

Gender Lens to the UN Treaty on Business and Human Rights

Introduction

Business principles do not always converge with human rights principles. In various dimensions, from violence against women, to women's economic participation, to tax, trade and investment, the gendered disparities are not resolved uniquely by market participation and growth dynamics. In fact, the growth-based model often puts women and other individuals who are marginalised in disadvantageous positions, ie, trapped in poverty, in unequal power relations and subject to abuse and violence.

A major human rights instrument to regulate the economy, namely the United Nations (UN) Treaty on Business and Human Rights, has started to change the conversation on neoliberalism by proposing that human rights have a priori value before economic imperatives. This entails the regulation of all corporate relationships by human rights principles, therefore recognising the primacy of human rights over divisive business instruments such as bilateral treaties on trade and investment.

Activities by corporate actors have differentiated and gendered impacts on the populations local to where corporates operate. Whether this is the disparity of pay in terms of the female labour force, the concern over gender-based violence, or indeed the impact of irresponsible corporate practices that pose serious human rights risks. Often, the gendered impacts of such practices or impacts that exacerbate other pre-existing inequalities are not adequately recognised. For example, environmental destruction often has a greater impact on women, who have less opportunities for alternative livelihoods compared to men who can travel more easily in search of paid labour.

Similarly, exploitative labour practices affect women and marginalised individuals and groups disproportionately due to their over representation in low-paid sectors. For

example, aggressive tax avoidance or evasion is a drain on revenues that could provide public services most needed by women and people living in poverty, while higher direct taxes like value added tax (VAT), are borne by women in a disproportionate fashion.

When instances of gender-related human rights harm has occurred, full and effective remedy and reparation is required, proportional to the gravity of the abuse. In order to guarantee that, we need a model that is centred on human rights principles rather than on the relentless pursuit of growth for its own sake. We need to challenge the asymmetries of power that lead to dialogue between business entities and local communities starting off on the wrong foot. The profit motive of business entities must be an expression of collective public interest rather than being an expression of the sole interests of the business entities. All corporate activities must be accountable and beneficial for local communities and guarantee ethical and just corporate conduct and behaviour towards them.

The UN Guiding Principles (UNGPs) on Business and Human Rights endorsed in 2011 have been an important step in establishing the norm that human rights frameworks and principles also apply to business entities. But they have their limitations as they are only voluntary in their application and adherence, and are largely gender blind. The 2019 UN Gender Guidance on Business and Human Rights tries to fill the gender gap, but does not establish binding rules, despite its explicit focus on access to remedy.

In 2013, the former UN Special Representative on business and human rights, John Ruggie, stated:

'The era of declaratory corporate social responsibility (CSR) is over. It is no longer enough for governments to act as though promoting CSR initiatives somehow absolve them of their obligations to govern in this

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domain, and to do so in the public interest. It is no longer enough for companies to claim they respect human rights; they must know and show that they do. And it is no longer enough for rights-holders merely to harbour the hope that governments and companies will fulfil their respective obligations; they are entitled to demand remedy for harm done.’

ACT Alliance, as an international coalition of churches and faith-based organisations that work together on emergency preparedness and humanitarian response, sustainable development, and advocacy, affirms that voluntary norms on business and human rights are not enough. Together, its members have a long history of promoting social justice, human rights and sustainable development. God’s action dislocates us, saves us, demands follow-up and the courage to walk alongside the struggles of all people in the construction of democratic societies, the promotion of economic, social and environmental justice, the fight for gender justice, and the battle for justice for migrant and displaced populations.

The gravity of the suffering of all people demands of us to raise our voices in the face of the political and economic powers that cause injustice and inequity that affect millions of lives. We believe that in order to ensure respect for human rights, we need binding rules on business and human rights at all levels, including respect for human rights, conducting meaningful human rights due diligence and adequate reporting, as well as access to remedy for victims of human rights abuses.

Why do we need binding legislation?

The shifting nature of international power relations has meant that transnational corporations often exercise greater power than governments across the world. This has often meant the violation of the sovereignty of states by aggressive transnational corporations. That is, states have sovereignty (individual or collective) over corporate actors, and this should be recognised as an important legal principle. The primacy of international investment in countries around the globe, in particular those in the global South, has resulted in the policies that aim to attract foreign capital to the detriment of the realisation of the human rights of individuals and communities.

We need to tackle this with fundamental

changes to the way capital is managed and invested, and by enhancing accountability mechanisms demanding respect for human rights. Governments, transnational corporations and multilateral institutions are focusing overwhelmingly on mobilising, subsidising, building capacity for public-private partnerships (PPPs) and other private-sector instruments to deliver the Sustainable Development Goals (SDGs). Yet most frequently fail to integrate the ethical and historical underpinnings of human rights into their approaches.

Women are the ones most affected by corporate human rights violations. While men and women face many of the same barriers with regards to accessing remedies, women and girls may be particularly marginalised due to underlying structural discrimination. These vulnerabilities become more severe when we intersect them with other social markers such as sexuality, class, race and ethnicity.

All evidence points to the fact that unless there is significant change in policy, practice, political will and resource commitment, millions will be left behind. Legally binding regulation is required to ensure that we avoid and/or remedy the negative impacts of business practices on individuals that are marginalised, in particular women and girls. It can, for example, curtail the impacts, both direct (as a result of environmental disasters) and indirect (as a result of tax evasion and avoidance), and create a roadmap for reparations.

The importance of the UN Treaty on Business and Human Rights

The ongoing process for a UN Treaty on Business and Human Rights is a historic opportunity to address the fragmentation of international law and change the current asymmetry of power between the planet, people and corporations, by regulating business activities in international human rights law. For this reason, ACT Alliance very much welcomes the efforts behind the negotiation and consolidation of the draft treaty.

The revised draft treaty released by the UN Open-Ended Intergovernmental Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights on 16 July 2019 is straightforward in terms of the states’ duties to respect, promote, protect and

fulfil human rights obligations.¹ However, the real issue lies in the implications for transnational corporations, including the potential loss of revenue for their host countries, which are usually in the global North. Draft one, like draft zero, fails to acknowledge the international legal personality of corporations, which is seen as an impediment to the full application of international human rights law and the protection of state sovereignty.² The fact is that state sovereignty is already being curtailed. The matter now is using this legal instrument to put limits on the overreach of corporate activities and ensure the duty bearer's ability to use sovereignty for better realisation of human rights. While draft one uses a broad definition of business activity which includes all 'economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means' (Article 1.3), it fails to acknowledge the overwhelming differentiated power exerted by transnational corporations. Similarly, the text of draft one is overly focused on the role of domestic law, shifting the obligation to member states and shying away from the creation of a level playing field for all corporations. We believe this is a mistake. We must tackle the negative effects of our current economic model by establishing clear limits to economic activities.

Like many civil society organisations, networks and coalitions, we recommend the establishment of direct obligations on companies to protect, respect and remedy human rights and the strengthening of the provisions on the criminal liability for companies and individuals. In our opinion, this means re-affirming the extraterritorial character of international human rights law; establishing mandatory human rights due diligence (Article 5.2); imposing mandatory human rights-based gender impact assessments; determining that business enterprises must use their leverage to prevent and mitigate human rights violations; as well as recognising that, for the purposes of international human rights law, corporations must be understood as single entities.

The draft treaty states that 'all human rights are universal, indivisible, interdependent and inter-related', and upholds 'the principles

of non-discrimination, participation and inclusion'.³ We strongly suggest using language of 'equal rights of all peoples' in the draft treaty, in order to reaffirm the gender spectrum while also keeping true to indigenous rights defenders' calls to enhance the role of communities.

We demand that the treaty does not lock in standards, which are lower than those embodied in the UNGPs. The treaty's definitions should be consistent with the terms in the UNGPs and its correlated norms, such as the Gender Guidance to the UNGPs.⁴

From a gender perspective, draft one is much sharper than draft zero. It mentions the differentiated corporate impacts on women, children, people with disabilities, indigenous peoples, migrants, refugees, internally displaced people and protected populations under occupation or conflict areas (preamble, Article 5.3.b and Article 14.4). The treaty addresses gender-specific risks leading the way (though still not as robustly as expected) for an analysis of deeply ingrained power imbalances between genders such as sexual harassment, emotional or psychological harassment, a lower percentage of formal employment for women and girls, and shameful gender pay gaps, which are, in turn, perpetuated by economic systems that support these injustices.

However, one group that is invisible in the current draft treaty are LGBT+ communities. The preamble of draft one reaffirms 'the equal rights of men and women', which is a clear use of binary language that fails to acknowledge other genders. Equally important is to mention the role of UN Gender Guidance on Business and Human Rights in setting standards for a stronger gender analysis and lens to corporate accountability.

The draft treaty now has clear provisions on the protection of human rights defenders as key actors for corporate accountability (preamble, Article 4.9) and particularly takes into account the differentiated impact on women human rights defenders. It affirms that victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies, and that human rights defenders shall be able to act free from threat, restriction and insecurity. It also states that: 'Victims shall have the right

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to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies, including through appropriate protective and support services that ensures substantive gender equality and equal and fair access to justice' (Article 4.4).

Draft one also builds on the UN Guiding Principles on Business and Human Rights by demanding, 'the respect, promotion, protection and fulfilment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities' (Article 12.3). Indeed, the draft treaty has the potential to link the UNGPs, the Gender Guidance to the UNGPs, and binding international human rights law. This is crucial if we are serious about providing affected communities and individuals with effective remedies.⁵

Under institutional arrangements, the draft treaty affirms that a thematic committee will be established to make general comments and normative recommendations on the implementation of the treaty, as well as provide concluding observations and recommendations on reports submitted by state parties. This is a very positive move towards an international accountability system that works for people on the ground. A similar positive provision is the creation of the International Fund for Victims (Article 13.7) which addresses the issue of reparations. We must build on this outstanding provision while working towards the approval of a treaty that reflects the real challenges and lived experience of individuals and communities living in the global South.

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Conclusions

ACT Alliance believes in an end to gender inequality and injustice, gender-based discrimination and violence, and in closing the gender gap and addressing unequal power relationships for the promotion of human dignity for all.

ACT Alliance is committed to achieving gender equality and enabling the self-empowerment of all women and girls as stated in Sustainable Development Goal 5 and the Istanbul Principles. ACT Alliance is also committed to respect, empower and protect the dignity, uniqueness, intrinsic worth and human rights of every human being. ACT Alliance does not accept any discrimination on the basis of gender identity and sexual orientation, disability, nationality, race, religion or belief, class or political opinion. Our belief is that all people shall have the same power to shape societies, faith communities and their own lives.

The human rights principles of universality and non-discrimination apply to all people with whom ACT Alliance works. ACT Alliance is committed to ensuring gender equality as a common value and an inalienable human right. In fact, ACT Alliance considers gender mainstreaming as an appropriate strategy to achieve gender equality.

Recommendations

In light of our conclusions, we recommend the following:

1. All state and non-state actors must support the development and guarantee the ratification, implementation and appropriate resourcing of a Treaty on Business and Human Rights. This means actively promoting negotiations and opposing any obstructions.
2. Human rights should be the cornerstone of all business practices. This means that they should be integrated in a mandatory basis to all contractual relationships. We, like many civil society organisations, networks and coalitions, the establishment of direct obligations on companies and the strengthening of the provisions on the criminal liability for companies and individuals.
3. From our experience, local communities, especially women from ethnic minorities, are the ones that suffer the burden of aggressive economic exploration that lead to land grabbing and destitution. The draft treaty must correct these historical injustices that are linked to colonialism, neoliberalism and patriarchy.
4. The treaty must reaffirm the extraterritorial reach of international human rights law; demand corporations use their leverage to prevent and mitigate human rights violations; establish mandatory human rights due diligence; and, for the purposes of International human rights law, state that corporation must be considered single entities.
5. All states have the duty to guarantee the realisation of human rights and extraterritorial obligations in punishing human rights violations by businesses. We recommend setting up a particular provision requiring states to exercise universal jurisdiction and a provision mandating that states prosecute international crimes on the basis of domestic modes of complicity.
6. We need wide support to the optional protocol to the Treaty on Business and Human Rights (Article 15), which is centred on mechanisms of access to remedy for victims of abuses committed in the context of business activities. In short, a legally binding instrument is needed that enables individuals and communities to bring cases to the committee which is being created by this treaty (Article 13.1).
7. Together with other women's rights networks which are engaged with the treaty (such as the coalition group Feminists for a Binding Treaty), we recommend the new draft includes a provision for transnational corporations to conduct mandatory human rights-based gender impact assessments (ex ante and periodically ex poste) of all their operations.
8. Although substantial improvements are reflected in draft one, stronger language is needed on gender-sensitive justice and remedy mechanisms that work for women, particularly those who are marginalised as a result of their intersecting identities.

Endnotes

- ¹ See draft one of the Treaty in *OE/GWG Chairmanship revised draft* 16/7/2019, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx>
- ² Ibid.
- ³ Moving Forward the UN Guiding Principles on Business and Human Rights: Between Enterprise Social Norms, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All, Larry Catá Backer, *Fordham International Law Journal* 2015, 38 (2), pp457-542.
- ⁴ For more, see 'Leaked document reveals EU's decision to withdraw from proposed UN binding treaty negotiations', Friends of the Earth Europe, *Business and Human Rights Resource Centre*, 15 March 2019 www.business-humanrights.org/en/leaked-document-reveals-eus-decision-to-withdraw-from-proposed-un-binding-treaty-negotiations
- ⁵ See *The EU's double agenda on globalisation: Corporate rights vs people's rights*, Friends of the Earth Europe, 15 October 2018, www.foeeurope.org/EUdoubleagenda

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