁸¹ OECD 2017 <http://www.oecd.org/>.

³⁸² OECD 2017 <http://www.oecd.org/>.

³⁸³ Giersch and Potheary 2017 <http://www.globalriskaffairs.com/>.

However, it goes even further and points out that child miners work in artisanal and small scale informal mines in gold, tin, coal, diamonds, gems, stone, salt mines and the number is on the rise.³⁸⁴ In addressing these abuses, like the guidance on weak governance zones, the practical actions guide similarly recommends that all corporations in the mineral supply chain conduct risk-based due diligence. Hence, this solidifies the argument that risk based due diligence is especially reserved for extreme contexts. It also shows that child labour in mineral supply chains is equally an extreme activity.

Unique to the guide is a five-step framework that is tailored to addressing child labour in the mineral supply chain. Step 1 requires corporations to establish a strong corporate management system. This is in essence is a policy commitment regarding child labour wherein a corporation articulates its public commitment not to tolerate child labour including the worst forms of it either in its own operations or the operations of its third party relationships. Step 2 requires corporations to identify and assess child labour risks in the mineral supply chain. Step 3 requires corporations to design and implement a strategy to respond to identified child labour risks. Step 4 requires corporations to carry out an independent third-party audit of smelters or refiners due diligence practices with regards to the worst forms of child labour. Lastly, Step 5 requires corporations to report annually on supply chain due diligence on the worst forms of child labour. This five-step framework is very similar to the five-step framework of the weak governance zones' guidance. The importance of it however, is that it specifically caters to child labour impacts in the mineral supply chain.

Additionally, the practical actions guide uses what can be attributed to as a two-pronged approach to addressing child labour risks in the mineral supply chain. The guide refers to the duties of both upstream and

³⁸⁴ OECD 2016 <http://www.oecd.org>.

downstream corporations. It recommends that upstream and downstream corporations work together to establish a system of control and transparency over the minerals in their possession in order to eliminate child labour from the supply chain.³⁸⁵ Upstream corporations are the mineral producers, for example, medium or large scale mining corporations.³⁸⁶ To ward off child labour impacts, upstream corporations are required to set up on the ground assessments and carry out fact based investigations on the circumstances of mineral extraction, trade, handling and export of minerals particularly from weak governance zones.³⁸⁷ Conducting on the ground assessment can be done through collaborative engagements which can assist corporations to tackle child labour in the supply chain more effectively. Such assessments should assist upstream corporations to find verifiable, reliable, and up to date evidence on the prevalence of child labour in the supply chain, whether it occurs through mineral extraction, trade, handling or export.³⁸⁸ On the ground assessments also include site visits which can be carried out by a local partner of the corporation or through the collaborative initiatives. According to the guide, upstream corporations should ensure that the on the ground assessments are independent, credible and robust.³⁸⁹ Further still, in terms of the guide, upstream corporations who face the risk of causing or contributing to the worst forms of child labour should develop a child protection code of conduct. This code of conduct should be made available to all who have a business relation with the corporation, including its employees. Failure to abide by the code of conduct, the guide recommends that disciplinary measures should be taken against defaulting parties.

³⁸⁵ OECD 2016 <http://www.oecd.org>.

³⁸⁶ Other entities in the upstream also include buyers, local traders, exporters, refiners and smelters.

³⁸⁷ OECD 2016 <http://www.oecd.org>.

³⁸⁸ OECD 2016 <http://www.oecd.org>.

³⁸⁹ OECD 2016 <http://www.oecd.org>.

Downstream corporations on the other hand include those corporations involved in the trade and exchange of metals, component manufacturers, product manufacturers, original equipment manufacturers, bullion banks, jewellery manufacturers and retailers amongst others.³⁹⁰ In eliminating child labour from the supply chain, downstream corporations are advised to focus on identifying the smelters and refiners in their supply chains, and to assess the due diligence practices of these smelters and refiners.³⁹¹ In terms of the guide, downstream corporations should institute their best efforts to identify the refiners and smelters in their supply chain. They should have documentation or systems in place to demonstrate that the refiners and smelters that they source from conduct sufficient due diligence to prevent child labour abuses. Examples of documentation can include reports generated by upstream corporations from the assessments made, as well copies of smelters and refiners due diligence audits. In a nutshell, downstream corporations have a duty to see to it that their minerals are sourced from legitimate sources and not the product of child labour.³⁹²

The practical actions guide also refers to what it calls "business partner due diligence". This means the identification of potential and actual child labour impacts linked to an individual business partner or what is commonly referred to here as third party relationships. The guide states that business partner due diligence is particularly useful for downstream corporations who are not directly causing or contributing to child labour impacts, but are linked to these impacts through their business relationships.³⁹³ The guide recommends that business partner due diligence should be tailored to the contexts of operation. This means two things: First, in contexts where children actively seek employment, business partner due diligence should seek to evaluate the capacity of the supplier to identify and mitigate child

³⁹⁰ OECD 2016 <http://www.oecd.org>.

³⁹¹ OECD 2016 <http://www.oecd.org>.

³⁹² OECD 2016 <http://www.oecd.org>.

³⁹³ OECD 2016 <http://www.oecd.org>.

labour risks.³⁹⁴ Second, in contexts where businesses actively recruit and employ children, business partner due diligence should include an assessment of how and why suppliers recruit and hire children.³⁹⁵

Overall, the practical actions guide clearly puts children first. It offers an extensive elaboration on what due diligence responsibility entails for child labour in the mineral supply chains. It introduces concepts such as business partner due diligence and through the two pronged approach, it clearly distinguishes the duties of upstream and downstream corporations in tackling child labour in the supply chain. The guide is therefore an effective way through which corporations can seek the betterment of the child and strongly uphold their due diligence responsibility duty. It was been pointed out that the practical actions guide builds on the due diligence guidance for weak governance zones. It has also been established that the decision in the case of Afrimex helped pave the way for the development of the guidance. In further understanding the due diligence responsibility duty for child labour under the OECD Guidelines, what follows below is a detailed and critical exploration of the Afrimex case.

3.3 OECD Guidelines due diligence responsibility in action: Afrimex case

In making its determination and recommendations with regard to Afrimex, the UK NCP implemented the requirement of due diligence responsibility for child labour impacts in the mineral supply chain. Within the system of the OECD Guidelines, the case is widely considered to be a landmark decision. In this light, Letnar Cernic³⁹⁶ observes that "the UK NCP's decision in *Global Witness v Afrimex* represents a seminal development in the field of corporate responsibility for human rights and case law for NCPs". More

³⁹⁴ OECD 2016 <http://www.oecd.org>.

³⁹⁵ OECD 2016 <http://www.oecd.org>.

³⁹⁶ Letnar Cernic 2009 <https://www.asil.org/insights/>.

importantly, Afrimex is significant for the reason that, to date, it is the only case which specifically extends the rationale of due diligence responsibility to child labourers as rights holders in the mineral supply chain. What follows below is a detailed explanation of the surrounding circumstances leading up to the decision of the UK NCP. It should be kept in mind at this point that the Afrimex case was instituted before the update of the OECD Guidelines in 2011. The 2011 version of the Guidelines includes a human rights chapter on which due diligence responsibility is predicated, to enable the filing of more detailed and specific corporate-related human rights complaints.³⁹⁷

3.3.1 Background of the case

The case of Afrimex can be reverted to as far back as 2001, pursuant to the establishment of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC.³⁹⁸ In its first 2001 report, the Panel of Experts noted that the conflict in the DRC had become about control of five key mineral resources: coltan, cassiterite, diamonds, copper cobalt and gold.³⁹⁹ It went on to assert that a number of corporations contributed to the exploitation of natural resources and perpetuated the war in the DRC. They fueled the war through direct trade of arms for natural resources. Others facilitated access to financial resources, which were used to purchase weapons. The Panel of Experts therefore considered corporations trading minerals to be the engine of the

³⁹⁷ Amnesty International *Obstacle course* 26.

³⁹⁸ *UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC Established by UN Security Council resolution 1291* (24 February 2000). The UN Security Council appointed an independent panel of experts to follow up on reports and collect information on all activities on illegal exploitation of natural resources and other forms of wealth of the DRC. The Panel of Experts was also mandated to research and analyse the links between the exploitation of the natural resources and other forms of wealth in the DRC and the continuation of the conflict.

³⁹⁹ *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo S/2001/357* (12 April 2001) para 213. Hereafter referred to as Panel of Experts report (2001).

conflict in the DRC, in its words, they "prepared the field for illegal mining activities in the country".⁴⁰⁰ Interestingly, Afrimex was first mentioned in the Panel of Experts 2001 report as a corporation whose activities were cause for concern.⁴⁰¹ In 2002, the Panel of Experts released its second report.⁴⁰² Here, it was established that Afrimex was indeed one of corporations exporting minerals from eastern DRC via Rwanda during the conflict. Afrimex was therefore listed in Annex III of the 2002 report as being in violation of the OECD Guidelines.

3.3.2 Allegations instituted by Global Witness

Following the UN Panel of Experts' reports, NGO Global Witness, on 20 February 2007, brought a complaint to the UK NCP to investigate whether Afrimex violated the OECD Guidelines in its activities in the DRC. Global Witness alleged that Afrimex (which operated as *Société Kotecha* in the DRC) failed to respect human rights, particularly the rights of the child, in its context of operation. The corporation paid financial contributions through its suppliers (*Société de Commercialisation des Minerais SOCOMI*) to the rebel group RCD-Goma, which perpetrated numerous human rights atrocities in the region,⁴⁰³ including the forced recruitment of children as soldiers and labourers.⁴⁰⁴ Afrimex was also alleged to have practiced "insufficient due diligence" on the supply chain by sourcing minerals from mines that used child labour and forced labour.⁴⁰⁵ Global Witness referred to the conditions on the mines on which the child labourers worked as

⁴⁰⁰ Panel of Experts report (2001) para 215.

⁴⁰¹ Panel of Experts report (2001) annex I.

⁴⁰² *Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo S/2002/1146* (16 October 2002).

⁴⁰³ OECD Watch 2007 <https://www.oecdwatch.org>.

⁴⁰⁴ Amnesty International 2003 <http://www.kongo-kinshasa.de>.

⁴⁰⁵ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 53.

having unacceptable health and safety practices.⁴⁰⁶ A serious violation to the mental, physical, social and moral well-being of the child.

In line with the duty of due diligence responsibility for child labour impacts in the supply chain, Afrimex had specifically breached three standards of the 2000 version of OECD Guidelines: The first two concern chapter II on General Policies, paragraphs II.2 and II.10. Paragraph II.2 requires corporations to respect the human rights of those affected by their activities. Respect for human rights should be consistent with the host state's international obligations and commitments. Paragraph II.10 on the other hand requires corporations to encourage, where practicable, its third party relationships, including its suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines. Last and more significantly, Global Witness referenced Chapter IV on Employment and Industrial Relations paragraph 1(b) and alleged that Afrimex failed to apply sufficient due diligence in its mineral supply chain and contribute to the effective elimination of child labour.

To elaborate on its position, Global Witness noted the following:

II.2.Afrimex paid taxes to an armed group (the RCD-Goma) that was engaged in an armed conflict against the Congolese government and had a well-documented record of committing serious human rights abuses against the civilian population in eastern DRC. As demonstrated by reports by international human rights NGOs and other sources, the RCD-Goma continued carrying out grave human rights abuses, including massacres, sexual violence, arbitrary detention, torture and recruitment of child soldiers throughout the conflict. II.10 There are grounds to suspect that Afrimex breached this Guideline: Afrimex did not give any indication in any of its responses or interviews cited in this submission that it had encouraged its suppliers to apply principles compatible with the OECD Guidelines or that it conducted due diligence to ensure that its suppliers were complying with the OECD Guidelines. On the contrary, Afrimex's own disregard for the OECD Guidelines would indicate that it made no effort to ensure that its suppliers did so...⁴⁰⁷ IV. 1(b) Afrimex profited from minerals sourced from mines with unacceptable health and

⁴⁰⁶ OECD Watch 2007 <https://www.oecdwatch.org>.

⁴⁰⁷ OECD Watch 2007 <https://www.oecdwatch.org>.

safety practices, including life-threatening conditions, use of forced labour and child labour... Global Witness is not aware that Afrimex took steps to improve or protest against the conditions in the mines from which it was buying minerals, to conduct due diligence or to seek alternative suppliers whose practices conformed to international labour standards.⁴⁰⁸

In a nutshell, Global Witness sought to hold Afrimex to account for failure to enforce its due diligence duty to promote respect for human rights, including the rights of the child in the mineral supply chains.

3.3.3 Afrimex's response

In its response to the allegations, Afrimex held the opinion that it did not act contrary to the expectations of the OECD Guidelines. The corporation dismissed the allegation of paying financial contributions through its supply chain to the RCD-Goma. Concerning its failure to apply sufficient due diligence to prevent child labour abuses in the supply chain, Afrimex questioned the rationality of this allegation. The corporation stated that it was several steps removed from the mines that used child labour in the supply chain. With no direct link to the mines, and with no audit chain to trace the minerals back to the mine where they were sourced, it proved difficult to apply sufficient due diligence to contribute to the elimination of child labour. Overall, Afrimex considered Global Witness's complaint as flawed, consisting of numerous misconceptions and errors.⁴⁰⁹

It is deeply concerning that Afrimex chose to dismiss the associated allegations with little or no regard for the related human rights impacts in question, especially child labour. Particularly with respect to the payment of financial contributions being made to rebel groups, Afrimex's denial should be taken with a pinch of salt from the onset, calling for further investigation to be had. This is because it is a very common occurrence for

⁴⁰⁸ OECD Watch 2007 <https://www.oecdwatch.org>.

⁴⁰⁹ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* paras 14, 15 and 16.

corporations operating in contexts of weak governance and conflict to get caught up in tensions associated with armed groups. The story of corporate involvement in human rights violations associated with armed groups is one that has been replicated numerous times in such contexts across the globe. For example, reference can be made to the case of *The Presbyterian Church of Sudan et al v Talisman Energy Inc and Republic of Sudan*.⁴¹⁰ Between 1998 and 2003, Canadian corporation, Talisman Energy Inc. carried out operations in the South of Sudan amidst a violent civil war. In 2001, the corporation was alleged to have been complicit in gross human rights abuses perpetrated by the Sudanese government armed forces.⁴¹¹ It was alleged that Talisman had conspired with and aided and abetted the Sudanese government armed forces in committing genocide, crimes against humanity and war crimes.

Reference can also be made to the case of *Alexis Holyweek Sarei et al v Rio Tinto PLC and Rio Tinto Limited*.⁴¹² In 2000, Rio Tinto Plc, an Anglo-Australian mining corporation, was alleged to have been complicit in war crimes and crimes against humanity on the island of Bougainville in Papua New Guinea (PNG). The atrocities were allegedly committed by the PNG army against residents of Bougainville during a secessionist conflict. Adding on, in *Kiobel v Royal Dutch Petroleum*⁴¹³ and *Esther Kiobel v Royal Dutch Petroleum*,⁴¹⁴ proceedings were instituted in 2002 against Royal Dutch shell Company. Kiobel sought damages and other relief for alleged crimes against humanity, including torture and extrajudicial executions perpetrated against the Ogoni people in Nigeria. Nigerian armed forces were alleged to have carried out the atrocities, with the corporation's

⁴¹⁰ *The Presbyterian Church of Sudan et al v Talisman Energy Inc And Republic of Sudan* 2nd US Circuit Court of Appeal 2009 No 07-0016.

⁴¹¹ The armed forces carried out atrocities against non-Muslim Sudanese living in the area of an oil concession held by Talisman in Southern Sudan during the civil war.

⁴¹² *Alexis Holyweek Sarei et al v Rio Tinto PLC and Rio Tinto Limited* 9th US Circuit Court of Appeals, 2011 No 02-56256/02-56390.

⁴¹³ *Kiobel v Royal Dutch Petroleum* 621 F. 3d 111 (2nd Cir 2010).

⁴¹⁴ *Esther Kiobel v Royal Dutch Petroleum Co* 1335.ct.1659 (2013).

assistance and complicity. In *John Doe I et al v UNOCAL Corp et al*,⁴¹⁵ the 2004 suit alleged complicity of serious human rights abuses against oil corporation UNOCAL. The complainants allegedly suffered at the hands of the Myanmar military during the construction of a gas pipeline in Myanmar. UNOCAL had allegedly provided logistic and financial support to the military.

Specific to the context of the DRC, reference can be made to the case *Military Court of Katanga, Congo, Public Prosecutor v Ademar Ilunga et al*⁴¹⁶ and *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd.*⁴¹⁷ Both cases relate to Anvil mining's alleged complicity to human rights atrocities carried out by armed factions in the DRC. Anvil Mining carried out operations in the Dikulushi mine in the town of Kilwa in the DRC. In October 2004, Kilwa was the site of fighting between the Congolese Armed Forces (FARDC) and a small group of rebels. During the fighting, serious human rights atrocities were committed against the civilians including executions, arbitrary arrests, rape and torture. As many as one hundred civilians were said to have been killed. Anvil Mining was allegedly complicit to the violations by providing logistical support including transport (planes and vehicles) to the Congolese Armed Forces during the insurgency.

The last example is that of AngloGold Ashanti. In 2003, AngloGold Ashanti commenced its mining explorations in Ituri District, Orientale Province.⁴¹⁸ In the years that followed, allegations surfaced of the corporation's business relations with the Nationalist and Integrationist Front (NIF), an armed group exercising *de facto* control over Ituri District and accused of

⁴¹⁵ *John Doe I et al v UNOCAL Corp et al*.

⁴¹⁶ *Military Court of Katanga, Congo, Public Prosecutor v Ademar Ilunga et al (CAAI)* Case No RPN 010/2006 Judgement 28 June 2007.

⁴¹⁷ *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd Québec Court of Appeals Canada* 2012 No 500-09-021701-115.

⁴¹⁸ Prosansky 2007 *Northwestern JIHR* 243.

perpetrating grave human rights abuses against the local inhabitants.⁴¹⁹ AngloGold Ashanti admitted to making a payment to FNI, the corporation also allegedly offered logistical assistance by providing transportation, housing and funding to the armed group.⁴²⁰ AngloGold Ashanti claimed that its encounters with FNI were unavoidable; its co-operation with the armed group was done under duress and without such co-operation, it was impossible for AngloGold Ashanti to carry out its operations in Ituri District.⁴²¹ AngloGold Ashanti notes quite clearly that contexts of weak governance and conflict present a multitude of challenges to corporations. Overall, considering the overlap and similarity of the issues, these few examples out of the numerous cases, present enough evidence to bring Afrimex's claim into question.

3.3.4 UK NCP's key findings

Following a failed mediation process, Global Witness and Afrimex subsequently moved to an NCP determination. On August 28, 2008, the UK NCP of the OECD issued its decision *in Global Witness v Afrimex Ltd*. Two key findings of the NCP are precisely relevant to the discussion of due diligence responsibility and its application to child labour in the mineral supply chain:

First, concerning the payment of financial contributions to rebel groups, the NCP concluded that Afrimex failed to influence its third party relationships in the supply chain (SOCOMI) to cease trading in minerals during a period

⁴¹⁹ Prosansky 2007 *Northwestern JIHR* 242-244. FNI combatants are said to have attacked several villages, killing scores of civilians and displacing thousands of local inhabitants by forcing them to flee. The armed group conducted witch hunts and killed seventy people whom they accused of witchcraft. FNI tactics of controlling mineral resources in Ituri included forced labour, arbitrary beatings, arrest, fines or even death. The group charged artisanal miners a fee and took gold from them. They used taxes from the mines to buy weapons and traded gold for weapons.

⁴²⁰ Prosansky 2007 *Northwestern JIHR* 245-246.

⁴²¹ Prosansky 2007 *Northwestern JIHR* 236; Human Rights Watch 2005 <http://www.hrw.org/reports>.

when taxes and licence fees were paid to the RCD-Goma.⁴²² In turn, the payment of the taxation down the supply chain funded the conflict in which numerous human rights abuses occurred, especially the worst forms of child labour abuses.⁴²³ The NCP held that Afrimex had failed to meet requirements II.2 and II.10 of the General Policies of the OECD Guidelines.⁴²⁴ Overall, the NCP concluded that Afrimex failed to enforce its due diligence duty to respect human rights and it failed to use its influence in the supply chain to require third party relationships to respect human rights. The NCP determined that the links between UK-based Afrimex and DRC based Société Kotech and SOCOMI were sufficient for Afrimex to significantly influence those two companies.⁴²⁵

In arriving at its decision, the NCP considered the level of due diligence applied to the supply chain by Afrimex. Here, the NCP notably referred to the author of the normative framework and his articulation of due diligence. The NCP reiterated that due diligence is a process whereby corporations ensure compliance with national law and also manage the risk of human rights harm with a view to avoiding it.⁴²⁶ Further, the scope of due diligence for human rights should be determined by the context in which the corporation is operating, its activities, and the relationships associated with those activities.⁴²⁷ It is Interesting to note that the NCP

⁴²² *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 59.

⁴²³ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 51.

⁴²⁴ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 51.

⁴²⁵ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* paras 26 and 27. The NCP considered family ties, overlapping directors who were also shareholder across the company at arriving at this decision. As a result, the NCP treated the corporations as linked for the purposes of the complaint and urged Afrimex to use its influence over contracting parties and business partners throughout the supply chain.

⁴²⁶ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 41.

⁴²⁷ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 41.

referenced the normative framework at a time when the Guiding Principles were not yet fully developed. Thus, even before its UN Human Rights Council adoption, the normative framework was fast becoming a key instrument in international settings. Put clearly by Ruggie and Nelson,⁴²⁸ the NCP drew on the normative framework well before the full development of the UN Guiding principles or the revised OECD Guidelines.

Second, concerning child labour impacts, the NCP remarkably upheld the complaint. This was despite Afrimex's concern that it could not contribute to the abolition of child labour because it was far removed from the supply chain. Yet again, in arriving at its decision, the NCP cited the concept of due diligence as elaborated in the normative framework. This affirms MacLeod's argument that the NCP's determination of due diligence is deeply rooted in the normative framework's interpretation.⁴²⁹ The NCP held that if "sufficient due diligence" was applied to the supply chain, then Afrimex could have made a contribution to eliminate child labour from its mineral supply chain.⁴³⁰ It appears that the notion of "sufficient due diligence" is central to the case since both Global Witness and the NCP pertinently refer to it. Hence at this point, it will be noteworthy to engage the with NCP's elaboration of what constitutes sufficient due diligence. Paragraph 57 of the decisive and detailed Final Statement, read together with paragraph 62, gives insight into the NCP's determination of sufficient due diligence:

57. The reliance on oral assurances from the suppliers and the subsequent written statements amount to insufficient due diligence for a company sourcing minerals in the conflict zone in Eastern DRC. The NCP is concerned that these assurances lack substance and are not underpinned by any checks. Afrimex readily admitted to the NCP that it did not know the source of the minerals and put forward the view that as the NCP could not prove that its minerals were sourced from a mine that

⁴²⁸ Ruggie and Nelson 2015 <https://www.hks.harvard.edu>.

⁴²⁹ MacLeod *Towards normative transformation* 245.

⁴³⁰ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 54.

uses child or forced labour then the NCP could not determine that Afrimex failed to meet the requirements of the Guidelines. The NCP disagrees with this view and asserts that this in fact, supports its view that Afrimex practiced insufficient due diligence on the supply chain. 62. Afrimex did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety. The assurances that Afrimex gained from their suppliers were too weak to fulfil the requirements of the Guidelines. Therefore the NCP found that Afrimex had failed to: IV.1 (b) '*Contribute to the effective abolition of child labour.*'

From the above, it can be inferred that sufficient due diligence is first and foremost only applicable in certain contexts of operation. Specifically high risk areas like weak governance and conflict zones. In this light Kita⁴³¹ contends that while Afrimex's level of due diligence may have been acceptable outside a conflict zone, it proved unacceptable within the context of weak governance and conflict. In agreement with Kita, Larry Catá Backer⁴³² holds the opinion that Afrimex failed to perform the due diligence required when dealing with supply chain relationships in contexts which demand a greater level of scrutiny. Both Kita and Backer basically affirm the standpoint that sufficient due diligence is specifically a requirement for unstable contexts of operation. Second, for due diligence to be recognised as sufficient, it can again be inferred that corporations operating in hostile contexts are required to strongly influence change in the wrongful practices of their supply chain relationships. In influencing supply chain relationships, the NCP simply refers to exploring options and methods with suppliers to ensure that minerals are sourced from mines that do not abuse child labour. By contrast to the undertaking of the normative framework, the NCP does not refer to the leverage principle. Enforcing the leverage principle would arguably best fit the profile of sufficient due diligence. As shown previously, the duty of leverage would

⁴³¹ Kita 2010 *Penn State ILR* 374.

⁴³² Backer 2009 *Melbourne JIL* 24.

eventually require a corporation to terminate third party relationships where evidence of egregious human rights abuses exist.⁴³³

Third, the NCP reasons that sufficient due diligence requires corporations operating in unstable contexts to have knowledge of the source of their minerals. This knowledge should arguably be acquired through internal and external processes, since mere oral assurances and written statements from suppliers do not suffice. Here, some authors like Giersch and Potheary⁴³⁴ hold the view that sufficient due diligence means that Afrimex should have applied a rigorous risk-based due diligence approach. Simply relying on supplier due diligence or third party audit schemes may amount to insufficient due diligence. The authors further propose for corporations like Afrimex to adopt what they refer to as investigative due diligence. This means, discreet enquiries with local experts. This should assist corporations to gain real insights into relevant incidents of possible non-compliance with standards of responsible business conduct. In turn, an investigative due diligence process should assist corporations to determine whether or not their products are linked to child labour violations in the supply chain.⁴³⁵ While Giersch and Potheary's proposal of investigative due diligence offers thoughtful insight, it should go in hand with offering protection to participants of the discreet process so as to protect them from possible abuse such as intimidation.

In addition, Afrimex's defence of the lack of knowledge interestingly amounted to a verdict of insufficient due diligence being passed. It could be inferred here, that in making its determination, the NCP relied on the legal maxim *ignorantia juris non excusat* which when translated means ignorance of the law is not an excuse. Similarly, in this case, ignorance of the source of minerals is not an excuse to exonerate the wrongdoer. For

⁴³³ UN Guiding Principles (2011) - Principle 19.

⁴³⁴ Giersch and Potheary 2017 <http://www.globalriskaffairs.com/>.

⁴³⁵ Giersch and Potheary 2017 <http://www.globalriskaffairs.com/>.

this reason, the NCP refers to Afrimex's lack of knowledge as an admission of guilt in its failure to carry out sufficient due diligence. Overall, the NCP's determination of insufficient due diligence suggests that extraordinary due diligence measures should be taken where there is a likelihood of the occurrence of severe human rights impacts like child labour violations in the mineral supply chain. This is comparable to the finding of the UN Committee on the Rights of the Child in General comment no 16. To recapitulate the discussion in chapter 2, the Committee required a "child rights due diligence" approach where the context of operation presented a high risk of corporate involvement in child rights violations.⁴³⁶

3.3.5 UK NCPs key recommendations

The milestone decision in the Afrimex case led to a number of recommendations being made by the UK NCP. At the heart of the recommendations was the integration of a practical and effective Corporate Social Responsibility (CSR) policy document. In formulating its CSR document, the NCP advised Afrimex to consider the potential implications of its activities. In doing so, the NCP proposed for the policy document to make explicit reference to international human rights instruments. Although not expressly mentioned by the NCP, it has already been established in chapter 2 that for child labour violations, this means reference to the CRC and the two core ILO conventions on child labour.⁴³⁷ Further, the NCP sought assurances from Afrimex that the policy document would change corporate culture and not amount to what it termed as a "worthless piece of paper".⁴³⁸ The NCP's concern underscores the window-dressing

⁴³⁶ UN Committee on the Rights of the Child- General comment No 16 (2013) para 62.

⁴³⁷ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* paras 63, 64 and 65.

⁴³⁸ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 66.

allegation which is commonly made against corporations who simply engage in CSR initiatives as a gateway to boost profits.⁴³⁹

In making its recommendations the NCP again drew attention to the normative framework and its conception of due diligence responsibility. Afrimex was advised to adopt the due diligence standard under the framework and to require that its suppliers commit to promoting respect for human rights, including the rights of the child to be free from economic exploitation in its supply chain.⁴⁴⁰ Clearly, the UK NCP referred to the normative framework a number of times. It is therefore hardly surprising that the OECD went on to adopt the human rights chapter of the normative framework, on which due diligence responsibility is founded, soon after it had received the full approval of the UN Human Rights Council. Hence, today, the UK NCPs recommendations in the Afrimex case have arguably received a heightened status through the update of the OECD Guidelines in 2011.

As part of its recommendations, the NCP also prominently referenced the *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*.⁴⁴¹ The NCP pointed out that the Risk Awareness Tool required corporations to take adequate steps, precisely due diligence measures, to avoid situations that might aggravate existing human rights problems, and to respect the human rights of those affected by its activities. Although not stated *verbatim*, the Risk Awareness Tool clearly recognises the responsibility for corporations to enforce their due diligence responsibility duty to respect the rights of the child. As a general

⁴³⁹ Connors, Anderson-MacDonald and Thomson 2017 *Journal of Business Ethics* 599, 601.

⁴⁴⁰ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 64.

⁴⁴¹ *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones* (2006). The tool was developed by the OECD Investment Committee to assist corporations that invest in countries where the state is unwilling or unable to assume its responsibilities in enforcing respect for human rights.

requirement, respect for children's rights should be consistent with the host state's international obligations and commitments especially where domestic laws are weak.⁴⁴² This means that corporations operating in contexts of weak governance or conflict should first and foremost comply with national human rights obligations, however, if the law is weak, they should observe higher international human rights standards. In line with this preceding statement, as a home state, the UK NCP pointed out its expectation for overseas corporations like Afrimex to exercise the highest levels of due diligence, which it must apply to its supply chain in host states where widespread violence and systematic child labour abuses occur.⁴⁴³

Lastly in its recommendations, the NCP outlined the imminent risks for corporations in their failure to institute due diligence practices in the supply chain. Relying on the Risk Awareness Tool, the NCP iterated that the onus is solely upon the corporation to exercise due diligence responsibility and to manage human rights risks like child labour violations in the supply chain. Failure to do so could potentially damage the corporate reputation or give rise to violations of law or other human rights abuses.⁴⁴⁴ While naming and shaming campaigns, boycotts, and negative global media coverage would undoubtedly erode a corporation's reputation, it can consequently offset other related risks. For example, bad publicity can result in divestment by ethical and mainstream investors and shareholders, which can affect access to capital.⁴⁴⁵ Faced with enormous pressure to rectify the damage, the corporation can apply its duty of leverage as a last resort and terminate contracts with suppliers. However, the breaking of contracts may

⁴⁴² *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* paras 67 and 68.

⁴⁴³ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* paras 75 and 76.

⁴⁴⁴ *Final statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) Ltd* para 69.

⁴⁴⁵ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

contribute to operational disruptions. The corporation can also incur financial costs if new procurement strategies are adopted and new suppliers have to be trained.⁴⁴⁶ Furthermore, the corporation can potentially be faced with legal action in the courts of law for its role in perpetrating human rights violations through supply chain affiliations.⁴⁴⁷ Given this setting, it can be argued that corporations should be driven to enforce their due diligence responsibility duty to mitigate related risks. Notably, Taka⁴⁴⁸ observes that corporate vulnerability to reputational risks associated with human rights impacts has increased the strategic management of global supply chains in recent years, regardless of whether or not corporations operate directly in conflict areas or weak states. Thus, due diligence responsibility is arguably becoming an integral component of corporate conduct.

3.3.6 Critique of Afrimex case

Following its publication, the Final Statement determination of the UK NCP was largely welcomed. In its press release, Global Witness, in no uncertain terms, stated that the ruling had sent the right message to corporations complicit to child labour violations in the supply chain.⁴⁴⁹ In Global Witness's view, it provided indispensable positive guidance to help change corporate culture and behaviour.⁴⁵⁰ However, almost 10 years since the ruling, today, it has been shown that 1 million children work in mining activities, with the numbers said to be on the rise. Thus, while the case undoubtedly set a strong precedent for child labour abuses in the supply chain, the full impact of the decision largely remains to be seen. For this reason, the Afrimex case has been subjected to scrutiny.

⁴⁴⁶ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

⁴⁴⁷ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

⁴⁴⁸ Taka 2014 <http://www.saiia.org.za>.

⁴⁴⁹ Global Witness 2008 <https://www.globalwitness.org/>.

⁴⁵⁰ Global Witness 2008 <https://www.globalwitness.org/>.

The criticism levelled against Afrimex mainly points to the failure of the UK NCP to monitor Afrimex's adherence to the recommendations. The NCPs do not have the mandate to enforce decisions, hence, according to the OECD Watch, this allows corporations like Afrimex to simply ignore the Final Statement and continue business as usual with impunity.⁴⁵¹ True to this, soon after the Final Statement publication, Global Witness requested that Afrimex indicate how it complied with the NCP's recommendations. Surprisingly, Afrimex claimed that there was no need for it to implement the recommendations, stating that it had stopped trading in minerals from the DRC since late 2008.⁴⁵² However, in the period between 2008 and 2009, a UN Group of Experts report referenced Afrimex as being affiliated with another supply chain relationship which was cited to have made payments to yet another rebel group in the DRC.⁴⁵³

Basically, the criticism leveled against Afrimex questions the relevance of not only the Afrimex case and the NCPs but of the OECD Guidelines as a mechanism to promote respect for the rights of the child in supply chain activities. However, to dismiss the case primarily based on the NCPs inability to enforce decisions would be a misrepresentation of the truth. While the Afrimex case is non-binding in nature, it is argued here that it provides a degree of corporate accountability for human rights impacts. It should also be recognised that the OECD Guidelines go a step further from the normative framework and offer a grievance mechanism system in the form of NCPs. The NCPs therefore serve as an important vehicle for providing remedy in cases of human rights breaches like child labour.

⁴⁵¹ Oldenziel, Wilde-Ramsing and Feeney *Assessing the contribution of the OECD* 37.

⁴⁵² MacLeod *Towards normative transformation* 247-248; Oldenziel, Wilde-Ramsing and Feeney *Assessing the contribution of the OECD* 37.

⁴⁵³ Oldenziel, Wilde-Ramsing and Feeney *Assessing the contribution of the OECD* 37. The report reference Afrimex as being affiliated with another supply chain relationship, Muyeye, who was cited to have made payments to rebel group, the FDLR. Like the RDC-Goma, FDLR is famously known for committing numerous human rights atrocities in the DRC.

3.3.7 Relevance of Afrimex case

Although not short of pitfalls, the decision in Afrimex is highly relevant today primarily for three reasons. First, the case emphasises the importance of applying due diligence to corporate supply chains in order to prevent grave human rights abuses like the worst forms of child labour. Second, while due diligence has been thoroughly outlined in the Guidelines as well as in the complementary guidance, the Afrimex case approaches due diligence from a pragmatic point of view. It shows the relationship between conflict affected regions and child labour which proves the notion that child labour predominantly occurs in regions of weak governance and conflict. It also proves that it is through third party relationships that corporations become complicit to child abuses. Third, the case promotes a shared responsibility approach to addressing human rights concerns in the supply chain. Although the abuses were perpetrated in the DRC as a host nation, the UK as a home state was front and centre in resolving the matter. Overall, the case is undoubtedly the foundation of due diligence responsibility for child labour in the mineral supply chain. This reflects the main line of argument in this chapter, that is, that due diligence responsibility has practical application under the OECD Guidelines. Thus, owing to this, the OECD Guidelines appear to have a stronger resolve to promoting the rights of the child to be free from economic exploitation in the mineral supply chain.

3.4 Strengths and limitations of OECD Guidelines application of due diligence responsibility

3.4.1 Strengths

It is key to note that in comparison to the normative framework, the OECD Guidelines place an explicit obligation on corporations to contribute to the effective abolition of child labour in the mineral supply chains through due diligence responsibility. For the purpose of the study at hand, this is

undoubtedly the greatest strength of the Guidelines. Additionally, owing to the fact that they incorporate a human rights chapter and extend due diligence responsibility to a corporation's third party relationships in the supply chain, the Guidelines can be seen as a highly relevant instrument. Further, some scholars like Papaioannou⁴⁵⁴ contend that the Guidelines are one of the most geographically extensive corporate codes on due diligence responsibility owing to their extra-territorial reach. Papaioannou's contention has rightly been noted in the discussion on the relevance of the Afrimex case above. More relevantly, an important strength of the Guidelines in comparison to the normative framework, is their potential to remediate human rights impacts through the NCPs. While this raises the bar for due diligence responsibility, more importantly, it shows that the Guidelines have a progressive approach to addressing human rights impacts in supply chain activities. Similar to the strengths of the normative framework, due diligence responsibility under the Guidelines is also an on-going proactive and reactive process.

3.4.2 Limitations

Although the OECD Guidelines have specific application to child labour in the mineral supply chain, one major limitation is that unlike the normative framework, they do not have universal coverage. The Guidelines only apply to those corporations headquartered in the countries that have signed them. This means that corporations which operate outside OECD countries are not covered by the Guidelines. For example, the Guidelines exclude major emerging economies such as South Africa, India, China, and Russia. They also exclude weak governance and conflict zones such as the DRC. Thus, one could argue that this seemingly stagnates progress in addressing corporate-related human rights impacts. However, in support of the Guidelines, the argument made is that despite their lack of universal

⁴⁵⁴ Papaioannou "The illegal exploitation of natural resources" 278.

coverage, the Guidelines are still global in reach owing to their extra-territorial nature which goes beyond national borders. It is for this reason that the UK NCP was able to remediate human rights impacts in the DRC.

On the downside however, the Guidelines fall short in that the NCP recommendations are largely unenforceable in nature. Adding to this, the Guidelines themselves are non-binding standards, thus corporations are not legally required to uphold the duty of due diligence responsibility as outlined under the Guidelines. Like the normative framework, this questions the reliability of due diligence responsibility under the Guidelines as a tool to realise the rights of the child to be free from economic exploitation in the supply chain. In view of the shortfalls of the most authoritative due diligence responsibility standards, it is important to note that other internationally relevant standards have taken a key interest in addressing the due diligence responsibility duty of corporations in relation to human rights impacts. What follows below is an evaluation of due diligence as attributed to beyond the most authoritative standards.

3.5 Beyond the most authoritative due diligence responsibility guidelines

Beyond the normative framework and the OECD Guidelines, the ILO MNE Declaration, the UN Global Compact and the US *Dodd Frank Act* can be interpreted as applying due diligence responsibility standards to child labour in the mineral supply chain.

3.5.1 ILO MNE Declaration

The *ILO Tripartite declaration of principles concerning multinational enterprises and social policy*, commonly referred to as the MNE Declaration is the only ILO instrument that provides guidance to corporations on social

policy and inclusive, responsible and sustainable workplace practices.⁴⁵⁵ Unlike the normative framework which was adopted by the UN or the OECD Guidelines which are state based recommendations to corporations, the MNE Declaration was elaborated and adopted by governments, employers and workers. The principles of the declaration are therefore addressed to corporations, governments and employers' and workers' organisations, hence it is referred to as the tripartite declaration. Although the declaration has been in existence for almost 40 years, it was amended in 2000 and 2006 and revised in 2017 as a response to new economic realities such as the globalisation of supply chains.⁴⁵⁶ The declaration also takes into account developments since the last update in 2006, this includes the endorsement of the Guiding Principles by the UN Human Rights Council in 2011 and the goals and targets of the 2030 Agenda for Sustainable Development. The declaration also notes the importance of the updated OECD Guidelines.⁴⁵⁷ Thus, it can safely be said that the declaration has a comprehensive approach to addressing corporate responsibilities.

In terms of paragraph 8 of the declaration's General Policies, corporations are required to respect human rights. In paragraph 9, they are required to contribute to the realisation of the ILO *Declaration on Fundamental Principles and Rights at Work* which entrenches the rights of the child to be free from child labour. The paragraph states the following:

All members, even if they have not ratified the fundamental Conventions in question, have an obligation, arising from the very fact of membership to the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely...
(c) the effective abolition of child labour...⁴⁵⁸

⁴⁵⁵ ILO 2017 <http://www.ilo.org/>.

⁴⁵⁶ ILO 2017 <http://www.ilo.org/>; Biondi 2015 *Intern'l J Labour Research* 106.

⁴⁵⁷ ILO 2017 <http://www.ilo.org/>.

⁴⁵⁸ *ILO Tripartite declaration of principles concerning multinational enterprises and social policy* (2017) General policies para 9.

The ILO MNE Declaration therefore requires corporations to contribute significantly to the attainment of its objectives, this includes the realisation of the rights of the child to be free from economic exploitation in corporate activities. Due diligence responsibility under the declaration is specifically addressed in paragraph 10 of the General Policies. It appears in the same format as the normative framework and the OECD Guidelines. Overall, under the declaration, corporations are equally required to have high regard for human rights. Further, paragraph 26 which addresses employment relations states the following:

Multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour in their operations and should take immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.⁴⁵⁹

Despite the fact that the declaration contains only recommendations, it provides material evidence that the consideration of the rights of the child should be at the forefront of corporate responsibilities.⁴⁶⁰ The broad application of the declaration also makes it highly relevant. However, it is only briefly referred to here because unlike the Guiding principles, it has not been adopted at the UN level and unlike the OECD Guidelines, it does not specifically address child labour impacts in the mineral supply chain.

3.5.2 UN Global Compact

The UN Global Compact, launched in 2000⁴⁶¹ is a voluntary initiative which calls upon corporations to conduct their business while respecting the ten principles of the Global Compact. According to the initiative, corporate

⁴⁵⁹ *ILO Tripartite declaration of principles concerning multinational enterprises and social policy* (2017) Employment para 26.

⁴⁶⁰ Clapham *The human rights obligations* 215.

⁴⁶¹ The concept of the Global Compact had been developed for the then Secretary-General at that time, by the then UN assistant Secretary-General and chief advisor for strategic planning-Professor John Ruggie.

sustainability starts with a corporation's value system and a principled approach to doing business. This means that corporations should operate in ways that, at a minimum, meet fundamental responsibilities which include human rights responsibilities.⁴⁶² Three out of the ten principles of the Global Compact are applicable to the discussion on due diligence responsibilities for child labour in the supply chain. In terms of principle 1 corporations should support and respect the protection of internationally proclaimed human rights. Accordingly, principle 2 states that corporations should make sure that they are not complicit in human rights abuses. Lastly, principle 5 explicitly commits corporations to uphold the rights of the child and ensure the effective abolition of child labour.⁴⁶³

To strongly enforce the corporate duty to respect human rights, participating corporations to the Global Compact are required to show commitment to the principles through a publication and reporting process. In 2010, an advisory group on corporate supply chain sustainability was established as a platform for integrating the ten principles into supply chain management systems of corporations.⁴⁶⁴ In 2012 however, several hundred corporations affiliated to the organisation were de-listed for failure to fulfil minimum reporting requirements.⁴⁶⁵ This arguably shows the unwilling nature of the organisation to undermine human rights responsibilities, making it a force to be reckoned with. Nevertheless, the credibility of the Global Compact has been criticised over the years. This is because the organisation does not monitor and verify corporate activities, in particular, for violations against human rights.⁴⁶⁶ Hence, to enhance its credibility, the Global Compact enacted a complaints mechanism for abuses made by a corporation adhering to the aims and principles of the organisation. Where a corporation declines to dialogue on a certain issue, it

⁴⁶² Global Compact 2017 <https://www.unglobalcompact.org/>.

⁴⁶³ Global Compact 2017 <https://www.unglobalcompact.org/>.

⁴⁶⁴ ILO 2016 <http://www.ilo.org>.

⁴⁶⁵ De Schutter "Beyond the guiding principles" xvi-xvii.

⁴⁶⁶ Borges 2016 *U Baltimore JIL* 27; Cullen *The role of international law* 255.

will be labelled as "non-communicating" and automatically eradicated from the list of participants.⁴⁶⁷

Even though the Global Compact has been criticised by some, it arguably further enhanced its credibility through its partnership with UNICEF and Save the Children in 2013 where it co-authored the children's rights and business principles with the two organisations. The children's rights and business principles outline in great detail the duties of corporations towards children. They encompass an outright approach on the roles of corporations in relation to the children's rights and encourage corporations to support children's rights in a variety of ways. Due diligence responsibility as referred to under the normative framework and the OECD Guidelines is attributed to in the principles.⁴⁶⁸ More significantly, principle 2 requires corporations to contribute towards the elimination of child labour, including in all corporate activities and business relationships. Thus, as Martins⁴⁶⁹ comments, the Global Compact steers the due diligence responsibility agenda for children's rights and child labour in the right direction.

3.5.3 US Dodd Frank Act

Some home states have taken the initiative to address the cruelty of the worst forms of child labour in mineral supply chains by enforcing a duty on corporations within their jurisdictions to carry out due diligence practices and report on actions taken. The US, through its *Dodd Frank Act*, imposes disclosure requirements on corporate mineral supply chains for corporations under its jurisdiction. The concern of the US is that the exploitation and trade of conflict minerals originating from the DRC is helping to finance the conflict which is characterised by extreme levels of violence and human rights abuses like child labour.⁴⁷⁰ The Act therefore

⁴⁶⁷ Borges 2016 *U Baltimore JIL* 27.

⁴⁶⁸ UNICEF 2013 <http://www.unglobalcompact.org>.

⁴⁶⁹ Martins 2012 *Fordham JCLF* 26.

⁴⁷⁰ Section 1502 *Dodd Frank Act*.

requires US corporations that use conflict minerals such as tin, tantalum, tungsten and gold, to publicly disclose their use and to register with the US Securities and Exchange Commission (SEC).⁴⁷¹ Any corporation covered by the Act must conduct a reasonable inquiry as to the country of origin of any minerals that the corporation uses in manufacturing its products. However, like the Global Compact, the *Dodd Frank Act* has also faced criticism. According to Global Witness, although corporations are required to disclose where they source their minerals from, there is generally no ban or penalty on the use of conflict minerals. Also, if a corporation discovers that it has been sourcing minerals from the DRC or neighbouring countries, it is not illegal for it to stop doing so. Moreover, Global Witness notes that the Act does not provide for any remedial action to be taken.⁴⁷² Nonetheless, it is argued that states, through initiatives such as the *Dodd Frank Act*, are advancing the duty of due diligence responsibility for human rights concerns like child labour in the mineral supply chains. Thus, although the most authoritative due diligence responsibility standards of our time take a soft law approach, the *Dodd Frank Act* has shown that states can play a vital role and require mandatory due diligence within their domestic jurisdictions.

Remarkably, it is key to point out here that there has significantly been a surge in the requirement for mandatory due diligence laws within states. For example, specific to child labour, the beginning of 2017 saw the adoption of a new Child Labour Due Diligence Bill in the Netherlands. The Dutch Parliament adopted the Bill which requires corporations to identify the risk of child labour in their supply chains and develop an action plan to address child labour risks.⁴⁷³ Likewise, other European Union (EU) states like France, the UK and Switzerland are also headed in the same direction

⁴⁷¹ Section 1502 *Dodd Frank Act*.

⁴⁷² Global Witness 2011 <https://www.globalwitness.org/>.

⁴⁷³ Business & Human Rights Resource Centre 2017 <https://business-humanrights.org/>;
Stop Child Labour 2017 <http://www.stopchildlabour.eu/>.

as far as mandatory due diligence is concerned.⁴⁷⁴ This undoubtedly shows that human rights concerns in the supply chain can effectively be tackled through a shared responsibility between states and corporations.

3.6 Conclusion

The aim of this chapter was to examine the extent to which due diligence responsibility applies to child labourers as rights holders in the mineral supply chain under the OECD Guidelines. The first significant part of the chapter set out to show the context of the application of OECD Guidelines due diligence responsibility. Here it was shown that the OECD Guidelines expressly require due diligence responsibility for child labour impacts. This is in terms of chapter II on General Policies, Chapter IV on Human Rights and chapter V on Employment and Industrial Relations. Additionally, the complementary guidance on due diligence responsibility in weak governance zones accompanied by the practical actions guide for child labour in mineral supply chains, cast this notion in stone. The section therefore proved the main line of argument of the chapter, that is, that the OECD Guidelines have practical application to child labour in the mineral supply chain and offer a progressive approach to due diligence responsibility.

The second significant part of the chapter focuses on analysing the Afrimex case. The case further advanced the notion of the Guidelines' practical approach to child labour. The Afrimex case is thereby seen as the benchmark and precedent of the due diligence responsibility principle for child labour impacts in the mineral supply chain. The third part of the chapter went on to elaborate the strengths and limitations of the OECD Guidelines as a tool to enforce the due diligence responsibility duty for child labour in the supply chain. A key strength of the Guidelines is undoubtedly its ability to remediate child labour, yet, although it has extra-territorial

⁴⁷⁴ Business & Human Rights Resource Centre 2017 <https://business-humanrights.org/>.

reach, its key weakness is the lack of universal coverage. The fourth section of the chapter addresses the duty of due diligence responsibility under the ILO MNE Declaration, the Global Compact and the *US Dodd Frank Act*. The key finding under this section is that there is a high concern for child labour as a human rights issue in supply chain activities. It also portrays the role of states in enforcing binding due diligence standards for child labour in national laws.

Overall, in line with the purpose of the dissertation as a whole, the Guidelines have shown that they have a stronger resolve to promoting respect for the rights of the child. This advances the rights holders' perspective for child labour. It also proves that the Guidelines are a more reliable platform for realising the rights of the child to be free from economic exploitation in the mineral supply chain. In light of this, it should nonetheless be recalled that due diligence responsibility under the most authoritative standards is founded on the duty to only respect human rights. This exists in isolation of the full range of international human rights law duties to respect, protect and fulfil human rights. It should therefore be established if the duty to only respect human rights can achieve the intended goal of realising the rights of the child to be free from economic exploitation the supply chain. Chapter 4 makes an assessment of this.

CHAPTER 4

Can due diligence responsibility duty to only "respect" human rights realise the rights of the child in the supply chain?

4.1 Introduction

While the aim of the previous two chapters was to show the extent to which due diligence responsibility applies to child labourers as rights holders in the mineral supply chain, this chapter addresses the pertinent question of whether due diligence responsibility as a duty to only respect human rights can effectively contribute to realising the rights of the child to be free from economic exploitation in the supply chain. Traditionally, international law primarily confers the full range of duties to respect, protect and fulfil human rights obligations on states. According to the UN OHCHR, this means that states have a combination of both positive and negative duties to realise human rights.⁴⁷⁵ The duty to respect means that states, including all organs and agents of the state, should refrain from interfering with or curtailing the enjoyment of human rights. The duty to protect requires the state to protect individuals and groups of individuals against human rights violations. The duty to fulfil requires the state to take necessary measures to facilitate the enjoyment of basic human rights for each person within its jurisdiction.⁴⁷⁶ As a result, the state is referred to as the *de jure* duty bearer in the realisation of human rights responsibilities.

In stark contrast to states, corporations as duty bearers of due diligence responsibility are bestowed with a negative duty to only respect human rights. This duty is clearly encompassed in the most authoritative due diligence responsibility guidelines. This means that corporations are secondary duty bearers of human rights responsibilities whose role is to simply refrain from infringing on individuals' human rights. However, since

⁴⁷⁵ UN OHCHR 2017 <http://www.ohchr.org/>.

⁴⁷⁶ UN OHCHR 2017 <http://www.ohchr.org/>.

states are required to effectively realise human rights responsibilities through the tripartite obligations, one would question the usefulness of the duty to only respect, which clearly exists in isolation of the accompanying duties to protect and fulfil. Put practically, in relation to child labour impacts in the mineral supply chain, the question then becomes whether the duty to only respect human rights can achieve the goal of realising the rights of the child to be free from economic exploitation in the supply chain.

The hypothesis of the dissertation is that due diligence responsibility can be used as a tool to realise the rights of the child to be free from child labour in mineral supply chains. While this hypothesis is largely supported throughout the dissertation, it is nevertheless revealed in this chapter that due diligence responsibility can better serve the rights holders' perspective through an integrated approach. This means that within the guise of soft law approaches to due diligence responsibility, corporations should be required to equally respect, protect and fulfil human rights in order to realise the rights of the child in supply chain activities. This line of reasoning forms the basis of the argument in this chapter. Following this introduction, the chapter unfolds in the following order: realising the rights of the child: respect only vs respect, protect and fulfil; proposal for an integrated approach to realising the rights of the child in supply chain activities; benefits and implications of an integrated approach to child labour for corporations; the future for child labour concerns in corporate supply chains and; the conclusion.

4.2 Realising the rights of the child: respect only vs respect, protect and fulfil

The surrounding debate on the realisation of human rights is twofold; on the one hand, there are those who contest that corporations as duty bearers of due diligence, like states, should have the full range of duties to respect, protect and fulfil human rights such as the rights of the child in the

supply chain. On the other hand, there are those who are notoriously against the full range of international human rights duties being extended to corporations. To fully engage in the debate at hand, reference is made to five identified approaches:

4.2.1 UN Norm's approach

The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*⁴⁷⁷ were the first global initiative to famously require corporations to respect, protect and fulfil the realisation of human rights obligations.⁴⁷⁸ Founded on a set of twenty-three articles, the UN Norms were approved in August of 2003 by the UN Sub-Commission on the Promotion and Protection of Human Rights. In April of 2004, they were considered by the UN Commission on Human Rights, however, they were not approved for adoption.⁴⁷⁹ Although the UN Commission on Human Rights expressed its appreciation to the Sub-Commission for the work undertaken in preparing the draft norms, stating that the UN Norms contained useful elements and ideas for consideration, the commission did not approve them citing that they had no legal standing.⁴⁸⁰ Some authors like Martins,⁴⁸¹ argue that the UN Norms were rendered unenforceable because they extended the full range of duties to respect, protect and fulfil to corporations. Further, others contend that the UN Norms were not enforced because they embodied a vision of *de lege ferenda*, or the law to which we may aspire but they did not reflect *lex lata* or positive existing law.⁴⁸² Regardless of this, it is noteworthy to engage

⁴⁷⁷ *UN Sub-Commission on the Promotion and Protection of Human Rights – Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights UN Doc E/CN.4/Sub.2/2003/12/Rev.2* (13 August 2003) hereafter referred to as UN Norms (2003).

⁴⁷⁸ UN Norms (2003) A. General Obligations.

⁴⁷⁹ Business & Human Rights Resource Centre 2017 <https://business-humanrights.org/>.

⁴⁸⁰ Business & Human Rights Resource Centre 2017 <https://business-humanrights.org/>.

⁴⁸¹ Martins 2012 *Fordham JCFL* 38; Martins *Corporate Influence* 10.

⁴⁸² Baxi 2005 *HRLR* 14.

with the text of the UN Norms in order to understand the reasoning behind the decision to extend tripartite duties to corporations.

While the UN Norms rightly recognised the state as having primary responsibilities to respect, protect and fulfil human rights duties, they nevertheless required corporations as organs of society to do the same.⁴⁸³ The UN Norms therefore imposed both negative and positive obligations on corporations. This meant that corporations were not only under a duty to refrain from directly or indirectly contributing to, and benefiting from human rights violations. They were also required to use their influence to promote and ensure respect for human rights.⁴⁸⁴ Incidentally, within the ambit of this tripartite approach, the UN Norms advanced the due diligence responsibility rationale. They required corporations to use their due diligence responsibility duty to ensure that their activities did not contribute directly or indirectly to human rights violations. By exercising due diligence, corporations were required not to benefit directly or indirectly from abuses of which they were aware or ought to have been aware of.⁴⁸⁵

In specific relation to child labour impacts, the UN Norms required corporations to respect the rights of children to be protected from economic exploitation.⁴⁸⁶ Additionally, in the commentary on child labour, the UN Norms state that the full range of tripartite responsibilities for child labour means that corporations should not only refrain from interfering with the rights of the child. Instead, they should facilitate the enjoyment of the rights of the child by creating and implementing a plan of action to eliminate child labour. This includes a plan to consider what happens to

⁴⁸³ UN Norms (2003) Preamble.

⁴⁸⁴ Deva 2004 *ILSA J Intern'l & Comp L* 495.

⁴⁸⁵ *UN Sub-Commission on the Promotion and Protection of Human Rights- Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/38/Rev.2* (2003). A. General Obligations commentary para 1(b), hereafter referred to as UN Norms commentary (2003).

⁴⁸⁶ UN Norms (2003) para 6.

children when they are no longer employed. It also includes measures such as withdrawing children from work in supply chain activities. Such measures should be in tandem with the provision of suitable opportunities aimed at education, vocational training and other social protection for children and their families, for example employing parents or adolescent children in non-hazardous activities.⁴⁸⁷ It can thus be interpreted at this point, that the UN Norms constituted the most comprehensive statement of due diligence responsibility obligations for corporations to respect, protect and fulfil human rights. The UN Norms clearly stretched beyond the limit of today's authoritative due diligence responsibility guidelines. In doing so however, one could argue that the UN Norms simply recognised that the duty to respect cannot be separated from the accompanying duties to protect and fulfil human rights responsibilities.

4.2.2 Ruggie's approach

The author of the normative framework, John Ruggie, has equally famously argued that conferring the full range of duties to respect, protect and fulfil human rights obligations on corporations as duty bearers of due diligence responsibility is requiring them to do too much.⁴⁸⁸ According to Ruggie, corporations are simply organs of society. This means that they are specialised economic organs and not democratic public interest institutions.⁴⁸⁹ Enforcing the full range of duties to respect, protect and fulfil may therefore compel responsible corporations faced with the most difficult social challenges imaginable, to perform *de facto* state roles for which they are ill-equipped.⁴⁹⁰ As such, the duty to respect only, is used so as to not mirror the duties of states to respect, protect and fulfil. Framed in this way, Ruggie's argument is firstly that the duty to respect only is

⁴⁸⁷ UN Norms commentary (2003) para 6(d).

⁴⁸⁸ Normative framework 2006 Interim report para 29; Normative framework 2010 report para 64.

⁴⁸⁹ Normative framework 2008 report para 53.

⁴⁹⁰ Normative framework 2006 Interim report para 29.

bestowed on corporations to distinctively distinguish corporate duties from that of states.

On a second note, Ruggie refers to the duty to respect only as a social norm that is embedded in social expectations.⁴⁹¹ This means that the duty to respect is the basic expectation that society has of corporations in the fulfilment of human rights obligations.⁴⁹² In another sense, Ruggie contends that society only requires baseline expectations from corporations as duty bearers of due diligence responsibility. This would mean that society would not expect corporations to engage in broader duties to protect and fulfil their human rights obligations. Basically, Ruggie's contention is that the duty to only respect on which due diligence is founded, is not an obligation to realise human rights. This argument however appears to be problematic if actualised in practice. From a pragmatic perspective, societal expectations can easily be triggered by pressure from civil society groups as well as local communities. This can include for example, pressure for a corporation operating in a certain context, for instance an informal mining community, to build schools or offer employment to local inhabitants. Given this scenario, corporations can voluntarily adopt responsibilities which go beyond the duty to only respect. On this premise, Ruggie's connotation of the duty to respect as a social expectation has unsurprisingly been questioned by a number of human rights activists. Some question whether this duty is sufficient in itself to guide corporations in the realisation or fulfilment of human rights.⁴⁹³ Others argue that the duty to only respect as a social expectation is equivalent to awarding the lowest common denominator status to human rights responsibilities of corporations. The net should be cast far and wide

⁴⁹¹ Normative framework 2009 report para 48.

⁴⁹² Normative framework 2009 report para 48.

⁴⁹³ Amao 2008 <http://www.ssrn.com/>.

so as to include a deeper legal basis which does not weaken the fulfilment of human rights.⁴⁹⁴

In essence, the argument made in opposition to Ruggie's is that the duty to respect cannot visibly exist in isolation of the duties to protect and fulfil. This undoubtedly supports the approach of the UN Norms. On the other hand however, it could be that Ruggie does not envisage the duty to only respect in its purest form. For instance, when one refers back to the discussion of due diligence responsibility under the normative framework, it can clearly be seen that the procedural content of due diligence responsibility contains elements which go beyond the duty to only respect.⁴⁹⁵ Thus, in his defence, considering his "protect, respect and remedy" framework, it can be said that Ruggie confined himself to using the duty to respect to simply distinguish this from the state duty to protect human rights. Whether this entails that corporations should strictly only refrain from infringing human rights without engaging in broader measures to fulfil the realisation of human rights, would be highly unlikely.

4.2.3 Bilchitz's approach

David Bilchitz has widely written on corporate responsibilities in the business and human rights domain. His most recent work proposes for a business and human rights treaty which legally requires corporations to enforce their human rights obligations.⁴⁹⁶ Writing soon after the adoption of the normative framework, Bilchitz argued that the duty to respect cannot exist in isolation of the duties to protect and fulfil. In cementing his argument, Bilchitz referred to Henry Shue's famous typology of rights. According to Bilchitz, Shue is one of the most prominent legal scholars whose typology of rights is an explicit criticism of the attempts to

⁴⁹⁴ Lopez "The Ruggie process" 65-66.

⁴⁹⁵ See chapter 2.5 for discussion on procedural content.

⁴⁹⁶ In "Putting flesh on the bone" 1-24, Bilchitz sets the tone on what a business and human rights treaty should look like.

distinguish between the duty to respect, protect and fulfil.⁴⁹⁷ Shue argues that negative duties such as the duty to respect only, give rise largely to obligations to avoid infringing the rights of others whilst positive duties like the duties to protect and fulfil give rise to obligations to actively take steps to realise the rights of others.⁴⁹⁸ According to Shue, it is more accurate to recognise that the complete fulfilment of a right involves the performance of multiple kinds of duties. Shue states that any recognised right does not only have one type of correlative duty but rather, should be seen to have a minimum of three types of derivative duties emanating from it if the right is to be successfully realised.⁴⁹⁹

Bilchitz further notes that Shue's typology of duties is widely mirrored in international human rights language which recognises that states have a duty to respect, that is, to avoid depriving; a duty to protect, that is, to protect from deprivation; and a duty to fulfil, that is, to aid the deprived.⁵⁰⁰ Seen in this light, Bilchitz considers the position of the UN Norms and argues that by referring corporations to full range of obligations, the UN Norms in essence indicate that the duties to respect, protect and fulfil can be extended to corporations for the realisation of human rights. In contrast to the position of the UN Norms, Bilchitz argues that Ruggie's specification of the corporate duty to only respect human rights would appear to involve a severe contraction of the obligations that corporations may be required to perform if Shue's typology is applied.

Overall, the claim of Bilchitz is that the duty to only require corporations to respect human rights falls short of adequately realising human rights obligations. The duty to only respect also significantly contrasts with Shue's typology of human rights obligations. If we apply this reasoning to child labour in the supply chain, Bilchitz's argument is that the right of the child

⁴⁹⁷ Bilchitz 2010 *Sur IJHR* 205.

⁴⁹⁸ Bilchitz 2010 *Sur IJHR* 205.

⁴⁹⁹ Bilchitz 2010 *Sur IJHR* 205.

⁵⁰⁰ Bilchitz 2010 *Sur IJHR* 205.

to be free from economic exploitation can only be achieved through tripartite duties since, according to Shue, it is more accurate to recognise that the complete fulfilment of each kind of right should include the performance of multiple kinds of duties. Bilchitz, relying on Shue, in actuality states that the rights of the child in the supply chain should be successfully achieved through tripartite duties. Respect for the rights of the child through due diligence responsibility therefore means that corporations should enforce the three duties; duty to avoid depriving the child of their right, duty to protect the child from deprivations of their right and duty to aid the deprived child. Bilchitz's approach similarly resembles that of the UN Norms.

4.2.4 Letnar Cernic's approach

Letnar Cernic is one notable legal scholar who has thoroughly addressed the corporate responsibility for fundamental human rights.⁵⁰¹ Letnar Cernic argues that corporations have tripartite obligations to respect, protect and fulfil fundamental human rights.⁵⁰² According to him, the tripartite typology can also be employed in relation to the human rights obligations of corporations. In Letnar Cernic's view, the fact that the state is the primary duty bearer of human rights responsibilities does not imply that only states have duties to respect, protect and fulfil the realisation of human rights.⁵⁰³ In entrenching his argument, Letnar Cernic interestingly goes even further than Bilchitz. Although he similarly refers to Shue's typology of duties, the author defines his own typology of duties tailored to addressing corporate human rights responsibilities. Letnar Cernic's typology of duties is based on the recognition that all members of society, which includes corporations, share responsibilities for the realisation of human rights.⁵⁰⁴ What follows

⁵⁰¹ Written in 2008, Letnar Cernic's thesis focused on addressing the corporate responsibility for fundamental human rights.

⁵⁰² Letnar Cernic *Corporate responsibility* 87.

⁵⁰³ Letnar Cernic *Corporate responsibility* 88.

⁵⁰⁴ Letnar Cernic *Corporate responsibility* 88.

below is a detailed explanation of Letnar Cernic's typology of corporate duties to respect, protect and fulfil human rights, including the duty not to co-operate in human rights abuses.

4.2.4.1 Letnar Cernic's typology: duty to respect

According to Letnar Cernic's typology, the corporate obligation to respect human rights means that corporations are obliged to refrain from interfering with the enjoyment of fundamental human rights of individuals. Put differently, the duty to respect should be seen as an obligation to do no harm to the human rights of others.⁵⁰⁵ In a similar vein, the obligation to respect fundamental human rights implies that corporate activities should refrain from interfering with or violating the rights of people.⁵⁰⁶ According to Letnar Cernic, the obligation to respect may appear to suggest that corporations should undertake due diligence responsibility. This is to ensure that corporations not only comply with fundamental human rights obligations but that they also do everything possible to avoid causing harm.⁵⁰⁷ Corporate obligations to respect fundamental human rights therefore extend beyond the sphere of a corporation's employees to include all individuals affected by the corporation's activities, in this sense, third party relationships.⁵⁰⁸ The measures that corporations could adopt to ensure respect for fundamental human rights in their activities include:

... acknowledging fundamental human rights in their policies, constantly and consistently examining human rights situations in countries where a corporation operates, or intends to do so; effectively monitoring supply chains by drafting explicit policies that protect the human rights of the corporation's employees and workers throughout its supply chain; implementing a monitoring system to ensure that human rights policies are being implemented; and adopting explicit policies to ensure that the

⁵⁰⁵ Letnar Cernic *Corporate responsibility* 88.

⁵⁰⁶ Letnar Cernic *Corporate responsibility* 89.

⁵⁰⁷ Letnar Cernic *Corporate responsibility* 90.

⁵⁰⁸ Letnar Cernic *Corporate responsibility* 90.

corporation's security arrangements do not contribute to fundamental human rights violations.⁵⁰⁹

Quite clearly, Letnar Cernic's understanding of the duty to respect closely resembles that of the authoritative due diligence responsibility guidelines. However, in opposition to the guidelines, Letnar Cernic envisages the duties to respect and protect as extending to corporations.

4.2.4.2 Letnar Cernic's typology: duty to protect

Further, in terms of Letnar Cernic's typology, the duty to protect includes the obligations of corporations to protect individuals from fundamental human rights violations. A corporation should support the protection of fundamental human rights by employing its expertise and resources to protect the rights of individuals and local communities where it operates even if the corporation is itself not a source of potential human rights violations.⁵¹⁰ In other words, an obligation to protect means that a corporation is obliged to adopt internal regulations and take other measures to prohibit and prevent fundamental human rights violations internally, in its own activities, but also externally in its third party business relationships throughout the supply chain.⁵¹¹ In requiring corporations to protect human rights in its third party relationships, Letnar Cernic relies on Clapham's reasoning. Clapham argues that the obligation to protect exists even if human rights impacts do not derive from the corporation itself.⁵¹² Framed in this way, it appears therefore, that Letnar Cernic's obligation to protect extends much further than the obligation to respect, making it highly relevant to third party relationships.⁵¹³ Thus, in terms of Letnar Cernic's typology duty to protect, corporations not only have an obligation

⁵⁰⁹ Letnar Cernic *Corporate responsibility* 90.

⁵¹⁰ Letnar Cernic *Corporate responsibility* 90-91.

⁵¹¹ Letnar Cernic *Corporate responsibility* 91.

⁵¹² Letnar Cernic *Corporate responsibility* 91.

⁵¹³ Letnar Cernic *Corporate responsibility* 91.

to protect fundamental human rights internally in relation to their own activities but also externally in relation to third party relationships.⁵¹⁴

Interestingly, to demonstrate the external duty to protect human rights, Letnar Cernic refers to the Afrimex case. According to him, Afrimex demonstrates in the clearest terms how a corporation's external duty to protect human rights can be applied. Additionally, where human rights abuses occur such as child labour on cocoa plantations in the East African countries, for instance Ivory Coast, Letnar Cernic argues that the obligation to protect would suggest that a corporation should ensure that the plantations that supply cocoa follow fundamental labour standards, thus prohibiting child labour.⁵¹⁵ Letnar Cernic also contends that a number of corporations already recognise that they have obligations to protect fundamental human rights in relation to the activities of their third party relationships. He gives an example of situations where corporations like Primark have cut ties with suppliers who used child labour in the supply chain.⁵¹⁶ If we apply this reasoning to the case of child labour in the mineral supply chain, Letnar Cernic in essence contends that the due diligence responsibility duty to respect the rights of the child is in fact an articulation of the duty to protect the rights of the child. In comparison to Ruggie, Letnar Cernic's approach undisputedly blurs the lines between the tripartite obligations.

4.2.4.3 Letnar Cernic's typology: duty to fulfil

Further still, in terms of Letnar Cernic's typology, corporations, like states, equally have an obligation to fulfil. The obligation to fulfil fundamental human rights requires corporations to formulate, implement and periodically review a coherent human rights policy so as to lessen the risk

⁵¹⁴ Letnar Cernic *Corporate responsibility* 91.

⁵¹⁵ Letnar Cernic *Corporate responsibility* 91.

⁵¹⁶ Letnar Cernic *Corporate responsibility* 92.

of human rights impacts throughout the entire corporate structure.⁵¹⁷ According to Letnar Cernic, a corporation may become a primary holder of an obligation to fulfil, foremost in weak governance and conflict zones or failed states where there is no efficient governmental authority.⁵¹⁸ The duty to fulfil can also occur when a corporation operates in contexts where the state is unable to fulfil the rights of the people in that region.⁵¹⁹ The duty to fulfil in terms of Letnar Cernic's typology is however subject to a condition, it depends on the size of the corporation and available resources.⁵²⁰ Here, it appears to be quite obvious that Letnar Cernic refrains from fully extending the duty to fulfil to corporations as he notes that the duty to fulfil should primarily be envisaged as a state duty. Framed in this way, it can thus be implied that Letnar Cernic, in a similar vein as Ruggie, bestows part of the duty to fulfil on states because he recognises that some situations would require corporations to perform *de facto* state roles for which they are ill-equipped. On the other hand, in contrast to Ruggie, Letnar Cernic's typology duty to fulfil refers to a policy statement to ward off human rights risks. Thus, it seems that the due diligence responsibility duty can also be seen as a duty that fulfils human rights obligations if Letnar Cernic's typology of rights were to be applied.

4.2.4.4 Letnar Cernic's typology: additional duty not to co-operate

Last in Letnar Cernic's typology of duties, corporations may additionally have an obligation not to co-operate with actors involved in fundamental human rights violations.⁵²¹ Letnar Cernic describes such obligations as a form of duty to respect and as being more ethical and moral in nature than a legally enforceable obligation.⁵²² The duty not to co-operate would

⁵¹⁷ Letnar Cernic *Corporate responsibility* 93.

⁵¹⁸ Letnar Cernic *Corporate responsibility* 93.

⁵¹⁹ Letnar Cernic *Corporate responsibility* 93.

⁵²⁰ Letnar Cernic *Corporate responsibility* 93.

⁵²¹ Letnar Cernic *Corporate responsibility* 93.

⁵²² Letnar Cernic *Corporate responsibility* 93.

inherently apply to corporations in situations where states commit systematic human rights abuses. In such cases, the danger is that corporations would unintentionally be brought to a position where they become directly or indirectly involved in human rights violations.⁵²³ As noted by Jagers, the operations of corporations in hostile contexts might indirectly support oppressive regimes.⁵²⁴ Jagers further adds that the duty not to co-operate can be placed between the duty to respect and the duty to protect as it has both positive and negative elements.⁵²⁵ Similarly, the obligation not to co-operate may require a corporation either to withdraw its activities from dangerous areas where widespread and systematic human rights abuses occur or it may require a corporation to take measures to ensure that its corporate operations do not amount to complicity in human rights abuses.⁵²⁶ The relevance of the duty not to co-operate can however be questioned at this point. This is because this duty is clearly part of the duty to respect. The duty to respect human rights, which Letnar Cernic also recognises as being a duty not to infringe human rights, embraces obligations which prevent corporations from co-operating with those who perpetuate egregious human rights violations. Nonetheless, it can also be said that Letnar Cernic specifically refers to this duty in order to make a distinction between what he refers to as moral and ethical obligations from legal obligations. Overall, Letnar Cernic's typology of duties can be summed up as a statement which requires engagement with the full range of duties in order to realise human rights obligations.

4.2.5 Deva's approach

Surya Deva, like Bilchitz and Letnar Cernic, is one author who has widely engaged in the business and human rights domain. Unlike Bilchitz and Letnar Cernic however, Deva has specifically considered the question of

⁵²³ Letnar Cernic *Corporate responsibility* 93.

⁵²⁴ Letnar Cernic *Corporate responsibility* 93.

⁵²⁵ Letnar Cernic *Corporate responsibility* 93.

⁵²⁶ Letnar Cernic *Corporate responsibility* 94.

whether the duty to respect can exist in isolation of the duty to protect and fulfil with regard to child labour.⁵²⁷ Deva contends that corporations should not only have a responsibility to respect, but also a responsibility to protect and fulfil the rights of children.⁵²⁸ In extending the full range of duties to corporations, the backdrop of Deva's standpoint addresses regulatory regimes on child labour. According to him, regulatory regimes on child labour focus mostly on a negative responsibility of not hiring children below a certain age.⁵²⁹ On this premise, Deva argues that the goal of realising the rights of the child cannot be accomplished unless this negative static responsibility is complemented with other responsive positive measures.⁵³⁰ Thus, he develops what he terms as a responsive responsibility approach to child labour which he explains in the following way:

Responsiveness can be contrasted with 'responsibility' in that the former focuses more on strategy and action rather than outlining what duties corporations have on a given issue. Another dimension of being responsive is that one does not have a pre-defined inflexible response applicable to all situations. Instead of only having a static and mostly negative responsibility, the exact contours of corporate responsiveness should be determined, to some extent, by what is necessary to achieve an agreed goal.⁵³¹

In further explaining his responsive responsibility approach, Deva contends that instead of corporations merely being obligated not to employ children below the minimum age, they should also be obligated to take positive measures to enhance the status of child labourers such as providing education, vocational training, or offering employment to the adult members of the children's family.⁵³² Deva argues that corporations as organs of society, in addition to the duties of states, should contribute to achieving the full realisation of the rights of the child by engaging with all

⁵²⁷ In Deva 2014 *J Indian L Inst* 143-174 he explores the responsibility of corporations regarding child labour.

⁵²⁸ Deva 2014 *J Indian L Inst* 143.

⁵²⁹ Deva 2014 *J Indian L Inst* 144.

⁵³⁰ Deva 2014 *J Indian L Inst* 144.

⁵³¹ Deva 2014 *J Indian L Inst* 144-145.

⁵³² Deva 2014 *J Indian L Inst* 145.

economic, social and cultural factors that push children into hazardous work.⁵³³

In other words, Deva agrees with the approach envisaged under the UN Norms which is in line with Bilchitz and Letnar Cernic's approaches. To elaborate on Deva's standpoint, he basically argues that due diligence responsibility duty of corporations should not narrowly be viewed as a duty to only respect, but also a responsibility to protect and fulfil the rights of the child. Through a responsive responsibility approach, Deva notes that corporations should be required to contribute to realising the rights of the child in broader ways which includes measures aimed at education and decent work. Hence, Deva's finding is that the due diligence responsibility duty to only respect, limits corporate engagement in other measures which complement the tripartite duties of states.

Overall, in view of the different approaches discussed above, what prominently comes to light at this point is the understanding that the duty of corporations to only respect the rights of the child severely falls short of attaining the full realisation of the rights of the child to be free from child labour practices in the supply chain. However, in terms of the most authoritative due diligence responsibility guidelines, it is argued that the failure to realise the rights of the child through a duty to only respect human rights is a consequence of the manner in which the guidelines address this duty. This argument unfolds in the section below.

4.2.6 Failure to realise the rights of the child under the most authoritative due diligence responsibility guidelines

Due diligence responsibility duty to respect human rights as proposed by the most authoritative guidelines is undoubtedly dynamic. It fits well with the idea of promoting respect for the rights of the child through both

⁵³³ Deva 2014 *J Indian L Inst* 145.

substantive and procedural ways. However, it should be addressed at this point that the failure to achieve the full realisation of the rights of the child through the due diligence responsibility duty to respect human rights is arguably the making of the most authoritative guidelines examined in chapter 2 and chapter 3. The duty to respect human rights through due diligence responsibility under the guidelines is addressed simply as a standard of conduct. This means that it is not a strict obligation to guarantee certain outcomes or results.⁵³⁴ Framed in this way, this duty as a standard of conduct cannot effectively achieve the realisation of human rights.

The authoritative guidelines simply embrace a negative responsibility to respect, or in line with Deva's reasoning, a negative static responsibility to only avoid infringing human rights with which they are involved. Put differently, the guidelines do not necessarily expect corporations as duty bearers of due diligence responsibility to contribute to realising human rights responsibilities like child labour in the supply chain. As long as corporations and their supply chain relationships do not use child labour, they will satisfy the duty to only respect as envisaged under the guidelines. The duty to only respect human rights under the guidelines does not require corporations to participate in broader measures such as the undertaking of education and decent work opportunities for adolescent children. Thus, the guidelines formulate the duty to respect human rights in a narrow sense. This is however highly problematic for human rights considerations if the achievement of the right in question is to be actualised.

In contrast to the normative framework, the OECD Guidelines make a slight attempt at requiring corporations to go beyond the duty to only respect. As discussed prior, they state that corporations should contribute to the

⁵³⁴ Bonnitcha and McCorquodale 2013 <https://papers.ssrn.com>.

effective abolition of child labour.⁵³⁵ Effective in this sense could entail going beyond the duty to only respect to include duties to protect and fulfil human rights. The OECD guidelines nonetheless do not indulge in further discussion on the matter, thus, the true meaning of this statement can only be assumed. The argument being made at this point is that the most authoritative due diligence responsibility guidelines should have made a greater effort to promote the realisation of human rights obligations beyond the duty to only respect. Although the due diligence process under the guidelines has aspects which resemble the full range of duties, the guidelines do not explicitly recognise this, and thus, it remains to be seen as a mere assumption. From the standpoint of a rights holders' perspective for child labour, as the majority of authors have shown, it is argued that the duty to respect only on which due diligence responsibility is founded, cannot achieve the realisation of the rights of the child if it is separated from the duty to protect and fulfil.

To be clear, states should rightly be recognised as having the full range of duties to respect, protect and fulfil. However, the tripartite obligations should also be extended to corporations through soft law approaches such as the most authoritative due diligence responsibility guidelines. The guidelines should explicitly require corporations to participate in broader measures which aim to achieve the full realisation of human rights obligations. It has been shown that today, corporations dominate the international scene, thus, they should undoubtedly be required to do more and take additional measures to contribute towards the realisation of human rights. The bottom line is that due diligence responsibility measures should go beyond simply requiring corporations to respect human rights to protecting and fulfilling so as to secure the realisation of given rights.

⁵³⁵ See chapter 3.2.3, discussion on due diligence responsibility under chapter V. Employment and industrial relations.

4.3 Proposal for an integrated approach to realising the rights of the child in supply chain activities

Following the above contention, an integrated approach for addressing the realisation of human rights, such as child labour in the mineral supply chain, is proposed at this point. In terms of its standing, an integrated approach is established on the due diligence responsibility duty of corporations to respect human rights. In terms of its definition, an integrated approach is a combination of different responsive measures to achieve the realisation of human rights. In terms of its nature, an integrated approach deals with human rights concerns like child labour in the mineral supply chain in a holistic manner. It requires corporations to respect, protect and fulfil human rights under the guise of soft law duties. In terms of its purpose and what it is expected to achieve, an integrated approach should ensure the progressive realisation of human rights.

4.3.1 Envisioning an integrated approach for child labour in mineral supply chains

For child labour concerns in the mineral supply chain, there are precisely three attributes to an integrated approach:

First and foremost, an integrated approach for child labour in the mineral supply chain should consider the rights holders' perspective. This means that it should recognise children as rights holders and more importantly, it should recognise child labour as a serious violation of the rights of a child. Thus, an integrated approach for child labour should recognise children as persons who have a legitimate claim to the right to be free from economic exploitation in the supply chain. Second, an integrated approach for child labour in the mineral supply chain should consider the duties of corporations to respect, protect and fulfil the rights of the child. For example, through the integrated approach, corporations should simultaneously address root causes of child labour such as poverty and

inequality, together with access to education and decent work opportunities for adolescents and parents of child labourers. Third, an integrated approach for child labour in the mineral supply chain bestows a duty on corporate actors to take action through their corporate activities to ensure the realisation of rights of the child. It puts an obligation on corporations as duty bearers of due diligence responsibility not to undermine the full spectrum of international human rights responsibilities. Thus, corporations that cause, contribute, or are linked to child labour impacts through supply chain activities should be required to address child labour through combined approaches. Remarkably, a number of corporations already participate in integrated approaches to addressing human rights concerns like child labour in the supply chain. Amongst them, Nestlé particularly stands out.

4.3.2 Nestlé as an example of best practice for an integrated approach

As pointed out previously, Nestlé has had a long inauspicious history with child labour in the supply chain in the regions from which it sources cocoa from, namely Ivory Coast and Ghana.⁵³⁶ As a result, the corporation has taken a number of steps to address child labour in its supply chain through monitoring and remediation schemes in Ivory Coast and Ghana, as part of its Cocoa Plan.⁵³⁷ For example, in 2012, Nestlé set up a Child Labour Monitoring and Remediation System (CLMRS) in Ivory Coast that covers co-operatives from which it sources cocoa in the supply chain.⁵³⁸ The CLMRS is designed to use locally recruited community liaison people and child labour agents who work to raise awareness of child labour in communities, identify children at risk and report their findings. It offers training workshops on the identification, prevention and remediation of child labour and organises awareness-raising activities in communities where child

⁵³⁶ See chapter 2.4.1 for discussion on *Doe v Nestlé*.

⁵³⁷ Nestlé 2017 <http://www.nestle.com/>.

⁵³⁸ Nestlé 2017 <http://www.nestle.com/>.

labour is prevalent.⁵³⁹ According to the corporation, since 2012, the CLMRS has helped to identify over 7,000 children involved in child labour. The system has also helped over 5, 000 children to move away from child labouring practices.⁵⁴⁰ Further, through its on-going CLMRS, in September of 2015, Nestlé self-commissioned a report conducted by the Fair Labour Association (FLA).⁵⁴¹ In the 2015 report, Nestlé found that it was sourcing from some co-operatives in its supply chain that purchase cocoa from farmers that use child labour in Ivory Coast.⁵⁴² In dealing with the matter, by mid-2015 the CLMRS covered 33 cooperatives in the supply chain. In 2016, the corporation also rolled out its CLMRS in Ghana to prevent the presence of child labour in the supply chain.⁵⁴³ Above all, Nestle attests that its CLMRS works incredibly, data indicates that the majority of children assisted through the system do not return to work, and that many are now in full time education instead.⁵⁴⁴

While the CLMRS is visibly part of an integrated approach to addressing child labour in the supply chain, the corporation does not end there. It couples the CLMRS with other positive steps. To give a practical example, Nestlé recognises that child labour predominantly occurs in family units, thus it states, "it is a common occurrence for families in Ivory Coast to use

⁵³⁹ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴⁰ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴¹ FLA is a collaborative effort of socially responsible corporations, colleges and universities and civil society organisations. FLA aims to create lasting solutions to abusive labour practices by offering tools and resources to corporations, delivering training to factory workers and management, conducting due diligence responsibility through independent assessments, and advocating for greater accountability and transparency from corporations, manufacturers, factories and others involved in global supply chains.

⁵⁴² The FLA visited 260 farms used by Nestlé in Ivory Coast from September to December 2014 and found 25 workers, less than 15 years of age, working on 17 out of the 260 farms visited. Of the 25 child workers, 24 were working on family farms and not attending school and one was hired as a child worker. For generations in Western Africa, family farmers have been obliged to use their children as labour as they cannot afford to pay for waged help.

⁵⁴³ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴⁴ Nestlé 2017 <http://www.nestle.com/>.

children as labour as they cannot afford to pay for waged help".⁵⁴⁵ On this basis, the corporation has recognised that entirely prohibiting children from working on family farms entirely may not be a viable solution as it could worsen levels of destitution in countries with high levels of poverty.⁵⁴⁶ According to Nestlé's understanding, simply prohibiting child labour could heighten vulnerability to trafficking in children as parents and relatives will be forced to sell their children to traffickers to work for other cocoa farmers for their survival.⁵⁴⁷ Thus, the corporation notes that strong safeguards should be implemented to ensure that child labour in the supply chain is dealt with in a holistic manner.

On this premise, Nestlé's integrated approach also tackles child labour by helping children in cocoa growing communities to attend school. It built or renovated 42 schools to benefit more than 11,000 children and it launched a partnership with Jacobs Foundation in 2016 to help children with literacy training.⁵⁴⁸ Additionally, on the premise of an integrated approach, Nestlé has given support to help increase household incomes so that children do not have to work and families can afford to send them to school. As an example, it helped women's groups to start growing food crops for sale.⁵⁴⁹ Nestlé also helped adolescents to organise labour groups that villages can employ for high-risk work like cutting trees and spraying crops, to make it less likely that children perform such hazardous work.⁵⁵⁰ The corporation also collaborates directly with local authorities and civil society organisations to address the root causes of child labour in its supply chain while ensuring that the communities in which it operates remain financially and socially sustainable.⁵⁵¹ Beyond the concern for child labour, Nestlé also

⁵⁴⁵ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴⁶ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴⁷ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴⁸ Nestlé 2017 <http://www.nestle.com/>.

⁵⁴⁹ Nestlé 2017 <http://www.nestle.com/>.

⁵⁵⁰ Nestlé 2017 <http://www.nestle.com/>.

⁵⁵¹ Nestlé 2017 <http://www.nestle.com/>.

helps farmers by training them in good agricultural practices and promotes gender equality.⁵⁵²

It can thus be said that Nestlé's integrated approach to child labour does not simply aim to avoid infringing the rights of the child. Nestlé goes as far as to enforce the tripartite duties to respect, protect and fulfil the rights of the child. It not only avoids depriving the child of their right, it consequently takes steps to protect the child from deprivations of their right and aids the deprived child. Nestlé therefore shows that in reality, it is impossible to separate the tripartite obligations. It is therefore suggested that the authoritative due diligence responsibility guidelines should reconsider their approach and enforce the tripartite duties through already established soft law norms.

4.4 Benefits and implications of an integrated approach to child labour for corporations

An integrated approach comes with a number of benefits to corporations when willfully applied. On the other hand however, corporations may be faced with harsh repercussions for failure to institute integrated approaches where child labour impacts are concerned. Some of the benefits and implications are addressed at this point.

4.4.1 Benefits of embracing an integrated approach

First and foremost, an integrated approach should be seen as a precondition to doing business, premised on the understanding that corporations have a due diligence responsibility duty to respect human rights. Based upon this notion, corporations should apply an integrated approach to address human rights concerns like child labour in the mineral supply chain for sustainable business practices. Undertaking an integrated approach can undoubtedly leverage a corporation's commercial position,

⁵⁵² Nestlé 2017 <http://www.nestle.com/>.

not only within the communities within which it operates, but also on a global platform. In this light, it should also be noted that globally, consumers are increasingly becoming aware of and being concerned about human rights impacts. Thus, once consumers and civil society groups become aware of corporate participation in integrated approaches for the promotion of human rights, they would be more eager to portray the corporation's business activities in a positive light. This would protect the corporation's reputation and increase consumer confidence.

Additionally, an integrated approach to addressing human rights impacts can also serve as a starting point to ward off impending risks to a corporation's commercial operations. For example, taking the case of Nestlé, through Nestlé's engagement with local communities, the corporation visibly become aware of the root causes of child labour. Thus, it addressed impending risks through education, decent work and social security measures. Thereby eliminating the risks of having a continuous cycle of child labour in the supply chain. Also, in the event that a problem emerges in the supply chain such as a legal risk, corporations can show that they have acted responsibly through integrated action.

Integrated approaches can also go beyond benefitting corporations directly to include benefits to the human rights regime as a whole. Since corporations are usually the first party of contact in the supply chain, when they embrace the eradication of child labour through integrated approaches, they can assist in defining the nature and scope of child labour impacts in the supply chain, thereby assisting state governments to effectively respect, protect and fulfil the rights of the child. If corporations contribute to defining the nature and scope of human rights impacts, this will most likely also strengthen regulatory mechanisms in place for the protection of human rights, especially in contexts where the law is seldom enforced. Above all, corporations should recognise that their economic

power puts them in the best position to realise human rights responsibilities through integrated approaches.

4.4.2 Implications for failure to embrace an integrated approach

The repercussions for failure to embrace an integrated approach can mainly be associated with four types of overlapping risks that would ensue. This includes reputational, legal, operational and financial risks. These risks have already been discussed in part above.⁵⁵³ It will, however, be appropriate at this point to refer to a real-world example pertaining to the associated risks. In 2008, US based corporation Agriprocessor, was charged with over 9,311 child labour violations in the courts of law.⁵⁵⁴ The case revealed that the child labourers worked in hazardous conditions. They were exposed to poisonous chemicals and they operated dangerous equipment.⁵⁵⁵ The court case therefore created bad publicity for the corporation and Agriprocessor soon filed for bankruptcy, citing a decrease in demand for its products and increased labour costs in the aftermath of the case.⁵⁵⁶

The case thus shows that where corporations resist taking part in integrated measures to address human rights abuses like child labour, they risk commercial disadvantage as their reputational, operational, legal and financial well-being may be directly linked to human rights concerns. Having discussed the benefits and implications of an integrated approach, it is now time to turn to a discussion on the future for human rights concerns like child labour in the mineral supply chain. This should help to determine if due diligence responsibility practices, in their current form as

⁵⁵³ See chapter 2.2.2 discussion on causes of child labour in mineral supply chains and chapter 3.3.5 discussion on UK NCPs key recommendations.

⁵⁵⁴ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

⁵⁵⁵ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

⁵⁵⁶ The Global Compact 2017 <http://hrbdf.org/dilemmas/child-labour/>.

voluntary standards, will be a viable solution in the future for addressing human rights concerns like child labour in the mineral supply chain.

4.5 The future for child labour concerns in corporate supply chains

In a bid to address the continued concern for human rights impacts like child labour in the mineral supply chains, there have been resounding calls in the international landscape which go beyond voluntary and non-binding due diligence responsibility duties. Examples of such calls are given below.

4.5.1 Growing disclosure requirements

Currently in the global landscape, there are growing disclosure requirements to address the presence of child labour in corporate activities. For instance, the ILO has reported that since 2016, the 6,000 largest listed corporations in the EU were required to disclose how they manage human rights and labour rights risks in their business activities, including child labour impacts.⁵⁵⁷ Further, still in the EU, a number of governments have been reported to require mandatory due diligence responsibility practices from corporations. Alongside the proposed Dutch Child Labour Due Diligence Bill which has already been referred to,⁵⁵⁸ the ILO notes that the UK has introduced due diligence reporting requirements for corporations with regard to slavery and trafficking risks throughout their supply chains.⁵⁵⁹ Other EU countries like France and Switzerland have also been reported to propose parliamentary amendments which require large corporations to develop and enact mandatory due diligence standards to prevent human rights abuses like child labour in corporate supply chains.⁵⁶⁰ Overall, within the EU, governments are being lobbied to develop EU-wide

⁵⁵⁷ ILO *ILO-IOE Child labour guidance tool for business* 7.

⁵⁵⁸ See chapter 3.5.3 discussion on the US *Dodd Frank Act*.

⁵⁵⁹ ILO *ILO-IOE Child labour guidance tool for business* 7.

⁵⁶⁰ Business & Human Rights Resource Centre 2017 <https://business-humanrights.org/>.

legislation on mandatory due diligence to address human rights impacts that EU-based corporations have either caused, contributed to or have been linked to.⁵⁶¹

Beyond the EU, the ILO also reports that corporations doing business in the US, in California to be exact, who have over US \$100 million in worldwide revenue, are required to report on their actions to eradicate slavery and human trafficking, including of children, in their supply chains.⁵⁶² Adding to this, US corporations investing in high risk child labour regions like Myanmar, are required to disclose their human rights due diligence efforts, including in relation to third party relationships that may use child labour.⁵⁶³ The ILO also reports that the federal government in the US now requires due diligence in relation to trafficking in persons, including for the purposes of forced labour and child labour from corporations seeking federal contracts.⁵⁶⁴ The *Dodd Frank Act*, discussed prior, is also another famous US initiative requiring due diligence practices from corporations.⁵⁶⁵ Beyond the EU and US, it has similarly been reported that stock exchanges in India, Malaysia, Singapore and South Africa amongst others countries, require corporations to report on how they manage their human rights impacts.⁵⁶⁶

Overall, what comes to light at this point is the understanding that state governments are clearly demanding increased transparency from corporations to protect the rights of the child. It can be pointed out that focus for the requirement of due diligence practices for corporations largely falls within the domain of the EU and the US mainly because most of the world's largest corporations are housed in these jurisdictions. Thus, whilst

⁵⁶¹ Business & Human Rights Resource Centre 2017 <https://business-humanrights.org/>.

⁵⁶² ILO *ILO-IOE Child labour guidance tool for business* 7.

⁵⁶³ ILO *ILO-IOE Child labour guidance tool for business* 7.

⁵⁶⁴ ILO *ILO-IOE Child labour guidance tool for business* 7.

⁵⁶⁵ See chapter 3.5.3 US *Dodd Frank Act*.

⁵⁶⁶ ILO *ILO-IOE Child labour guidance tool for business* 7.

due diligence responsibility under the most authoritative guidelines remains to be seen as a voluntary non-binding duty which only requires corporations to respect the rights of the child, the duty can still be enforced through hard law mandatory requirements commissioned by states. Based on this understanding, it can thus be said that there is much hope for the future of human rights concerns like child labour in the mineral supply chain.

4.6 Conclusion

The core purpose of this chapter was to address the question of whether the due diligence responsibility duty to only respect the rights of the child can effectively contribute to realising the rights of the child to be free from economic exploitation in the supply chain. This question is central to the dissertation owing to the fact that it is intricately linked to the hypothesis of the dissertation. In terms of the hypothesis, it has been stated that due diligence responsibility can be used as a tool to realise the rights of the child to be free from child labour in mineral supply chains. Generally, this hypothesis is largely supported throughout the dissertation, in line with the discussions of chapter 2 and chapter 3. This chapter however makes some key findings which are in contrast to the hypothesis.

The chapter sets off by engaging in a thorough debate on the duty to respect only which is weighed against the duties to protect and fulfil. From the five approaches engaged in this debate, the key finding is that the duty to respect only, cannot and should not exist in isolation of the duties to protect and fulfil, if the rights of the child are to be realised. As a result of this revelation, the second significant part of the chapter went on to propose for what is termed here as an integrated approach to addressing human rights concerns like child labour in the supply chain. Through the proposal for an integrated approach, the understanding is that the rights of the child can be fully realised since it requires corporations to participate in broader measures to respect, protect and fulfil the rights of the child.

The third significant part of the chapter outlines the benefits and implications of proposed integrated approaches for child labour to corporations. The finding here is that corporations who actively engage in integrated approaches are likely to have sustainable business practices whilst those who do not are likely to face either legal, operational, financial or reputational risks. The last significant part of the chapter offers insight into the future of child labour as a human rights issue in corporate supply chain activities. The main finding here is that although due diligence responsibility under the most authoritative guidelines is simply farmed as a soft law voluntary duty, states are now more than ever, enforcing mandatory due diligence practices for corporations. For child labour in the supply chain, this means that corporations cannot escape accountability for either causing, contributing to or being linked to child labour impacts. This shows that child labour concerns are held to a high standard in international settings. This undoubtedly offers hope to realising the rights of the child to be free from economic exploitation in the mineral supply chain.

CHAPTER 5

Conclusion and recommendations

5.1 Conclusion

This chapter concludes the study through a recapitulation of the important points explored. The underlying aim of the dissertation was to examine the application of due diligence responsibility to child labour in mineral supply chains through the guise of a rights holders' perspective. This is based on the premise that a due diligence responsibility gap exists for child labour in the mineral supply chain. The introduction of the study begun by laying out this human rights predicament faced in our time. It established the notion that globally, 1 million children aged between 5 and 17 years work as child labourers in mining activities. Child work in mining activities is carried out despite international efforts having been made to prohibit the practice completely. Under international law norms, it is noted that the CRC and the two core conventions on child labour explicitly recognise children as rights holders who have a right to be free from economic exploitation. It has been recognised that the perpetuation of child labour abuses in mineral supply chains today is largely attributed to the dominance of complex and fragmented corporate global supply chain activities and it mostly occurs in contexts designated as weak governance and conflict zones. The case of Afrimex primarily casts this contention in stone. This contention has also rightly been affirmed by credible sources such as the most recent *Buenos Aires Declaration on Child Labour, Forced Labour and Youth Employment*.

Fortunately, the international community has recognised the existing human rights concern. While it was pointed out that states are considered to be the primary duty bearers of human rights responsibilities, it was also shown that the duty to respect human rights has also been extended to corporations like Afrimex owing to their economic power and dominance in international settings. As a result, the finding was that corporations are

now required to respect human rights in their global supply chains. It has been shown that the duty to respect means that corporations should carry out due diligence responsibility in their supply chain activities and identify, prevent, mitigate and remedy human rights impacts like child labour. The finding is therefore that due diligence responsibility of corporations is clearly framed as a response to addressing corporate-related human rights impacts in the supply chain. The Guiding Principles, together with the OECD Guidelines are widely recognised as being the most influential due diligence responsibility guidelines. In unfolding the extent to which due diligence responsibility applies to child labourers as rights holders, the discussion of the study therefore primarily focused on these two standards.

Following the introductory chapter, chapter 2 attempted to examine the notion of due diligence responsibility and its application to child labour in the mineral supply chain as established under the Guiding Principles, synonymously referred to as the normative framework. The Guiding Principles are to date, the only due diligence responsibility guidelines to have been adopted at the UN level. Thus, they have universal coverage. Based on this, this study has identified that due diligence responsibility under the normative framework has authoritative effect which requires corporations to discharge their due diligence obligation and respect the rights of the child in supply chain activities.

The main finding from chapter 2 was that the normative framework highly promotes the rights holders' perspective for child labour through its substantive content which requires corporations to refer to all internationally relevant human rights. The substantive content can potentially help corporations to identify and prevent child labour impacts in the supply chain. It was also put forward that through the procedural content, corporations can mitigate and remedy child labour impacts, thus achieving the realisation of the rights of the child to be free from economic exploitation in the supply chain. This is because the procedural content

requires corporations to make a human rights impact assessment, integrate the findings, track and report on performance, as well as to remediate the impacts and make a policy commitment. The statement on the procedural content was however, only slightly proven to be correct. The procedural content cannot fully realise the rights of the child, this because it offers an optional remediation process for impacts that corporations are linked to through third party relationships in the supply chain. The argument made in relation to this was that remediation should play a central role in the due diligence process. Failure to remediate is arguably a failure to eliminate child labour impacts from the supply chain.

Chapter 2 also revealed the strength of the due diligence responsibility process under the normative framework, which is described as being an on-going process. Nonetheless, the framework's greatest shortfall is its non-binding status. This creates a significant impediment to using due diligence responsibility as a tool through which corporations can participate in realising the rights of the child to be free from child labour in the supply chain. Overall, this chapter presented itself as the longest chapter of the study. This is owed to the broad application of the Guiding Principles. They apply to all relevant human rights, thus, it is the duty of any human rights scholar to transpose their application to the specific rights in question.

Chapter 3 can be referred to as a build-up to chapter 2. The chapter examined the extent of the application of due diligence responsibility to child labour in mineral supply chains under the OECD Guidelines. The main finding of this chapter was that unlike the normative framework, the OECD Guidelines institute a pragmatic approach to due diligence responsibility which is tailored to child labour impacts in the mineral supply chain. This is because the OECD Guidelines expressly require due diligence responsibility for child labour impacts in terms of chapter V on Labour and Employment relations. The Guidelines also offer complementary guidance on due diligence responsibility specific to child labour impacts in the mineral supply

chain in terms of the due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and the practical actions guide for companies to identify and address the worst forms of child labour in the minerals supply chain.

Additionally, the OECD Guidelines were found to have practical application to child labour in light of the Afrimex case which instituted the requirement of due diligence responsibility for child labour impacts in the mineral supply chain. Based on this, the main argument of the chapter was that the guidelines offer a progressive approach to due diligence responsibility for child labour impacts in the mineral supply chain. This means that the Guidelines enforce the rights holders' perspective more strongly, that is, they have a stronger resolve to promoting respect for the rights of the child and realising the rights of the child to be free from economic exploitation. In comparison to the Guiding Principles, a key strength of the OECD Guidelines is their ability to remediate child labour impacts. However, the greatest shortfall of the OECD Guidelines is their lack of universal coverage.

Within chapter 3, an effort was also made to consider the application of due diligence responsibility beyond the two most authoritative standards. In doing so, due diligence responsibility under the ILO MNE Declaration, the Global Compact and the US *Dodd Frank Act* were assessed. The key finding under this section of the chapter was the understanding that child labour impacts in global supply chain activities are considered to be of great concern in international settings. More importantly, this section revealed the importance of the role of the state in addressing due diligence responsibility standards for child labour within national laws.

Chapter 4 on the other hand, is quite different in content and approach compared to chapter 2 and 3. This chapter, which is also the shortest chapter of the dissertation, is focused on primarily addressing the hypothesis of the study, which is, that due diligence responsibility can be used as a tool to realise the rights of the child to be free from child labour

in mineral supply chains. Chapter 4 therefore addressed the question of whether due diligence responsibility as a duty to only respect human rights, as framed under the authoritative guidelines, can effectively contribute to realising the rights of the child to be free from economic exploitation in the supply chain. Since states are required to effectively realise human rights responsibilities through the tripartite obligations, to respect, protect and fulfil, this chapter questions the usefulness of the duty to only respect. The main finding of this chapter was that due diligence responsibility as a duty to only respect human rights cannot effectively promote the rights holders' perspective and realise the rights of the child in the supply chain. An important proposal made in this chapter is that corporations should be required to equally respect, protect and fulfil human rights through an integrated approach. The finding is that integrated approaches to child labour can benefit corporate actors when applied. On the other hand, corporations can be faced with detrimental consequences for failure to apply an integrated approach.

Chapter 4 also made an attempt to offer insight into the future of child labour as a human rights issue in corporate global supply chain activities. The main finding here was that states are actively enforcing the due diligence responsibility requirement under their domestic laws. Thus, whilst due diligence responsibility under the authoritative standards remains to be seen as a non-binding voluntary principle, corporations can seldom escape accountability for either causing, contributing to or being linked to child labour impacts. This undoubtedly offers hope to realising the rights of the child to be free from economic exploitation in the mineral supply chain.

Above all, the research question of this study has thoroughly been addressed through the given chapters. This dissertation therefore bridges the due diligence responsibility gap for child labour in the mineral supply chain. Moreover, the findings of the research consequently extend our knowledge on the extent to which due diligence responsibility applies to

child labourers as rights holders in the mineral supply chain. The study therefore adds to the growing body of literature on the responsibility of corporations' *vis-à-vis* the rights of the child in supply chain activities. However, in general, it seems that due diligence responsibility to respect human rights can only be used to realise the rights of the child in the mineral supply chain as far as corporations, as duty bearers, are willing to discharge this duty. Hence, taken together, the findings suggest that future research should focus on further enhancing the duty of due diligence for corporations by promoting rights holders' perspectives. For example, such research can focus on offering insight as to how corporations can participate in integrated approaches in order to realise their human rights responsibilities and to respect, protect and fulfil human rights duties. It can also focus on addressing interlinked principles such as due diligence and the best interests of the child or due diligence and education. Until such time as the most authoritative guidelines require mandatory due diligence, one should work within the confines of soft law approaches in order to determine how due diligence responsibility can enhance the status of rights holders like children. To give insight into the coming storm, it can be reiterated that UNICEF estimates that more than 100 million children will be trapped in child labour by the year 2020.⁵⁶⁷ The ILO also projects that 121 million children will be in child labour by the year 2025.⁵⁶⁸ Thus, action should speedily be taken to address these concerns. The duty of due diligence responsibility of corporations is undoubtedly an avenue through which the promotion and protection of the rights of the child can be achieved.

5.2 Recommendations

Based on the insight of the chapters, seven recommendations are made:

⁵⁶⁷ UNICEF 2017 <https://www.unicef.org/protection/>.

⁵⁶⁸ ILO *Global estimates of child labour* 8.

- (1) In all situations, corporations should primarily approach their due diligence responsibility duty for child labour from rights a rights holders' perspective.
- (2) In order to effectively promote the rights of the child within their global supply chain activities, corporations should embed the principles of the CRC, C138 and C182 within their internal operations and extend this to their third party relationships in the supply chain.
- (3) Corporations should recognise that children are vulnerable human beings whose best interests should be at the centre of due diligence responsibility practices in all situations.
- (4) Corporations should be willing to promote the rights of the child through broader measures. Through an integrated approach, they should offer decent work to adolescent child labourers and education to minors.
- (5) Whether they have caused, contributed to, or are only linked to child labour impacts in the supply chain, corporations should be willing to remediate the impacts.
- (6) For child labour impacts in the mineral supply chain, corporations should especially be guided by the OECD's due diligence responsibility guidance for responsible supply chains of minerals from conflict-affected and high-risk areas as well as the practical actions guide on child labour in mineral supply chains.
- (7) Beyond the most authoritative due diligence responsibility guidelines, corporations should also make reference to and be guided by other relevant standards, particularly the ILO MNE Declaration.

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