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Remedying depletion through social reproduction – a critical engagement with the UN’s Business and Human Rights framework

European Journal of Politics and Gender • vol 3 • no 2

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Abstract

The growing recognition of unpaid work in international law and the SDGs acknowledges that gendered labour supports the global economy. This work can have harmful impacts leading to ‘depletion of social reproduction’ (Rai et al, 2014). When corporate harms impact on workers and communities, family members are often required to provide caring labour for those directly affected. But the consequential harms of depletion are generally invisible within the law and uncompensated. We argue, in assessing the United Nations’ business and human rights framework, that the international legal regime must take account of social reproductive work and its consequent harms.

Keywords

social reproduction; law; harms; depletion; business and human rights

Acknowledgement

The authors acknowledge the valuable comments of the anonymous reviewers that assisted in the development of this article.

The Authors declare that there is no conflict of interest.

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Introduction

The recent recognition of unpaid work in the United Nations (UN) Sustainable Development Goals (SDG), at the International Labour Organisation (ILO) and in international human rights law is welcome. This is especially so in the context of the continuing mobilisation of women into the labour market, without necessarily a gendered redistribution of domestic unpaid labour. The UN’s new focus on the recognition of unpaid domestic labour in the SDGs (SDG 5.4) is an opportunity to consider how the multiple ways in which the harmful impacts of such work, conceptualised by Rai et al (2014) as depletion through social reproduction (forthwith, depletion), could be recognised better and compensated for even as we struggle to transform the gendered regime of care itself (see also Elson, 2000). Building on this work, we have argued (Goldblatt and Rai, 2018) that harmful practices – in our case study through corporate negligence - often have ripple effects beyond the obvious individual victims; unpaid carers of those directly affected also suffer harms as a result of depletion. The law usually fails to recognise or compensate this work in remedying harms because this labour is invisible and taken for granted. Further, harm as depletion connects our environment, community life and our everyday lives; depletion of one affects the harm to the others. Together, these secondary or consequential harms correspond with the idea in feminist legal theory that harm is relational (Nedelsky, 2011: 22-34) and leads to communities of harm (Ni Aoláin, 2009). In this article we build on this work to argue that the developing international legal regime – the UN’s Business and Human Rights framework - can and must take account of social reproductive work and its consequent harms. Without this, as Rai, Brown and Ruwanpura (2018: 378) have argued in their critique of the SDGs, ‘Women’s wage employment while considered a panacea in the SDGs...can actually increase the depletion of women if not replenished through state social infrastructural support, redistribution of gender care roles and the recognition of domestic labour. The language of growth [which the Business and Human Rights framework also espouses] itself needs to be challenged...’.

As relational harm, depletion can be intensified because of a range of reasons, including through mal-practices of corporations. The UN’s Business and Human Rights framework is directed at specifically preventing and remedying harms of corporate negligence and mal-practices. Much of the work on gender, harm and reparation/compensation at the international level arises from the context of conflict and post-conflict reconstruction and in the field of transitional justice (Manjoo, 2017); and much of it concerns violence against women (True, 2012). This work at the level of international law and feminist engagement with the concept of harm in tort law at the domestic level yields lessons that should inform critical responses to aspects of international human rights law that deal with ‘everyday’ rather than

extraordinary harms. In this article we propose new interpretations of harm and responses to it that take account of depletion to inform improved international legal frameworks. Building on the discussion of depletion, we note both the possibilities and limits of a legal remedial approach. Whilst the Business and Human Rights framework addresses the issue of corporate responsibility to avoid destruction of livelihoods, we argue that it does not address the needs of those who care, and also does not challenge the growth agenda at the centre of the development paradigm. This produces strains in the narratives of change that the Business and Human Rights framework proposes.

The article begins with a discussion of depletion and its relationship to ideas of harm in law. We then undertake a brief survey and discussion of the inclusion of unpaid work and care in key UN documents and treaty body reports to demonstrate efforts to increase the visibility of this labour. We move on to critically discussing the UN's response to the challenge of harmful corporate practices in its framework and activities around business and human rights, particularly as it pertains to remedy and make certain recommendations for improvements to the framework. Our methodological approach in this article involves analysis of three recent UN human rights documents providing interpretation on issues of gender, remedy and harmful business practices emerging from the UN Working Group on Business and Human Rights and the UN Committee on Economic, Social and Cultural Rights. These bodies and the 'soft law' documents they have produced were chosen because they reflect the current efforts at the UN level to build an internationally agreed understanding of human rights as they pertain to business. Following this critical analysis and our recommendations we suggest that improved compensatory responses, while valuable, are not enough and that transformative responses to depletion as a harm are needed. The article concludes with some of the strategic questions that should be considered in using law and rights to challenge and address harms that deplete the providers of social reproductive labour.

Depletion through social reproduction and compensation of harm

Our argument in this article builds on the concepts of depletion and harm. Specifically, we analyse these concepts in the context of non-recognition of unpaid social reproductive labour, most of which is carried out by women. Social reproduction includes the everyday practices that support, but are often also in tension with, production in society including: biological reproduction (including affective services to maintain families; unpaid production in the home (including care, subsistence and community contributions); and the reproduction of culture and ideology (Hoskyns and Rai, 2007). Rai et al argue (2014) that social reproductive work, especially as it is gender unequal and is not supported adequately by the state, leads to depletion of those engaged in it. Further, certain corporate and state actions or omissions result in harms to individuals, families and communities and worsen the depletion impacts on those engaged in social reproductive labour. This leads us to think about depletion in the

context of which harms are recognized and which ones are not, and the reasons for this. It also leads us to ask who is compensated for which of the harms done to them and who is not? Further, we ask what effects does the denial of compensation for this depletion have on the lives of individuals, households and communities? There is a considerable feminist literature on this anomaly – of excluding most of the work within the home as unproductive labour – and its harmful effects (Waring, 1988; Picchio, 1992; Elson, 2000, Fraser, 2016; Hoskyns and Rai, 2007).

Social reproductive work is of course gendered; despite some shifts in the distribution of this work, most of the responsibility for it is still borne by women. It is also the case that women have less access to resources that might support this unpaid labour – health, education, financial products and property, for example, remain skewed towards men, especially in poor and precarious contexts. Some of these resources can be provided through social policy and the law; under conditions of austerity and crises however, these resources are limited and even eroded. The gendered nature of this work and the lack of state support can thus increase the rates of depletion through social reproduction, which Rai et al (2014: 3-4) define 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’. Thus, for example, where a man is poorly paid and works long hours and his wife is required to take on greater responsibility such as for subsistence farming and care of family members. In the absence of state support such as childcare or social protection she may suffer health and other negative impacts through lack of sleep, lack of time for self-care or stress, and her family may suffer harm resulting from this depletion of social reproduction.

An example of how depletion could occur as a result of harmful business practices is where a mining company fails to provide protective wear for workers exposed to dangerous dust. When workers become ill and are forced to leave their employment, they often become dependent on family members for their care. This care burden, if not supported by the company and the state, causes depletion of social reproduction entailing a range of harmful impacts on individuals, family, community and even on the physical infrastructure of the worker’s household (Goldblatt and Rai, 2018). 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.

Further, 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. Depletion 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 (Rai et al, 2014).

In our previous work (Goldblatt and Rai, 2018) we have noted that the feminist critiques of tort law can assist us in understanding why the complexities of care work and the depletion that may result from it are often absent in law dealing with the compensation of harm. Conaghan (2003: 192) has pointed to the difficulty law faces in dealing with the relational nature of harm, emotions and intimacy. A further feminist concern with the law is that it focuses on individual rather than collective responsibility for harm. As Conaghan (2012: viii) notes, ‘the focus of tort on individual responsibility in the context of injury and harm sits somewhat at odds with more progressive articulations of social or collective responsibility for misfortune’. These critiques are particularly pertinent to the international law responses to harm that borrow from domestic legal approaches (Ni Aoláin, 2009) and, we argue, should be challenged in relation to legal frameworks on business and human rights. Introducing ideas of relational or community harm into legal considerations of harmful business practices, brings into focus the idea that such practices can have both direct and more hidden, indirect impacts. Before considering the adequacy of the international frameworks in addressing unpaid domestic work, especially arising from corporate harms, we examine the emerging acknowledgment of unpaid work in key UN documents. This allows us to consider how on the one hand they align with the recognition of social reproductive work, but on the other, through promoting growth as the primary indicator of development, could undermine a closer regulation of international business. By examining the UN’s Business and Human Rights framework through the lens of depletion we demonstrate how this tension plays out.

Recognition of unpaid work at the international level

The clearest international articulation of the need to include unpaid domestic labour in our conceptualisation of work is to be found in the Sustainable Development Goals (SDG) that were adopted on the 25th of September 2015 as a template to guide and inform global policy-making up until 2030. The SDGs are anchored in a discourse of universal human rights and are accompanied by an ‘explicit acknowledgement that equality must apply not only to opportunities, but also outcomes’ (Razavi, 2016: 28). The path breaking report of the UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (2013: 2), argued that: ‘...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’. SDG 5 - ‘Achieve gender equality and empower all women and girls’ - has built on this report, the *ILO Domestic Workers Convention, 2011 C189* and much of the feminist work on unpaid work, to include Target 5.4, which encourages state parties to ‘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'.¹ SDG 5.4 also emphasizes economic and political investment from the state or private bodies, which may contribute to addressing structural gender inequalities, which Rai et al call (2014) 'replenishment'. SDG 5 further promotes 'shifts in social norms to address the issue of women's unpaid domestic labour' through 'promotion of shared responsibility within the household and the family as nationally appropriate', which gestures towards more transformative agendas of gender equality (although with national opt outs which allow individual states to make exceptions in the name of cultural contexts). However, on closer analysis we find that SDGs build on an instrumentalist approach to equality as efficiency that was outlined as 'smart economics', which conflates the empowerment of women as agential individuals 'with the feminist goal of removing the structural discrimination which women face as a gendered constituency' (Chant and Sweetman, 2016:517; Wilson, 2013). The SDGs continue to focus on growth as coterminous with development, use traditional measures, such as GDP, to benchmark development and promote women's waged work as a panacea for gender equality (see SDG 8 for example). This approach to women's employment, despite the inclusion of SDG 5.4, can increase the depletion of women if not replenished through state social infrastructural support, redistribution of gender care roles and the recognition of domestic labour (Rai, Brown and Ruwanpura, 2018).

While recent feminist efforts have been central to the inclusion of unpaid work in the SDGs, this long-standing feminist concern goes back many years at the international human rights level. The Committee for the Elimination of Discrimination Against Women (CEDAW Committee) in its 17th General Recommendation in 1991 dealt with 'Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product' (United Nations Committee for the Elimination of Discrimination Against Women, 1991). Its 16th General Recommendation, also in 1991, dealt with 'Unpaid women workers in rural and urban family enterprises'. The Beijing Declaration and Platform for Action of 1995 stressed the need to deal with the unequal distribution of paid and unpaid work between men and women (United Nations Committee for the Elimination of Discrimination Against Women, 1991). But following this, the issue of unpaid work and care was largely neglected at the international level (Sepulveda Carmona and Donald, 2014). The recognition of this issue in the SDGs is also starting to influence the UN human rights mechanisms. In 2016, the CEDAW Committee gave attention to unpaid work in considering the specific rights of rural women in General Recommendation 34 (United Nations Committee for the Elimination of Discrimination Against Women, 2016). There have been 26 specific and general recommendations on unpaid work by UN human rights bodies since 2010 with the number increasing over the years through to 2018.² The majority of these come from the CEDAW committee with a few mentions by the Committee on the Rights of the Child and within the Universal Periodic Report process. In 2018, the Committee on Economic, Social and Cultural Rights (CESCR) issued a decision in response to an individual communication under the Optional Protocol to the International Covenant on Economic Social and

Cultural Rights dealing with the recognition of unpaid work for the purpose of access to social security in Ecuador (United Nations Committee on Economic, Social and Cultural Rights, 2018). The Committee found that Ecuador had violated a woman's rights to social security, non-discrimination and gender equality in failing to ensure that periods of unpaid work were counted for the purpose of continuous contributions to pension schemes. The supposedly gender-neutral rules disadvantaged women who had career breaks during periods of time spent on unpaid caring (ESCR-Net 2018).

While some promising progress is being made at the international law level on women's unpaid care work, this article explores an issue not fully considered in UN frameworks – human rights obligations of non-state actors and questions of remedy where harmful business practices cause depletion.

Business and Human Rights - remedying depletion?

Since the 1990s, there has been a shift in the UN's approach – from ILO pressure for recourse to legally binding regulatory instruments, to advocating corporate social responsibility, voluntary codes of conduct, and a discourse of 'social dialogue', and the Kofi Annan initiated UN Global Compact, which has been lauded and sharply criticized by labour scholars (Ruwanpura, 2016; Hauf, 2015; Kabeer, 2004; Jenkins 2001). In 2005, at the behest of the UN Commission on Human Rights, the UN Secretary General appointed a Special Representative on human rights and transnational corporations and other business enterprises. John Ruggie, who filled this role until 2011, initially proposed a framework titled 'Protect, Respect and Remedy' dealing with the role of the state and corporations regarding the human rights of others as well as the rights of victims to remedies. In 2008 the Human Rights Council requested the Special Representative to develop this framework to give it greater definition and effect including the integration of a gender perspective into the framework (which occurred to a limited extent: Dovey 2014). This led in 2011, to the adoption of the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* ('Guiding Principles'). At the instance of some states, the Human Rights Council established a five member Working Group on Business and Human Rights in 2011, whose mandate was to promote dissemination and implementation of the Guiding Principles. The Human Rights Council also established a Forum on Business and Human Rights in 2011, which is an annual conference held in Geneva for a wide range of stakeholders chaired by the Working Group (OHCHR, 2019). In 2014 the Human Rights Council established the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights made up of state parties to 'elaborate' a treaty instrument.

The idea of a treaty has generated significant division and debate about the regulation of corporations by international law rather than states, and about strategic decisions regarding voluntaristic or mandatory approaches to business obligations (Deva, 2012; Deva and Bilchitz, 2013; Baumann-Pauly and Nolan, 2016; Deva and Bilchitz, 2017). In arguing for a legally binding international response to corporations, Baxi (2015: 26) challenges the impunity that allows such entities to produce and perpetuate ‘geographies of human rightlessness’. In July 2018, the Open-ended intergovernmental working group produced a zero draft treaty and a revised draft in July 2019 (Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 2018; 2019). While debates about the value of such a treaty are ongoing, the Office for the High Commission on Human Rights has developed a three phase project on accountability and remedy (OHCHR 2014) while the Working Group on Business and Human Rights reported in July 2017 to the Human Rights Council on the meaning of effective remedy in the Guiding Principles and the approach that should be followed by all stakeholders in the case of violations of human rights by businesses. The Working Group on Business and Human Rights’ 2017 report is a significant document in setting out its understanding of the idea of ‘remedy’ in the Guiding Principles and may inform the debate about the content of a future treaty and the interpretation of its remedial framework. In 2019 the Working Group on Business and Human Rights produced a further report on the ‘Gender dimensions of the Guiding Principles on Business and Human Rights’.

In offering a gender lens on the Guiding Principles, Meyersfeld (2013: 203-4) noted that corporations must take account of gendered human rights impacts both internally (such as via equal pay, representation on boards, etc) and externally through impacts on communities (such as environmental impacts and market impacts that affect women in specific and harsh ways). In addition, she noted that corporations are complicit with states in the maintenance of informal employment that disproportionately affects women. Meyersfeld (2013: 214) considered the two pillars of the Ruggie framework – the state’s obligations to protect people from violations caused by businesses and businesses’ responsibility to respect human rights (based on performance standards rather than law at present) to call for a tiered enquiry involving the state, the community and the family, noting that this final level may be ‘difficult to navigate’. Her constructive unpacking of the gender dimensions of the ‘protect’ and ‘respect’ elements of the Guiding Principles is a valuable backdrop to our discussion of the gender dimensions of ‘remedy’, the third element of the framework, and to show how the concept of depletion might contribute to elaborating this.

We now examine the Working Group on Business and Human Rights' two reports alongside a report by the UN Committee on Economic, Social and Cultural Rights outlining state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. These documents reflect efforts to integrate a gendered approach following the acknowledgment by the Working Group that 'the business and human rights (BHR) discourse has not so far given adequate attention to the differentiated impacts of business-related human rights abuses on women and the additional barriers that they face in accessing effective remedies to redress such abuses' (OHCHR, 2018). This is mirrored in the limited academic discussion of gender in the field of business and human rights.³ The Working Group responded to this gap by launching a thematic project on the gender dimensions of the Guiding Principles (OHCHR, 2018). Its 2019 report is the outcome of this project. This report and the earlier Working Group report on remedy and the Committee on Economic, Social and Cultural Rights report require careful examination to determine the extent and adequacy of their consideration of the gender dimensions of the international framework on business and human rights including, of relevance to this discussion, the approach to remedy within the framework.

Working Group on Business and Human Rights Report on Remedy

The Working Group report on remedy is premised on the right to an effective remedy for harm as a 'core tenet of international human rights law' (United Nations General Assembly, 2017: para 2). The report noted that access to remedy is insufficient without an effective right to a remedy resulting from the process (paras 14-15). Both aspects entail responsibilities and obligations from states and business entities (para 15). Effective remedies to victims should also result in corporate accountability (para 17). While rights-holders must be central to informing the nature of effective remedies (paras 18-25) the report recognised they may have low expectations due to socio-economic and cultural conditions, lack of information and power imbalances which must be addressed to overcome this 'asymmetry' (paras 22-24). Remedies should be provided without discrimination which may entail affirmative measures to include marginalised or vulnerable groups (para 25). States and businesses are required to be sensitive to diversity amongst rights holders (paras 26-31). The report mentioned indigenous peoples and children but gave most attention to women as an 'illustrative group'. The report noted (para 28) that:

“Women’s experiences should be relevant in three interrelated ways: how corporate activities may affect women differently, including by reinforcing or exacerbating existing gender discrimination by adopting gender-neutral policies; what additional barriers women may face in gaining access to effective remedies to redress human rights abuses; and what remedial responses women may need to achieve substantive justice in an era in which the private sector is playing a dominant role.”

However, the report did not discuss the unpaid reproductive labour that women provide when businesses cause harm to workers and communities. As we have noted above, this work lacks visibility in so many spheres that it is unsurprising that it is omitted in this context.

The report referred to the need for remedies to be accessible, affordable, adequate and timely (para 32). The question of adequacy seems most relevant to the issue of compensating depletion. In relation to adequacy the report noted (para 33) that one-off compensation may not always address ongoing need and compensation may also be required to address future as opposed to current needs. There should thus be ‘some built-in flexibility to respond to harm discovered after the conclusion of compensation agreements’ (ibid). While it is notable that the report pointed to compensation addressing changes over time, adequacy must also involve recognition of the full costs of harms to all involved. Injuries, loss of livelihood and similar harms have impacts that spread outward like ripples in a pond to families and communities. Adequate remedies must therefore include these often-hidden harms. This goes also to the definition of ‘rights-holders’ and the proper reach of remedial measures to all impacted by corporate harms.

The UN’s ‘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’, (on which the report drew extensively) defined ‘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)

This definition, in including family members and dependents, is valuable in acknowledging that harms extend beyond the single, often male, victim. The business and human rights framework for remedies should include this broader understanding in its conceptualisation of rights holders so as to ensure that effective recourse reaches women impacted by corporate harms. Notably, the 2019 draft treaty defines victim as including ‘the immediate family or dependents of the direct victim’ (Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 2019, Article 1(1)). This notion of rights-holder may conflict with domestic legal frameworks that often limit compensation for harm to the victim as a discrete legal subject, unencumbered or supported by family. The Basic Principles’ 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.⁴

The business and human rights report again drew on international law as captured in the UN Basic Principles which see reparation as including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The idea of rehabilitative care for victims is critically important for family members who provide unpaid care services to meet these rehabilitative needs in the absence of services that do so. The report (para 49) referred to the Committee on the Rights of the Child which said that ‘States should provide medical and psychological assistance, legal support and measures of rehabilitation to children who are victims of abuse and violence caused or contributed to by business actors’ (para 31). The recommendations in the report required ‘transformative changes in laws, policies, remedial mechanisms, societal structures and global governance’ that start with removing ‘well-known legal, practical, procedural and jurisdictional barriers to gaining access to judicial and non-judicial mechanisms’ (para 55). The Working Group concluded its report by recommending that states and business actors adopt a gender lens in ensuring access to effective remedies (paras 86(b) and 87(e)). This remedial framework, while commendable in its inclusion of gender, needs to go further in acknowledging the relational nature of harm and the need to remedy the work of social reproduction and the depletion that may arise from it. This raises the

issue of who is responsible for providing such services where business has caused harm: the state, the business or the family/community? The Committee on Economic, Social and Cultural Rights General Comment No. 24 (GC) on States responsibilities under the International Covenant on Economic, Social and Cultural Rights in the context of business activities explained that its coverage only extends to businesses indirectly via the obligations of state actors. It did however note that, based on international law on state responsibility, states may be held directly responsible for business action/inaction where the business is conducting work on behalf of the state; where a business exercises government authority; or the state acknowledges/adopts business conduct as its own (para 11). Whether the state and business share this responsibility or not, it is important, we argue, to ensure that unpaid carers do not shoulder this burden unsupported and that they are compensated adequately for their labour in the absence of state provision. Before looking further at the Committee's General Comment, we briefly discuss the 2019 Working Group report on gender and the guiding principles.

Working Group on Business and Human Rights Report on Gender

The report (2019) was an opportunity to build in recognition of unpaid social reproductive work into the remedial framework of the guiding principles and more generally across the principles. The report, the product of extensive consultation with civil society, governments and business across the world, contained many admirable features. It recognized that much of the work women perform is unpaid and that women do most of the world's care work (para 12). It also recognized that women are impacted differently from men when business activities harm communities, tacitly acknowledging the depletion impacts (para 18). It acknowledged the challenges women face in accessing remedies that may operate within 'patriarchal norms' (para 19). The Working Group proposed a three-pillar approach including 'gender-responsive assessment, gender-transformative measures and gender-transformative remedies' (para 39). The report did not elaborate on this last pillar merely noting that 'remedies should combine preventive, redressive and deterrent elements and change existing power structures that discriminate against women' (para 40). In the Annex to the report there are a range of illustrative examples of activities that could be taken in furtherance of each of the guidelines. In relation to guiding principle 11 on avoiding and addressing women's rights violations, the report gave one example linked to the issue of social reproductive work. It said that 'Business enterprises should ensure that their land acquisition and compensation processes neither reinforce gender-discriminatory landownership practices nor adversely affect women's

livelihoods and subsistence’ (22 (e)). While the report acknowledged that women’s caring responsibilities should not be a barrier to their accessing justice in relation to remedies (para 36(a) and para 52(a)) it did not squarely address the issue of remedy following business malpractices causing harm by depleting those doing social reproductive work and also failed to address in any comprehensive way, the implications of harmful business practices on people providing social reproductive work and the ways in which such ‘depletion’ harms could appropriately be remedied.

Committee on Economic, Social and Cultural Rights General Comment 24

The Committee on Economic, Social and Cultural Rights General Comment 24 included women as one of the groups ‘disproportionately affected by the adverse impact of business activities’ (para 8) and addressed the duty to eliminate formal and substantive discrimination by States and to prohibit this discrimination by non-state entities in the exercise of economic, social and cultural rights (para 7). It also recognised intersectional and multiple discrimination affecting particular groups and gave the example of ‘investment-linked evictions and displacements’ that ‘often result in physical and sexual violence against, and inadequate compensation and additional burdens related to resettlement for, women and girls’ (para 9). It recommended that:

“... States parties address the specific impacts of business activities on women and girls, including indigenous women and girls, and incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights, including by consulting the Guidance on National Action Plans on Business and Human Rights.”

The reference to inadequate compensation for women is notable in the context of this discussion as is the reference to ‘additional burdens’. This latter term seems to suggest ideas of depletion affecting women in particular, following harmful actions of states and businesses.

In terms of redress for harm caused, the Committee observed many barriers such as lack of access to information or legal aid and also the ‘unavailability of collective redress mechanisms where violations are widespread and diffuse’ (para 42). This last barrier could be significant for families/communities wishing to claim compensation for business harms causing depletion. This becomes all the more challenging in cases involving transnational harms (para 43). The Committee made special mention of the need to support Indigenous communities (para 46) and

particularly in relation to judicial mechanisms (para 52) and non-judicial mechanisms (para 56) but did not refer to issues facing women claimants. The General Comment was also silent on the substantive aspects of remedies including: to whom they should be available, what harms they should cover, and how harm should be defined (including in relation to its wide reach beyond the direct victims).

Beyond narrow remedies – transformative responses to depletion

While all three UN Committee documents discussed above offer guidance on issues of remedy in situations of human rights violations by corporations, including with reference to women and gender, they continue to neglect the remedial responses needed to address social reproductive work that is necessitated by such violations and the depletion that follows. As noted above, both international and domestic legal frameworks often fail to reach this relational dimension of harm; we urge that the international law dealing with remedy should incorporate this critique.

The Working Group on Business and Human Rights could, for example, build depletion into the substantive understanding of remedy by ensuring that remedies are available to victims, a category that includes those required to provide unpaid 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. The Working Group report on remedy drew 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 need to address the role of women and the social reproductive work they do at costs to themselves and to address gender inequality in the context of remedying human rights violations caused by businesses. The Working Group needs, therefore, to develop clear approaches to the forms of remedy that take account of gender and in particular depletion. Measurement of business practices that cause harm resulting from this depletion should be required to be built into mandatory national time-use studies and other evaluative measures to generate an accurate picture of such harms. Developing and strengthening the international law framework on business and human rights to address gender and in particular, social reproduction (including its depletion effects), is necessary and important. However, it is not enough. In this concluding section, we discuss one of the strategies to reverse harm – what Rai et al (2014) have called 'replenishment' – where states or non-state bodies contribute to inflows

that go some way to lessen the effects of depletion. Replenishment accompanies strategies that mitigate harm as well as transformative strategies that work to avoid harm entirely by changing structural conditions that lead to harm/injustice. Replenishment would involve state measures such as tax breaks, benefits and regulation of conditions of work, as well as the ready availability of health care and free schooling, alongside legal regulation of business.

Replenishment can then occur as a form of remedy where a business is required not only to compensate people for work done, but where the community is supported to build up its care resources, for example through the provision of new services such as a clinic, free schooling or provision of safe and subsidized transport. Within the UN framework, businesses could, for example, be required to contribute to this form of ameliorating harm by, for example, introducing fair trade initiatives to provide support to the workers. For example, from 2010 onwards Body Shop International and two co-operatives in Nicaragua added a charge to the price of products to compensate 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 (Hoskyns et al, 2012). A remedial framework could also include measures to provide women, who would normally undertake unpaid care following harms caused by business, with adequate support through provision of child and elder care centres, life-long learning opportunities and training along with job opportunities to compensate them for loss of earnings or for extra care work as they support the primary victims of corporate malpractice. Good quality childcare including parental leave benefits for men and women could encourage changes in caring responsibilities through transformative remedial measures. This would recognize not only the rights to compensation of the primary victim – the miner or the builder – but also of the carers. In terms of the community, replenishment measures might involve ensuring that polluting businesses clean up polluted areas and employing the unemployed in the local community to do this work. Our point here is that remedial responses that take into account an expanded notion of harm, and a gendered approach to these, could undo the impacts of poorly planned and implemented business projects and reshape these into socially beneficial ones. Clearly, this does not prevent harm from occurring in the first place for which tighter regulations, implementation of legal obligations and strict penalties for infringement would be needed. However, where remedy is conceived of expansively, it can

mitigate the harm that does accrue through the mal-practices of businesses, especially through a gendered compensatory regime.

Our concern here is that it is important to develop new frames of accountability for both states and businesses to address the urgent issue of depletion. This approach is aimed more broadly at generating arguments for preventative responses that avoid depletion harms by increasing provision of public and private care infrastructure that supports the growing number of women in the paid workforce and the unpaid work of care. Persistent feminist campaigns, methodological developments, and legal initiatives have seen some progress in the direction of recognition of social reproductive work. One example of a domestic legal initiative to include the value of social reproduction in compensation is the case brought against mining houses in South Africa for illness caused to miners (see *Nkala and Others v. Harmony Gold Mining Company Limited and Others*, 2016) where the court did take into account the harms to the carers of the miners (see Goldblatt and Rai, 2018). However, even in this case, the out of court settlement which does compensate dependents, did not take into account the value of care work of the family carers. This both suggests the possibilities and the limits of the law as a framework for developing remedies that value social reproductive work. We need to build on such initiatives further by embedding acknowledgment of the costs of social reproduction and ensuring that remedies include sustainable measures to support those who are engaged in unpaid domestic labour. We are aware that this approach does not necessarily address bigger issues of gender redistribution of social reproduction. For example, The World Survey on the Role of Women in Development Report of the Secretary-General (2019: 31) notes that ‘Owing to discriminatory social norms and gender stereotypes regarding unpaid care and domestic work, there is often a high degree of intergenerational transfer of unpaid care work from women to children, in particular girls, rather than redistribution between women and men’. Michelle Barrett (2014: 236) has argued that, ‘The law itself encodes fundamental assumptions about gender division and it is salutary to consider how recently it is that women have been recognized as legal subjects in their own rights’. However, as Rai et al (2014: 15) suggest, ‘if we see successful transformation not as a single revolutionary event but as a bundle of changes that may add up to transformation in the longer term, then we may find some elements of that bundle emerging through these struggles for gender equality and the valuation of social reproduction’. For example, The World Survey Report (2019: 11) also underlines the importance of depletion as a concept in addressing women’s time-poverty and double burden. We would argue that an engagement with the business and human rights framework need not

therefore lead to co-option of feminists or the strengthening of what Halley et al (2019) have termed ‘governance feminism’. We have argued in this article that, however flawed, we cannot view existing political institutions – national and international - as outside of the purview of our political struggles. This is for a simple reason: laws and policies matter.

Notes:

1. However, the focus of Convention 189 remains on paid domestic work; it does not cover unpaid domestic work, which remains overwhelmingly the responsibility of women (Rai, 2018).
2. Based on a search of the term ‘unpaid work’ in the UN’s database the Universal Human Rights Index. In a search of the term ‘care’ there were a small number of additional mentions of women’s care responsibilities.
3. With some notable exceptions including Meyersfeld (2013), Dovey (2014) and Simons and Handl (2019).
4. As is the case in the settlement agreement of a mining class action in South Africa which defines dependent as ‘wife, child or life partner’ (LRC, 2019).

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