

Submission to the Working Group on the issue of human rights and transnational corporations and other business enterprises in response to the Open Call for Input regarding the Working Group's Report on the Gender Lens to the UN Guiding Principles on Business and Human Rights

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Introduction

Women experience business-related human rights abuses differently and disproportionately in relation to their position as workers, relatives of workers, and members of communities affected by harmful business activity. As workers, issues such as unequal pay, poor working conditions, lack of child care support and sexual harassment are well documented and important. Our focus in this submission is the position of women who are either: 1) relatives of workers harmed by businesses, who suffer harms themselves as a consequence of their caring roles; 2) members of communities engaged in social reproductive activities who suffer harm when their communities are impacted by harmful business practices. While we are very concerned with preventing business practices that violate human rights, (the *protect* and *respect* dimensions of the Guiding Principles) and are aware of the critical importance of understanding impacts on social reproduction in relation to these dimensions, our focus in this submission is on the *remedy* dimension of the Guiding Principles. This is because we are currently engaged in a multi-disciplinary project examining gender, harm and social reproduction and are interested in ensuring that the international human rights frameworks include a clear recognition of the ways in which women suffer harm related to their social reproductive roles that should result in remedies. This submission first defines social reproduction and depletion. It then considers this depletion through social reproduction in the context of business activities and how this impacts on understandings of remedy in the Guiding Principles. It makes two main recommendations in relation to the substantive definition of harm and victim; and in relation to forms of remedy.

1 Social reproduction and depletion

Social reproduction includes the everyday practices that support, but are often also in tension with, production in society including:¹

- (1) biological reproduction (including reproducing labour). This includes the provision of the sexual, emotional and affective services that are required to maintain family and intimate relationships;
- (2) unpaid production in the home of both goods and services. This includes different forms of care, social provisioning through unpaid work in subsistence farming, family business as well as voluntary work directed at meeting needs in and of the community;
- (3) the reproduction of culture and ideology which stabilizes (and sometimes challenges) dominant social relations.

¹ Hoskyns C and Rai SM (2007) 'Recasting the international political economy: Counting women's unpaid work' *New Political Economy* 12(3): 297–317.

Social reproductive work under current regimes of production and exchange, as noted by feminist economists, is largely treated as invisible, private and is not counted in economic measures such as the GDP. At the same time, such recognition is absolutely necessary to the functioning of the economy and society. Women perform the bulk of this work which is unremunerated and undervalued. This position has only recently been given close attention in international human rights law.² The path-breaking report of the UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, noted in 2013 that:³

...unpaid care work is...a major human rights issue...that heavy and unequal care responsibilities are a major barrier to gender equality and to women's equal enjoyment of human rights, and, in many cases, condemn women to poverty. Therefore, the failure of States to adequately provide, fund, support and regulate care contradicts their human rights obligations, by creating and exacerbating inequalities and threatening women's rights enjoyment.

Unpaid social reproductive work by women has since found its way into the Sustainable Development Goals (SDGs). SDG 5 on gender equality includes under target 5.4 the following:

Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate.

We would like to take this forward and suggest, as Rai et al have argued, that social reproductive work, especially where it is not counted as contributing to the economy, leads to depletion of those engaged in it.⁴ They define *depletion through social reproduction* (DSR) as 'the level at which the resource outflows exceed resource inflows in carrying out social reproductive work over a threshold of sustainability, making it harmful for those engaged in this unvalued work' (2014:3-4). The harm through depletion is experienced not only by individuals involved in this work – to their health, both physical and mental, and to their sense of self as well as to their entitlements, but also to the fabric of the household and those who inhabit it, as well as communities of which they are members. It thus results in the decrease in collective household resources, including lack of leisure time spent together, failure to manage the consequences of an increase in the number of household members engaged in wage labour and reduced support structures. It also harms the communities within which households and individuals live their lives, which includes the shrinking of spaces for community organisation as a result of a lack of time commitments from those mobilized into paid work, depletion of neighbourliness, and of possibilities of collective provisioning. DSR then continues to leach out from the labouring bodies, households and communities, unrecognised, unmapped and unvalued and results in harm to those engaged in this work. If unrecognized, depletion erodes individual lives as well as social institutions (family, community groups and resources), which produces a crisis in society.

² Although note General Recommendations 16 and 17 of the CEDAW Committee from 1991.

³ Special rapporteur on extreme poverty and human rights (2013) A/68/293 http://www.un.org/ga/search/view_doc.asp?symbol=A%2F68%2F293&Submit=Search&Lang=E

Also see: Magdalena Sepúlveda Carmona & Kate Donald (2014) 'What does care have to do with human rights? Analysing the impact on women's rights and gender equality', *Gender & Development*, 22:3.

⁴ Rai SM, Hoskyns C and Thomas D (2014) 'Depletion: The cost of social reproduction' *International Feminist Journal of Politics* 1: 86–105.

2 Remediating depletion through social reproduction caused by business

This depletion through social reproduction is rendered more harmful when business practices put strain on workers and communities. For example, where a mine routinely violates health and safety laws leading to workplace injury, the families of the ill or injured miners may have to give up paid or unpaid work to provide care. This consequence was noted by the South African High Court in class action litigation against 32 gold mines. The court said:⁵

It has to be borne in mind that while the mineworker experienced pain and suffering from the loss of amenities of life prior to his death, his widow and children too, bore some hardship by virtue of the care they were required to give to him as a result of his loss of amenities of life.

It further noted that:⁶

The care-work is demanding and includes efforts such as carrying, lifting and bathing the mineworkers, monitoring their medication, and staying up at night to attend to their needs. These women, and in some cases girls, are often anxious about the physical deterioration of their loved ones, the mineworkers, and as a result “have reported experiencing tearfulness, nightmares, insomnia, worry, anxiety, fear, despair and despondency, . . . trauma . . . headaches, body aches and physical exhaustion.” In short, they too bear a heavy burden as a result of the mineworkers contracting silicosis and TB. Often, the care work requires fulltime attention, effectively compelling many women and girls to forego income-generating, educational, and other opportunities.

The harm to the carers described here can generate a ripple effect of harms that can undermine family and community. While the court’s acknowledgment is significant, most domestic legal systems fail to provide remedies in tort for the unpaid caring labour and its impacts on the carer that follow from actionable harms. We see the international human rights framework on remedy for harms by businesses as an opportunity to take seriously the feminist work in tort law that has critiqued this aspect of the law.⁷

The Working Group’s 2017 report on remedy is an important effort to elaborate on the meaning of remedy in relation to business and human rights.⁸ The report of the Committee on Economic, Social and Cultural Rights on state obligations in relation to ICESCR in the context of business activities is also significant.⁹ While both reports highlight issues related to gender we recommend greater guidance on remedy in relation to harms that impact on those providing social reproductive labour and its consequences for them and their communities.

The nature of harm and its victims

⁵ Nkala and Others v Harmony Gold Mining Company Limited and Others [2016] (7) BCLR 881 (GJ), at 213.

⁶ Ibid, at 214. For a discussion of this judgment by the authors of this submission see: Goldblatt, BA & Rai, SM 2018, ‘Recognizing the Full Costs of Care? Compensation for Families in South Africa’s Silicosis Class Action’, *Social and Legal Studies*.

⁷ For a discussion of these feminist critiques of tort law see Goldblatt and Rai, above n 6, 16-17.

⁸ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN General Assembly 72nd Session, (18 July 2017) A/72/150.

⁹ CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24.

It is helpful to draw on UN work on remedy that has looked beyond the immediate victim of harm to recognise the family and community also impacted. Thus, the UN's 2005 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' define 'victims' as (para 8):

... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also *includes the immediate family or dependants* of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. (our emphasis).

Rashida Manjoo, in her role as Special Rapporteur on violence against women, has noted that this understanding of 'communities of harm' has important implications for women and different forms of family.¹⁰ Manjoo, in a discussion of gender and reparations following conflict, noted that reparations must go beyond compensation to broader issues of redress and a notion of remedy that transforms the status quo, including through the empowerment of women. We would argue that a similar approach to remedy is needed in relation to the more 'mundane' and 'everyday' harms committed by businesses.

We recommend that the Working Group builds gender and DSR into the substantive understanding of remedy by ensuring that remedies are available to victims widely defined as including those required to provide social reproductive labour. This alters the substantive meaning of harm by widening it to include the ripple effects or communities of harm that flow from the impact on the direct victim.

This broader notion of rights-holder may conflict with domestic legal frameworks that often limit compensation for harm to the victim as a discreet legal subject, unencumbered or supported by family. A more relational notion of victim challenges the idea of autonomous legal actors and opens the door to a broader idea of connectedness in relation to remedies for harm. At the same time, formal legal definitions of family/dependency may act to exclude other forms of family such as non-marital partnerships, same-sex partnerships, and multiple generational households. ***It is important that a functional and non-discriminatory understanding of family is used to reach appropriate dependents.***

Forms of remedy

In addition to these substantive changes to understandings of harm and those entitled to claim remedies, we recommend that gender perspectives and more specifically, DSR should be systematically built into the forms of remedy. The Working Group report on remedy draws on the UN Basic Principles' understanding of reparation as including *restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition* of harm. All of these elements should properly address the role of women and the social reproductive work they do at costs to themselves

¹⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/14/22, 2010.

and others; and should be used creatively and transformatively to address gender inequality in the context of remedying human rights violations caused by businesses. We recommend that the Working Group develop clear approaches to the forms of remedy that take account of gender and in particular DSR.

This could be informed by broader efforts to consider how to remedy DSR. Rai et al suggest three ways of doing so: mitigation, replenishment and transformation.¹¹ *Mitigation*, is an individual attempt to lessen the consequences of DSR by, for example, paying for help or sharing care responsibilities within the extended family. Whilst this is most important, given the gendered nature of social reproductive work, it should not place increased burdens on women down the care chain.¹² Remedies must compensate care work undertaken by family members and its impact on them or should provide payment for outside parties to undertake this work, particularly where state provision of health and social services are inadequate. Creative remedies may need to marshal state and non-state resources to overcome the impact of corporate harms.

Replenishment can occur as a form of remedy where a business is required not only to compensate people for work done or pay for it, but where the community is supported to build up its care resources, for example through the provision of new services such as a clinic, road or provision of transport. Businesses could be required to contribute to this form of ameliorating harm by, for example, introducing fair trade initiatives to provide support to the workers. From 2010 onwards Body Shop International (BSI) and two co-operatives in Nicaragua made a charge to the buyers for the unpaid work of women, domestic and otherwise, which they see as providing a subsidy to the cash crop production. The cash provided has then been used to create a savings and loan scheme for women, which can be disbursed to fund small projects that support social reproductive work. As a result women appear to be more confident – some have joined the co-operatives in their own right and at least some are beginning to have more power in the family.¹³

Transformation is the third strategy of reversing depletion. Rai et al argue that this includes:

... restructuring of gendered social relations. This would mean, for example, both men and women being fully involved in the sharing of SR. This would transform not only the lives of millions of women who largely bear the burden of this work today, but would also mean the restructuring of wider social relations, as gender based inequalities outside the home are challenged to equalize social reproductive work (2014:14).

Built into a remedial framework, transformation could occur where, for example, women who would normally provide unpaid care following harms caused by business, are provided with education and training along with job opportunities to tend to direct victims or to repair communities along with men. Good quality child care including parental leave benefits for men and women could encourage changes in caring responsibilities through transformative remedial measures.

¹¹ Above n 4.

¹² See for example, Sonia Michel and Ito Peng (eds) (2017) *Gender, Migration, and the Work of Care: A Multi-Scalar Approach to the Pacific Rim* (Palgrave Macmillan).

¹³ Hoskyns, C., Hoskyns, N., Butler, F., 2012. Pricing fair trade products to include unpaid labour and empower women – the example of Nicaraguan sesame and coffee cooperatives. *Oñati Socio-legal Series* [online], 2 (2), 24-35.

We recommend that the remedial framework for addressing human rights violations by businesses take account of gender and social reproductive work in particular, in the development of far-reaching forms of remedy that aim to mitigate, replenish and transform depletion through social reproduction and contribute towards the advancement of substantive gender equality.

Conclusion

While this submission has only addressed the remedy element of the Guiding Principles, aspects of our argument could and should be extended to the respect and protect dimensions of the framework so as to avoid harm to women by requiring them to undertake additional social reproductive labour that depletes them, their families and communities.