

GENDER-RESPONSIVE DUE DILIGENCE FOR BUSINESS ACTORS: HUMAN RIGHTS-BASED APPROACHES

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KEY MESSAGES

- Companies are part of the social fabric wherever they operate and they influence policies, economies, legal, social and cultural norms and practices, including gendered power relations.
- The UN Guiding Principles on business and human rights contain little detail as to how companies should develop gender-responsive human rights due diligence (HRDD) processes. It is crucial to provide more substantive guidance to business and other stakeholders as a gender-blind or gender-neutral approach to human rights due diligence will not render visible or account for the impact of corporate activities on the lives of specific groups of women, men and gender non-binary people.
- At present, there is no systematic treatment of gender-responsive HRDD obligations within international human rights laws and policies. But the growing body of international human rights law on gender equality, together with a large number of policies and voluntary guidelines adopted by businesses, states, civil society and other stakeholders provide indicators of the core principles that should be included within gender-responsive human rights due diligence. In addition, emerging laws on HRDD and National Action Plans on business and human rights represent an unrealized potential to incorporate gender-responsiveness into the implementation of the UN Guiding Principles.
- Emerging from these currently disparate instruments is a consensus that companies should engage in systemic gender equality and human rights impact assessments at all phases of their operational planning, implementation and monitoring. While recognizing that each context is different - particularly given the dynamic and varied nature of gendered power relations - the use of a human rights-based approach that prioritizes and facilitates participation by all affected right holders, along with gender-responsive accountability mechanisms, should form key components of HRDD.
- The often-used 'gender lens' metaphor is not helpful as it implies laying a filter over 'regular HRDD' - that is, simply putting 'gender glasses' on the process. The concept of 'gender-responsive human rights due diligence' better captures the give and take relationship between the company and its environment and the need to embed throughout the HRDD process an awareness of and response to what is going on in each context - which could be as wide as the marketplace or as specific as an individual factory or farm.
- Gender-responsive HRDD requires companies to take a holistic approach to their operating environments by identifying, preventing, mitigating and accounting for the ways in which their actions or omissions may differently affect men, women and gender non-conforming people. This means that businesses must go beyond minimum standards to respect human rights and also consider ways in which they might use their influence in specific situations to facilitate human rights guarantees by identifying, confronting and helping to dismantle structural forms of inequality.
- In some instances, companies are already participating in initiatives that could lay the foundations of gender-responsive human rights due diligence, and are putting in place policies and procedures that challenge gender discrimination. In certain cases, they are even taking a role in policy advocacy on these issues. This is an indication that larger change is possible.

1. INTRODUCTION

The UN Guiding Principles on business and human rights (UNGPs) make a key contribution to the implementation of human rights guarantees through their definition of the concept of human rights due diligence (HRDD), which directs companies to 'identify, prevent, mitigate and account for' their adverse human rights impact.¹

The UNGPs' discussion of business and state responsibilities to prevent and redress gender-based discrimination is, however, very limited.² This is despite the fact that there is a well-developed body of international human rights law containing guarantees of substantive gender equality for people within all areas of economic, social, cultural and political life. The international human rights framework has predominantly concentrated on the obligations of states to protect against and remedy human rights violations by companies and other non-state actors. In contrast, most initiatives that aim to engage directly with businesses on issues of gender equality are voluntary in nature and tend to focus on discrimination within the workplace rather than on the broader socioeconomic, legal and political context within which companies operate and over which they exercise a certain degree of influence.

Global and national macroeconomic policies create, reinforce and perpetuate structural forms of inequality that affect specific groups of people.³ The impact of these policies, including the development of global and regional trade regimes, the retreat of the welfare state, the privatization of formerly public goods, the operation of international monetary and financial institutions and the promotion of neoliberalism as the dominant political paradigm through which economic

1 Guiding Principles on Business and Human Rights (UNGPs), UN doc A/HRC/17/31, 21 March 2011. See also, OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 2012, p 6: 'In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.'

2 UNGPs, supra fn 1. The preamble to the Guiding Principles states: 'These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.' Guiding Principle 7 on 'Supporting Business Respect for Human Rights in Conflict-Affected Areas' notes that states should provide 'adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence' (7b). The Commentary to Principles 3, 12 and 20 also refers to women's human rights as requiring particular attention from businesses in particular contexts due to their 'risk of vulnerability and/or marginalization'.

3 International Federation for Human Rights, *Montréal Principles on Women's Economic, Social and Cultural Rights*, December 2002, para 12.

growth is sought is not gender neutral.⁴ It is within these broader contexts that business activities occur, and an awareness of this background constitutes an essential component in the identification of the steps that businesses must take when engaging in HRDD.

Companies are part of the social fabric wherever they operate and they influence policies, economies, legal, social and cultural norms and practices. With this power come responsibilities for business to ensure that they are not doing harm by engaging in direct or indirect gender discrimination and that they are using their role to actively promote equality within and outside of the workplace. For this reason, approaches to HRDD need to do more than refer to gender equality and women's human rights as items to be ticked off a generic checklist. They must fully integrate gender-responsive practices within each area of their business operations.

Gender-responsive due diligence is deeper than 'putting a gender lens on'. Indeed, we would argue that the often-used 'lens' metaphor is not useful, as it implies laying a filter over 'regular HRDD' – that is, simply putting 'gender glasses' on the process (or slipping them off). One of the first challenges in addressing gender inequality in relation to corporate activity is recognizing embedded gender norms, complex cultural biases and power imbalances – which differ in each context even if common aspects can be detected across industries, sectors and countries – and acknowledging a company's relationship to and impact on these. This task calls for meaningful engagement and grappling with complexities among stakeholders. While a company cannot change such contexts on its own, it does have a responsibility to acknowledge these situations and ensure that it is not perpetuating or benefiting from gendered inequalities.

It is for these reasons that we have chosen to adopt the concept of 'gender-responsive human rights due diligence'. This term captures both the give and take relationship between the company and its environment and the need to embed throughout the HRDD process an awareness of and response to what is going on in each context (which could be as wide as the marketplace or as specific as an individual factory or farm). In the rapidly changing field of business and human

4 See, for example, International Labour Organization (ILO), *Report on Women and Men in the Informal Economy: A Statistical Picture, 2013*; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), General Recommendation no 35, UN doc CEDAW/C/GC/35, 26 July 2017, para 14; UN Human Rights Council (HRC), Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yakin Ertürk: Political Economy of Women's Rights, 18 May 2009, UN Doc A/HRC/11/6; Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights: The Impact of Economic Reform Policies on Women's Human Rights, UN doc A/73/179; UN Women, *Why Macroeconomic Policy Matters for Gender Equality*, Policy Brief no 4; C. Simeoni and S. Muchai, 'Women, Macroeconomic Policies and the SDGs', in Civil Society Reflection Group on the 2030 Agenda for Sustainable Development, *Spotlight on Sustainable Development 2018: Exploring New Policy Pathways*, <http://dawnnet.org/wp-content/uploads/2018/07/Spotlight-Report-2018.pdf> (last accessed 19 November 2018); UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), General Recommendation no 34, UN doc CEDAW/C/GC/34, 7 March 2016, para 10; Center for Economic and Social Rights, *Assessing Austerity: Monitoring the Human Rights Impact of Fiscal Consolidation*, February 2018, http://www.cesr.org/sites/default/files/Austerity-Report-Online2018.FINAL_.pdf (last accessed 19 November 2018).

rights, there is growing consensus within both human rights and corporate circles that businesses must go beyond minimum standards to respect human rights. They must also consider ways in which they might use their influence in specific situations to facilitate human rights guarantees by identifying, confronting and helping to dismantle structural forms of inequality.

In our research we found evidence of an incipient push for companies to be part of societal change in addressing gender inequality. It is not just civil society organizations (CSOs) that have taken up this agenda. In some cases, companies have taken more progressive positions in relation to gender equality than governments have. For instance, in the US, at a time when the federal government is considering narrowing the definition of sex in a way that is discriminatory towards transgender or intersex people, the Human Rights Campaign, the country's largest lesbian, gay, bisexual and transgender (LGBT) civil rights advocacy group, reported that 'the number of employers offering transgender-inclusive health care coverage' rose from 647 in 2017 to 750 in 2018.⁵ Further, many companies have spoken out publicly against recent anti-LGBT legislation in North Carolina and Texas.⁶ These examples show that companies can put in place policies and procedures that challenge gender discrimination, and they can, and sometimes do, take an active role in policy advocacy on these issues.

This study aims to map the contours of business due diligence responsibilities and the way in which these articulate with international human rights standards on gender equality and non-discrimination. It is hoped that the findings may prove useful for the process of reflection concerning the integration of a gender perspective within the UNGPs that was launched by the UN Working Group on Business and Human Rights in 2017.⁷ The Working Group's development of additional guidance for stakeholders concerning the ways in which they could integrate a gender analysis within their national and international implementation of the UNGPs is a necessary and timely initiative.

5 Human Rights Campaign, *Corporate Equality Index 2018*, <https://assets2.hrc.org/files/assets/resources/CEI-2018-FullReport.pdf> (last accessed 19 November 2018). The US federal government has announced it is considering narrowing the definition of sex as 'either male or female, unchangeable', a move *The New York Times* has said 'would essentially eradicate federal recognition' of the approximately 1.4 million Americans who are transgender, E. L. Green, K. Benner and R. Pear, '“Transgender” Could Be Defined out of Existence by Trump Administration', *The New York Times*, 21 October 2018, https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?rref=collection%2Fbyline%2Frobert-pear&action=click&contentCollection=united®ion=stream&module=stream_unit&version=latest&contentPlacement=7&pgtype=collection. Dozens of companies publicly denounced the government's proposed move. See T. Romm, 'Apple, Facebook and Google Among 56 Businesses Telling Trump Not to Weaken Transgender Rights', *The Washington Post*, 1 November 2018, <https://www.washingtonpost.com/technology/2018/11/01/apple-facebook-google-among-businesses-telling-trump-not-weaken-transgender-rights/>.

6 J. Weston Phippen, 'The Businesses Against the Texas Bathroom Bill', *The Atlantic*, 17 July 2017, <https://www.theatlantic.com/news/archive/2017/07/business-against-texas-bathroom-bill/533928/>.

7 See OHCHR, 'Gender Lens to the UNGPs', <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx> (last accessed 19 November 2018). As part of the mandate given to it by the HRC, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, report on human rights due diligence (UN Working Group on Business and Human Rights) is required to 'integrate a gender perspective throughout [its] work', UN doc A/HRC/Res/17/4.

The Briefing begins by defining HRDD and outlining international human rights standards on gender equality and non-discrimination. The next part of the study examines the application of a gender and women's rights analysis to due diligence responsibilities in existing and developing international human rights law and in national laws, as well as through various voluntary initiatives taken to advance and monitor gender equality in connection with business activities. The fourth section of the paper focuses on three illustrative business contexts – global supply chains, land-based agricultural investments and conflict-affected areas – within which there has been much discussion surrounding the need for gender-responsive due diligence processes.

A. RESEARCH QUESTIONS

How can the human rights of women, men and gender-diverse persons be promoted and protected within the context of business activities?

What are the direct responsibilities of business to respect and facilitate gender equality through the application of due diligence standards?

What does gender-responsive HRDD mean for companies in practice?

B. METHODS

The analysis draws together international human rights norms, soft law guidance documents, business and country case studies, expert reports from civil society and other human rights actors and academic literature. Following preliminary research, a decision was made by the authors to regroup the material around three illustrative business contexts in which particularly entrenched issues of gender inequality have been identified: global supply chains, land-based agricultural investments and situations of armed conflict.

These contexts highlight a number of the theoretical and practical questions that arise in the integration of a gender analysis within business due diligence processes.⁸ The study does not exhaustively cover the field of due diligence obligations for businesses; instead, it seeks to trace current trends and to identify a number of key issues for consideration and future research with a view to improving the integration of human rights-based gender analyses within business activities.

8 S. McInerney-Lankford, 'Legal Methodologies and Human Rights Research: Challenges and Opportunities', in B. A. Andreassen, H-O. Sano and S. McInerney-Lankford (eds), *Research Methods in Human Rights: A Handbook*, Edward Elgar, 2017, p 60. The research provides 'scrutiny of the inbuilt normative and political assumptions of the human rights framework ... to help advance the human rights project and see human rights obligations fulfilled in a range of legal and policy contexts'.

2. DEFINING THE CONTOURS OF HUMAN RIGHTS DUE DILIGENCE AND GENDER

Due diligence constitutes an essential ongoing process that enables business actors and other stakeholders, including governments, to identify and address their impacts on rights holders.

The concept of due diligence has a very long history in international law, beginning from doctrine and arbitral practice on diplomatic protection and then expanding into numerous fields ranging from environmental to corporate law to human rights, where it has formed a key component in strategies to hold states and other duty bearers accountable for acts of gender-based violence against women.⁹

Gender is a category of analysis that can be used to render visible relationships of power and domination.¹⁰ The term 'gender' is used to describe the socially constructed differences between people that are: attributed throughout the life cycle; learned, not innate; changeable for any given society over time and manifested with wide variations both within and between cultures.¹¹ Gender influences the opportunities and resources accessible to people in all societies and has historically resulted in a hierarchical distribution of power and rights that favours men and disadvantages women and people with non-binary gender identities, such as transgender and intersex persons.¹²

Both due diligence and gender are concepts that are used relatively frequently in many different ways. The following section outlines some of the major issues and debates surrounding each of these ideas and lays out the approach taken to them in this study.

9 J. Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women Against Violence', in C. Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women From Violence*, Martinus Nijhoff, 2008.

10 J. Wallach Scott, 'Gender: Still a Useful Category of Analysis?', 57 *Diogenes* 1 (2010).

11 OHCHR, *Women's Rights Are Human Rights*, 2014, pp 35–36, <https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> (last accessed 19 November 2018).

12 CEDAW Committee, General Recommendation no 28 (2010), UN doc CEDAW/C/GC/28, para 5. The term 'sex' refers to a person's biological status and is 'typically categorized as male, female or intersex. There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs and external genitalia', APA, 'Definitions Related to Sexual Orientation and Gender Diversity in APA Documents', p 5, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last accessed 19 November 2018).

A. HUMAN RIGHTS DUE DILIGENCE: DEFINITIONS AND CONCEPTS

The UNGPs are built around three, equally important pillars: the state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for victims of corporate-related human rights abuses. The second pillar, at its most basic, requires companies to ‘avoid causing or contributing to adverse human rights impacts’ and to address these when they occur. This pillar is of most relevance to the discussion at hand, as the corporate responsibility to respect rests in important part on the concept of HRDD, which companies must undertake in order to be able to ‘identify, prevent, mitigate and account for how they address their adverse human rights impacts’.¹³

The UNGPs describe a multi-step process by which businesses should carry out HRDD. This involves a company’s *identifying and assessing* its potential and actual impacts on rights holders (for example, through a human rights impact assessment); *integrating* these findings across its operations; *tracking* the effectiveness of its responses and *communicating* externally on how it is addressing the impacts.¹⁴ The process is meant to be ongoing and should cover adverse impacts that a company ‘may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’.¹⁵ Companies are thus expected to conduct HRDD throughout their operations, which includes suppliers, subcontractors and major commercial partners (such as security providers).

HRDD is essential for helping companies understand the contexts in which they operate. Indeed, one of the UNGPs’ tenets is that, without implementing due diligence, companies cannot possibly know or prove they are upholding their responsibility to respect human rights.¹⁶ In the years since the UNGPs were published, the concept of HRDD has been taken up by states, companies, CSOs, organized labour and investors as a concrete way to advance the implementation of the UNGPs. And while the UNGPs do not have the force of law, the concept of ‘mandatory HRDD’ is being incorporated into laws in certain jurisdictions (see Section 3B below).

The UNGPs themselves do not address gender in an integral manner. This is despite the fact that the UN Human Rights Council (HRC) Resolution 8/7, which called on the Special Representative to ‘operationalize’ the ‘Protect, Respect and Remedy’ framework that he had developed, explicitly asked him to ‘integrate a

¹³ UNGPs, supra fn 1, Guiding Principle 17.

¹⁴ UNGPs, supra fn 1, Guiding Principles 18–21.

¹⁵ Ibid, Guiding Principle 17.

¹⁶ John Ruggie, who developed the ‘Respect, Protect and Remedy’ Framework and the UNGPs during his mandate as the UN Special Representative to the Secretary-General on human rights and transnational corporations and other business enterprises, asserts that exercising human rights due diligence (HRDD) is the way companies can “‘know and show” that they respect rights’. J. G. Ruggie, *Just Business: Multinational Corporations and Human Rights*, Norton, 2013, p 113.

gender perspective throughout his work’.¹⁷ The section of the UNGPs encompassing HRDD specifies that to identify and assess actual or potential adverse human rights impacts, companies should ‘draw on internal and/or independent external human rights expertise’ and ‘involve meaningful consultation with potentially affected groups’.¹⁸ This includes ‘assessing the human rights context’ before starting business activity, and paying ‘special attention’ to individuals or groups ‘that may be at heightened risk of vulnerability or marginalization’.¹⁹ Companies are called on to ‘bear in mind the different risks’ faced by women and men,²⁰ and ‘might employ tools they already use in relation to other issues’, such as ‘gender-disaggregated data where relevant’.²¹

The UNGPs do not provide specific guidance on what gender-responsive HRDD might look like; they do not even mention the concept as such. They do, however, point up certain essential elements of sound HRDD, which – reading between the lines – are also the building blocks of a gender-responsive approach. Namely, companies must understand the *context* in which they operate (this should include, for example, recognizing existing gender norms, power relations,²² patriarchal political, economic and cultural structures and the ways in which businesses might perpetuate gender discrimination through their presence, activities and business model); they must seek *meaningful engagement* (which might include, for example, consulting women and girls separately from men and boys; it also means seeing rights holders as diverse and intersectional in their identities, rather than ‘women versus men’²³); and they should find ways to *analyze and account for* how their impacts on various groups might differ. Section 3C below takes note of more recent sources that build on these basic elements and offer preliminary guidance on integrating a gender perspective into HRDD.

As noted in the introduction and reiterated at several points in this study, the responsibility to undertake HRDD cannot be discharged by checking off items on

¹⁷ HRC, Res 8/7, 18 June 2008, http://ap.ohchr.org/documents/e/hrc/resolutions/A_HRC_RES_8_7.pdf (last accessed 19 November 2018).

¹⁸ UNGPs, supra fn 1, Guiding Principle 18.

¹⁹ Ibid, Guiding Principle 18 Commentary.

²⁰ Ibid.

²¹ Ibid, Guiding Principle 20 Commentary.

²² Gender-responsive HRDD should be based ‘on an explicit recognition of the unequal power relations between women and men’. Gender and Development Network (GADN) and Corporate Responsibility Coalition (CORE), *Why National Action Plans on Business and Human Rights Must Integrate and Prioritise Gender Equality and Women’s Human Rights*, November 2015, p 14, https://static1.squarespace.com/static/536c4ee8e4b0b60bc6ca7c74/t/5665b7ef69492ed58501622f/1449506799634/GADN+BHR+paper+for+UN+Global+Forum+Nov+15_FINAL.pdf (last accessed 19 November 2018), p 14.

²³ Thanks to K. Salcito, Executive Director of Nomogaia, for making this point in a telephone conversation, 11 June 2018. Salcito also points out that the UNGPs’ suggestion that, if consultation of an affected stakeholder is impossible, a business enterprise should ‘consider reasonable alternatives’ (such as consulting an expert), could be problematic from a gender-responsive point of view, as there might be no legitimate substitute for, e.g., a woman who is marginalized by a project.

a list. Nor is the objective of HRDD to protect companies from liability;²⁴ as the UN Working Group on Business and Human Rights points out, ‘the prevention of adverse impacts on people is the main purpose of human rights due diligence’.²⁵ Further, where gender equality initiatives or women’s empowerment programmes are carried out as a way for companies to burnish their reputations, reach new customers or otherwise create benefits for themselves – the so-called ‘business case’ or ‘win-win’ argument for gender equality – these should not be confused with gender-responsive HRDD.²⁶ Rather, the latter must begin with, and remain focused on, rights holders, the impacts companies have on them and how these impacts differ according to gendered social and economic relations.

Gender-responsive HRDD requires companies to take a holistic approach to their operating environment by identifying, preventing, mitigating and accounting for the ways in which their actions or omissions may differently affect men, women and gender non-conforming people.

B. GENDER EQUALITY AND NON-DISCRIMINATION

The Universal Declaration of Human Rights (UDHR), along with all of the other international human rights instruments, provides that sex and gender discrimination must be identified and redressed to ensure that everyone can equally enjoy human rights.²⁷ The UN treaty bodies have used interpretive general comments to advance understandings of gendered inequalities and the steps that must be taken to identify and remedy these within the context of international human rights obligations.

In its General Comment no 20 (2009), the UN Committee on Economic, Social and Cultural Rights (CESCR) noted, ‘the social construction of gender stereotypes, prejudices and expected roles ... have created obstacles to the equal fulfillment of economic, social and cultural rights’.²⁸ The HRC has stated that the non-discrimination guarantees in Articles 2 and 3 of the International Covenant on Civil and

24 As Guiding Principle 17 Commentary points out, ‘Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.’ UNGPs, supra fn 1.

25 UN Working Group Business and Human Rights, UN doc A/73/163, 16 July 2018, para 17.

26 For more on the problematic nature of a ‘win-win’ approach to gender equality, see E. Prügl, ‘Corporate Social Responsibility and the Neoliberalization of Feminism’, and S. Tornhill, ‘The Wins of Corporate Gender Equality Politics: Coca-Cola and Female Micro-entrepreneurship in South Africa’, both in K. Grosser, L. McCarthy and M. A. Kilgour (eds), *Gender Equality and Responsible Business*, Greenleaf, 2016.

27 Provisions prohibiting sex and gender-based discrimination can be found inter alia in the International Covenant on Civil and Political Rights, Arts 2(1), 4(1), 24, 26; the International Covenant on Economic, Social and Cultural Rights, Arts 2(2), 3; the Preamble to the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Rights of the Child, Art 2; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art 1; the Preamble, Art 3 and Art 6 of the Convention on the Rights of Persons with Disabilities.

28 Committee on Economic, Cultural and Social Rights (CESCR), General Comment no 20 (2009), UN doc E/GC.12/20, para 20.

Political Rights (ICCPR) require the removal of barriers to the equal enjoyment of each of the rights contained in the Covenant and that all necessary steps must be taken to end sex discrimination in the public and private sectors.²⁹ The UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) has also clearly articulated the obligations of States Parties to eliminate direct and indirect discrimination ‘by any person, organization or enterprise’ against women and girls in all areas of life.³⁰ In addition, the CEDAW Committee has noted that gender-based violence, whether this is perpetrated by agents of the state or private persons, is a form of discrimination that nullifies or impairs the realization of women’s human rights and its prohibition has become a principle of customary international law.³¹

Guarantees of non-discrimination under international human rights law encompass both *direct* and indirect forms of discrimination.³² The achievement of *substantive or de facto/real equality*, as required by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and other international human rights instruments, goes beyond guaranteeing to women treatment that is identical to that of men and may necessitate temporary special measures such as quotas and affirmative action programmes alongside efforts directed at dismantling harmful gender stereotypes and discriminatory laws and practices in order to ensure equality of outcomes.³³

Although states have long been regarded as the primary bearers of human rights obligations, the distinction between the human rights duties of public and private actors is gradually being eroded and there is now a degree of acceptance that *non-state actors have direct responsibilities under international human rights law* to respect and even facilitate the implementation of human rights.³⁴ It has been argued that the preamble of the UDHR, which refers to the responsibility of ‘every organ of

29 HRC, General Comment no 28 (2000), UN doc HRI/GEN/1/Rev.9 (1), paras 3–5.

30 CEDAW Committee, General Recommendation no 28, supra fn 12, para 5.

31 CEDAW Committee, General Recommendation no 35 on Gender-Based Violence Against Women Updating General Recommendation no 19, UN doc CEDAW/C/GC/35.

32 CESCR, General Comment no 16 (2005), paras 12–13:

12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women which cannot be justified objectively.

13. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities ... a gender-neutral law may leave the existing inequality in place, or exacerbate it.

33 CEDAW, Article 2(e); CEDAW Committee, General Recommendation no 25 on Temporary Special Measures.

34 A. Clapham, *Human Rights Obligations of Non-State Actors*, OUP, 2006; International Council on Human Rights Policy (ICHRP), *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, 2002, https://reliefweb.int/sites/reliefweb.int/files/resources/F7FA1F4A174F76AF8525741F006839D4-ICHRP_Beyond%20Voluntarism.pdf (last accessed 19 November 2018).

society' to promote and respect human rights also creates duties for businesses.³⁵ Many of the human rights treaty monitoring bodies, in particular the CESCR, the CEDAW Committee and the Committee on the Rights of the Child, have highlighted the due diligence responsibilities of businesses to respect international human rights law, including guarantees of non-discrimination, that exist alongside the duties of States Parties to protect human rights.³⁶

The International Labour Organization (ILO) plays a pivotal role in advancing fundamental rights at work and associated guarantees on gender equality.³⁷ The ILO's tripartite structure – which includes representatives from governments, workers' and employers' organizations – makes it an important actor in the development of human rights-based due diligence instruments. Of particular note in this respect are its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy³⁸ and the proposed ILO Convention and Recommendation on Ending Violence and Harassment in the World of Work.³⁹

In numerous international instruments, the international community – including business actors – has endorsed gender integration or gender mainstreaming as a

35 ICHRP, *Beyond Voluntarism*, supra fn 34, pp 58-62.

36 See in particular, CESCR, General Comment no 24 (2017) on State Obligations in the Context of Business Activities, UN doc E/C.12/GC/24, paras 4-5: 'In addition, under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice.'; CEDAW Committee, General Recommendation no 34, supra fn 4, para 13; CEDAW Committee, General Recommendation no 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change, UN doc CEDAW/C/GC/37, paras 47 and 48: 'To ensure that private sector activities in the field of disaster risk reduction and climate change respect and protect women's human rights, they must guarantee accountability and be participatory, gender-responsive and subject to continuous human rights-based monitoring and evaluation.'; Committee on the Rights of the Child, UN doc CRC/C/GC/16, para 8:

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

37 See, for example, ILO, Report of the Director-General, *The Women at Work Initiative: The Push for Equality*, International Labour Conference, 107th Session, 2018, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_629239.pdf (last accessed 19 November 2018); ILO, *Gender Equality and Decent Work: Selected ILO Conventions and Recommendations that Promote Gender Equality as of 2012*, 2012, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_088023.pdf (last accessed 19 November 2018); See also ILO, *ILO Action Plan for Gender Equality 2018-21*, 2018, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_645402.pdf (last accessed 19 November 2018).

38 ILO, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 2017, para 30, https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (last accessed 19 November 2018): 'Multinational enterprises should be guided by the principle of non-discrimination throughout their operations without prejudice to the measures envisaged in paragraph 18 or to government policies designed to correct historical patterns of discrimination and thereby to extend equality of opportunity and treatment in employment.'

39 ILO, *Ending Violence and Harassment Against Women and Men in the World of Work*, International Labour Conference, 107th Session, 2018, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_553577.pdf (last accessed 19 November 2018).

critical and strategic approach for the achievement of gender equality.⁴⁰ Gender integration is the process of assessing the implications for women, men and gender non-conforming people of any planned action, including legislation, policies or programmes, in all areas and at all levels.⁴¹ It has commonly, and incorrectly, been understood as referring only to the monitoring of women's human rights or gender-based violence against women. Effective gender integration requires that due consideration is given to the ways in which gendered power relations in a given context affect the human rights of everyone including men, women and gender non-conforming persons.

Human rights obligations to prevent and eliminate gender-based discrimination require that all duty bearers develop systems, such as due diligence processes, to analyse, prevent and respond to gendered inequalities. The integration of gender analysis within human rights work ensures that critical human rights issues are made visible and that both direct and indirect forms of gender-based discrimination are prevented and remedied by governments and other duty bearers. Failure to engage in a gender analysis may result in the experiences of women, girls and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons being made invisible or reducing them to helpless victims, thereby perpetuating harmful stereotypes that negate their agency as right holders.⁴²

Given the gender-based discrimination and inequality historically experienced by women and girls around the world, human rights law requires that urgent and targeted steps are taken by states and non-state actors to eliminate discrimination against women and to guarantee the promotion and protection of women's human rights.⁴³ It is, however, important to take due account of the ways in which gender-based inequalities *intersect* with other forms of discrimination based on attributes such as socioeconomic status, ability, ethnic origin and age. The international human rights mechanisms have drawn attention to *intersectional and multiple forms of discrimination* and the need for interventions designed to realize gender integration and women's equal rights to take full account of the differences that exist within and between various groups of women, men and gender-diverse persons.⁴⁴

40 See the Outcome Documents of the Vienna Declaration and Programme of Action (1993); the Beijing Declaration and Platform for Action (1995); the 23rd Special Session of the General Assembly; UN Economic and Social Council (ECOSOC) Agreed Conclusions, as contained in resolution 1997/2; the Millennium Declaration; the Sustainable Development Agenda 2030 and numerous resolutions of the General Assembly and the Security Council.

41 OHCHR, *Women's Rights Are Human Rights*, supra fn 11.

42 See, for example, S. Arora-Jonsson, 'Virtue and Vulnerability: Discourses on Women, Gender and Climate Change', 21 *Global Environmental Change* 2 (2011); M. Cobbett, 'Beyond "Victims" and "Heroines": Constructing "Girlhood" in International Development', 14 *Progress in Development Studies* 4 (2014).

43 ECOSOC Agreed Conclusions, supra fn 40.

44 CEDAW Committee, General Recommendation no 28, supra fn 12, para 18:

Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.

International human rights instruments provide important guarantees of substantive gender equality that must be respected by both public and private actors. The approach taken in this study is to examine gender equality and women's human rights and the way in which these are affected by business activities in specific contexts. Gender is an analytical category that applies to transgender and intersex people, women and girls, as well as to men and boys, and gender-responsive due diligence should ensure that it considers the situation of all rights holders.⁴⁵ That said, throughout the world, women, girls and those people who do not identify as men, experience human rights violations as a result of patriarchal systems of oppression that intersect with other forms of power based on attributes such as social class, ability, ethnicity, sexual orientation and gender identity, migrant status and age.⁴⁶ Recognizing this reality requires businesses to focus on and prioritize respect for and the promotion of women's substantive equality and human rights within all phases of their due diligence processes.⁴⁷

45 For more on the importance of 'thinking beyond the duality of gender' see D. L. Otto, *Gender Issues and International Human Rights: An Overview*, 1 October 2012, Human Rights Law Series, Edward Elgar, 2012; University of Melbourne Legal Studies Research Paper no 606, <https://ssrn.com/abstract=2154770> (last accessed 19 November 2018).

46 Equal Rights Trust, 16 *Equal Rights Review. Special Focus: Intersectionality* (2016), <http://www.equalrightstrust.org/ertdocumentbank/Equal%20Rights%20Review%20Volume%2016%20Intersectionality.pdf> (last accessed 19 November 2018).

47 GADN and CORE, *Why National Action Plans on Business and Human Rights Must Integrate and Prioritise Gender Equality and Women's Human Rights*, supra fn 22, p 14.

3. GENDER-RESPONSIVE HUMAN RIGHTS DUE DILIGENCE

'Because gender discrimination is so universally entrenched – rendering it largely invisible – there is a high risk that such issues will not be identified unless explicitly addressed by government and businesses, including in corporate due diligence processes, meaning women's rights will continue to be violated.'⁴⁸

At present, there is no systematic treatment of gender-responsive HRDD obligations within international human rights laws and policies. The core components of a comprehensive approach to gender equality within due diligence analysis must be distilled from the existing guarantees within international human rights law and the UNGPs themselves as outlined above, as well as from a range of other, currently disparate, voluntary guidance documents and indicators. The following sections briefly discuss and tie together various instruments and initiatives on business HRDD on different scales from the international to the national and examine their potential as sites for the consolidation of norms on business due diligence, women's human rights and gender equality.

A. PROPOSED LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

At the international level, a proposed legally binding instrument (LBI) on business and human rights, to be elaborated by an open-ended intergovernmental working group (OEIGWG),⁴⁹ provides entrées for discussing gender-responsive HRDD. Feminist human rights organizations have participated in the ongoing discussion and debate about the proposed LBI. As do many human rights non-governmental organizations (NGOs) generally, feminist CSOs see the proposed treaty as one of multiple possible mechanisms to hold companies accountable and to address, in particular, extraterritorial problems and the failures of states to address corporate-related human rights abuses at the national level.

Ahead of the fourth OEIGWG meeting at the HRC in October 2018, at which a 'zero draft' of the instrument was discussed, the Women's International League for Peace and Freedom (WILPF) put out a statement on the proposed treaty on behalf of Feminists for a Binding Treaty, a coalition of organizations working 'to integrate a gender perspective' in the proposed treaty. The statement criticized the zero draft

48 Ibid, p 6.

49 The LBI process and the OEIGWG were established in a resolution adopted in 2014 by the HRC. See HRC, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises With Respect to Human Rights*, UN doc A/HRC/26/L.22/Rev.1, 25 June 2014.

for taking a ‘piecemeal approach’ to gender, in the same way as the UNGPs and ‘many international law instruments’ do. According to WILPF, gaps that the zero draft failed to address included: identifying and preventing through HRDD ‘the specific risks’ that women face from corporate abuse; recognizing and addressing the barriers to access to remedy, as well as the intersectional discrimination, that women and marginalized groups confront in cases of corporate abuse; and the ‘corporate impunity’ that human rights defenders and women human rights defenders face. WILPF also argued that ‘a gender perspective is not about treating women as a “vulnerable group” requiring special attention’.⁵⁰

Members of Feminists for a Binding Treaty have also pointed out that, while the treaty ‘has the potential to address systematic corporate power’ that exacerbates growing inequality, the zero draft ‘fails to acknowledge the complexities of corporate power’ and how companies ‘often act in collusion with the State’. The final text, they argue, should not just pay ‘special attention’ to women, but should explicitly call for gender impact assessments carried out by an independent party chosen by women and communities and should ‘explicitly elaborate’ on measures to address ‘the impact of corporate operations on gender roles and gender-based discrimination, women’s health ... gender-based and sexual violence, gender division of labour and access to resources’.⁵¹ The OEIGWG is now tasked with incorporating input from the October 2018 session into a ‘First Draft’ to be discussed in 2019.⁵²

B. NATIONAL LAWS AND ACTION PLANS ON HUMAN RIGHTS DUE DILIGENCE

Not long after the endorsement of the UNGPs, various stakeholders began to call for states to mandate corporate HRDD as a way to ensure that companies comply with the UNGPs.⁵³ And in fact, laws have begun to emerge that explicitly require

50 Women’s International League for Peace and Freedom (WILPF), ‘Joint Statement by #Feminists4BindingTreaty to the IGWG’, 15 October 2018, https://wilpf.org/wilpf_statements/joint-statement-by-feminists4bindingtreaty-to-the-igwg/ (last accessed 19 November 2018). Earlier, WILPF had made a written submission with specific proposals on how to integrate gender analysis into the zero draft.

51 F. Anumo and I. Michaeli, ‘Justice Not “Special Attention”: Feminist Visions for the Binding Treaty’, AWID, 15 August 2018, <https://www.awid.org/news-and-analysis/justice-not-special-attention-feminist-visions-binding-treaty> (last accessed 19 November 2018). In October 2017, Feminists for a Binding Treaty published a statement on the ‘draft elements’ document – the precursor to the ‘zero draft’ – that outlined specific suggestions for inclusion in the document, including mandatory gender impact assessments; gender-sensitive justice and remedy mechanisms and ensuring respect and protection for women human rights defenders. See Asia Pacific Forum on Women, Law and Development (APWLD) et al, ‘Integrating a Gender Perspective Into the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises’, 20 October 2017, <https://wilpf.org/wp-content/uploads/2017/10/Jt-statement-gender-into-the-treaty-October-2017.pdf>, (last accessed 19 November 2018). For more on the binding treaty, see GADN and AWID, ‘Feminist Perspectives on Corporate Accountability and Workers’ Rights: The UN Binding Treaty and Beyond’, webinar, 20 September 2018.

52 European Coalition for Corporate Justice (ECCJ), ‘Day 5 of Negotiations for a UN Binding Treaty on Business and Human Rights’, 19 October 2018, <http://corporatejustice.org/news/9989-day-5-of-negotiations-for-a-un-binding-treaty-on-business-and-human-rights> (last accessed 19 November 2018).

53 C. Albin-Lackey, *Without Rules: A Failed Approach to Corporate Accountability*, Human Rights Watch, 2013, https://www.hrw.org/sites/default/files/related_material/business.pdf (last accessed 19 November 2018).

companies to undertake HRDD. These represent one of the most concrete ways in which states are implementing the UNGPs.

France’s duty of vigilance law, passed in March 2017, goes the farthest. It requires large French companies to establish and implement a ‘vigilance plan’ to allow for risk identification and the prevention of severe violations of human rights as well as environmental harms resulting from their operations and those of their subsidiaries, subcontractors and suppliers.⁵⁴ Each company must draft the plan in association with its stakeholders, publicly disclose it and include a mapping of risks, actions to mitigate these, a monitoring scheme and an alert mechanism developed in partnership with trade unions.⁵⁵

Although the law’s point of departure is the UNGPs’ concept of HRDD, the legal text does not specify aspects of this due diligence, nor does it indicate what constitutes ‘adequate’ due diligence. The details are left up to companies. In Switzerland, a popular movement has led to a proposed law that, similarly to the French case, would impose mandatory human rights and environmental due diligence on Swiss multinationals, including for their activities abroad, and would thus translate the UNGPs’ concept of HRDD into national law.⁵⁶

Several other countries have passed laws that are mainly disclosure requirements with an HRDD component. Two prominent examples are: (1) the California Transparency in Supply Chains Act (2010), which requires retailers and manufacturers doing business in California with annual worldwide gross receipts of over \$100 million to publicly disclose their efforts to eradicate slavery and human trafficking from their supply chains;⁵⁷ and (2) the UK Modern Slavery Act (MSA) of 2015, which requires companies operating in the UK with a global turnover of £36 million or more to publish an annual statement on steps they have taken to keep human trafficking and forced labour out of their business and supply chains.⁵⁸ The MSA proposes information that companies can include in their statements (such

54 *Loi n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*.

55 If a company fails to comply, a party with standing can ask a judge to compel compliance. Victims who believe they have suffered harm due to a company’s failure to create or implement a vigilance plan can bring a civil claim in a French court (to win such a claim, the plaintiff must be able to show that the harm suffered was linked to the company’s breach of duty).

56 See Solidar Suisse, ‘The Responsible Business Initiative’, <https://www.solidar.ch/en/signup/the-responsible-business-initiative> (last accessed 19 November 2018). The proposed law is currently being debated in the Swiss parliament.

57 Senate Bill no 657, https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf (last accessed 19 November 2018). Regarding US laws, John Ruggie has also noted that the concept of HRDD ‘found its way’ into Section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which requires companies listed in the US to carry out and report on due diligence on their mineral supply chains in and around the Democratic Republic of Congo. See J. Ruggie, ‘Progress in Corporate Accountability’, Institute for Human Rights and Business (IHRB), 4 February 2013, <https://www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability> (last accessed 19 November 2018).

58 Modern Slavery Act (MSA) 2015, <http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted#section-54-2> (last accessed 19 November 2018).

as a company's structure; its policies and processes in relation to slavery and human trafficking; and the effectiveness of these in ensuring slavery and human trafficking are kept out of its business) but companies can choose what to report.

In both the UK and California cases, a company could report that it has taken no due diligence steps and still comply with the law. Further, there is no monetary or criminal penalty for non-compliance with either of these laws; in the UK case, a court can compel disclosure, and in the California case, the state Attorney General can bring an action for injunctive relief.⁵⁹ In June 2018, the Australian state of New South Wales (NSW) passed its own Modern Slavery Act. While similar to the UK's MSA, the NSW law applies financial penalties for failure to publish a modern slavery statement.⁶⁰

None of the above laws mentions gender-related issues in connection with due diligence.⁶¹ The California and UK acts might, for example, have emphasized the fact that women and girls are 'disproportionately victimized above all for forced labor in the private economy',⁶² and then built specific guidance into the laws that would help companies address this. As a recent report on modern slavery by the ILO and Walk Free Foundation argues, an effective policy response must take the role of gender into account.⁶³ However, HRDD is a developing area of law, and there is, therefore, an opportunity to bring gender-related considerations to bear as new laws are formed and as implementation guidance and regulations are produced or refined for existing laws.

59 In October 2018, Ergon Associates reported that only 54 percent of the 150 companies that had produced a statement in mid-2017 had published a subsequent statement, and over 40 percent of those made minimal or no changes. Ergon Associates found the quality of the reporting had not gone up in the subsequent cycle. Ergon Associates, *Modern Slavery Reporting: Is There Evidence of Progress?*, October 2018, http://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739 (last accessed 19 November 2018).

60 Modern Slavery Act 2018 no 30, <https://www.legislation.nsw.gov.au/#/view/act/2018/30> (last accessed 19 November 2018). At the time of writing, the Australian Parliament is considering a Modern Slavery Bill. Modeled on the UK MSA, the Australian bill carries no penalties for non-compliance. See Allen & Overy, *Modern Slavery Bill – Preparing for Greater Supply Chain Transparency in Australia*, 3 September 2018, <http://www.allenoverly.com/SiteCollectionDocuments/Modern%20Slavery%20-%20Preparing%20for%20Greater%20Supply%20Chain%20Transparency%20in%20Australia.pdf> (last accessed 19 November 2018).

61 Ergon Associates, *Modern Slavery Reporting*, supra fn 59, however, found that two companies analysed (M&S and Primark) included links in their reporting on suppliers that had information on gender disaggregation of the workforce; one company (Whistles) reported it was conducting analysis of areas of its business with 'modern slavery risk' factors, such as migrant labour, child labour, temporary workers and women workers.

62 ILO and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva, 2017, https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm (last accessed 19 November 2018).

63 Ibid, p 52.

National Action Plans (NAPs) represent another concrete way in which states have begun to implement the UNGPs.⁶⁴ In 2012, the European Union called on its member states to create such plans, followed by an HRC resolution in 2014 that asked states to do the same.⁶⁵ As of late 2018, 22 countries had produced NAPs, with a similar number in progress.⁶⁶ NAPs are not legal documents; they are primarily statements of commitment and accounts of steps taken by states. An NGO assessment of NAPs in 2017 found, however, that where they did commit to future actions, these were 'overly vague', making it difficult to monitor progress.⁶⁷ The assessment also found existing NAPs put much more emphasis on voluntary measures than on regulatory ones, and devoted little attention to access to remedy.⁶⁸

More specifically on gender, the Gender and Development Network (GADN) and the Corporate Responsibility Coalition (CORE) reported in 2015 that existing NAPs lacked 'a strong gendered analysis of the specific human rights risks and impacts for women ... arising from business activities'.⁶⁹ Three years later, the Danish Institute for Human Rights (DIHR) mapped topics for state attention as they implement the UNGPs.⁷⁰ As part of this exercise, the DIHR went through all existing NAPs as of 2018, noting what they did and did not cover in relation to women and business and human rights. The NAPs mapping reveals a number of countries that have or are working on laws and policies to address issues such as parental leave, gender equality and female entrepreneurship. On the other hand, the DIHR notes the virtual absence in existing NAPs of the mention of many gender-related issues that could be particularly relevant to gender-responsive due diligence, such as women migrant workers, the relationship between privatization and gender and women's position with regard to land rights (though the DIHR points to examples of states that do deal with these issues through laws and policies).

64 See, CESCR, General Comment no 24, supra fn 36, para 59: 'Action plans on business and human rights should incorporate human rights principles, including effective and meaningful participation, non-discrimination and gender equality, and accountability and transparency.'

65 European Group of National Human Rights Institutions, *Implementing the UN Guiding Principles on Business and Human Rights: Discussion Paper on National Implementation Plans for EU Member States*, <https://www.business-humanrights.org/sites/default/files/media/eu-nhris-paper-on-national-implementation-plans-for-ungps-210612-short.pdf> (last accessed 19 November 2018); HRC Res A/HRC/26/L.1, 23 June 2014.

66 Business and Human Rights Resource Centre, 'National Action Plans', <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans/?dateorder=datedesc&page=0&componenttype=all> (last accessed 19 November 2018).

67 International Corporate Accountability Roundtable (ICAR), ECCJ and Dejusticia, *Assessments of Existing National Action Plans (NAPs) on Business and Human Rights*, August 2017, p 5, <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/599c543ae9bdf40b5b6f055/1503417406364/NAP+Assessment+Aug+2017+FINAL.pdf> (last accessed 19 November 2018). The report evaluates the 11 NAPs available in English (out of a total of 17 NAPs globally) as of April 2017.

68 Ibid.

69 GADN and CORE, *Why National Action Plans on Business and Human Rights Must Integrate and Prioritise Gender Equality and Women's Human Rights*, supra fn 22, p 3.

70 The Danish Institute for Human Rights (DIHR), 'Women in Business and Human Rights: A Mapping of Topics for State Attention in United Nations Guiding Principles on Business and Human Rights Implementation Processes', consultation draft, September 2018.

As GADN and CORE point out, NAPs represent a chance for governments to integrate gender equality and women's rights into policy and law and to make good on states' commitments under international human rights law.⁷¹ This integration would help companies 'go beyond "do no harm" to proactively contribute towards the protection, promotion and fulfillment of women's human rights'.⁷² They recognize this 'requires strong regulatory frameworks, combined with gender-sensitive human rights due diligence' and measures to reduce barriers to justice. And they note in particular that companies are 'demanding ... clear regulatory frameworks and guidelines from governments'.⁷³

GADN recommendations to states for gender-sensitive NAPs – in particular on corporate responsibility to respect – include measures such as working with companies, trade unions and civil society to develop sector-specific guidance on human rights risks for women and gender-sensitive human rights due diligence (e.g. human rights and gender impact assessments that 'take account of institutionalized forms of gender inequalities', ensuring full and meaningful participation of women and transparent reporting on gender equality indicators) and supporting sector-wide living-wage initiatives in global supply chains.⁷⁴

At this point, emerging laws and NAPs represent an *unrealized potential* to incorporate gender-responsiveness into the implementation of the UNGPs. To the extent law and policy initiatives such as NAPs can – as GADN and CORE put it – help companies 'go beyond "do no harm"', they also represent an opportunity for governments, companies and CSOs to rethink gender norms in each national setting (and each sector) and address how these affect and are affected by private-sector activity.

C. OTHER GUIDANCE AND TOOLS ON DUE DILIGENCE AND GENDER

It is worth noting several other relevant initiatives that have put gender-sensitive due diligence processes on the international human rights and development agenda. The Organisation for Economic Co-operation and Development's (OECD) voluntary *Due Diligence Guidance for Responsible Business Conduct* (2018) merits discussion because it has garnered broad consensus from states, civil society and companies and will likely be taken as an important reference document on HRDD going forward. The Women's Empowerment Principles (WEPs) warrant mention because their Gender Gap Analysis Tool translates general principles on gender equality into indicators that could help frame gender-responsive HRDD. The 2030 Sustainable Development Agenda contains goals related to gender equality and a host of other human rights while also creating a strong push for private-sector partnerships geared toward the realization of the UN Sustainable Development Goals (SDGs).

71 GADN and CORE, *Why National Action Plans on Business and Human Rights Must Integrate and Prioritise Gender Equality and Women's Human Rights*, supra fn 22, p 2.

72 Ibid, p 4.

73 Ibid, p 2.

74 Ibid, pp 14 and 17.

The OECD's *Due Diligence Guidance* is based on the *OECD Guidelines for Multinational Enterprises*, which are fully aligned with the UNGPs, and aims to guide business on conducting due diligence. It is quite specific on steps and details of HRDD, and provides potential entry points on gender-related issues. For example, it notes from the outset that due diligence is risk-based, and underscores that this means accounting for how risks 'affect different groups, such as applying a gender perspective'.⁷⁵ The Guidance also calls for companies to identify and remove potential barriers to stakeholder engagement, such as 'gender and power imbalances'.⁷⁶

The *Guidance* could have been more explicit throughout on gender issues by providing concrete examples of gender-related issues that must form part of due diligence in each of its detailed sections on identifying, preventing, tracking and remediating impacts. For example, where it rightly talks about addressing systemic issues, the document notes 'widespread harassment and abuse of women and girls within society'.⁷⁷ It could have gone further and called on companies to interrogate how their own presence and actions might contribute to or perpetuate this abuse (see Section 4A below, 'Global Supply Chains'). That said, the brief section on integrating gender issues into due diligence goes farther than industry-facing publications generally do in that it calls explicitly for elements such as identifying intersectionality, developing gender-responsive 'protection of whistleblowers', assessing 'whether women benefit equitably in compensation payments' and identifying 'gender-specific trends and patterns' in negative impacts. In this sense, the *Guidance* provides a start.

The WEPs, a joint project of UN Women and the UN Global Compact, provide guidance to business on promoting gender equality. The fact that the WEPs are based on the 'business case for corporate action to promote gender equality and women's empowerment'⁷⁸ is problematic, as it implies that an economic rationale prevails over any rights-based argument for gender equality. This is not unique to the WEPs; the 'business case' is a common rationale for industry- and company-led initiatives on gender equality. Feminist groups have argued that the so-called business case for women's rights is an example of 'subordinating women's rights to the logic of profitability', a logic that actually 'strengthens the system that perpetuates economic and gender injustice'.⁷⁹

75 Organisation for Economic Co-operation and Development (OECD), *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, p 17, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> (last accessed 19 November 2018).

76 Ibid, p 51.

77 Ibid, p 76.

78 Empower Women, 'WEPs', <https://www.empowerwomen.org/en/weps/about> (last accessed 19 November 2018); WEPs Gender Gap Analysis Tool, 'The Case for Gender Equality', <https://weps-gapanalysis.org/case-for-gender-equality/> (last accessed 19 November 2018).

79 I. Michaeli, 'Women's Rights Beyond the "Business Case"', side event panel at United Nations Human Rights Council, 27 June 2018, <https://www.facebook.com/ridhglobal/videos/10158384846034616/> (last accessed 19 November 2018). See also, Prügl, 'Corporate Social Responsibility and the Neoliberalization of Feminism', supra fn 26, p 50.

Women's Empowerment Principles⁸⁰

1. Establish high-level corporate leadership for gender equality.
2. Treat all women and men fairly at work – respect and support human rights and nondiscrimination.
3. Ensure the health, safety and well-being of all women and men workers.
4. Promote education, training and professional development for women.
5. Implement enterprise development, supply chain and marketing practices that empower women.
6. Promote equality through community initiatives and advocacy.
7. Measure and publicly report on progress to achieve gender equality.

Most relevant for the analysis at hand is the WEPs' Gender Gap Analysis Tool, a checklist for companies to assess whether they are 'advancing gender equality'.⁸¹ Although the Principles and the Tool mention human rights only occasionally, there are positive aspects in relation to gender responsiveness. Somewhat unusually, for example, the tool discusses both men and women throughout.⁸² It incorporates international labour law that is protective of women's rights (e.g. ILO conventions). In addition, some WEP indicators go beyond the workplace: e.g. whether a company addresses 'the safety of women traveling to and from work and on company-related business'; whether it has zero tolerance for violence at work 'including while on business travel and in client entertainment';⁸³ whether it provides support for victims of domestic violence; whether it advocates for removal of legal barriers to women's economic empowerment and whether it has 'an approach to responsible marketing that considers the portrayal of gender stereotypes'.⁸⁴ This last indicator is one of a few examples in the WEPs that might require a deeper inquiry of companies, such as whether their business model or practices might exacerbate harmful gender norms; this aspect could have been better developed in the Tool.

80 UN Global Compact and UN Development Fund for Women (UNIFEM), Women's Empowerment Principles: Equality Means Business, http://www.un.org/en/ecosoc/newfunct/pdf/womens_empowerment_principles_ppt_for_29_mar_briefing-without_notes.pdf (last accessed 18 November 2018).

81 WEPs Gender Gap Analysis Tool, 'About the WEPs Gender Gap Analysis Tool', <https://weps-gapana.lysis.org/about-the-tool/> (last accessed 18 November 2018).

82 For example, they call for supporting access to dependent care for both men and women. UN Global Compact and UN Development Fund for Women (UNIFEM), *Women's Empowerment Principles*, supra fn 80, Principle 2.

83 On the case for companies taking a 'stronger stance against commercial sex ... in relation to work or on business travel', see C. Holgersson and S. Thøgersen, 'Corporate Sexual Responsibility: How Companies Can Act Against the Purchasing of Sex', in K. Grosser, L. McCarthy and M. A. Kilgour (eds), *Gender Equality and Responsible Business*, Greenleaf, 2016.

84 WEPs Gender Gap Analysis Tool, 'The Case for Gender Equality', supra fn 78.

The 2030 Sustainable Development Agenda positions the realization of gender equality as one of its core objectives through the injunction that nobody should be 'left behind'.⁸⁵ The participatory manner in which the SDGs were developed and the fact that gender equality is 'simultaneously separated and singled out, and connected and collated' within the goals and associated targets and indicators has given rise to a degree of optimism in human rights circles concerning the role that the SDGs might potentially play in advancing gender equality and women's human rights.⁸⁶ Nevertheless, this optimism remains tempered by concerns about the failure of the SDGs to systematically use human rights framings across all of their goals, targets and monitoring indicators or to elaborate strong systems of accountability to ensure their implementation.⁸⁷

Many incisive feminist analyses of the SDGs argue that they reinforce the idea that resource-intensive economic growth is a natural pre-condition for sustainable development and equality, while noting that the 2030 Agenda 'does not present a strategy for structural reform to tackle poverty and inequality, nor does it challenge existing trade, tax or financial architectures'.⁸⁸

The SDGs assume large-scale private-sector support in order to bridge the 'funding gap' between global development objectives and available public resources. It has been argued that a 'policy consensus has emerged that achieving the SDGs requires "responsible business conduct" ... understood as entailing that businesses meet their responsibility to respect human rights as described by the UN Guiding Principles on Business and Human Rights (UNGPs)'.⁸⁹ In spite of this perceived consensus concerning business human rights responsibilities, the dominant narrative emerging about the role of business in the realization of gender equality goals through the SDGs is that, not only is the private sector a 'necessary partner' for their achievement, but business itself stands to benefit from the economic and sustainability gains to be made through greater equality.⁹⁰ Within these narra-

85 C. Golay, *No One Will Be Left Behind: The Role of United Nations Human Rights Mechanisms in Monitoring the Sustainable Development Goals That Seek to Realize Economic, Social and Cultural Rights*, Briefing no 11, Geneva Academy of International Humanitarian Law and Human Rights, January 2018, <https://www.geneva-academy.ch/our-projects/publications/detail/285-briefing-no011-no-one-will-be-left-behind-the-role-of-un-human-rights-mechanisms-in-monitoring-the-sdgs-that-seek-to-realize-escr> (last accessed 19 November 2018); I. T. Winkler and C. Williams, 'The Sustainable Development Goals and Human Rights: A Critical Early Review', 21 *The International Journal of Human Rights* 8 (2017).

86 V. Esquival and C. Sweetman, 'Gender and the Sustainable Development Goals', 24 *Gender and Development* 1, (2016).

87 Winkler and Williams, 'The Sustainable Development Goals and human rights', supra fn 85.

88 Esquival and Sweetman, 'Gender and the Sustainable Development Goals', supra fn 86.

89 DIHR, 'Realising the SDGs: The Role of Responsible Business', <https://www.humanrights.dk/projects/realising-sdgs-role-responsible-business> (last accessed 19 November 2018).

90 See Shift and World Business Council for Sustainable Development (WBCSD), *The Human Rights Opportunity: 15 Real-Life Cases of How Business Is Contributing to the Sustainable Development Goals by Putting People First*, New York, July 2018, <https://www.wbcd.org/Programs/People/Social-Impact/Human-Rights/Resources/15-real-life-cases-of-how-business-is-contributing-to-the-Sustainable-Development-Goals-by-putting-people-first> (last accessed 19 November 2018). See also, Women Rising 2030, Business and Sustainable Development Commission, *Better Leadership Better World: Women Leading for the Global Goals*, 2018, <https://sdghub.com/project/better-leadership-better-world-women-leading-for-the-global-goals/> (last accessed 19 November 2018).

tives, the role of companies in the achievement of SDG 5 on gender equality is largely conceived of as the empowerment of individual women – through training and parity programmes – with a view to inserting them into existing business practices in order to boost productivity.⁹¹ There is a paucity of linkages to the human rights framework on gender equality, and in particular, to the role that business could play in redressing broader structural inequalities and discriminatory social norms.⁹²

In relation to business due diligence, there has been criticism of companies for ‘SDG washing’ by picking certain goals – including SDG 5 on gender equality – and using these primarily for the purposes of marketing. Very few company-led SDG initiatives appear to be engaging in a meaningful reflection on gendered power relations and the many ways in which business could be made more accountable for the implementation of the SDGs, such as through the integration of gender analysis within due diligence processes.⁹³

‘It is clear that the world will never reach the SDGs without businesses. While businesses can make positive contributions, such as creating jobs, finding innovative solutions for climate challenges or contributing to human capital development, they can also cause or contribute to negative impacts, such as exploiting labour in supply chains, damaging the environment or engaging in corrupt practices. Businesses should pay due attention to ensure that they avoid undermining the SDGs by causing or contributing to negative impacts ... Ultimately, companies should do their due diligence on all SDGs to avoid undermining these goals. This is the essential baseline.’⁹⁴

91 Global Sourcing Council, ‘Global Businesses Are Making a Difference on SDG 5 – Gender Equality’, 8 April 2016, <https://www.gsacouncil.org/global-businesses-are-making-a-difference-on-sdg-5-gender-equality/> (last accessed 19 November 2018): ‘Empowering women strengthens democracy, contributes to innovation, and increases diversity and inclusiveness in the workplace. It is key to attracting talent, thus advancing companies’ growth and competitiveness in the global marketplace.’

92 One exception to this trend is the DIHR’s Social Impact Toolkit, <https://www.socialimpactkit.com> (last accessed 19 November 2018), which seeks to engage companies in a holistic reflection on the ways in which they can map and monitor the right to an adequate standard of living using several of the SDGs as measuring tools.

93 Ethical Corporation, *The Responsible Business Trends Report 2018*. The authors underscore ‘a risk of “SDG washing”’, with companies using the SDGs as a communication tool ‘without much actual adaptation of strategy or measurement of their impact towards the Goals’, p. 1.

94 R. Nieuwenkamp, ‘Ever Heard of SDG Washing? The Urgency of SDG Due Diligence’, OECD, *Development Matters*, 25 September 2017, <https://oecd-development-matters.org/2017/09/25/ever-heard-of-sdg-washing-the-urgency-of-sdg-due-diligence/> (last accessed 19 November 2018).

4. GENDER-RESPONSIVE DUE DILIGENCE IN CONTEXT

This section provides an overview of what gender-responsive HRDD might look like in the three different business contexts that we have identified as illustrative case studies: global supply chains, land-based agricultural investments and conflict-affected areas.

Each context highlights particular issues that companies might need to consider within their due diligence processes in order to respect and facilitate the realization of equal rights. The scope of gender-responsive due diligence responsibilities encompasses the workplace, as well as the ways in which business duties to respect and fulfil human rights extend beyond the immediate activities of the company itself and into areas including community development and to confronting violations of human rights and gender-equality norms by states and non-state actors.

Many of the employment opportunities that have emerged from trade liberalization in various sectors of the global economy are highly gender-segregated and, as a general rule, women and girls are more likely to be concentrated in precarious jobs characterized by unequal remuneration, poor working conditions, an absence of social security coverage and low levels of unionization.⁹⁵ For this and many other reasons, the adoption of gender-responsive HRDD processes by business has the potential to play a crucial role in rendering visible, preventing, monitoring and remedying gendered inequalities on a number of scales, from the local to the national and transnational.

A. GLOBAL SUPPLY CHAINS

‘While the rising availability of manufacturing jobs in many developing countries has given rural, marginalized and impoverished women opportunities to earn a living and not depend on traditional family structures, most of these jobs are in hazardous conditions, restrict women’s capacity to organize or participate in trade unions, and are dependent on low wages and low-cost environments to attract investment.’⁹⁶

95 Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, UN doc A/73/139, 10 July 2018.

96 Statement submitted by Asia Pacific Forum on Women, Law and Development (APWLD) to the Commission on the Status of Women sixty-first session, 13–24 Mar 2017, UN doc E/CN.6/2017/NGO/45, 9 Nov 2016.

1. INTRODUCTION

With the acceleration of economic globalization and trade liberalization over the past three decades, manufacturing and other services have been rapidly moved offshore from industrialized to developing countries, resulting in the creation of extensive global supply chains (GSCs).⁹⁷ Multinational brands in sectors such as apparel and textiles, footwear, consumer electronics, toys and automotives, but also telecommunications (e.g. call centres), food and beverages – to name only a few – have benefited from the cheap labour and often weak environmental and labour regulations that prevail in many developing economies. In a number of cases, female workers make up the bulk of the workforce in factories manufacturing goods and agricultural operations producing for GSCs.⁹⁸

Work in GSCs has brought some advantages to women, including an increased ability to support themselves and others, more ‘bargaining power at home’ and,

97 As John Ruggie wrote recently, ‘[a]s a result of vast and complex global supply chains, roughly 80% of global trade today (in terms of gross exports) is linked to the production networks of multinational corporations ... One out of seven jobs in the world is estimated to be directly global supply chain related (one out five in G-20 countries).’ J. G. Ruggie, ‘“Guiding Principles” for the Business & Human Rights Treaty Negotiations: An Open Letter to the Intergovernmental Working Group’, 9 October 2018.

98 For example, Business for Social Responsibility (BSR), citing the ILO, reported that globally, women ‘represent an average of 68 percent of the garment workforce and 45 percent of the textile sector workforce’, BSR, *Empowering Female Workers in the Apparel Industry: Three Areas for Business Action*, June 2017, p 7, https://www.bsr.org/reports/BSR_Empowering_Female_Workers_in_the_Apparel_Industry.pdf (last accessed 19 November 2018). In a 2014 study, the NGO Verité cited a Malaysian government estimate that 60 percent of workers in that country’s electronics sector were women, while an independent report estimated the figure to be up to 70 to 80 percent, Verité, *Forced Labor in the Production of Electronic Goods in Malaysia: A Comprehensive Study of Scope and Characteristics*, 2014, <https://verite.org/wp-content/uploads/2016/11/VeriteForcedLaborMalaysianElectronics2014.pdf> (last accessed 19 November 2018). According to another NGO report, most of the 9 million jobs provided in Southeast Asia by the so-called ‘TCF’ (textiles, clothing, footwear) sectors are filled by women, Éthique sur l’Étiquette and Clean Clothes Campaign, *Foul Play Sponsors Leave Workers (Still) on the Sidelines*, June 2018, <https://cleanclothes.org/resources/national-cccs/foul-play-ii-sponsors-leave-workers-still-on-the-sidelines/view> (last accessed 19 November 2018). FairWear Foundation (FWF) reports that in Bangladesh and India, women make up 60–80 percent of garment workers, FWF, *Breaking the Silence: The FWF Violence and Harassment Prevention Programme*, 2018, https://www.fairwear.org/wp-content/uploads/2018/04/2018_FWF_Breaking-the-silence.pdf (last accessed 19 November 2018). On Sri Lankan tea plantations, tea pickers are mostly female, FIAN International, IUF and Misereor, *Harvesting Hunger: Plantation Workers and the Right to Food*, 2014, https://www.fian.org/fileadmin/media/publications_2015/Study_Plantationworkers_2014.pdf (last accessed 19 November 2018). According to Shift, field workers on Moroccan berry farms supplying European brands are ‘overwhelmingly women’, (Shift Project, ‘The Human Rights Opportunity: Better Strawberries Group’, <https://www.shiftproject.org/sdgs/gender-equality/better-strawberries-group/> (last accessed 19 November 2018). Horticulture in Kenya and Uganda is a ‘highly feminized industry’, with women making up most of the workforce, B. Evers, M. Opondo, S. Barrientos, A. Krishnan, F. Amoding and L. Ndlovu, ‘Global and Regional Supermarkets: Implications for Producers and Workers in Kenyan and Ugandan Horticulture’, Working Paper no 39, Capturing the Gains, January 2014, <http://www.capturingthegains.org/pdf/ctg-wp-2014-39.pdf> (last accessed 19 November 2018). And since the 1960s, the ‘vast majority’ of workers at the assembly plants in Mexico and Central America called *maquiladoras*, which supply goods to sectors as varied as automotives, electronics, garments and footwear, have been women, per S. Dorocki and P. Brzegowy, ‘The Maquiladora Industry Impact on the Social and Economic Situation in Mexico in the Era of Globalization’, in M. Wójtowicz and A. Winiarczyk-Rażniak (eds), *Environmental and Socio-Economic Transformations in Developing Areas As the Effect of Globalization*, Wydawnictwo Naukowe Uniwersytetu Pedagogicznego, 2014.

in some cases, better job prospects.⁹⁹ In certain sectors and countries, employment in export supply chains represents an improvement, in both wages and working conditions, over either rural agricultural or domestic work.

It is a double-edged sword, however. Writing about women workers in GSCs, Jacobs et al argue that ‘[w]omen brought into formal production gain a measure of independence; however, this may be seen as infringing existing gendered norms’, and these women ‘may suffer unwanted attention from managers and sometimes, co-workers’.¹⁰⁰ As the Special Rapporteur on contemporary forms of slavery has noted, women workers in GSCs ‘are particularly vulnerable to exploitation in certain sectors given the nexus of gender discrimination and inequality’.¹⁰¹

Studies stretching back to the early 2000s have found gender inequality, sexual harassment and other violations of women workers’ rights to be pervasive in the GSCs of many sectors.¹⁰² For example, in supply chains for ready-made garments (RMGs), women are often hired for lower-skill, lower-paid work than men, paid less than men for the same work and exposed to widespread sexual harassment both in factories and in their commute to and from work.¹⁰³ Academic and NGO research has shown gender-based discrimination, including lower pay for women, forced pregnancy testing¹⁰⁴ and sexual harassment to be common in *maquiladoras*, duty-free assembly plants found primarily on the US–Mexico border.¹⁰⁵ In the US agriculture sector, it is estimated that over 80 percent of women farmworkers (many of them immigrants) are subjected to sexual abuse and harassment.¹⁰⁶

99 See S. Jacobs, B. Brahic and M. M. Olaiya, ‘Sexual Harassment in an East African Agribusiness Supply Chain’, 26 *The Economic and Labour Relations Review* 3 (2015); N. Hossain, ‘Women’s Empowerment Revisited: From Individual to Collective Power Among the Export Sector Workers of Bangladesh’, IDS Working Paper No 389, Institute of Development Studies, 2012, <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.2040-0209.2012.00389.x> (last accessed 19 November 2018); N. Khosla, ‘The Ready-Made Garments Industry in Bangladesh: A Means to Reducing Gender-based Social Exclusion of Women?’, 11 *Journal of International Women’s Studies* 1 (2009).

100 Jacobs et al, ‘Sexual Harassment in an East African Agribusiness Supply Chain’, supra fn 99, 5, citing H. Friedmann, ‘Patriarchal commodity production’ 20 *Social Analysis* (1986).

101 Report of the Special Rapporteur on Contemporary Forms of Slavery, UN doc A/HRC/30/35, 8 July 2015, para 19.

102 See, for example, K. Raworth, *Trading Away our Rights: Women Working in Global Supply Chains*, Oxfam, April 2004, <https://www.oxfam.org/sites/www.oxfam.org/files/rights.pdf> (last accessed 19 November 2018); FWF, *Breaking the Silence*, supra fn 98; Jacobs et al, ‘Sexual Harassment in an East African Agribusiness Supply Chain’, supra fn 99.

103 Khosla, ‘The Ready-Made Garments Industry in Bangladesh’, supra fn 99.

104 On pregnancy discrimination in *maquiladoras*, see ‘Mexico: No Guarantees: Sex Discrimination in Mexico’s Maquiladora Sector’ (no author), August 1996, https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/14/mexico_0896.pdf (last accessed 19 November 2018).

105 See Dorocki and Brzegowy, ‘The Maquiladora Industry Impact on the Social and Economic Situation in Mexico in the Era of Globalization’, supra fn 98; see also the work of the Maquila Solidarity Network, <http://www.maquilasolidarity.org/en/ourwork/womensrights> (last accessed 19 November 2018).

106 Worker-Driven Social Responsibility (WSR) Network, *Now the Fear Is Gone: Advancing Gender Justice Through Worker-Driven Social Responsibility*, February 2018, p 3, <https://wsr-network.org/resource/now-the-fear-is-gone/> (last accessed 19 November 2018).

The ILO and FairWear Foundation (FWF) report that in many industries, women are concentrated in lower-status jobs in GSCs, and that ‘globally, 53 percent of women work in vulnerable jobs, which can increase the risk of experiencing violence’.¹⁰⁷ This figure rises dramatically in certain regions: in sub-Saharan Africa and South Asia, the same source cites a UN estimate that over 80 percent of women work in vulnerable jobs – that is, ‘casual, temporary and insecure’.¹⁰⁸ In developed countries, as well, including in the EU, female migrant workers in a number of industries face insecurity, low wages and sexual violence and abuse on the job.¹⁰⁹

It is not just that women working in GSCs have ended up in precarious work in which they are exposed to gender-based violence: the GSC system is predicated on this situation. As the Asia Pacific Forum on Women, Law and Development (APWLD) notes for the Asia Pacific region, ‘export-led economies depend on the exploitation of women workers as a comparative advantage ... The attraction of low paid, less unionized, more “flexible” (or desperate), workers has driven large profits in the global supply chain.’¹¹⁰ In Europe, as well, perpetrators of sexual abuse in the workplace ‘make use of the financial dependence and the isolated situation of the female [migrant] workers’ in their supply chain, a situation made worse by the workers’ lack of access to the justice system when their rights have been violated.¹¹¹

Further, female workers are prevalent in homeworking situations at the unmonitored lower tiers of GSCs, where working conditions and pay are often extremely poor.¹¹² Most home-based workers in GSCs are ‘subcontracted or dependent workers working for an employer, intermediary or subcontractor for a piece rate’.¹¹³ Up to 300 million people in developing countries carry out homework, and over half of them are women; most lack formal employment status so are even more vulnerable to exploitation than are other workers in GSCs.¹¹⁴ Despite the advantages afforded women homeworkers (flexibility to balance paid work with unpaid do-

107 International Training Centre and FairWear Foundation, ‘Briefing 2.1: Global Supply Chains: Where do Women Work and Under What Conditions?’, https://gbv.itcilo.org/index.php/briefing/show_paragraph/id/40.html (last accessed 19 November 2018).

108 Ibid.

109 T. Quiachon, *Tackling Modern Slavery in the Supply Chain*, Knowledge Paper, Löning, October 2018, p 3, <https://www.loening-berlin.de/wp-content/uploads/2018/10/2018-10-04-Knowledge-Paper-6-Modern-Slavery.pdf> (last accessed 19 November 2018). The paper cites the example of thousands of female migrant workers, many from Morocco and Romania, working without legal contracts and for very low pay picking strawberries in Spain for export to other European countries. Dozens of these workers ‘reported being harassed, raped, blackmailed, physically assaulted or insulted by their superiors’.

110 APWLD, Statement, *supra* fn 96, p 2.

111 Quiachon, *Tackling Modern Slavery in the Supply Chain*, *supra* fn 109, p 3.

112 Report of the Special Rapporteur on Contemporary Forms of Slavery, *supra* fn 101, notes that the lower levels of supply chains ‘have been shown to be at risk of products or raw materials being sourced from home-based or small workshops in the informal economy and made in situations of debt bondage, forced labour or the worst forms of child labour’.

113 Ethical Trading Initiative (ETI), ‘Homeworkers and Homeworking: An Introduction’, *Human Rights Due Diligence Framework* https://www.ethicaltrade.org/sites/default/files/shared_resources/eti_human_rights_due_diligence_framework.pdf (last accessed 19 November 2018).

114 Ibid.

mestic work such as childcare; employment for women who cannot leave home for cultural or religious reasons), their lack of formal status exposes them to low pay, poor working conditions, low or no benefits and the inability to organize.¹¹⁵

2. SOCIAL AUDITING AND BEYOND

Since the 1990s, CSOs and activists have regularly exposed persistent human rights violations found in the GSCs of multinational companies (MNCs). Companies’ first response to these exposés was to formulate labour codes of conduct, followed by so-called social auditing schemes, also known as private voluntary regulation, an industry-driven monitoring system involving third-party inspections and certification sometimes paid for by the brands sourcing from the factories or agricultural operations in question.

Over the years, academic researchers, human rights organizations and trade unions have pointed to important weaknesses in social auditing. These include the ‘snapshot’ nature of inspections (they often provide only an isolated look at operations, with little to say about the context in which rights violations take place or are exacerbated by buyer companies’ own actions); the fact that social auditing seems able to affect mainly ‘outcome standards’ such as wages or health and safety but not ‘process rights’ such as freedom of association and non-discrimination;¹¹⁶ the potential for social auditing to weaken government regulation and trade unions’ roles;¹¹⁷ and the inherent conflict of interest in third-party auditors’ being paid by buyer companies to inspect their suppliers.¹¹⁸

The critical literature has also asserted that social auditing is incapable of spotting or addressing gendered aspects of worker rights violations in the supply chain,

115 Ibid.

116 It was Barrientos and Smith who, in their germinal work, ‘Do Workers Benefit From Ethical Trade?’, a multi-country, long-term study of the ETI’s Base Code, found that ‘while codes were having an effect on *outcome standards*, they are having little or no effect on *process rights*’, S. Barrientos and S. Smith, ‘Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems’, 28 *Third World Quarterly* 4 (2007), 721, original emphasis.

117 A number of critics go further, asserting that social auditing has actively undermined freedom of association. See, for example, M. Anner, ‘Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains’, 40 *Politics & Society* 4 (2012); American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights*, 23 April 2013, <https://aflcio.org/reports/responsibility-outsourced> (last accessed 19 November 2018). Other observers dispute the assertion that social auditing weakens government regulation, and have argued that, in some situations, it can be combined successfully with state regulatory mechanisms such as labour inspectorates to improve conditions for supply chain workers. See, for example, R.M. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*, Cambridge University Press, 2013.

118 The critical literature on social auditing is vast. See, for example, AFL-CIO, *Responsibility Outsourced*, *supra* fn 117; D. O’Rourke, ‘Monitoring the Monitors: A Critique of Corporate Third-Party Labor Monitoring’, in R. Jenkins, R. Pearson and G. Seyfang (eds), *Corporate Responsibility and Ethical Trade: Codes of Conduct in the Global Economy*, Earthscan, 2002; Barrientos and Smith, ‘Do Workers Benefit from Ethical Trade?’, *supra* fn 116; R.M. Locke, F. Qin and A. Brause, ‘Does Monitoring Improve Labor Standards? Lessons from Nike’, 61 *International Labor Relations Review* 1 (2007).

such as sexual harassment.¹¹⁹ Indeed, private voluntary regulation is not set up to deal with the wider context in which persistent violations of women workers' rights often occur, or to address gendered social and legal norms that might lead to women having no other options but to take low-paying, exploitative supply-chain jobs. As one study reviewing allegations of sexual abuse on a Kenyan tea plantation found, 'evidence of sexual harassment and abuse ... is distinctly challenging to collect – particularly when potential victims face further sexual abuse or job insecurity for speaking with investigators'.¹²⁰ The study raised fundamental questions about the ability of certification (based on social auditing) to uncover and address gender-based violence in supply chains due to its 'covert and stigmatized nature', which in itself can obscure the fact that it is often systemic.¹²¹

The collapse of the Rana Plaza factory complex in April 2013 on the outskirts of Dhaka, Bangladesh, resulted in the deaths of 1,134 garment workers, most of whom were female.¹²² Although many factory fires and building collapses had preceded Rana Plaza, the sheer scale of the tragedy forced many buyer brands to acknowledge what labour and human rights groups had been saying since the 1990s: not only was social auditing failing to address poor and dangerous conditions in GSCs; in some cases it was making things worse (before it collapsed, the Rana Plaza facility had passed international social audits, though Bangladeshi engineers had concluded the building was unsound,¹²³ a classic example of the 'false positive' mentality created by social auditing).

In the wake of Rana Plaza, global unions spearheaded the signing of the Accord on Fire and Building Safety in Bangladesh, a significant departure from voluntary, unilateral brand-ordered audits. The Accord is a legally binding agreement between apparel brands and trade unions that seeks to create a 'safe and sustainable' RMG industry in Bangladesh. Its features include requiring factory audits to be undertaken by an independent party and aggregated results to be made public; redressing power imbalances by increasing worker voice and union involvement; and creating consequences for non-compliance (through a binding arbitration clause).¹²⁴ The Accord has been discussed as a potential model for other sectors and countries in the longer run.

119 See especially, Barrientos and Smith, 'Do Workers Benefit from Ethical Trade?', supra fn 116; L. Abbott, 'Allegations of Sexual Harassment and Abuse in Unilever's Kericho Plantation, Kenya: A Case Study of Due Diligence and Certification Processes', February 2012.

120 Abbott, 'Allegations of Sexual Harassment and Abuse in Unilever's Kericho Plantation, Kenya', supra fn 119. Abbott also cites a similar case involving female garment workers in Jordan to underscore the point that these shortcomings are not unique to the Kenyan tea plantation that was the focus of her review, but are found in other 'gendered work environments'.

121 Ibid.

122 S. Souplet-Wilson, 'Made in Bangladesh: A Critical Analysis of the Empowerment Dynamics Related to Female Workers in the Bangladesh Ready-Made-Garment Sector', 11 *Journal of Politics and International Studies* (2014).

123 R. Chao, 'Dhaka Factory Collapse: How Far Can Businesses be Held Responsible?' *The Guardian*, 16 May 2013, <https://www.theguardian.com/sustainable-business/dhaka-factory-collapse-businesses-held-responsible>.

124 2018 Accord on Fire and Building Safety in Bangladesh, May 2018 <http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf> (last accessed 19 November 2018). The 2018 Accord was a renewal of the one published in 2013.

At the same time, the continued widespread use of social auditing by international buyer companies¹²⁵ has led to further thought about what would be necessary to improve factory inspections and hold buyers accountable for human rights violations by their suppliers: for example, by creating legal liability for auditors and retailers¹²⁶ or combining private and public regulation of supply chains.¹²⁷

There are also specific efforts to address gender equality in social auditing. One recent example, Business for Social Responsibility's (BSR) *Gender Equality in Social Auditing Guidance* worked with social auditors and companies to 'adapt existing auditing processes so that women's issues are better surfaced'.¹²⁸ This guidance provides a nuanced and comprehensive exploration of gender-disaggregated data that can help companies better uncover gendered issues in their supply chains (just one of many examples is a detailed sample interview to guide auditors in identifying domestic violence and gendered power relations that could extend into the workplace).¹²⁹ Its focus on increasing worker voice through more gender-responsive and gender-diverse worker interviews is welcome.

Ultimately, however, the initiative is based on trying to improve social auditing, which, as touched on above, has been seriously discredited as a due diligence methodology, as it is predicated on compliance and risk management for brands as opposed to protection of workers' rights.¹³⁰ It should also be noted that BSR's main arguments for addressing gender equality issues in GSCs are based on the business case (e.g. productivity, workforce stability and cost savings), and not the rights case.¹³¹ In fact, where BSR's guidance pushes companies to interrogate their own policies and practices and how these could have gendered effects on workers, it provides the beginnings of a larger – and needed – exercise of, as BSR puts it, 'more in-depth root cause analysis'.¹³² That analysis must then lead to a change in corporate behaviour – not in the service of enhancing social auditing but to contribute to better protection of workers' rights. The next section turns to these points.

125 According to one source, Corporate Social Responsibility (CSR) certification and social auditing was an \$80 billion annual industry as of 2013, AFL-CIO, *Responsibility Outsourced*, supra fn 117.

126 C. Terwindt and M. Saaga-Maass, *Liability of Social Auditors in the Textile Industry*, Friedrich Ebert Stiftung, December 2016, https://www.ecchr.eu/fileadmin/Publikationen/Policy_Paper_Liability_of_Social_Auditors_in_the_Textile_Industry_FES_ECCHR_2016.pdf (last accessed 19 November 2018). The authors warn, however, that 'caution is warranted when trying to improve' the quality of social audits.

127 See, e.g. Locke, *The Promise and Limits of Private Power*, supra fn 117, Chapter 7.

128 BSR, *Gender Equality in Social Auditing Guidance*, Ministry of Foreign Affairs of the Netherlands, September 2018, p 2.

129 See, e.g., *ibid*, p 63.

130 AFL-CIO, *Responsibility Outsourced*, supra fn 117.

131 BSR, *Gender Equality in Social Auditing Guidance*, supra fn 128, p 12.

132 *Ibid*, p 56.

3. RETHINKING GENDER RELATIONS IN GLOBAL SUPPLY CHAINS

Rethinking social auditing is therefore not enough: nor is gender-responsive HRDD a ‘checklist’ to be overlaid on social auditing. Rather, there is a need to address head-on the contextual and structural factors that have led to the disproportionate negative impacts on women workers in GSCs. In line with the UNGPs, HRDD encompasses knowledge about the context in which sourcing operations take place, the ways in which companies might *cause, contribute or be directly linked* to adverse impacts on these workers, and how they might help to address these impacts. Perhaps a first step is to hit ‘pause’ on the drive for a blueprint and instead encourage a broad discussion of what might go into gender-responsive HRDD in supply chains, and to insist that companies be part of this. Recent research and emerging initiatives provide many ideas for such a discussion, as well as opportunities for companies to participate in or learn from programmes that are grappling with the challenges of gendered relations in GSCs.

One initiative in this vein is FWF’s pilot programme on Violence and Harassment Prevention in the garment industry in India and Bangladesh, which focuses on women workers, while noting that men, especially those who are gender non-conforming, are also victims of gender-based violence and harassment at work. Due diligence in the programme explicitly includes confidentiality for complainants, hidden investigations and cross-checking, as well as the need for brands to recognize the link between their purchasing practices on the one hand (for example, production pressure exerted on suppliers) and violence and harassment of women workers on the other (e.g. night overtime, abuse due to production targets). Brands must make a ‘long-term commitment’ to confront violence and sexual harassment with their suppliers.¹³³

The pilot programme also acknowledges the embedded nature of gendered discrimination. For example, FWF notes that in India, the caste system magnifies violence and harassment in the workplace.¹³⁴ The programme calls for attention to intersectionality and for interrogating the links between women’s poverty and the violence and harassment they suffer at work, asserting that ‘[l]iving wages will not eliminate all discrimination and workplace violence. But decent incomes buy women more ability to say no to dangerous and hostile working conditions.’¹³⁵ It also illustrates the applicability of recommendations from earlier research on gendered violence in another sector that feeds into GSCs – tea plantations. That research suggested that a comprehensive approach to addressing sexual harassment and abuse involves incorporating independent, gender-related expertise into the design and ongoing implementation of HRDD, allowing for independent investigation of allegations and having ‘heightened sensitivity to cultural context and gender relations’.¹³⁶

133 FairWear Foundation, *Breaking the Silence*, supra fn 98.

134 Ibid.

135 Ibid, citing J. Morris, ‘Living Wages: The Intersection With the Fight Against Gender-Based Violence’, <https://www.fairwear.org/vaw-prevention/#!/content/https://www.fairwear.org/vaw-prevention/living-wages-intersection-fight-gender-based-violence/> (last accessed 19 November 2018).

136 Abbott, ‘Allegations of Sexual Harassment and Abuse in Unilever’s Kericho Plantation, Kenya’, supra fn 119.

Further, FWF argues that a ‘more powerful worker representation system’ is necessary.¹³⁷ While APWLD points to research showing the importance of trade unions in lowering the gender pay gap, it notes the very low union density levels in Asia, particularly in sectors where women account for the majority of workers.¹³⁸ On the issue of worker representation and women’s voice, however, it is worth noting Prügl’s warning against factory ‘empowerment’ or corporate social responsibility (CSR) programmes in which ‘paternalism replaces unions and collective bargaining’ and which approach gender as ‘an individual-level category’, with the goal being to empower individual women without a ‘critique of structures that marginalize unpaid care labor’.¹³⁹ Programmes that strengthen female leadership in trade unions,¹⁴⁰ and collective bargaining and international framework agreements between brands and trade unions that explicitly incorporate gender equality,¹⁴¹ are two examples of approaches that hold promise for addressing gender rights violations in GSCs.

An example of a supply-chain initiative predicated on worker participation is the Fair Food Program (FFP) of the Coalition of Immokalee Workers (CIW), a worker-based rights organization. The FFP joins farmers, farmworkers and retail food companies to improve working conditions and wages for agricultural workers primarily on the eastern seaboard of the US. Using a human rights-based framework, the FFP aims at ‘structural interventions that address underlying root causes’ of supply-chain rights violations.¹⁴² In doing so, it has dramatically reduced gender-based violence against female workers in US tomato fields,¹⁴³ which the Worker-Driven Social Responsibility Network (WSR Network) recognizes as being based on a complex mix of ‘extreme poverty, language barriers, racial discrimination, isolated worksites and dependence on men’ for employment.¹⁴⁴

Through worker organization and campaigns to pressure brands, the FFP has secured binding agreements with large buyers to pay more for tomatoes (an increase passed through to workers). It provides worker-to-worker education and rapid investigation and resolution of worker complaints, and places financial consequences on non-compliance (tomato growers that fail to address violations lose the right to sell to buyers). It has also pioneered ‘worker-driven social responsibility’ (WSR),

137 FairWear Foundation, *Breaking the Silence*, supra fn 98.

138 APWLD, Statement, supra fn 96.

139 Prüg, ‘Corporate Social Responsibility and the Neoliberalization of Feminism’, supra fn 26, pp 49 and 51.

140 Jacobs et al, ‘Sexual Harassment in an East African Agribusiness Supply Chain’, supra fn 99.

141 BSR, *Gender Equality in Social Auditing Guidance*, supra fn 128, pp 75 and 111.

142 WSR Network, *Now the Fear is Gone*, supra fn 107, pp 13 and 14.

143 Coalition of Immokalee Workers (CIW), ‘Farmworker Women Launch “Harvest Without Violence” Campaign to End Sexual Violence in Wendy’s Supply Chain!’, 17 September 2017 <https://ciw-online.org/blog/2017/09/harvest-without-violence/> (last accessed 19 November 2018).

144 WSR Network, *Now the Fear is Gone*, supra fn 106, p 5.

in which workers are central to monitoring and protecting their own rights.¹⁴⁵ The WSR Network reports that ‘the cumulative impact of these reinforcing elements has been to fundamentally realign relations between workers, supervisors and employers’, making ‘the right to work free from gender-based violence’ the ‘new norm’.¹⁴⁶

The NGO Oxfam has also done extensive work on companies’ approach to human rights in their agricultural supply chains, including through its Behind the Brands campaign, which aims to assess – and pressure – food and beverage multinationals on their agricultural sourcing policies.¹⁴⁷ As part of the campaign, Oxfam has highlighted gender inequalities that affect women workers and women farmers in the supply chains of these companies. In recent research on the programme, Sahan presents findings and recommendations to companies that might form some of the outlines of gender-responsive HRDD.¹⁴⁸ One recommendation calls for companies to recognize, in part through gender-disaggregated data, how women are treated in their supply chains.¹⁴⁹ Companies are then expected to commit transparently to addressing inequalities and power imbalances, including by hiring women extension workers, promoting women to join and lead cooperative groups in the supply chain, and rewarding coops that provide equal-term contracts to men and women farmers.

To evaluate company performance on gender equality, Oxfam looked at brands’ awareness of the issues women in agriculture face (discrimination, access to land, household obligations).¹⁵⁰ Awareness is a key first step in any kind of HRDD – this includes companies’ awareness of how their own sourcing practices affect women farmers and workers differently than they affect men (see box below on understanding context). The campaign’s research found that almost no company it evaluated ‘systematically tracks gender issues’ in its supply chain.¹⁵¹ Sahan concludes that, ‘[o]n gender, while there has been some progress, there is little evidence that the food and beverage companies are attempting to change supplier behavior to ensure gender inequality is addressed’.¹⁵²

145 Ibid, p 7. The WSR Network points to the Bangladesh Accord as another example of worker-driven social responsibility.

146 Ibid, pp 8–9.

147 Oxfam, Behind the Brands, <https://www.behindthebrands.org/about/> (last accessed 19 November 2018).

148 E. Sahan, ‘Women in Global Supply Chains: Campaigning for Change’, in K. Grosser, L. McCarthy and M. A. Kilgour (eds), *Gender Equality and Responsible Business*, Greenleaf, 2016.

149 Ibid, p 117.

150 Sahan notes that Oxfam is aware that ‘reducing and redistributing women’s unpaid care work in the household is absolutely critical to ensuring empowerment’, *ibid*, p 126.

151 Ibid.

152 Ibid, p 129.

Companies’ Contribution to Inequality and the Need to Focus on the Whole Context

In their analysis of MNC response to the use of homework and child labour in the leather sector in India and Pakistan, Delaney et al note that one reason for the failure of a major corporate campaign to eliminate child labour in football stitching in South Asia was brands’ ‘gender-blind’ approach to the problem, in which they ignored ‘systemic inequalities’ that confined women and children to homework due to their ‘domestic roles’.¹⁵³ By seeing child labour ‘in isolation from the context of [children’s] families and communities’, MNCs missed the ‘clear link between the poor labor conditions of homeworkers, the undervaluing of women’s work in the home and child labor’; in essence, ‘the children share the poverty caused by the lack of opportunity and exploitation of women workers’.¹⁵⁴ Such a gender-blind approach, and a ‘singular focus on child labor’, can end up exacerbating ‘existing poverty and inequality’.¹⁵⁵ Indeed, the authors suggest that child labour and homework are ‘a consequence of corporate purchasing and subcontracting policies’.¹⁵⁶

Delaney et al argue that MNCs can ‘support the improvement of conditions in the GPN [Global Production Network], respecting minimum labor standards for all workers *including* the abolition of child labor’.¹⁵⁷ They can start by seeking to involve homeworkers and building their ‘agency’ by bringing them together in unions and local organizations, and including these and other key actors in efforts ‘to address everyday labor rights abuses’.¹⁵⁸

Finally, it is interesting to note the number of initiatives on gender and GSCs that push companies to look beyond their own supply chains – outside the workplace and more broadly at society, including at the policy advocacy level. On the issue of gender-based violence, for example, a recent report on female apparel workers by the business advisory organization BSR explicitly calls on companies to go beyond ‘work place interventions’ and ‘aim to understand vulnerabilities and patterns of harassment and violence outside of the workplace, tap into public systems and work to strengthen those systems’.¹⁵⁹ Translating this into a gender-responsive due diligence frame could mean buyer brands examining sociocultural norms in sourcing countries regarding women working outside the home, working at night or commuting to work, how these norms might affect women working in brands’ supply chains, and how the buyers’ own policies and procedures affect those norms.

153 A. Delaney, R. Burchielli and J. Tate, ‘Corporate CSR Responses to Homework and Child Labour in the Indian and Pakistan Leather Sector’ in K. Grosser, L. McCarthy and M. A. Kilgour (eds), *Gender Equality and Responsible Business*, Greenleaf, 2016, pp 172 and 179.

154 Ibid.

155 Ibid, pp 172 and 177.

156 Ibid, p 180, emphasis added.

157 Ibid, p 181, original emphasis.

158 Ibid, p 182.

159 BSR, *Empowering Female Workers in the Apparel Industry*, *supra* fn 98, p 3.

On unpaid care work, BSR argues that apparel companies can reduce the disproportionate burden on women ‘by supporting access to high quality, family-centered childcare’.¹⁶⁰ This is echoed in Oxfam’s recommendation that brands advocate for gender equity in sourcing-country agricultural laws.¹⁶¹ And the Ethical Trading Initiative (ETI), an alliance of companies, trade unions and NGOs promoting supply chain workers’ rights, calls on companies to review discriminatory laws in sourcing country frameworks, identify direct and indirect causes of negative impacts (including gender norms and gender discrimination in those countries), and ‘engage and advocate with government on laws’ to protect workers’ rights.¹⁶² These enjoinders are illustrative of growing calls for companies to support *societal change* to address unfair gender norms in their operating environments.

The challenges to this are real: indeed, Sahan laments that, even when gender equality ‘is accepted as an important issue, it is often dismissed as ... something companies are not responsible for and can do little about. This is the great challenge in getting companies to take gender seriously.’¹⁶³ Whether companies are willing to face this challenge, and accept the responsibility that goes with the immense benefits and profits they reap from their GSCs, is a question that must be broached in any honest discussion of gender-responsive HRDD.

The programmes and initiatives reviewed in this section could be seen as contributing to the rethinking of gender in supply chains going on in many quarters. They suggest that, while there is no simple answer to what gender-responsive HRDD in GSCs looks like, companies might want to consider certain starting points:

- recognizing embedded gender norms and structural violence that form the backdrop to supply-chain sourcing in many industries
- looking outside the workplace to understand what happens within it
- not simply ‘adding workers’ voices’ to social auditing but centering supply-chain labour rights programmes on workers’ own participation in preserving these rights
- ensuring independent and gender-responsive investigation of gender-related rights violations
- advocating for gender equality in sourcing-country laws

¹⁶⁰ Ibid.

¹⁶¹ Sahan, ‘Women in Global Supply Chains’, supra fn 148, p 117.

¹⁶² ETI, Human Rights Due Diligence Framework, supra fn 113, pp 12–13.

¹⁶³ Sahan, ‘Women in Global Supply Chains’, supra fn 148, p 132. Marston makes a similar point when she notes that one of the biggest obstacles to addressing corporate violations of women’s rights is the idea that these violations are ‘culturally relative and acceptable in the context within which they have taken place’. She notes that this attitude allows companies to argue that these abuses fall outside their responsibility. A. Marston, *Women, Business and Human Rights: A Background Paper for the UN Working Group on Discrimination against Women in Law and Practice*, Marston Consulting, 7 March 2014, p 30.

- seeing the whole context – focusing on cross-cutting rights violations and how these can reinforce each other
- understanding the company’s own place in this context and its impact on existing norms

According to BSR, ‘alternative approaches’ to social auditing need more ‘systems and metrics’ to prove their effectiveness to companies.¹⁶⁴ Yet as touched on by this section, emerging initiatives are already developing their own systems and metrics and are providing entrées for companies to participate: indeed, these initiatives’ success depends on this participation.

B. LAND-BASED AGRICULTURAL INVESTMENTS

The phenomenon of ‘land grabbing’ – the acquisition or long-term lease of land by investors – and resulting dispossession and forced eviction of smallholder farmers and landless peasants, along with other human rights impacts in local communities, has been a subject of increasing concern amongst human rights advocates over the past decade.¹⁶⁵ The main drivers of land grabbing in the global South include: increased investment in food and non-food commodities as well as biofuel production by large agro-industrial companies, acquisition of land for use by extractive industries, and speculative ‘land banking’ in order to avert future land scarcity.¹⁶⁶ These global and large-scale trends are also intricately connected to more localized pressures on land and to changes in the business models of small-scale and medium-sized farming enterprises as they seek to integrate themselves within global and regional agricultural markets.¹⁶⁷

¹⁶⁴ BSR, *Gender Equality in Social Auditing Guidance*, supra fn 128, p 134.

¹⁶⁵ See, for example, la Via Campesina, ‘Launch of an International Alliance Against Land Grabbing’, 7 December 2011, <https://viacampesina.org/en/launch-of-international-alliance-against-land-grabbing/> (last accessed 19 November 2018); FIAN International, ‘Land Grabbing’, <https://www.fian.org/en/what-we-do/issues/land-grabbing/> (last accessed 19 November 2018); Oxfam Australia, *Banking on Shaky Ground: Australia’s Big Four Banks and Land Grabs*, https://www.oxfam.org.au/wp-content/uploads/site-media/pdf/2014-47%20australia%27s%20big%204%20banks%20and%20land%20grabs_fa_web.pdf (last accessed 19 November 2018); C. Golay and I. Biglino, ‘Human Rights Responses to Land Grabbing: A Right to Food Perspective’, 34 *Third World Quarterly* 9(2013); P. Wisborg, ‘Human Rights Against Land Grabbing? A Reflection on Norms, Policies and Power’, 26 *Journal of Agricultural and Environmental Ethics* 6 (2013); S. M. Borras, R. Hall, I. Scoones, B. White and W. Wolford, ‘Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction’, 38 *The Journal of Peasant Studies* 2, (2011); O. De Schutter, ‘How Not to Think About Land Grabbing’, 12 January 2011, <https://www.ohchr.org/Documents/Issues/Food/20110112-OpEd-HowNottoThinkaboutLandGrabbing-E.pdf> (last accessed 19 November 2018).

¹⁶⁶ ‘Module 4: Gender Issues in Land Policy and Administration’ in The World Bank, *Gender in Agriculture Sourcebook*, 2009, p 137, <http://siteresources.worldbank.org/INTGENAGRLIVSOUBOOK/Resources/CompleteBook.pdf> (last accessed 19 November 2018); L. Cotula, ‘The International Political Economy of the Global Land Rush’, in B. White, S. M. Borras Jr., R. Hall, I. Scoones and W. Wolford (eds), *The New Enclosures: Critical Perspectives on Corporate Land Deals*, Taylor & Francis, 2013. See also, the Land Matrix, www.landmatrix.org (last accessed 19 November 2018). See further, *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains*, 2014, https://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-commitment-land-rights-agriculture.pdf (last accessed 19 November 2018).

¹⁶⁷ R. Hall, I. Scoones and D. Tsikata, ‘Plantations, Outgrowers and Commercial Farming in Africa: Agricultural Commercialisation and Implications for Agrarian Change’, 44 *The Journal of Peasant Studies* 3 (2017).

1. INTRODUCTION

The extent of land grabbing is difficult to quantify due to the lack of a clear definition of what constitutes a 'land grab' as well as the fact that many large land investment deals are shrouded in secrecy, which makes obtaining data about their scope and distribution challenging.¹⁶⁸ It is nonetheless apparent that 'the phenomenon is massive and growing'.¹⁶⁹ Importantly, it has also been noted that 'investors are most interested in higher-value land with higher fertility, greater irrigation potential, better infrastructure or proximity to markets. As a result, loss of even a small share of this land can have a major impact on local people.'¹⁷⁰

GRAIN: The Global Farmland Grab

'[P]rofit-driven agribusiness expansion is now the dominant agenda ... Food corporations like China's COFCO are expanding by getting more deeply engaged in farming itself ... Geographically, plantations are expanding into new territories. Oil palm plantations alone are responsible for a large portion of land grabs in the food and agriculture sector in the last few years. Much of this expansion is led by Asian conglomerates like Wilmar, Olam and Sime Darby, which are carving out massive chunks of territory in Africa, as well as Latin America, East Asia and the Pacific ... In 2008, only a few pension funds were investing in farmland. By 2012, several more were showing interest. Today the number has ballooned. Pension funds are the source of much of the capital behind companies buying farmland globally. Some, such as the US-based TIAA-CREF, are even running their own farming operations.'¹⁷¹

The promotion of large-scale land acquisitions for agricultural investment in a number of countries has led to the privatization of collectively held resources including land, pastures, forests, seeds and water, with corresponding effects on the rights to food and nutrition, health, housing, work, cultural identity, education

168 Global Reporting Initiative, *Land Tenure Rights: The Need for Greater Transparency Among Companies Worldwide*, 2016, <https://www.globalreporting.org/resourcelibrary/GRI-G4-Land-Tenure-Rights.pdf> (last accessed 19 November 2018).

169 Cotula, 'The International Political Economy of the Global Land Rush', supra fn 166. See also, J. Zhan, M. Hafiz and W. Speller 'The Impact of Larger Scale Agricultural Investments on Communities in South East Asia: A First Assessment', 6 *International Development Policy | Revue Internationale de Politique de Développement* 1 (September 2015).

170 L. Cotula, *Land Tenure Issues in Agricultural Investment*, SOLAW Background Thematic Report TR05B, Food and Agriculture Organization (FAO), http://www.fao.org/fileadmin/templates/solaw/files/thematic_reports/TR_05B_web.pdf (last accessed 19 November 2018).

171 GRAIN, 'The Global Farmland Grab in 2016. How Big? How Bad?', 14 June 2016, <https://www.grain.org/article/entries/5492-the-global-farmland-grab-in-2016-how-big-how-bad> (last accessed 19 November 2018).

and political participation.¹⁷² There is also evidence that many of these land-based investments have not achieved their stated development aims in terms of agricultural productivity gains, decent employment opportunities and poverty reduction, and that where they have resulted in the resettlement of local communities, there have been significant negative consequences for human rights and livelihoods.¹⁷³

In light of the observed human rights impacts of large-scale investments in land and agriculture, there have been repeated calls from civil society, international organizations and other stakeholders to ensure that business investments in agriculture and land are regulated by specific human rights principles, including those related to the rights to food, decent work, health, secure land tenure and free, prior and informed consent to development, as well as participatory rights for peasants and rural communities.¹⁷⁴

2. GENDER INEQUALITY AND LAND-BASED AGRICULTURAL INVESTMENTS

Land-based agricultural investments have the potential to reinforce and exacerbate existing gender inequalities in rural communities and to create new forms of gendered exclusion and discrimination.¹⁷⁵ There is a growing body of research from all regions of the world that demonstrates that land commercialization and agri-

172 Golay and Biglino, 'Human Rights Responses to Land Grabbing', supra fn 165; Global Reporting Initiative, *Land Tenure Rights*, supra fn 168; Nestlé *Commitment on Land & Land Rights in Agricultural Supply Chains*, supra fn 166.

173 R. Meinzen-Dick, *Property Rights for Poverty Reduction?* DESA Working Paper no 91, 2009, ST/ESA/2009/DWP/91, https://www.un.org/esa/desa/papers/2009/wp91_2009.pdf (last accessed 19 November 2018); Lorenzo Cotula, 'The International Political Economy of the Global Land Rush', supra fn 166; S. Lawry, C. Samii, R. Hall, A. Leopold, D. Hornby and F. Mtero, 'The Impact of Land Property Rights Interventions on Investment and Agricultural Productivity in Developing Countries: A Systematic Review', 9 *Journal of Development Effectiveness* (2017); The World Bank, *The Impact of Larger-Scale Agricultural Investments on Local Communities*, April 2017, <https://openknowledge.worldbank.org/bitstream/handle/10986/26487/114431-NWP-PUBLIC-ADD-SERIES.pdf?sequence=1&isAllowed=y> (last accessed 19 November 2018).

174 la Via Campesina, *Peasants Fighting for Justice: Cases of Violations of Peasants' Human Rights*, July 2017, <https://viacampesina.org/en/wp-content/uploads/sites/2/2017/08/Peasants-Fighting-for-Justice-EN-Low-Res.pdf> (last accessed 19 November 2018); Global Reporting Initiative, *Land Tenure Rights* supra fn 168, p 5.

175 DEMETER, www.r4d-demeter.info (last accessed 19 November 2018). Launched in March 2015, DEMETER (Droits et Égalité pour une Meilleure Économie de la Terre) is a six-year research project applying a right to food and gender equality perspective to examining changes in food security in the wake of land commercialization in two focus countries, Cambodia and Ghana. Results from the first phase of the project demonstrate documented changes in gender relations as a result of agricultural and land commercialization. These changes include: fragmentation of land tenure with women generally losing a greater portion of agricultural land as a result of pressure from investors – this is particularly acute in Ghana due to the workings of customary norms on land inheritance and transmission; and changes in crop selection, with men being more likely to have the decision-making power and collateral to invest in cash crops for export with women being left to provide unpaid labour on family farms while continuing to source food either through subsistence plots or through purchase using income from off-farm labour activities. Conflicts over ownership and user rights have also increased rates of domestic violence in Cambodia. See also, Human Rights Centre Clinic, University of Essex, *Business and Human Rights: Engendering Human Rights Due Diligence - A Legal Analysis*, 2017, <https://corporate-responsibility.org/wp-content/uploads/2017/11/Essex-Human-Rights-Clinic-Report-Business-and-Human-Rights-Engendering-Human-Rights-Due-Diligence-A-Legal-Analysis.pdf> (last accessed 19 November 2018).

cultural investments are influencing ‘gender relations, the social, economic and political meanings that are ascribed to them and the injustices they produce’.¹⁷⁶

Gendered Impacts of Land Commercialization in Cambodia

‘Land commercialization in Cambodia is occurring due to a combination of large-scale and small-scale pressures on land. Some factors that contribute to land commercialization include neoliberal development policies, patronage-based governance, increased population growth, and rural to rural migration to areas that are perceived to have an abundance of land.

Women’s access to land: As a result of the uneven distribution of land titles, the proposed benefits of joint titling promised under the 2001 Land Law have not been realized. Moreover, linking access to property to conjugal status may exacerbate gendered insecurities.

Women’s access to the commons: The loss of forest resources due to land concessions, illegal logging and increased in-migration has resulted in loss of food, livelihood and income for rural households. For women, who are traditionally responsible for food preparation, this has meant an increasing dependency on markets for food provision which in certain cases results in reduced accessibility.

Gender division of labour: Economic land concessions have generated few to no job opportunities for local women. Due to their domestic responsibilities, women are paid less and have access to fewer jobs in the rural wage labour market.

Violence against women: There is an increase in incidents of violence against women in households affected by land conflicts. Women land activists who defend their household’s and communities’ rights to land and housing are particularly vulnerable to domestic violence and abuse.¹⁷⁷

176 J. Bourke-Martignoni, *Gender Equality and the Right to Food in Contexts of Agricultural Commercialization*, Research Brief, Geneva Academy, January 2017, <https://www.geneva-academy.ch/joomla-tools-files/docman-files/Gender%20Equality%20and%20the%20Right%20to%20Food.pdf> (last accessed 19 November 2018); Julia and B. White, ‘Gendered Experiences of Dispossession: Oil Palm Expansion in a Dayak Hibun Community in West Kalimantan’, in B. White, S. M. Borras Jr., R. Hall, I. Scoones and W. Wolford (eds), *The New Enclosures: Critical Perspectives on Corporate Land Deals*, Taylor & Francis, 2013; J. Behrman, R. Meinzen-Dick and A. Quisumbing, ‘The Gender Implications of Large-Scale Land Deals’, 39 *Journal of Peasant Studies*, 1 (2012); S. Razavi, *Shifting Burdens: Gender and Agrarian Change Under Neoliberalism*, UN Research Institute for Social Development (UNRISD), 2002; R. Hall and M. Osorio, *Agricultural Investment: Gender and Land in Africa*, PLAAS, Conference Proceedings, 2014, https://www.plaas.org.za/sites/default/files/publications-pdf/AIGLIA%20Report_Web.pdf (last accessed 19 November 2018); Human Rights Centre Clinic, University of Essex, *Business and Human Rights*, supra fn 175.

177 S. Joshi, *Gendered Impacts of Land Commercialization in Cambodia*, DEMETER Research Brief 1/2018, Graduate Institute of International Studies, Geneva, http://repository.graduateinstitute.ch/cord/296074/files/Demeter_Research_Brief_1_2705_e-edition.pdf (last accessed 19 November 2018).

It has been found that gender-neutral investments in agriculture and land tend to reinforce gender inequalities and, for this reason, corporate due diligence in the land and agricultural sectors requires the adoption of targeted and participatory policies, processes and indicators.¹⁷⁸ The International Institute for Sustainable Development (IISD) has analysed the gender-responsiveness of a number of Voluntary Sustainability Standards (VSS) adopted by growers’ organizations and companies that produce commodities for import and export, as well as multi-stakeholder Responsible Investment Frameworks (RIFs), concluding that overall, ‘the RIFs are stronger than the VSSs on gender, but important gaps remain’.¹⁷⁹

Some of the key issues that have been identified as warranting greater attention in gender-responsive HRDD processes in the agricultural sector include, the gender dimensions of:

- individual and collective tenure rights over land and natural resources
- farming contracts and credit
- productive inputs and training
- unpaid farm and ‘reproductive’ work
- employment and working conditions, in particular gender-based violence in the workplace
- access to remedies, including compensation schemes for loss of land and income
- representation in consultation processes and free, prior and informed consent
- participation in decision-making at the household, business and community levels¹⁸⁰

Several of these topics are expanded upon below.

3. LAND TENURE AND PROPERTY RIGHTS

Land tenure or property rights determine who owns land, who has usufruct (user) rights over it and the resources it provides, under what conditions and for how

178 K. Sexsmith, C. Smaller and W. Speller, ‘How to Improve Gender Equality in Agriculture’, Investment in Agriculture Policy Brief no 5, International Institute for Sustainable Development (IISD), May 2017, <https://www.iisd.org/sites/default/files/publications/how-to-improve-gender-equality-agriculture.pdf> (last accessed 19 November 2018).

179 Ibid.

180 Human Rights Centre Clinic, University of Essex, *Business and Human Rights*, supra fn 175; K. Sexsmith, *Promoting Gender Equality in Foreign Agricultural Investments: Lessons from Voluntary Sustainability Standards*, IISD, 2017, <https://www.iisd.org/library/promoting-gender-equality-foreign-agricultural-investments-lessons-voluntary-sustainability> (last accessed 19 November 2018).

long.¹⁸¹ Throughout the world, there are gendered disparities in land ownership and user rights, with women consistently having less access than men to recognized and secure tenure over land and natural resources.¹⁸² In many countries, land rights are regulated through customary norms that make women's land ownership, inheritance and user rights conditional upon their family relationships.¹⁸³ This inequality has been heightened in some cases through the formalization of customary tenure arrangements – which may have previously recognized collective forms of land ownership and resource-user rights – that have resulted in the vesting of individual land titles in the household head (who, in traditionally patrilineal societies, is male).¹⁸⁴

Land tenure regimes have significant consequences for women in settings of agricultural and land commercialization due to the fact that their rights as land owners and users may not be recognized by companies, thereby excluding them from compensation frameworks for loss of land and from opportunities to participate in contract farming or outgrower schemes.¹⁸⁵ The formalization of customary land tenure through its recognition in national laws and the reform of cadastral and land registration systems has been one of the major mechanisms through which various actors have sought to improve gender-equality and food-security outcomes in different contexts.¹⁸⁶ Crucially, however, it has been noted that private land-titling programmes are also gendered and these are often modeled on forms of land ownership and usufruct rights that may not necessarily correspond to local customs and practices.¹⁸⁷ In many cases, the individualized titling of land and its conversion into economic land concessions has led to women being denied access to common resources including forests, pastures and water sources.¹⁸⁸ For

181 FAO, *Land Tenure and Rural Development*, 2002, <http://www.fao.org/3/a-y4307e.pdf> (last accessed 19 November 2018); Global Reporting Initiative, *Land Tenure Rights*, supra fn 168. See also, Cotula, *Land Tenure Issues in Agricultural Investment*, supra fn 170.

182 Landesa, 'The Law of the Land and the Case for Women's Land Rights', 2016, https://s24756.pcdn.co/wp-content/uploads/Women_Land_print.pdf (last accessed 19 November 2018). For a critical exploration of the need for greater nuance in discussions over women's land tenure rights see C. Doss, R. Meinzen-Dick, A. Quisumbing and S. Theis, 'Women in Agriculture: Four Myths' 16 *Global Food Security* (2017), <http://dx.doi.org/10.1016/j.gfs.2017.10.001> (last accessed 19 November 2018).

183 CEDAW Committee, General Recommendation no 34, supra fn 4; FAO, *Gender and Land Rights, Economic and Social Perspectives*, Policy Brief no 8, March 2010, <http://www.fao.org/docrep/012/al059e/al059e00.pdf> (last accessed 19 November 2018).

184 USAID, *Land Tenure, Property Rights and Gender*, July 2013, https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Gender_Brief_061214-1.pdf (last accessed 19 November 2018).

185 M. Osorio and A. Gallina, *Gender Opportunities and Constraints in Land-Related Agricultural Investment*, FAO, 2018, <http://www.fao.org/3/ca0182en/CA0182EN.pdf> (last accessed 19 November 2018); International Development Law Organization (IDLO), *Women, Food, Land: Exploring Rule of Law Linkages: Using Law to Strengthen Food Security and Land Rights for Women*, 2016, <https://www.idlo.int/sites/default/files/pdfs/highlights/Women%2C%20Land%2C%20Food-Exploring%20Rule%20of%20Law%20Linkages.pdf> (last accessed 19 November 2018).

186 The World Bank, *Gender in Agriculture Sourcebook*, supra fn 166; IDLO, *Women, Food, Land*, supra fn 185.

187 Doss et al, 'Women in Agriculture', supra fn 182. See also, M. Baaz, M. Lilja, A. Östlund, 'Legal Pluralism, Gendered Discourses and Hybridity in Land Titling Practices in Cambodia' 44 *Journal of Law and Society* 2 (2017).

188 Joshi, *Gendered Impacts of Land Commercialization in Cambodia*, supra fn 177.

this reason, CSOs and other land-tenure experts have advocated for community land titling and land-rental schemes as the preferred forms of tenure for advancing gender equality.¹⁸⁹ The complexity and diversity of land-tenure systems and their gender dimensions is something that companies must address within gender-responsive HRDD as a failure to do so risks heightening and reinforcing pre-existing gender inequalities.¹⁹⁰

The Voluntary Guidelines on the Responsible Governance of Tenure (VGGT), which were adopted by the UN Food and Agriculture Organization Committee on World Food Security following extensive consultations with stakeholders from civil society, government and business, underscore that in the context of land-based investments, business enterprises have a responsibility to respect legitimate tenure rights as well as all other human rights guarantees such as those on non-discrimination.¹⁹¹ The VGGT further highlight that gender equality is an essential principle in the responsible governance of tenure of land, fisheries and forests in order to guarantee food security.¹⁹² A number of large agro-industrial companies have adopted commitments on land rights in agricultural supply chains that incorporate the VGGT and their principles on gender equality, transparency and the promotion of security of land tenure for women, men and indigenous peoples.¹⁹³

189 Hall and Osorio, *Agricultural Investment*, supra fn 176.

190 Human Rights Centre Clinic, University of Essex, *Business and Human Rights*, supra fn 175.

191 FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the Context of National Food Security*, 2012, para 12.12: 'Investors have the responsibility to respect national law and legislation and recognize and respect tenure rights of others and the rule of law in line with the general principles for non-state actors as contained in these Guidelines. Investments should not contribute to food insecurity and environmental degradation.' <http://www.fao.org/docrep/016/i2801e/i2801e.pdf> (last accessed 19 November 2018).

192 Ibid. Note in particular Part 3B, para 4, which provides that gender equality is an essential principle for the implementation of responsible governance of tenure of land, fisheries and forests in order to guarantee food security. See further, paras 4.6, 5.4, 5.5, 7.1, 7.4, 9.2, 9.6, 15.3, 15.5, 15.6, 15.10, 17.3, 21.1, 23.2; See also, FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, 2004, paras. 2.5, 3.5, 3.9, 7.4, 8.3, 8.4, 8.6, 8.10, 10.8, 10.10, 13.4, 17.5, <http://www.fao.org/3/a-y7937e.pdf> (last accessed 19 November 2018). See also, CEDAW Committee, General Recommendation no 34, supra fn 4, paras 55–59; CESCR, General Comment no 12 (1999), UN doc E/C/1999/5, para 26, notes obligations to guarantee 'full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property'.

193 See, for example, *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains*, supra fn 166.

It is vital for investors in land and agriculture to be aware of and respond to the complex and highly localized forms of land tenure that may exist in the areas in which they are considering acquiring land. Gender-responsive due diligence in this regard will necessitate extensive consultations with all groups – women, men, older persons, youth, landless peasants and minorities – in rural communities with a view to mapping various forms of individual and collective tenure and usufruct rights, whether these are formal, customary or unrecognized. Businesses must ensure that women, particularly indigenous women, provide their own free, prior and informed consent to any development that affects their land rights.¹⁹⁴

4. OUTGROWER AND CONTRACT FARMING SCHEMES

Large numbers of agribusiness companies have adopted outgrower and contract farming models as a means to more effectively integrate local smallholder farmers into their supply chains.¹⁹⁵ Narratives around the rise of outgrower farming schemes have positioned these as ‘win-win’ arrangements through which agribusiness capital and smallholder farming are linked in ways that benefit both groups and prevent the dispossession observed in many traditional large-scale agricultural land acquisitions.¹⁹⁶ As a general rule, women tend to benefit less from contract farming and outgrower schemes as they are often unable to access these due to discrimination in the allocation of land tenure rights and restricted access to finance, productive inputs and labour.¹⁹⁷ Importantly, however, Hall et al note that gender, age and socioeconomic relations of class interact in some settings in order to privilege older, more wealthy farmers who have access to both the land and capital that allow them to enter outgrower schemes and to benefit from these, while younger landless farmers are marginalized.¹⁹⁸

Where companies use the ‘household’ as the contracting unit in outgrower schemes, this has often led to agreements being made with the male ‘head of household’ without considering intra-household inequalities and the fact that women frequently provide unremunerated agricultural and ‘reproductive’ labour on family farms.¹⁹⁹ Gender discrimination in credit markets also makes it more

194 FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land*, supra fn 191, para 12.11: ‘Contracting parties should provide comprehensive information to ensure that all relevant persons are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by all who are affected. The negotiation process should be non-discriminatory and gender sensitive.’ See also, ILO Convention no 169 and the UN Declaration on the Rights of Indigenous Peoples; Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains, supra fn 166.

195 Osorio and Gallina, *Gender Opportunities and Constraints in Land-Related Agricultural Investment*, supra fn 185; Hall et al, ‘Plantations, Outgrowers and Commercial Farming in Africa’, supra fn 167.

196 Hall et al, ‘Plantations, Outgrowers and Commercial Farming in Africa’, supra fn 167.

197 Osorio and Gallina, *Gender Opportunities and Constraints in Land-Related Agricultural Investment*, supra fn 185.

198 Hall et al, ‘Plantations, Outgrowers and Commercial Farming in Africa’, supra fn 167.

199 Hall and Osorio, *Agricultural Investment*, supra fn 176, p 43.

difficult for women farmers to acquire production inputs such as machinery, fertilizers and crop storage facilities. Additionally, women farmers are often excluded from participation in extension services and training schemes and that prohibits them from benefiting equitably from the innovations and efficiency gains that these provide.²⁰⁰

A study of an outgrower sugar cane scheme in Zambia’s Mazabuka district involving South African company Illovo Ltd revealed that women can experience both benefits and costs as a result of the introduction of contract farming. Some of the benefits observed were a significant increase in income and food security for the (small) number of women who had land tenure and were granted contracts. The risks highlighted included systematic exclusion of women without land tenure from decision-making structures, despite their contributions of unremunerated labour on their husbands’ plots or wages from work in the core estate or in processing activities, and increasing difficulties in accessing common property resources such as water, firewood and grazing land. The research noted that the ‘distribution of risk and reward is uneven, and can be addressed in part by companies requiring joint registration of contracts among spouses, alongside gender sensitization interventions’.²⁰¹

‘Agricultural investments, even when resulting from genuine partnerships with rural producers, may actually contribute to perpetuate or even accentuate certain types of inequalities within communities. For instance, businesses might prefer to engage with better-off, male farmers, with a more solid asset base, because they can ensure higher productivity and greater efficiency ... Since investments do not operate in a vacuum, the pre-existing social and cultural context, including prevailing gender inequalities, greatly influences the outcomes of investments. A critical assessment of the notion of inclusiveness requires the examination of gender roles at different levels; it is necessary to understand how these dynamics affect the way in which schemes and contractual arrangements are planned and implemented.’²⁰²

5. AGRICULTURAL EMPLOYMENT

Agricultural investment projects, particularly plantation agriculture, may create new paid employment opportunities for people in rural communities.²⁰³ The FAO notes that there are wide variations in the gendered patterns of on- and off-farm work in agrarian settings but that it is clear that women in these communities earn

200 Osorio and Gallina, *Gender Opportunities and Constraints in Land-Related Agricultural Investment*, supra fn 185.

201 Hall and Osorio, *Agricultural Investment*, supra fn 176, p 43.

202 Osorio and Gallina, *Gender Opportunities and Constraints in Land-Related Agricultural Investment*, supra fn 185, p 2.

203 Hall et al, ‘Plantations, Outgrowers and Commercial Farming in Africa’, supra fn 167.

less than men and work longer hours in both paid and unpaid activities.²⁰⁴ There is evidence that women are less likely to be hired as permanent workers on plantations and other large-scale agricultural holdings and that the jobs that have been created through agricultural and land investments have tended to reproduce gender divisions of labour that relegate women to temporary, insecure, inadequately remunerated work under poor conditions.²⁰⁵ In addition, participation by women in wage work on plantations and in other areas of agribusiness activities has not been found to relieve them of the burden of reproductive work, including food sourcing and preparation and caring for other family members.²⁰⁶

When investment projects have improved women's incomes, they have sometimes helped to transform gendered cultural norms on decision-making within households and communities.²⁰⁷ However, investment projects have rarely improved women's under-representation in producer cooperatives or worker groups, including in internal decision-making and dispute-resolution bodies, which remain male-dominated.²⁰⁸

6. GENDER-RESPONSIVE HRDD IN LAND-BASED INVESTMENTS

In order to prevent, mitigate and remedy the discriminatory impact of land-based investments in agriculture, agricultural investors should adopt participatory gender-equality strategies and create processes to monitor the gender impact of company operations at all phases of project development and implementation.²⁰⁹ As the IISD notes, 'contributing to gender equality should be considered part of the 'social contract' associated with foreign investments in agriculture – much in the same way as recognition of existing land rights and community participation are now broadly accepted as key principles for fair and equitable investments'.²¹⁰

Based on the above survey of existing academic and civil-society research and business practice, alongside the VSS and RIFs that have been developed in this field, it is possible to sketch some of the broad contours of what gender-sensitive HRDD might look like in the area of land-based agricultural investments:

204 FAO, *Gender Dimensions of Agricultural and Rural Employment: Differentiated Pathways Out of Poverty*, 2010, <http://www.fao.org/docrep/013/i1638e/i1638e.pdf> (last accessed 9 November 2018).

205 The World Bank, *The Impact of Larger-Scale Agricultural Investments on Local Communities*, supra fn 173; European Bank for Reconstruction and Development (EBRD), *Gender Toolkit: Matrix 2*, https://www.ebrd.com/downloads/sector/gender/Gender_toolkit_matrix2.pdf (last accessed 19 November 2018); Joshi, *Gendered Impacts of Land Commercialization in Cambodia*, supra fn 177. See the discussion of food processing in Section 4A, 'Global Supply Chains'.

206 DEMETER, supra fn 175. Hall et al, 'Plantations, Outgrowers and Commercial Farming in Africa', supra fn 167.

207 B. Agarwal, 'Gender and Land Rights Revisited: Exploring New Prospects Via the State, Family and Market', 3 *Journal of Agrarian Change* (2003); The World Bank, *Gender in Agriculture Sourcebook* supra fn 167; IDLO, *Women, Food, Land*, supra fn 185.

208 Human Rights Centre Clinic, University of Essex, *Business and Human Rights*, supra fn 175.

209 FAO, *Voluntary Guidelines on the Responsible Governance of Tenure of Land*, supra fn 191; Sexsmith et al, 'How to Improve Gender Equality in Agriculture', supra fn 179; IDLO, *Women, Food, Land*, supra fn 185.

210 Sexsmith et al, 'How to Improve Gender Equality in Agriculture', supra fn 178.

- An analysis of individual and collective tenure rights over land and natural resources should be carried out in each context and specific attention paid to prevailing gender norms in local forms of land tenure with mechanisms developed to ensure equal rights over land and natural resources.
- Systems of contracting should be reviewed to ensure that they are not discriminatory and measures should be taken to promote gender-equal participation in outgrower schemes.
- Extension and training programmes should be offered as a priority to women farmers and other groups who are traditionally under-represented as participants in these schemes.
- Policies to address the disproportionate burden of unpaid agricultural and care work undertaken by women should be adopted.
- Impact assessments and monitoring of gender discrimination (including gender-based violence) in employment within agribusinesses should be undertaken.
- Gender-based barriers to accessing remedies, including compensation schemes for loss of land and resource rights, should be identified and removed.
- Free, prior and informed consent processes must include women and, if necessary, they should be consulted separately and independent facilitators engaged to ensure that they are able to freely express their opinions.
- Steps should be taken to promote women's equal participation in decision-making at the household, business and community levels.

C. CONFLICT-AFFECTED ZONES

1. INTRODUCTION

There is a deep and broad literature on conflict situations and gender.²¹¹ A number of organizations that work on peacebuilding, governance and reform in conflict and post-conflict zones also provide research and advisory services to MNCs and others operating in these areas, including on how to approach gender-related issues.²¹² Yet some of those groups themselves note the gaps at the intersection of conflict, gender and private-sector activity. For example, Naujoks and Hartel assert that '[i]n the debate around private sector and conflict, too little attention has been paid to the gender perspective'.²¹³ International Alert, which has done extensive work on gender and conflict-affected settings (CAS), notes that, within peacebuilding circles, there is a 'growing willingness to rethink approaches to gender', but at the same time, a disconnect between the exploration of these nuances in 'policy documents and research' and their application in practice.²¹⁴

Further, a review of numerous guidelines, principles and tools aimed specifically at companies on the topic of human rights and security in CAS²¹⁵ reveals that gender-responsiveness is not incorporated in a systematic or regular manner. Certain guidelines and soft law instruments for companies do mention gender, and dedicated and detailed guidance exists on gendered aspects of security arrangements.²¹⁶ But the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the International Committee of the Red Cross (ICRC) point to one source, *A Women's*

211 This literature ranges from feminist analysis of war, conflict and international relations (see, for example, the works of Cynthia Enloe), to works exploring the impact of the privatization of war on women (see, for example, A. F. Vrdoljak, 'Women and Private Military and Security Companies', in F. Francioni and N. Ronzitti (eds), *War by Contract: Human Rights, International Humanitarian Law and the Regulation of Private Military and Security Companies*, Oxford University Press, 2010; S. Schulz and C. Yeung, 'Private Military and Security Companies and Gender', in M. Bastick and K. Valasek (eds), *Gender and Security Sector Reform Toolkit*, DCAF, OSCE/ODIHR, UN-INSTRAW, 2008), to gender analysis geared toward practitioners in the fields of security, peacekeeping and peacebuilding (see, for example, the publications of the Geneva Centre for Security Policy's (GCSP) Gender and Inclusive Security programme, <https://www.gcsp.ch/News-Knowledge/Publications> (last accessed 19 November 2018), those of the Geneva Centre for the Democratic Control of Armed Forces' (DCAF) Gender and Security programme, <https://www.dcaf.ch/gender-and-security/cat2> (last accessed 19 November 2018) and those of International Alert's Gender programme, <https://www.international-alert.org/gender> (last accessed 19 November 2018)).

212 For example, International Alert, GCSP and DCAF.

213 J. Naujoks and I. Hartel, *Reality Check: The Gender Dimensions of the Impact of Multinational Companies' Operations in Fragile and Conflict-Affected Areas – Guidance for Research*, SOMO and International Alert, December 2015, p 6, https://www.international-alert.org/sites/default/files/Gender_DimensionsMultinationalCompanyOps_EN_2015.pdf (last accessed 19 November 2018).

214 H. Myrtilinen, J. Naujoks and J. El-Bushra, *Rethinking Gender in Peacebuilding*, International Alert, March 2014, pp 7 and 11, https://www.international-alert.org/sites/default/files/Gender_RethinkingGenderPeacebuilding_EN_2014.pdf (last accessed 19 November 2018).

215 Including resources provided by the Voluntary Principles, <http://www.voluntaryprinciples.org/re-sources/> (last accessed 19 November 2018), and DCAF-ICRC's knowledge hub, *Addressing Security and Human Rights Challenges in Complex Environments*, <http://www.securityhumanrightshub.org/content/general-guidance>.

216 See, for example, DCAF and ICRC, *Addressing Security and Human Rights Challenges in Complex Environments: Toolkit*, 3rd edn, June 2016, http://www.securityhumanrightshub.org/sites/default/files/publications/ASHRC_Toolkit_V3.pdf (last accessed 19 November 2018), p 184, for one listing of sources (mostly related to the mining industry). International Alert and the DCAF are among the organizations that have dedicated programmes on gender and peacebuilding, and gender and security, respectively.

Guide to Security Sector Reform (meant to help women in civil society to transform the security sector) as addressing 'a wide range of gender-sensitive security issues commonly overlooked by business and human rights publications'²¹⁷— an indication of the gap on this topic within sources aimed specifically at business.

2. WHY FOCUS ON CONFLICT ZONES?

This section does not attempt to summarize or provide an overview of the existing literature, but instead flags key concepts that could guide an exploration of gender-responsive due diligence by private-sector entities in CAS. One reason to focus on conflict zones is that gender inequality can be even more pronounced in such areas than in other operating environments. The current Special Rapporteur on trafficking in persons has underscored that conflict exacerbates gender-based discrimination, as protection systems weaken and 'opportunities for exploitation increase'.²¹⁸ Women in conflict situations are 'disproportionately exposed to sexual violence', which can include trafficking of women and girls for sexual exploitation.²¹⁹ In post-conflict situations, women and girls are at greater risk of trafficking-related sexual exploitation and gender-based violence.²²⁰ The DIHR, citing UN Women, notes that conflict and post-conflict situations can disproportionately affect women's access to, and management of, land and other natural resources because of their reliance on these resources for their livelihoods and their responsibility for fulfilling their families' needs.²²¹

As in other areas of operation, companies in conflict zones influence these underlying dynamics, including gender relations, through their very presence as well as their activities (for example, the security arrangements they choose) and relationships (for example, with host governments and local communities). On a positive note, close observers of CAS and gender point out that conflict and post-conflict periods can provide an opportunity to modify norms. Naujoks and Hartel point out that gender norms 'change over time, especially during times of conflict and post-conflict economic development' (they also note, however, that gender norms can 'harden' during conflict).²²² Schulz and Yeung assert post-conflict situations 'provide unparalleled opportunities for societal change where gender discrimination can be redressed and gender roles redefined'.²²³

217 DCAF and ICRC, *Addressing Security and Human Rights Challenges*, supra fn 216, p 184, emphasis added, referring to DCAF, *A Women's Guide to Security Sector Reform: Training Curriculum*, <https://www.dcaf.ch/womens-guide-security-sector-reform-training-curriculum> (last accessed 19 November 2018).

218 Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, UN doc A/71/303, 5 August 2016, para 25. Schulz and Yeung also point to the 'historical link between prostitution/sex work, the trafficking of women and children for the purposes of prostitution and the presence of regular armed forces' and note that, due to private security companies' using personnel from the armed forces, 'these linkages and practices also apply to private contractors'. Schulz and Yeung, 'Private Military and Security Companies and Gender', supra fn 211, p 5.

219 Report of the Special Rapporteur on Trafficking in Persons, supra fn 218, paras 32 and 33.

220 Ibid, para 40.

221 DIHR, 'Women in Business and Human Rights', supra fn 70, p 22, citing UN Women, 'Women and Natural Resources: Unlocking the Peacebuilding Potential', 2013, <http://www.undp.org/content/undp/en/home/libraypage/crisis-prevention-and-recovery/women-and-natural-resources.html> (last accessed 19 November 2018).

222 Naujoks and Hartel, *Reality Check*, supra fn 213, p 3.

223 Schulz and Yeung, 'Private Military and Security Companies and Gender', supra fn 211, p 14.

3. SECURITY FORCES AND GENDER-BASED VIOLENCE

MNCs operating in CAS are major consumers of security services,²²⁴ which can range from the use of unarmed guards for theft prevention to consulting firms for advisory services to armed security for the guarding of assets, employees and facilities.²²⁵ Providers of security can be private, public or some combination of these two (see box).

Public Versus Private Security

A discussion of when and why companies use public versus private security is beyond the scope of this paper. In some cases (e.g. extractive operations, public infrastructure), a state may require companies to use public security (police, armed forces). In other cases, a company might exclusively use the services of a private security company (PSC), and in yet others, it might use both public and private.

A company generally will not have the same leverage over public security forces that it has over private security, which could be its own employees or third-party personnel that it contracts. Despite this, a company ‘may be associated with the actions of public security forces in the eyes of local communities and other stakeholders’, and therefore where public forces’ actions are related to a company’s operations, the company is expected to assess the human rights-related risks of interacting with these forces and to use its influence to try to reduce these.²²⁶ As seen in the Porgera example (below), company use of public forces also presents a heightened risk of corporate collusion with the state.²²⁷

Regarding private security, ‘[a] company’s leverage and oversight over the behavior and quality of its employees or service provider is expected to be high’.²²⁸ As one source asserts, ‘[a] company can outsource its security, but it cannot outsource its responsibility’.²²⁹

224 E. Umlas, ‘Protected but Exposed: Multinationals and Private Security’, in *Small Arms Survey 2011: States of Security*, Cambridge University Press, 2011, p 136.

225 Ibid, p 137.

226 International Finance Corporation (IFC), *Use of Security Forces: Assessing and Managing Risks and Impacts: Guidance for Private Sector in Emerging Markets*, 2017, pp xii and 59–60, https://www.ifc.org/wps/wcm/connect/ab19adc0-290e-4930-966f-22c119d95cda/p_handbook_SecurityForces_2017.pdf?MOD=AJPERES (last accessed 19 November 2018)

227 Anumo and Michaeli, ‘Justice Not “Special Attention”’, supra fn 51, underscore this point in their account of an indigenous woman arrested for protesting corporate land grabbing and for defending a pregnant woman beaten by the military and police at the protests.

228 IFC, *Use of Security Forces*, supra fn 226, p 44.

229 Ibid, p 45.

Killick points out that women experience security arrangements differently than men do: ‘Women are at much greater risk of sexual violence, men at higher risk of arrest, extrajudicial killing or physical intimidation by security forces.’²³⁰ Further, Schulz and Yeung assert that ‘violent forms of masculinity are prevalent in militaries and (despite the absence of reliable data) it can be inferred that they are equally common in the private security sector’.²³¹

Multinationals operating in conflict-prone areas have been implicated in serious incidences of sexual exploitation and sexual and gender-based violence perpetrated by their security providers (including their own security staff, contracted private security personnel and law enforcement personnel), often against members of host communities, but also against female security personnel.²³² Incorporating gender-responsiveness into HRDD should therefore be of particular concern to companies in CAS. An emblematic case is that of Canadian mining company Barrick Gold in Papua New Guinea (PNG).

Security personnel employed by Barrick were alleged to have gang-raped women found on or near waste dumps of the Porgera Joint Venture (PJV) mine in PNG.²³³ The Porgera case involved alleged violence against men and women in the communities who had trespassed into the mine to scavenge for bits of gold. But it was the sexual violence against women by Barrick’s own security personnel that came to international attention, and the company was accused not just of complicity but of direct involvement in serious human rights violations.

In its 2011 report, *Gold’s Costly Dividend*, Human Rights Watch noted that rape survivors in Porgera ‘have few options for assistance or redress’, as they face social stigma as well as fear of reprisals if they report incidents to the police, who themselves are commonly accused of sexual harassment and violence.²³⁴ Human Rights Watch described a context of ‘violent insecurity’ around the mine and a government that ‘has consistently failed to maintain law and order’.²³⁵ A legal research team that testified about the case to the Canadian House of Commons in 2009 reported ‘a close relationship between PJV security personnel and PNG po-

230 N. Killick, *From Red to Green Flags: The Corporate Responsibility to Respect Human Rights in High-Risk Countries*, IHRB, 2011, p 60, https://www.ihrb.org/pdf/from_red_to_green_flags/complete_report.pdf (last accessed 19 November 2018).

231 Schulz and Yeung, ‘Private Military and Security Companies and Gender’, supra fn 211, p 4.

232 On the latter, see *ibid*, p 14; DCAF and ICRC, *Addressing Security and Human Rights Challenges*, supra fn 216, p 83.

233 Through interviews and other field research, Human Rights Watch documented gang rapes that allegedly took place in 2008, 2009 and 2010, Human Rights Watch, *Gold’s Costly Dividend: Human Rights Impacts of Papua New Guinea’s Porgera Gold Mine*, 2011, <https://www.hrw.org/sites/default/files/reports/png0211webcover.pdf> (last accessed 18 November 2018).

234 Ibid, p 10.

235 Ibid, p 9.

lice'.²³⁶ In the team's view, this called into question the government's 'ability to independently investigate' the allegations.²³⁷ Further, according to Human Rights Watch, Barrick had failed to establish channels through which community members could report abuses by company personnel, and failed to monitor its security personnel adequately in the field.²³⁸

After the allegations came to light, Barrick took several steps, including commissioning an outside investigation by a former PNG police commissioner, carrying out its own investigation²³⁹ and instituting monitoring systems for its security personnel.²⁴⁰ Nonetheless, a remedy mechanism that Barrick created in 2012 for victims of sexual violence at the mine became the subject of years of controversy.

The NGO Mining Watch Canada leveled several accusations at Barrick, including failure to consult rape victims on the remedy framework; offering compensation that was not rights-compatible; and requiring rape victims to sign a legal waiver in return for benefits packages.²⁴¹ A consultant who assessed the remedy mechanism in 2015 (with company funding) found it to be well-designed but flawed in its implementation, leaving claimants 'exposed to a process which failed adequately to protect them and which they did not understand'.²⁴² While some claimants 'received remedies that were equitable, even generous, under international law', many 'were left disaffected, stigmatized and abused'.²⁴³

The same year, two law school clinics published the results of a three-year investigation of the Porgera mechanism. They concluded it had several positive aspects but 'contained serious design and implementation flaws', including failure to investigate and remedy abuses promptly, inadequate engagement of survivors, in-

236 International Human Rights Clinic (IHRC) and Center for Human Rights and Global Justice (CHRGJ), Legal Brief Before the Standing Committee on Foreign Affairs and International Development, House of Commons, Regarding Bill C-300, Ottawa: IHRC, Harvard Law School, and CHRGJ, New York University Law School of Law, 2009, p 1, <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Harvard-testimony-re-Porgera-Main.pdf> (last accessed 18 November 2018), cited in Umlas, 'Protected but Exposed', supra fn 224, p 142.

237 IHRC and CHRGJ, Legal Brief, p 9, as cited in Umlas, 'Protected but Exposed', supra fn 224, p 142.

238 Human Rights Watch, *Gold's Costly Dividend*, supra fn 233, p 14.

239 Ibid, p 10.

240 Barrick Gold Corporation, *Statement by Barrick Gold Corporation in Response to Human Rights Watch Report*, 1 February 2011, https://www.hrw.org/sites/default/files/related_material/Statement%20by%20Barrick%20Gold%20Corporation%20in%20Response%20to%20Human%20Rights%20Watch%20Report%20%282%29_0.pdf (last accessed 18 November 2018).

241 C. Coumans, Mining Watch Canada, letter to Dr. Navanethem Pillay, UN High Commissioner for Human Rights, 4 September 2013, https://miningwatch.ca/sites/default/files/letter_to_unhchr_re_porgera_opinion_2013-09-04_0.pdf (last accessed 18 November 2018).

242 Enodo Rights, 'Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework', January 2016, p 2, <http://q4live.s22.clientfiles.s3-website-us-east-1.amazonaws.com/788666289/files/porgera/Enodo-Rights-Porgera-Remedy-Framework-Independent-Assessment.pdf> (last accessed 19 November 2018).

243 Ibid.

adequate remedy and requiring legal waivers.²⁴⁴ Human rights organizations have asserted that human rights violations such as rape should be dealt with through criminal prosecution, not company-level grievance mechanisms.²⁴⁵ As the law clinic report pointed out, 'remedy mechanisms created by companies themselves are unlikely to ever be fully independent of the company', and in cases of extreme power imbalance and serious human rights abuses, such as in Porgera, there are 'fundamental questions' about whether remedy mechanisms created by companies are appropriate.²⁴⁶ In this context, the authors noted the potential value of a 'joint effort between the company and the affected community' to create a remedy mechanism.²⁴⁷ Pilot community-driven operational grievance mechanisms (CDOGM) take this idea a step further, and are worth exploring.²⁴⁸

Viewed from an HRDD point of view, the Porgera case should raise questions for companies about the choice and implementation of security arrangements in CAS; about how to discipline those involved in rights violations and prevent further instances; about the heightened difficulties of access to justice in conflict zones and about appropriate reparations for gender-related violations. These questions also underscore the specific risks at the intersection of business, conflict zones, gender and security, including: security forces that use sexual and gender-based violence as a tool of retaliation or control; the potential for revictimizing gender-based violence survivors as a result of poorly designed or implemented grievance mechanisms; and the risk in CAS that companies could be complicit with state security in committing human rights violations. Gender-responsive HRDD, properly implemented, must take account of these complex dynamics.

As Schulz and Yeung noted 10 years ago, high-profile examples of private security contractors involved in sexual and gender-related abuse 'starkly highlight the importance of addressing misconduct'.²⁴⁹ It is not clear that this warning has been

244 Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, *Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned*, November 2015, pp 2-5, <http://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf> (last accessed 19 November 2018).

245 'Privatized Remedy and Human Rights: Rethinking Company-Level Grievance Mechanisms', panel discussion, 2014 UN Forum on Business and Human Rights, Geneva, 1-3 December; International Women's Rights Action Watch (IWRAP) Asia Pacific and Landesa Center for Women's Lands Rights, 'Submission to the UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on Access to Remedy', 15 June 2017, p 8, <https://www.iwraw-ap.org/wp-content/uploads/2018/04/Joint-Submission-on-Access-to-Remedy-15-June-2017.pdf> (last accessed 19 November 2018).

246 Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, *Righting Wrongs?*, supra fn 244, p 6.

247 Ibid, p 7.

248 See, for example, EarthRights International and SOMO, *Community-Driven Operational Grievance Mechanisms: Discussion Paper for a New Model*, March 2015, <https://www.business-humanrights.org/sites/default/files/documents/OGM%20Discussion%20Paper%20-%20ERI%2C%20SOMO%20-%20Mar%202015.pdf> (last accessed 19 November 2018); J. Kaufman and K. McDonnell, 'Community-Driven Operational Grievance Mechanisms', 1 *Business and Human Rights Journal* 1 (January 2016). It is not clear to what degree these early models have explicitly considered gender-related issues.

249 Schulz and Yeung, 'Private Military and Security Companies and Gender', supra fn 211, p 5.

taken up systematically in the business and human rights tools that address companies' use of security in conflict zones.

4. SOFT LAW AND SECURITY PROVISION

Two key soft law initiatives that address reconciling companies' need for security in conflict-prone areas with their responsibility to respect human rights are the Voluntary Principles on Security and Human Rights (VPs) and the International Code of Conduct for Private Security Service Providers (ICoC). The VPs provide guidance on interactions between companies and both public and private security. They cover areas such as the responsibility of companies to convey human rights policies to security providers, the vetting of human rights records of individuals providing security, the use of force and incident reporting. Signatory companies 'are expected to' communicate publicly 'at least annually' on their implementation of the VPs and must submit an annual report to the plenary,²⁵⁰ but the main penalty for companies that fail to report, or that produce inadequate reports, is to be declared 'inactive'.

The main text of the VPs does not explicitly mention gender-related issues.²⁵¹ A 2013 implementation guidance document²⁵² mentions gender in passing, mainly in terms of identifying women as a potentially vulnerable group. As Schulz and Yeung explicitly note, however, gender issues 'could be incorporated' into the implementation of the VPs.²⁵³ In fact, companies are increasingly expected to incorporate human rights elements into private security contracts, and according to the VPs, many signatory companies report that they require their contracts with private security providers to cite the VPs.²⁵⁴ The extent to which member companies incorporate gender-related issues into these contracts could be a question for further research.

The ICoC, formally launched in 2010 under Swiss government leadership, was the product of a multi-stakeholder process joining states, PSCs, CSOs and academics.²⁵⁵ It sets out the principles and standards for the responsible provision of security services, specifically in 'complex environments'. The Code's aim is 'to create better governance, compliance and accountability of PSCs', which are often used by

250 The Initiative of the Voluntary Principles on Security and Human Rights: Governance Rules, http://www.voluntaryprinciples.org/wp-content/uploads/2016/08/VPI_-_Governance_Rules_-_August_2016.pdf (last accessed 9 November 2018).

251 The same is the case for the VP Fact Sheets and the 'Roles and Responsibilities of Companies under the VPs'.

252 *Voluntary Principles on Security and Human Rights: Implementation Guidance Tool*, 2013, http://www.voluntaryprinciples.org/files/VPs_IGT_Final_13-09-11.pdf (last accessed 19 November 2018).

253 Schulz and Yeung, 'Private Military and Security Companies and Gender', *supra* fn 211, p 13.

254 *Voluntary Principles Initiative: Summary of Implementation Efforts During 2015*, http://www.voluntaryprinciples.org/wp-content/uploads/2016/06/VPs_-_Summary_Annual_Report_of_Implementation_Efforts_in_2015.pdf (last accessed 19 November 2018).

255 International Code of Conduct Association (ICoCA), 'History', <https://www.icoca.ch/en/history> (last accessed 19 November 2018).

MNCs in such settings. Compliance is overseen by the International Code of Conduct Association (ICoCA), a Swiss non-profit organization.²⁵⁶

The ICoC goes further than the VPs in that it includes explicit references to gender discrimination and sexual and gender-based violence in several sections. For example, signatory company personnel are prohibited from engaging in or benefiting from sexual exploitation and abuse or gender-based violence or crimes, 'either within the Company or externally'. Signatory companies are also required to report any instances of such conduct to the authorities. And the Code specifies that disqualifying crimes may include rape, sexual abuse and human trafficking. The Code stipulates that a safe and healthy working environment includes adopting policies that address sexual harassment.²⁵⁷ Complaints alleging code non-compliance or harm suffered from code violations can be submitted to the Code Secretariat.²⁵⁸ While compliance reports are not publicly available, members must collect and report to the Secretariat information such as the number of complaints received related to human trafficking, sexual exploitation and abuse or gender-based violence.²⁵⁹

5. ENHANCED CORPORATE DUE DILIGENCE, NUANCED RESEARCH AND 'RETHINKING GENDER'

The UNGPs note the importance of paying particular attention 'to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict'.²⁶⁰ In *From Red to Green Flags*, a report on how companies in high-risk countries can ensure their operations respect human rights (including where states fail to uphold their obligations), Killick explores the concept of enhanced human rights due diligence.²⁶¹ Naujoks and Hartel call for 'nuanced research' to help understand the gender dimensions of MNC operations in CAS.²⁶² At an even more fundamental level, Myrtinnen, Naujoks and El-Bushra point to the need for a wholesale 'rethinking' of gender by those involved in peacebuilding (this can include companies), which might encompass 'revisiting institutional cultures and incentives, staff profiles, progress and impact measures, and ways of working'.²⁶³ This section discusses these approaches as potential foundations for gender-responsive due diligence in conflict zones.

256 As of September 2018, 93 private security companies were members 'in good standing' with the ICoCA, of which 13 were certified as compliant with the Code, ICoCA, 'Membership', <https://www.icoca.ch/en/membership> (last accessed 19 November 2018).

257 International code of Conduct for Private Security Providers, https://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf (last accessed 19 November 2018).

258 ICoCA, *2016-17 Annual Report*, p 12.

259 ICoCA, 'Draft Metrics for Tier 1 Reporting', 1 December 2014, p 12.

260 UNGPs, Guiding Principle 7 Commentary, *supra* fn 1. The Special Representative to the Secretary-General's supplementary report, *Business and Human Rights in Conflict-Affected Regions: Challenges and Options Towards State Responses*, UN doc A/HRC/17/32, May 2011, does not explicitly take up gender-related issues.

261 Killick, *From Red to Green Flags*, *supra* fn 230.

262 Naujoks and Hartel, *Reality Check*, *supra* fn 213.

263 Myrtinnen et al, *Rethinking Gender in Peacebuilding*, *supra* fn 214, p 6.

Because of the heightened human rights risks in CAS and the greater possibility of corporate complicity in gross human rights abuses,²⁶⁴ companies in these areas are expected – even more than in other environments – to recognize and analyse the local context, including social and political dynamics, power structures, relationships among different groups, the role of government and the company’s place in all of this.²⁶⁵ This increased responsibility on businesses is sometimes called ‘enhanced human rights due diligence.’²⁶⁶ In conflict settings, gender sensitivity carries additional meaning because, as Killick points out, ‘the conditions in high-risk countries tend to exaggerate differences at every level’.²⁶⁷

Incorporating gender into enhanced due diligence can range from gender analysis and the participation of women in risk assessments to evaluating how a company can affect groups differently to creating ‘tailored strategies’ to reduce negative impacts.²⁶⁸ *From Red to Green Flags* identifies five areas in which gender sensitivity is particularly important in conflict zones: livelihoods, resources, services, security and health.²⁶⁹ Undertaking a ‘conflict analysis’ as part of enhanced due diligence is also considered good practice, and DCAF and ICRC recommend this include questions about the ‘scope and dynamics’ of sexual and gender-based violence.²⁷⁰ Similarly, investigation of allegations of human rights abuse by security forces should be sensitive to gendered aspects of the situation.²⁷¹ And understanding gender roles entails looking, as part of any impact assessment in CAS, at the ‘influencing roles of state, market and community institutions and how they perpetuate gender inequality’.²⁷²

Enhanced due diligence measures in relation to PSCs include contractual obligations and internal policies on sexual harassment and abuse, vetting personnel specifically on gender-based violence crimes (as the ICoC suggests) and ‘special training on the protection, special security needs, and human rights of women, girls and boys in conflict and post-conflict situations’.²⁷³ Another concrete suggestion offered by various sources, which could be considered part of enhanced HRDD, is that women be represented among security staff, whether public or private.²⁷⁴

264 UNGPs, Guiding Principle 23 Commentary, supra fn 1.

265 See Killick, *From Red to Green Flags*, supra fn 230.

266 See *ibid.* See also, International Alert, *Human Rights Due Diligence in Conflict-Affected Settings: Guidance for Extractives Industries*, 2018, p 15, for a table comparing the differences between HRDD in ‘more stable environments’ versus in conflict-affected settings, <https://www.international-alert.org/publications/human-rights-due-diligence-conflict-affected-settings> (last accessed 19 November 2018).

267 Killick, *From Red to Green Flags*, supra fn 230, p 59.

268 *Ibid.*, p 8.

269 *Ibid.*, p 59.

270 DCAF and ICRC, *Addressing Security and Human Rights Challenges*, supra fn 217, p 43.

271 *Ibid.*, p 142.

272 *Ibid.*, p 153.

273 These measures are suggested by Schulz and Yeung, ‘Private Military and Security Companies and Gender’, supra fn 211, pp 6–9 and 14. They point out that this sort of training is already often part of national armed forces deployment due to gender mainstreaming in UN peacekeeping and peacebuilding.

274 Killick, *From Red to Green Flags*, supra fn 230, p 78; DCAF and ICRC, *Addressing Security and Human Rights Challenges*, supra fn 217, p 40. See also, Schulz and Yeung, ‘Private Military and Security Companies and Gender’, supra fn 211, p 4.

Because of the complexities of gendered impacts of conflict on men and women, boys and girls, and companies’ role in these impacts, ‘nuanced research’ is key to understanding the ‘local dynamics’.²⁷⁵ An important place to start, according to Naujoks and Hartel, is for ‘all actors’ to take a ‘broader, holistic gender perspective’ in their work. For example, MNCs’ social impact baseline studies should include ‘specific gender roles at household level’ and companies need to take a ‘long-term approach to improving opportunities for women’ in conflict areas.²⁷⁶ It also means that when MNCs assess their context, they prioritize ‘the main gender relevant issues’ (including, for example, violence aimed at men) in their security planning and community engagement.²⁷⁷ This is not the same as checking a box marked ‘women consulted’.

A small sampling of the useful questions Naujoks and Hartel suggest for research into gendered impacts of MNCs in conflict settings provides an idea of the range of issues – from quite general to more subtle – that MNCs themselves must ask as part of their human rights due diligence in these contexts:

- ‘If men and women perform similar jobs, are they paid equally?’
- ‘How is the presence of MNC and subcontractor staff affecting gender roles and social relations in informal secondary employments such as illegal bars or in sex work?’
- ‘In public consultations, how are the processes gendered?’
- ‘How do gendered patterns of land ownership impact who negotiates resettlement or compensation?’
- ‘Whose security needs are prioritized? Does this affect men, women, boys and girls differently?’
- ‘How do potential tensions or discontent over MNC operations feed into pre-existing conflict dynamics, ethnic divisions or gender inequalities?’²⁷⁸

Stepping back further, Myrtinnen et al of International Alert call for a rethinking of gender in CAS, recognizing ‘the need for internal reflection on what gender means for peacebuilding, as opposed to responding to policy imperatives’.²⁷⁹ This underscores the parallel need for a real discussion about gender and corporate HRDD over a ‘check-list’ or ‘toolbox’ approach. To understand how business can have an impact on stakeholders, International Alert posits a ‘gender-relational approach’,

275 Naujoks and Hartel, *Reality Check*, supra fn 213, p 7.

276 *Ibid.*

277 *Ibid.*, p 8.

278 *Ibid.*, pp 9–10.

279 Myrtinnen et al, *Rethinking Gender in Peacebuilding*, supra fn 214, p 6.

which ‘involves asking open questions about how identities (of men, women, boys, girls, etc.) interact with each other, and how they influence, and are influenced by, conflict’.²⁸⁰ It also involves examining how gender roles relate to other factors such as age or ethnicity,²⁸¹ which allows a company to begin to understand intersectionality, the effects of cross-cutting identity factors and the multiple layers of discrimination that these can bring. For this reason as well, a number of guidelines to companies on CAS, where they mention gender-related issues, urge not only the participation of women in any stakeholder engagement carried out by companies (e.g. in assessing risk due to security arrangements), but also the engagement of women separate from other stakeholders where necessary.²⁸² In some situations, cultural norms or ‘taboos’ may keep some people ‘hidden from view’; this can include women and girls who are victims of sexual violence by armed groups.²⁸³

Returning to the notion that harmful gender norms can actually be challenged in CAS, it is incumbent on companies operating in these situations to consider not only how their presence and activities affect gender relations, but how they might contribute to redressing gender inequality as they carry out enhanced HRDD. Indeed, Killick suggests that, as part of their enhanced due diligence in conflict zones, companies should try to change laws where they are ‘framed badly, such that they could harm human rights’.²⁸⁴ This position is sure to meet with resistance from some companies. But it fits with observations made earlier in this briefing that pressure is growing for companies to be part of societal change when it comes to addressing gender inequality. And this means pushing the envelope by re-examining norms, recognizing companies’ role in perpetuating harmful ones and working with others to modify them.

It is not news that businesses in CAS are expected to understand the context of their operating environment as well as the implications – e.g. heightened risks to rights holders and to themselves – of carrying out enterprise in these complex situations.²⁸⁵ This understanding extends to recognizing existing social norms and power relations among local stakeholders, the agenda of non-state actors, and the human rights records of security providers. In that sense, the expectation that gen-

280 International Alert, *Human Rights Due Diligence in Conflict-Affected Settings*, supra fn 266, p 32. See also, p 46, which underscores that community engagement and impact assessments carried out by companies should allow for and capture gender-differentiated perspectives, and should get at questions such as how men, women, boys and girls experience conflict differently, and how gender identities themselves ‘are affected by conflict and vice versa’.

281 Ibid.

282 See, for example, IFC, *Use of Security Forces*, supra fn 226, p 10.

283 International Alert, *Human Rights Due Diligence in Conflict-Affected Settings*, supra fn 266, p 26.

284 Killick, *From Red to Green Flags*, supra fn 230, p 35. Similarly, Annie Golden Bersagel notes that, based on interviews of companies, good practice in situations where national law conflicts with international human rights standards might include ‘corporate civil disobedience’, or ‘rights-based non-compliance’. A. Golden Bersagel, *Meeting the Responsibility to Respect in Situations of Conflicting Legal Requirements*, Good Practice Note, UN Global Compact, 13 June 2011, <https://www.unglobalcompact.org/library/1001> (last accessed 19 November 2018).

285 See ICRC, *Business and International Humanitarian Law*, 2006; UNGPs, Guiding Principle 23, supra fn 1; Killick, *From Red to Green Flags*, supra fn 230; J. Ruggie, *Business and Human Rights in Conflict-Affected Regions*, supra fn 260.

der-responsive due diligence in conflict zones should encompass a focus on the systemic mirrors what good due diligence more generally in these zones already entails.

The examples in this section are evidence of helpful guidance on gender equality that already exists for companies in CAS. The guidance goes well beyond a checklist approach and the question of whether companies comply with existing standards, and instead asks companies to examine their whole operating context and their role in influencing the situation in those contexts. While this might not align with companies’ often short timeframes, such an approach is more likely to lead to HRDD that can mitigate or prevent the persistent and serious corporate-related human rights abuses found in conflict-affected settings.

5. CONCLUSIONS

Globally, economies, political systems and social relations are in a state of flux. Issues of transnational concern such as climate change, economic recession, large-scale migration and conflict provide important transformative opportunities for unequal gender relations, with increased attention to gender-responsiveness perhaps emerging as a ‘silver lining’ from these periods of uncertainty.²⁸⁶

Alongside this greater concern with discrimination and gendered inequalities has been a push to expand the framework of HRDD – by states, international organizations, civil society and companies themselves. In a report on corporate HRDD, the UN Working Group on Business and Human Rights noted that ‘some business platforms suggest that addressing root causes is the next frontier for business’.²⁸⁷ The same report points to examples in which companies are collaborating with other stakeholders precisely to ‘address specific and complex issues in supply chains’ and other ‘systemic issues’.²⁸⁸ This bodes well for the kind of work needed for a truly gender-responsive due diligence, which could extend to company engagement at the policy advocacy level: for example, by supporting reform of discriminatory laws.²⁸⁹

The examples provided in this Briefing demonstrate that a gender-blind or gender-neutral approach to HRDD will not render visible or account for the impact of corporate activities on the lives of specific groups of women, men and gender non-binary people. Conducted properly, HRDD encompasses an understanding of context and the ways in which company behaviour and actions (or inactions) can

affect rights holders. Many initiatives, some of them touched on above, are fleshing out the parameters of gender-responsive HRDD in specific contexts. Some of the most promising of these are not gender ‘lenses’ grafted onto existing, unequal power structures but rather have trained their attention on more fundamental tasks: the need to challenge harmful gender norms, rethink existing institutions and reform discriminatory laws. And companies are participating in these initiatives. This is an indication that larger change is possible.

286 OHCHR, ‘Challenge of Climate Change is Transformative’, 9 November 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/ClimateChangeCloud.aspx> (last accessed 19 November 2018):

‘One of the most significant things about the combination of gender and climate action is the potential for climate action to be transformative’, Nazhat Shameem Kahan, Ambassador of Fiji to Switzerland said. ‘We do not perpetuate the existing inequalities when dealing with climate change. Climate change is a new challenge for us, but it is not business as usual. In my view, gender responsiveness is a silver lining in the cloud of climate change.’

287 Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN doc A/73/163, 16 July 2018, para 56.

288 Ibid, para 58. The report identifies the Accord on Fire and Building Safety in Bangladesh, discussed above, as an example of such collaboration.

289 See The World Bank, *Women, Business and the Law 2018*, <http://documents.worldbank.org/curated/en/926401524803880673/pdf/125804-PUB-REPLACEMENT-PUBLIC.pdf> (last accessed 19 November 2018). Among the report’s findings: of 189 economies studied, 104 still put legal restrictions on women’s employment.

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