

# *A Feminist Approach to the Binding Instrument on Transnational Corporations and other Business Enterprises*

Sanyu AWORI\*, Felogene ANUMO\*\*, Denisse CORDOVA MONTES\*\*\* and Layla HUGHES\*\*\*\*

---

**Keywords:** corporations, gender, inequalities, treaty, women

## I. INTRODUCTION

This article will illustrate how women are disproportionately impacted by the negative consequences of business activities. It will then briefly discuss developments within the United Nations (UN) that seek to address the intersection of gender and business and human rights with a focus on the proposed binding instrument on transnational corporations and other business enterprises. Finally, the article will highlight key proposals for the binding instrument to ensure that women's experiences are visible and prioritized in the discourse on corporate regulation and accountability.

## II. THE IMPACT OF BUSINESS-RELATED HUMAN RIGHTS ABUSES ON WOMEN

Business-related human rights abuses are not gender neutral and occur within a context of power inequalities, patriarchal systems and entrenched discrimination that collude to have a disproportionate impact on women. This impact is seen in the different but overlapping roles that women hold in society as workers, peasants and other food producers, women human rights defenders, and in communities affected by the adverse impact of businesses.

Women workers are concentrated in precarious jobs at the bottom of global value chains and are over-represented in the informal economy in environments characterized by an absence of social, labour and legal protections. This is exacerbated by gender stereotypes about women's work that results in job segregation and gendered disparities in wages and benefits.

Similarly, peasant women cultivate, plough and harvest more than 50% of the world's food and are essential to the livelihoods of their communities: they act as caregivers, food producers, and carry and preserve traditional knowledge. However, peasant women are often excluded from the formulation of agricultural, rural development, economic, trade and financial policies and decision-making. In this context, peasant women are

---

\* International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific).

\*\* The Association for Women's Rights in Development (AWID).

\*\*\* FIAN International.

\*\*\*\* Center for International Environmental Law (CIEL).

rendered unable to exercise control over the natural resources on which they depend while increasingly being faced with rapid urban development and industrialization.<sup>1</sup>

When women are part of communities affected by business activities, they are more adversely affected than men. Large-scale agricultural investment projects, resource extraction, and other infrastructure projects can compound unequal power relations as land ownership remains a domain of male privilege through the interplay between patriarchal structures and colonial histories as well as retrogressive cultures and traditions. In over 90 countries, women's rights to land are limited by legal or sociocultural norms,<sup>2</sup> and women are typically excluded from decision making related to land use; and are less likely to be considered in redress mechanisms simply because they are often not recognized as heads of households.

This is against a backdrop of threats to civic freedoms. The number of attacks on defenders working on business and human rights has grown considerably over the years with at least 850 attacks reported between 2015 and December 2017.<sup>3</sup> While all human rights defenders working on corporate accountability face grave risks, there are specific gendered implications for women. Research by the Association for Women's Rights in Development<sup>4</sup> shows that women human rights defenders experience a number of violations as a direct consequence of their human rights advocacy and gender identity. This is because in challenging systems of governance and power relations, they are also challenging traditional gender roles.

### III. UN DEVELOPMENTS ON GENDER AND BUSINESS AND HUMAN RIGHTS

There is momentum to address the gendered dimensions of business activities in relation to human rights. The UN Committee on Economic, Social and Cultural Rights (CESCR) published their General Comment No. 24 on state obligation in the context of business activities.<sup>5</sup> The General Comment recognizes that women disproportionately experience the negative impacts of business activities and face heightened risks because of multiple and intersectional discrimination. To address this, CESCR calls on states to 'incorporate a gender perspective into all measures to regulate business activities' and recommends affirmative action measures to accelerate women's representation in the labour market and women's leadership in the corporate sphere.<sup>6</sup>

CESCR's General Comment follows the UN Committee on the Rights of the Child that published its General Comment No. 16 regarding the impact of the business sector

---

<sup>1</sup> Andrea Nuila and Priscilla Claeys, 'Rural Women's Rights in the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas', *FIAN International Briefing* (March 2016), [http://www.fian.org/fileadmin/media/Publications/Peasants\\_Rights/droits\\_fe\\_rurales\\_UK\\_web.pdf](http://www.fian.org/fileadmin/media/Publications/Peasants_Rights/droits_fe_rurales_UK_web.pdf) (accessed 5 April 2018).

<sup>2</sup> Landesa, 'The Law of the Land: Women's Rights to Land', <http://www.landesa.org/resources/property-not-poverty/> (accessed 5 April 2018).

<sup>3</sup> Business and Human Rights Resource Centre, 'Key Findings' (February 2018), <https://www.business-humanrights.org/en/key-findings-from-the-database-of-attacks-on-human-rights-defenders-feb-2017> (accessed 5 April 2018).

<sup>4</sup> Association for Women's Rights in Development and the Women Human Rights Defenders International Coalition, 'Women Human Rights Defenders Confronting Extractive Industries', (2017) [https://www.awid.org/sites/default/files/atoms/files/whrds-confronting\\_extractive\\_industries\\_report-eng.pdf](https://www.awid.org/sites/default/files/atoms/files/whrds-confronting_extractive_industries_report-eng.pdf) (accessed 5 April 2018).

<sup>5</sup> Committee on Economic, Social and Cultural Rights, 'General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', E/C.12/GC/24 (10 August 2017).

<sup>6</sup> *Ibid.*

on children's rights.<sup>7</sup> General Comment No. 16 draws attention to gender-based violence in conflict zones and it also recognizes that business policies requiring parents to work long hours will particularly impact girls who, due to the gender division of labour, are more likely to assume domestic and childcare obligations in their parents' absence.

More robust gender guidance has come from the UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) that has recommended that states address the impact of business activities on women's rights, including extraterritorial impacts.<sup>8</sup> The CEDAW Committee has raised the need for gender impact assessments for investments and has emphasized the need for gender-sensitive mechanisms to strengthen women's access to justice for corporate abuses.<sup>9</sup> In its General Recommendation No. 34, the CEDAW Committee calls on states to uphold their extraterritorial obligations; more specifically, to 'regulate the activities of domestic non-State actors within their jurisdiction, including when they operate extraterritorially' and to take 'regulatory measures to prevent any actor under their jurisdiction, including private individuals, companies and public entities, from infringing or abusing the rights of rural women outside their territory'.<sup>10</sup>

Similarly, the UN Conference on Trade and Development (UNCTAD) has examined how investment by transnational corporations affects gender issues and recommends that governments adopt a strategy towards gender and ensure consistency with national policies. UNCTAD also recommends that businesses ensure non-discrimination and equality in treatment in the workplace, incorporate gender concerns in their investment projects and business models, and assess the gender impact of divestment decisions.<sup>11</sup>

The Sustainable Development Goals (SDGs), whilst not explicitly addressing the issue of the impact of business activities on women, do establish specific targets that are aimed at redressing some of the underlying causes of the disproportionate impact that women experience from business activities. SDG Goal 5, which seeks to empower all women and girls, includes targets on unpaid care and domestic work, women's participation at all levels of decision making, and women's equal rights to economic resources among others.

Finally, the UN Guiding Principles on Business and Human Rights (the UNGPs) articulate existing human rights standards, which would include women's human rights as defined in other treaties. The framework underlines that it should be 'implemented in a non-discriminatory manner' and makes a few references to gender-specific risks, but it is not comprehensive in addressing the intersection of gender and business and human rights. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises is seeking to address this gap by referring to the gendered dimensions of adverse business activities in their work. Their report on

---

<sup>7</sup> Committee on the Rights of the Child, 'General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights', CRC/C/GC/16 (17 April 2013).

<sup>8</sup> Committee on the Elimination of All Forms Discrimination against Women, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women', CEDAW/C/2010/47/GC.2 (19 October 2010).

<sup>9</sup> Committee on the Elimination of All Forms of Discrimination against Women, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports Of Germany', CEDAW/C/DEU/CO/7-8 (9 March 2017).

<sup>10</sup> Committee on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 34 on the Rights of Rural Women', CEDAW/C/GC/34 (4 March 2016).

<sup>11</sup> United Nations Conference on Trade and Development, 'Investment by TNCs and Gender: Preliminary Assessment and Way Forward', [http://unctad.org/en/PublicationsLibrary/webdiaeia2014d4\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2014d4_en.pdf) (accessed 5 April 2018).

access to effective remedies examined how women's lived realities should inform both the process and outcomes in the provision of remedies and emphasized 'how critical it is for both States and businesses to engage with women by applying a gender lens while implementing the Guiding Principles'.<sup>12</sup>

However, the UNGPs and other voluntary initiatives are beset by the absence of mechanisms to monitor and enforce implementation. Given the growing asymmetries of power between states and corporations, the realities of corporate capture, and lack of political will by governments to regulate companies, there is global impetus to establish binding norms as corporate self-regulation and voluntary compliance have limitations.

#### IV. THE UN BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

The current negotiations for a legally binding instrument represent a historic opportunity to regulate transnational corporations and other business enterprises. This initiative is led by the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises (IGWG) mandated by the UN Human Rights Council in 2014.

The proposed binding instrument provides an opportunity to plug the accountability gaps. Yet given prevailing gender-based discrimination, there is the risk that women's experiences will be rendered invisible and women's human rights voices excluded from the discourse on corporate regulation and accountability. If a gender approach to the treaty is not prioritized, it may further the normalization of human rights violations experienced by women, girls and trans people. It is for these reasons that a collective of feminist organizations<sup>13</sup> are working together to influence the process to ensure that a gender perspective underpins the binding instrument.

#### V. INTEGRATING A GENDER PERSPECTIVE INTO THE BINDING INSTRUMENT

In preparation for the third session of the IGWG in October 2017, feminist organizations submitted a briefing paper that underscored concrete ways that the treaty should integrate a gender perspective.<sup>14</sup>

Firstly, it recommended that the treaty have explicit reference to mandatory human rights-based gender impact assessments conducted with the meaningful participation of women from all affected communities. Gender impact assessments would analyse the social, cultural, political and economic contexts to identify the gender-specific risks in all areas of business operations, particularly as women experience multiple and intersecting forms of discrimination based not only on their gender, but on their race, migrant status,

<sup>12</sup> Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, A/72/162 (18 July 2017).

<sup>13</sup> 'Feminists for a binding treaty' is a collective of organizations working to integrate a gender perspective into the legally binding instrument on transnational corporations and other business enterprises.

<sup>14</sup> Joint Submission, 'Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises', (20 October 2017) <https://wilpf.org/wp-content/uploads/2017/10/Jt-statement-gender-into-the-treaty-October-2017.pdf> (accessed 5 April 2018).

religion, age and other factors. These assessments should be ongoing processes that are conducted independently to ensure that business activities prevent human rights abuses.

The second recommendation focuses on gender-sensitive justice mechanisms. Women's rights to an effective remedy are stymied by substantive, procedural and practical barriers; judicial and non-judicial systems need to address this to ensure they are accessible to all women and are grounded in international standards. Given the transnational impact of business activities, the treaty also needs to expressly articulate a state's extraterritorial human rights obligations.

The third recommendation calls for the treaty to recognize and facilitate an enabling environment for women human rights defenders to do their work, free of reprisals, intimidation and violence. This is because 'respecting, protecting and enabling the work of women human rights defenders is a necessary condition to the realization of human rights and the rule of law'.<sup>15</sup>

At the heart of these proposals is understanding that women are not an inherently vulnerable group, but are rights-holders whose dignity, agency and autonomy are undermined by structural inequalities. Integrating a gender perspective into the treaty should therefore seek to address the inequalities that lead to differentiated impacts between men and women.

The IGWG reports to the UN Human Rights Council and has shared three reports for each of the annual multi-stakeholder consultations held in October every year. In its first report<sup>16</sup>, the IGWG referred to a gender-sensitive approach to ensure that women workers' rights are protected; it noted that for the binding instrument to be effective, it must be written from a gender perspective given the discriminatory impact of gender roles and norms. Similarly in the second report,<sup>17</sup> the IGWG notes how stakeholders point to the Convention on the Elimination of all Forms of Discrimination against Women as a framework that should be explicitly referenced in the instrument, given that it also sets out the extraterritorial obligations of states for national companies operating abroad. This report also draws links to mechanisms such as the UN Special Rapporteur on Violence against Women, and the need for gender analysis in human rights impact assessments and for remedies to be gender sensitive. In its latest report, the IGWG refers to the call for a gendered approach to the treaty, given the disproportionate impact of business-related human rights abuses on women, and the report also recognizes that preventative measures need to adopt a gender perspective and remedies need to be gender sensitive.<sup>18</sup> These admissions reflect the concerted advocacy of feminist voices that have been present from the start of the process.

Feminists will continue to support the intergovernmental process of negotiations and call on states to ensure that a zero draft (a working first draft of the treaty text) of the

---

<sup>15</sup> Ibid.

<sup>16</sup> Report on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, A/HRC/31/50 (5 February 2016).

<sup>17</sup> Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/34/47 (4 January 2017).

<sup>18</sup> Report on the Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/37/67 (24 January 2018).

legally binding instrument should serve as a basis of the fourth session of the IGWG be presented in July 2018, and that a work plan that enables the IGWG to comply with its mandate beyond 2018 be adopted.

By making explicit references to women's human rights and identifying the gender-specific risks in business activities, the binding treaty can proactively address the grossly unequal power relations that inform the context of business-related human rights abuses.

While multiple and complementary strategies are necessary to secure women's human rights, feminists are seizing the opportunity of the binding instrument to ensure that the nuanced gendered dimensions of corporate regulation and accountability are front and centre in the debates.