ACADEMY BRIEFING N°12

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

JOANNA BOURKE MARTIGNONI | ELIZABETH UMLAS
DECEMBER 2018

THE ACADEMY A JOINT CENTER OF
ACKNOWLEDGEMENTS

This Academy Briefing was researched and written by Dr Joanna Bourke Martignoni, Senior Researcher at the Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy) and Dr Elizabeth Umlas, Lecturer at the University of Fribourg.

With thanks to Professor Marco Sassòli and Felix Kirchmeier, who provided comments on an earlier draft, and to Munizha Ahmad-Cooke for her copy-editing.

The Geneva Academy would like to thank the Swiss Federal Department of Foreign Affairs for its support.

DISCLAIMER

This Briefing is the work of the authors. The views expressed in it do not necessarily reflect those of the project’s supporters or of anyone who provided input to, or commented on, drafts. The designation of states or territories does not imply any judgement by the Geneva Academy or the Swiss Confederation regarding the legal status of such states or territories, their authorities and institutions, the delimitation of their boundaries or the status of any states or territories that border them.
## CONTENTS

### KEY MESSAGES

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. INTRODUCTION</td>
<td>7</td>
</tr>
<tr>
<td>A. RESEARCH QUESTIONS</td>
<td>10</td>
</tr>
<tr>
<td>B. METHODS</td>
<td>10</td>
</tr>
<tr>
<td>2. DEFINING THE CONTOURS OF HUMAN RIGHTS DUE DILIGENCE AND GENDER</td>
<td>11</td>
</tr>
<tr>
<td>A. HUMAN RIGHTS DUE DILIGENCE: DEFINITIONS AND CONCEPTS</td>
<td>12</td>
</tr>
<tr>
<td>B. GENDER EQUALITY AND NON-DISCRIMINATION</td>
<td>14</td>
</tr>
<tr>
<td>3. GENDER-RESPONSIVE HUMAN RIGHTS DUE DILIGENCE</td>
<td>19</td>
</tr>
<tr>
<td>A. PROPOSED LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS</td>
<td>19</td>
</tr>
<tr>
<td>B. NATIONAL LAWS AND ACTION PLANS ON HUMAN RIGHTS DUE DILIGENCE</td>
<td>20</td>
</tr>
<tr>
<td>C. OTHER GUIDANCE AND TOOLS ON DUE DILIGENCE AND GENDER</td>
<td>24</td>
</tr>
<tr>
<td>4. GENDER-RESPONSIVE DUE DILIGENCE IN CONTEXT</td>
<td>29</td>
</tr>
<tr>
<td>A. GLOBAL SUPPLY CHAINS</td>
<td>29</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>30</td>
</tr>
<tr>
<td>2. SOCIAL AUDITING AND BEYOND</td>
<td>33</td>
</tr>
<tr>
<td>3. RETHINKING GENDER RELATIONS IN GLOBAL SUPPLY CHAINS</td>
<td>36</td>
</tr>
<tr>
<td>B. LAND-BASED AGRICULTURAL INVESTMENTS</td>
<td>41</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>42</td>
</tr>
<tr>
<td>2. GENDER INEQUALITY AND LAND-BASED AGRICULTURAL INVESTMENTS</td>
<td>43</td>
</tr>
<tr>
<td>3. LAND TENURE AND PROPERTY RIGHTS</td>
<td>45</td>
</tr>
<tr>
<td>4. OUTGROWER AND CONTRACT FARMING SCHEMES</td>
<td>48</td>
</tr>
<tr>
<td>5. AGRICULTURAL EMPLOYMENT</td>
<td>49</td>
</tr>
<tr>
<td>6. GENDER-RESPONSIVE HRDD IN LAND-BASED INVESTMENTS</td>
<td>50</td>
</tr>
<tr>
<td>C. CONFLICT-AFFECTED ZONES</td>
<td>52</td>
</tr>
<tr>
<td>1. INTRODUCTION</td>
<td>52</td>
</tr>
<tr>
<td>2. WHY FOCUS ON CONFLICT ZONES?</td>
<td>53</td>
</tr>
<tr>
<td>3. SECURITY FORCES AND GENDER-BASED VIOLENCE</td>
<td>54</td>
</tr>
<tr>
<td>4. SOFT LAW AND SECURITY PROVISION</td>
<td>58</td>
</tr>
<tr>
<td>5. ENHANCED CORPORATE DUE DILIGENCE, NUANCED RESEARCH AND ‘RETHINKING GENDER’</td>
<td>59</td>
</tr>
<tr>
<td>5. CONCLUSIONS</td>
<td>64</td>
</tr>
</tbody>
</table>
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

---


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’.

growth is sought is not gender neutral. 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 benefitting 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 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.

Further, many companies have spoken out publicly against recent anti-LGBT legislation in North Carolina and Texas. 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. 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.


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. 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.

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.

Gender is a category of analysis that can be used to render visible relationships of power and domination. 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. 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.

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.

---


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 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 their agenda without necessarily making gender a priority in their methods. 24 The lack of gender-sensitivity that remains in much HRDD practice, or a failure to consider the relevance of gender to different contexts, might mean that businesses are violating their obligations to respect human rights. The gender perspective in this study aims to offer a guide to companies about how they can integrate gender into their existing due diligence processes.

13 UNGPs, supra fn 1, Guiding Principle 17.
14 UNGPs, supra fn 1, Guiding Principles 18–21.
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.
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 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 ‘true’ 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

---

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.


27 Prügl and Tornhill, supra fn 26.

28 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.


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 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.

society’ to promote and respect human rights also creates duties for businesses. 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.

The International Labour Organization (ILO) plays a pivotal role in advancing fundamental rights at work and associated guarantees on gender equality. 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 is its Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the proposed ILO Convention and Recommendation on Ending Violence and Harassment in the World of Work.

In numerous international instruments, the international community – including business actors – has endorsed gender integration or gender mainstreaming as a critical and strategic approach for the achievement of gender equality. 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. 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 explicit 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.

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. 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.

---

35 ICHRBP, Beyond Voluntarism, supra fn 34, pp 56-62.

36 See in particular, CESCR, General Comment no 24 (2017) on State Obligations in the Context of Business Activities, UN doc E/C.12/2017/4, paras 4-5: ‘In addition, under international standards, business’ entities are expected to respect Crown 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/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 internationally 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.


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.’


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.


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.'
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.’

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), 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


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’. The OEIGWG is now tasked with incorporating input from the October 2018 session into a ‘First Draft’ to be discussed in 2019.53

**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.54 And in fact, laws have begun to emerge that explicitly require 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.55 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.56

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.57

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;58 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.59 The MSA proposes information that companies can include in their statements (such as

---


54 Lai n° 2017-399, 27 March 2017 relative au devoir de vigilance des sociétés mères et des entreprises dont les sièges sont situés sur le territoire national.

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).


58 Modern Slavery Act (MSA) 2015, http://www.legislation.gov.uk/ukpga/2015/50/enacted_section-54/enact appreciation...
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. 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.

None of the above laws mentions gender-related issues in connection with due diligence. 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’, 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. 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.

National Action Plans (NAPs) represent another concrete way in which states have begun to implement the UNGPs. 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. As of late 2018, 22 countries had produced NAPs, with a similar number in progress. 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. 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.

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’. Three years later, the Danish Institute for Human Rights (DIHR) mapped topics for state attention as they implement the UNGPs. 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 states that have or are working on laws and policies to address issues such as parental leave, gender equality and female entrepreneurship. 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.’


68 Ibid.


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. This integration would help companies ‘go beyond “do no harm” to proactively contribute towards the protection, promotion and fulfillment of women’s human rights’. 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’.

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 and gender impact assessments that ‘take account of institutional barriers to stakeholder engagement, such as “gender and power imbalances”’. The Guidance also calls for companies to identify and remove potential barriers to stakeholder engagement, such as ‘gender and power imbalances’.

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’. The Guidance also calls for companies to integrate gender equality into indicators that could help frame gender-responsive HRDD. The 2030 Sustainable Development Goals (SDGs) and the private-sector efforts geared toward the realization of the SDGs provide 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’ 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’.

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’. The Guidance also calls for companies to identify and remove potential barriers to stakeholder engagement, such as ‘gender and power imbalances’.

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’. 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’ 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’.

73 Ibid, p 2.
74 Ibid, pp 14 and 17.
76 Ibid, p 51.
77 Ibid, p 76.
Women’s Empowerment Principles

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’. 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. 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’; 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’. 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.

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’. 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. 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.

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’. 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)’. 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. Within these narratives...

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. Thögersen, ‘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.
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.91

‘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


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.


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


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). Multinational brands in sectors such as apparel and textiles, footwear, consumer electronics, toys and automobiles, 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.

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

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’.

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. 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. Academic and NGO research has shown gender-based discrimination, including lower pay for women, forced pregnancy testing and sexual harassment to be common in maquiladoras, duty-free assembly plants found primarily on the US–Mexico border.

In the US agriculture sector, it is estimated that over 80 per cent of women farmworkers (many of them immigrants) are subjected to sexual abuse and harassment.

97 As John Ruggie wrote recently, ‘[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.


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’.109 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’.110 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.111

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.’112 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.’113

Further, female workers are prevalent in homeworking situations at the unmonitored lower tiers of GSCs, where working conditions and pay are often extremely poor.114 Most home-based workers in GSCs are ‘subcontracted or dependent workers working for an employer, intermediary or subcontractor for a piece rate’.115 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.116 Despite the advantages afforded women homeworkers (flexibility to balance paid work with unpaid domestic 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.117

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; the potential for social auditing to weaken government regulation and trade unions’ roles; 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,
such as sexual harassment. 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’. 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.

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. Although many factory fires and building collapses had preceded Rana Plaza, the sheer scale of the tragedy forced many buyers 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, 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).

The Accord has been discussed as a potential model for other sectors and countries in the longer run.

At the same time, the continued widespread use of social auditing by international buyer companies 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 retailers or combining private and public regulation of supply chains.

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’.

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. 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. 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’. 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.


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.


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.


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


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. RE THINKING 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 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 ‘living 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 gender 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

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),

133 FairWear Foundation, Breaking the Silence, supra fn 98.
134 Ibid.
137 FairWear Foundation, Breaking the Silence, supra fn 98.
138 APWLD, Statement, supra fn 96.
139 Prügl, ‘Corporate Social Responsibility and the Neoliberalization of Feminism’, supra fn 26, pp 49 and 51.
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.
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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{148} One recommendation calls for companies to recognize, in part through gender-disaggregated data, how women are treated in their supply chains.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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’.\textsuperscript{152}

\textbf{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’.\textsuperscript{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’.\textsuperscript{154} Such a gender-blind approach, and a ‘singular focus on child labor’, can end up exacerbating ‘existing poverty and inequality’.\textsuperscript{155} Indeed, the authors suggest that child labour and homework are ‘a consequence of corporate purchasing and subcontracting policies’.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{158}

\textsuperscript{145} Ibid, p 7. The WSR Network points to the Bangladesh Accord as another example of worker-driven social responsibility.
\textsuperscript{146} Ibid, pp 8–9.
\textsuperscript{147} Oxfam, Behind the Brands, https://www.behindthebrands.org/about/ (last accessed 19 November 2018).
\textsuperscript{149} Ibid, p 117.
\textsuperscript{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.
\textsuperscript{151} Ibid.
\textsuperscript{152} Ibid, p 129.
\textsuperscript{153} A. Delaney, R. Burchielli and J. Tate, ‘Corporate CSR Responses to Homework and Child Labour in the Indian and Pakistani Leather Sector’ in K. Grosser, L. McCarthy and M. A. Kilgour (eds), Gender Equality and Responsible Business, Greenleaf, 2016, pp 172 and 179.
\textsuperscript{154} Ibid.
\textsuperscript{155} Ibid, pp 172 and 177.
\textsuperscript{156} Ibid, p 180, emphasis added.
\textsuperscript{157} Ibid, p 181, original emphasis.
\textsuperscript{158} Ibid, p 182.
\textsuperscript{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’. This is echoed in Oxfam’s recommendation that brands advocate for gender equity in sourcing-country agricultural laws. 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.

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.’ Whether companies are not responsible for and can do little about. This is the great challenge in getting companies to take gender seriously. 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

According to BSR, ‘alternative approaches’ to social auditing need more ‘systems and metrics’ to prove their effectiveness to companies. Yet as touched on by this section, emerging initiatives are already developing their own systems and metrics and are providing entry 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 among human rights advocates over the past decade. 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. 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.

---

160  Ibid.
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 ‘cultural relativist acceptability 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.
164  BSR, Gender Equality in Social Auditing Guidance, supra fn 128, p 134.
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.\(^\text{169}\) It is nonetheless apparent that ‘the phenomenon is massive and growing’.\(^\text{164}\) 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.’\(^\text{170}\)

**GRAIN: The Global Farmland Grab**

‘Profit-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.’\(^\text{171}\)

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 and political participation.\(^\text{172}\) 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.\(^\text{173}\)

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.\(^\text{174}\)

**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.\(^\text{175}\) There is a growing body of research from all regions of the world that demonstrates that land commercialization and agrarian reform projects have been significant negative consequences for human rights and livelihoods.\(^\text{173}\) 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.\(^\text{173}\)

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.\(^\text{174}\)

---


172 Goly 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.


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

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


179 Ibid.

long. 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. 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. 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 patriarchal societies, is male).

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 opportunities to participate in contract farming or outgrower schemes. 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. 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. 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.

For 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. 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.

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. 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. 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.


186 The World Bank, Gender in Agriculture Sourcebook, supra fn 166; IDLO, Women, Food, Land, supra fn 165.


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

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

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


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, 9.4, 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, 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.
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. 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. 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. 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.

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. Gender discrimination in credit markets also makes it more 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.

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.’

5. AGRICULTURAL EMPLOYMENT

Agricultural investment projects, particularly plantation agriculture, may create new paid employment opportunities for people in rural communities. 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...
• 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.

When investment projects have improved women’s incomes, they have sometimes helped to transform gendered cultural norms on decision-making within households and communities. 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.

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. As the ISID 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’.

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:


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


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


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

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

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. Vroolak, ‘Women and Private Military and Security Companies’, in N. 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.


216 See, for example, DCAF and ICRC, Addressing Security and Human Rights Challenges in Complex Environments: Toolkit, 3rd edn, June 2016, http://www.securityhumanrights.org/sites/default/files/publications/SHRC_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.


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.


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

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).

![Image of Security Forces and Gender-Based Violence]

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

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-

---

225 Ibid, p 137.
227 Anumo and Michael, ‘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.
232 On the latter, see ibid, p 14; DCAF and ICRC, Addressing Security and Human Rights Challenges, supra fn 216, p 83.
In the team’s view, this called into question the government’s ‘ability to independently investigate’ the allegations. 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, inadequate 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, in 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

---


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.


243 Ibid.


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, 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. A 2013 implementation guidance document 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. 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. It sets out the principles and standards for the responsible provision of security. Compliance is overseen by the International Code of Conduct Association (ICoCA), a Swiss non-profit organization. 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. 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.

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’. 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. Naujoks and Hartel call for ‘nuanced research’ to help understand the gender dimensions of MNC operations in CAS. At an even more fundamental level, Myrtinnen, Naujoks and El-Bushra point to the need for a whole ‘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’. This section discusses these approaches as potential foundations for gender-responsive due diligence in conflict zones.

251 The same is the case for the VP Fact Sheets and the ‘Roles and Responsibilities of Companies under the VPs’.
Because of the heightened human rights risks in CAS and the greater possibility of corporate complicity in gross human rights abuses, 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. This increased responsibility on businesses is sometimes called ‘enhanced human rights due diligence’.

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’.

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. From Red to Green Flags identifies five areas in which gender sensitivity is particularly important in conflict zones: livelihoods, resources, services, security and health.

 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.

Similarly, investigation of allegations of human rights abuse by security forces should be sensitive to gendered aspects of the situation. 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’.

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’.

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.

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 subcontractor staff affecting gender roles and social relations in informal secondary employments such as illegal bars or in sex work?’
- ‘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?’

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’. 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’.

---

[264] UNGPs, Guiding Principle 23 Commentary, supra fn 1.
[266] Killick, From Red to Green Flags, supra fn 230, p 59.
[268] Ibid, p 59.
[270] Ibid, p 142.
[272] These measures are suggested by Schultz 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.
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.” It also involves examining how gender roles relate to other factors such as age or ethnicity, 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. 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.

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’. 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. 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 gender-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.’


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

The Geneva Academy provides post-graduate education, conducts academic legal research and policy studies, and organizes training courses and expert meetings. We concentrate on branches of international law that relate to situations of armed conflict, protracted violence, and protection of human rights.

Established in 2007 by the Faculty of Law of the University of Geneva and the Graduate Institute of International and Development Studies, the Geneva Academy has acquired a global reputation for excellent teaching and research, and it attracts students of high quality to its master’s and training programmes. Our graduates are employed around the world, promoting and protecting international humanitarian law (IHL) and human rights (HR) in governments, NGOs, international organizations and academic institutions. The Geneva Academy thus contributes to the dissemination of legal knowledge in these crucial sectors.

Our scientific research focuses on clarifying IHL, strengthening human rights protection, and developing the areas of complementarity between IHL and international human rights law. In these areas, the Geneva Academy makes a specific contribution to policy development and debate, in government and among scholars and practitioners.

The Geneva Academy is a cosmopolitan community located in the heart of Geneva, an international city and humanitarian hub. Through close interaction with international organizations, NGOs, experts, and governments, we actively participate in global discussions of IHL, HR, international criminal law, and transitional justice.