

Relations of Ruling: A Feminist Critique of the *United Nations Guiding Principles on Business and Human Rights* and Violence against Women in the Context of Resource Extraction

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L'extraction des ressources a des conséquences directes et indirectes sur les femmes, et la recherche a démontré que ces conséquences ne sont pas les mêmes pour les hommes. La violence à l'égard des femmes semble avoir des conséquences transversales. Pourtant, les États, les organismes intergouvernementaux, les différents intervenants et les groupes de l'industrie n'en ont pas tenu compte lorsqu'ils ont établi des normes pour minimiser l'effet des activités des entreprises extractives sur les droits de la personne. En utilisant les travaux de Dorothy Smith sur l'ethnographie institutionnelle, et surtout la textualité féministe, le présent article propose une analyse approfondie à plusieurs niveaux, d'un point de vue féministe, du Principes directeurs relatifs aux entreprises et aux droits de l'homme (PDNU), qui constitue l'un des textes centraux visant l'impunité des entreprises quant aux effets nuisibles générés de leurs activités d'exploitation des ressources, et en particulier, de la violence faite aux femmes. Les auteures se demandent dans quelle mesure le texte du PDNU tient compte des femmes et de leurs intérêts. Pour répondre à cette interrogation, elles examinent la place que donne le texte au savoir et au traitement distinct des femmes par rapport aux activités des États et des entreprises et le situent dans le système juridique international généré issu du néolibéralisme. Elles démontrent ainsi que le PDNU est une méthode pour établir une « relation de pouvoir » déterminant le comportement des États et des entreprises envers les femmes. La structure et la nature des normes issues du texte non seulement ne reconnaissent pas les expériences des femmes et ne protègent pas leurs droits dans le domaine de l'extraction des ressources, mais aident également à perpétuer les structures patriarcales et néolibérales qui oppriment les femmes.

Resource extraction has both direct and indirect impacts on women, and research has shown that such impacts are differentiated from those on men. Violence against women appears to be a crosscutting impact. Yet states, intergovernmental organizations, multi-stakeholder initiatives, and industry groups have not taken this into consideration in the formulation of norms meant to address business-related human rights impacts. Drawing on Dorothy Smith's work on institutional

ethnography and, specifically, on feminist textuality, this article provides a close multi-level feminist analysis of the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles), which are one of the central instruments designed to address corporate impunity for harm caused by business extraction in terms of their ability to address the gendered impacts of resource extraction and, in particular, violence against women. The authors consider the extent to which women and the interests of women are reflected in the text of the UN Guiding Principles, investigate the prioritization of knowledge and the differentiated treatment in the text of women compared to states and business enterprises, and situate the UN Guiding Principles within the neo-liberal gendered international legal system. They argue that UN Guiding Principles are a technology that establishes the “relations of ruling” with respect to state and business behaviour and women, and that the text, structure, and nature of these norms not only fail to acknowledge women’s experiences or to protect women’s rights in the realm of resource extraction but also help to perpetuate the patriarchal and neo-liberal structures that oppress women.

Introduction

Resource extraction can have a variety of direct and indirect impacts on women that are differentiated from those of men. One seemingly crosscutting impact is violence against women. Extractive activity may take place in the global North or the global South, in conflict- or non-conflict-affected areas, and with the involvement of domestic and/or transnational extractive companies. In all cases, these projects tend to bring with them significant risk of violence for women, including sexual violence.¹

Despite the growing scholarly literature and non-governmental organization (NGO) and other reports on the differentiated impacts of resource extraction on women, including the prevalence of violence against women, the majority of norms developed by states, intergovernmental organizations, multi-stakeholder initiatives, and industry groups in their domestic and global responses to regulating

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1. See discussion later in this article.

business-related human rights impacts fail to do much more than mention women or make reference to the need for formal equality, if they do this at all. This article considers one of the central instruments designed to address corporate impunity for human rights violations caused by business, the 2011 *United Nations Guiding Principles on Business and Human Rights* (*UN Guiding Principles*).²

The *UN Guiding Principles* were developed by the UN Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) John G. Ruggie in order to implement the “Respect, Protect and Remedy” policy framework that the SRSG had produced in 2008. The *UN Guiding Principles* rest on three interrelated pillars: the binding obligation of states, under international human rights law, to protect individuals and groups from violations of their human rights by private actors such as business enterprises; the social responsibility of business enterprises (such as corporations) to respect human rights; and the provision of access to an effective remedy for victims of business-related human rights violations. These principles are the most widely accepted set of norms with respect to the regulation of the human rights impacts of business activity, having been unanimously endorsed by the United Nations Human Rights Council (UNHRC) in 2011 and having garnered significant support from both states and business actors alike.³ As such, they establish a paradigm for the regulation of the human rights impacts of business activity, including assessing state and business compliance with their human rights obligations and responsibilities, respectively, that has displaced or marginalized other conceptions of appropriate regulation.⁴

The aim of this article is to engage in a close feminist reading of the *UN Guiding Principles* in terms of their ability to address the gendered impacts of extractive activity—in particular, violence against women.⁵ We draw on the work

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2. John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, United Nations Human Rights Council (UNHCR), 17th Sess, UN Doc A/HRC/17/31 (2011) <https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf> [*UN Guiding Principles*].
 3. UNHRC, *Human Rights and Transnational Corporations and Other Business Enterprises*, 17th Sess, UN Doc A/HRC/RES/17/4 (6 July 2011).
 4. See e.g. the heated debate about the UNHCR Intergovernmental Working Group treaty process, discussed in Penelope Simons, “The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically” in Surya Deva & David Bilchitz, eds, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017) 48 at 48–52.
 5. This article develops some initial thoughts on this issue from an earlier article by Penelope Simons, “Unsustainable International Law: Transnational Resource Extraction and Violence against Women” (2017) 26:2 *Journal of Transnational Law and Contemporary Problems* 415.

of Canadian sociologist Dorothy Smith on institutional ethnography, specifically, feminist textuality.⁶ This latter approach understands texts as a technology of regulation, which establishes “relations of ruling” in terms of the actors and institutions that they protect or privilege.⁷ According to Smith, “[t]he relations of ruling are text-mediated and -based systems of ‘communication’, ‘knowledge’, ‘information’, ‘regulation’, ‘control’, and the like.”⁸ Smith focuses on everyday life and takes the individual experience as the entry point that allows us to see how these practices are being disciplined by, and simultaneously mould, institutional priorities or “relations of ruling.”⁹

For Smith, texts are crucial to understanding institutional priorities because of their material properties. First, as Smith argues, “[t]exts are key to . . . regulating the concerting of people’s work in institutional settings in the ways that they impose an accountability to the terms they establish.”¹⁰ Second, texts are significant because of their reproducibility. These material properties permit the text to be distributed widely and read and used by different people for various purposes:

It is the materiality of the text itself that connects the local setting at the moment of reading into the non-local relations that it bears. Its technology, its system of distribution, and its economy are foundational to the peculiar property of abstraction that provides for forms of social relations that have no particular place or time in which they happen . . . [t]he text creates something like an escape hatch out of the actual and is foundational to any possibility of social forms of abstraction of whatever kind, including this one written here.¹¹

Texts thus enable institutional processes to occur in a coordinated manner. Third, texts also offer stability, as they serve as a record of practices.¹² Feminist textuality

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6. Dorothy E Smith, *Institutional Ethnography: A Sociology for People* (Lanham, MD: AltaMira Press, 2005) at 59 [Smith, *Institutional Ethnography*]. Institutional ethnography, as explained by Smith, builds from the basis and assumptions of an “ontology of the social.” “The four-part [ontological] package that is foundational to the institutional ethnographic project” is essentially that “individuals are there; they are in their bodies; they are active; and what they are doing is coordinated with the doings of others” (*ibid*).
 7. Dorothy E Smith, *Texts, Facts and Femininity: Exploring the Relations of Ruling* (London: Routledge, 1990) [Smith, *Texts, Facts and Femininity*].
 8. Dorothy E Smith, “The Relations of Ruling: A Feminist Inquiry” (1996) 2:2 *Studies in Cultures, Organizations and Societies* 171 at 175 [Smith, “Feminist Inquiry”].
 9. Smith, *Texts, Facts and Femininity*, *supra* note 7.
 10. Smith, *Institutional Ethnography*, *supra* note 6 at 118.
 11. Dorothy E Smith, *Writing the Social: Critique, Theory and Investigations* (Toronto: University of Toronto Press, 1999) at 79 [Smith, *Writing the Social*].
 12. Marie Campbell & Frances Gregor, *Mapping Social Relations: A Primer in Doing Institutional Ethnography* (Aurora, ON: Garamond Press, 2002) at 31–44.

allows us to focus on the analysis of the so-called “institutional truth” reflected in the text and to consider how this ideology is both created and perpetuated by text-based institutional practices. It is the reproducibility and stability of texts that enable governance to happen in the form that we observe today.¹³

On this understanding, therefore, texts operate to discipline how the various actors using them think about a particular issue (such as the regulation of the human rights impacts of business activities) and to shape institutional practices. Texts, such as the *UN Guiding Principles*, not only shape the views and practices of institutions (such as states and intergovernmental organizations like the United Nations (UN), expert bodies like the UN Working Group on Business and Human Rights), and other actors (such as business enterprises), but they can also be constitutive of a reality that may or may not be consistent with the lived reality of the women affected by business activity, such as resource extraction.

We chose this particular methodology because it is a feminist methodology and a highly theorized framework.¹⁴ Institutional ethnography—and, in particular, feminist textuality—allows us, as feminists, to enter a textual arena, like the *UN Guiding Principles*, that has substantial influence over women’s lives by helping to shape social meanings and contributing to a cultural change. We acknowledge that there is a reality beyond the text and that “accounts of how things work” are reached dialogically and are not exclusively an effect of discourse.¹⁵ Indeed, in a post-structuralist

13. Smith, *Writing the Social*, *supra* note 11 at 170.

14. We believe that theory is fundamental to feminism, and we position ourselves in agreement with feminist theorists who argue that every practice is built upon particular theoretical presuppositions, independently of whether such presuppositions are explicitly acknowledged or taken for granted. In our opinion, not addressing and/or challenging theoretical assumptions makes them appear as a given, as natural, rather than as a political choice, and, therefore, it is a disingenuous position. Categories of conventional androcentric analysis of approaches to sexual difference, for example, cannot be successfully challenged without the help of theory.

15. Even though one may feel tempted to equate feminist textuality with discourse analysis, they are very different approaches based on different ontological and epistemological assumptions. We draw from institutional ethnography because we agree with the assumptions upon which it is based. Ontologically, institutional ethnography is grounded in actual people’s doings under definite material conditions. The social is defined as the coordination of people’s doings. Divergence of perspective and experience is created in the very process of coordinating people’s doings. The world of people’s activities and how they are coordinated is always in motion. Each moment of coordination is conditioned by the past and shapes the future. Thus, from this perspective, subjectivity is not exclusively discursively constituted. Specifically, feminist textuality does not mix well with the overwhelming emphasis of discourse analysis on the subject’s discursive constructions, as it leaves no space for the existence of women’s lives outside the text. See Marie Campbell, “Dorothy Smith and Knowing the World We Live In” (2003) 30:1 *Journal of Sociology and Social Welfare* 3 at 18, 19.

discursive construction of the subject, the core of Smith's theory would disappear, as it would annihilate the experience outside the text and would not allow for the ontological understanding of the social as the coordination of people's activities. Smith, on the other hand, emphasizes that the knowing subject is an actual person with a body, located in time, space, and context, and this gets lost in postmodern accounts.¹⁶

Epistemologically, we agree with the assumption of feminist textuality because institutional ethnography departs from the standpoint of women. Smith argues that the world is not made for women and that knowledge practices must be reconsidered if they are to include women. The aforementioned understanding that social and knowing practices have traditionally excluded women's ways of knowing had already motivated women in feminist politics to re-think the boundaries of intrahousehold dynamics and to try to challenge the division of domestic labour.¹⁷ However, for Smith, the notion is also theoretically important. She differentiates between "embodied knowing" and "abstract conceptual knowledge."¹⁸ Smith shows "how it is possible for men to forget their bodies and live and act in the conceptual mode" and to rely upon "objectified accounts of the world" that reflect their isolation from other ways of knowing.¹⁹ Smith's contribution is significant to sociology because it departs from the theorization of women's standpoint and develops a method for understanding and explaining why and how certain ways of knowing have a privileged position in our society and in sociology and thereby displace other ways of knowing. The author describes text-mediated social organization as the technology of ruling in capitalist knowledge-based societies that "rely on authorized versions of knowledge."²⁰ As Marie Campbell explains, "we all take up ruling concepts and activate them as we go about our daily lives."²¹

16. *Ibid* at 12.

17. *Ibid* at 15.

18. *Ibid* at 15.

19. *Ibid* at 14–15.

20. *Ibid* at 16.

21. *Ibid*. Besides the methodology of institutional ethnography, several overlapping bodies of theory underpin this research. First, the institutional is to be approached and discovered in movement, and there are no static structures waiting "out there" ready to be discovered or apprehended by the knower; it is rather people's actual activities coordinated with each other's in a historically committed process. Second, we assume a mitigated relativism, meaning that we believe we can make claims about how we believe the social world works, even though there will always be something completely unknown about it. See Dorothy E Smith, *The Everyday World as Problematic: A Feminist Sociology* (Milton Keynes, UK: Open University Press, 1988). Third, we build from a relational ontology; we rely on an understanding of the self as constituted in and through relations with others rather than as self-sufficient. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982). Finally, we see the law as a powerful discourse and as a complex terrain, which is constituted by, and simultaneously discursively constitutes,

We acknowledge that the methodology of this article is not a full institutional ethnography because we have not engaged in an empirical investigation of various actors related to the *UN Guiding Principles* in order to “knit” their knowledge together.²² Rather, we engage in a close multi-level analysis of one of the elements described by Smith—namely, the text-based organization of the *UN Guiding Principles* in the context of the human rights impacts of extractive company activities and its relationship to power—with the aim of understanding how women’s experiences, knowledge, and human rights are treated and the power relationships that are protected and reproduced.

The second section of this article will consider the issue of violence against women associated with resource extraction and its prevalence. In employing feminist textuality, we will then analyze the *UN Guiding Principles* from three related perspectives. First, in the third section of this article, we consider how women and women’s interests and rights are reflected in the text. Second, in the fourth section, we investigate the prioritization of knowledge and the differentiated treatment in the text of persons and especially women compared to states and business enterprises. Third, in the fifth section, we examine the nature of the norms and certain dichotomies that appear in the text. We situate the *UN Guiding Principles* in the gendered, neo-liberal international legal system and reflect on how the text of the *UN Guiding Principles* contributes to global and domestic structures that marginalize women. Our central argument is that the *UN Guiding Principles* are the technology that establishes “relations of ruling” in terms of state and business behaviour with respect to women who are survivors of violence associated with resource extraction. We argue that the text, structure, and nature of these norms not only fail to acknowledge women’s experiences or to protect women’s rights in the realm of resource extraction but that they also help to perpetuate the patriarchal and neo-liberal structures that oppress women. In engaging in this feminist analysis, we hope to contribute to the current project of

gender identities. See Carol Smart, “The Woman of Legal Discourse” (1992) 1:1 *Social and Legal Studies* 29; see also Dorothy E Chunn & Dany Lacombe, “Introduction” in Dorothy E Chunn & Dany Lacombe, eds, *Law as a Gendering Practice* (Don Mills, ON: Oxford University Press, 2000) 2 at 14.

22. Smith most recently described institutional ethnography as “[w]orking from people’s experience of their own doings, knitting different perspectives and positions together, and exploring the text-based forms of organization [that] provides means of constructing representations of how things work.” Smith, *Institutional Ethnography*, *supra* note 6 at 183. Smith’s methodological approach begins with the ontological and epistemological assumptions of feminist standpoint methodology and Marxist materialism. Epistemologically, Smith developed a critique of sociology by including feminist ways of knowing and feminist practices. She started from women’s experiences to develop a sociology for people, away from “ideological” theoretical frameworks that seem to ignore the realities and lived experiences of the subject. Reality is never encapsulated exclusively by discourses; narratives of such realities emerge dialogically between subjects, meaning

the UN Working Group on Business and Human Rights and others on gendering the *UN Guiding Principles*.²³ Such an endeavour, in our view, requires more than simply tinkering with the current principles or “adding women and stirring.” It requires a deep holistic analysis and subsequent reimagining of these influential norms.

Violence against Women and Resource Extraction

As Katy Jenkins observes, the detrimental impacts of mining and oil and gas extraction on communities, the environment, and human rights have been well documented. However, there has been much less consideration of the particular impacts of resource extraction on women.²⁴ Large-scale mining and oil and gas projects can have a variety of direct and indirect impacts on women that are differentiated from those of men. Significant gendered impacts include, but are not limited to, environmental degradation, including water and land contamination and the associated increased burdens on women where they are responsible for sourcing food and clean water for the family; impacts from water and land contamination on women’s and family members’ health and the increased burdens of care; the displacement of local communities and associated changes in gender roles; and the heightened risk of violence against women.²⁵

We focus specifically on violence against women, including sexual violence. There is a growing number of scholarly articles as well as reports from Indigenous women’s groups, other NGOs, UN experts, and international human rights treaty bodies that discuss the problem of violence against women in the context of resource extraction. This literature does not yet paint a comprehensive picture of such violence in either the national or global contexts. However, it does suggest that resource extraction brings with it an increased risk of violence against women whether the extraction project is situated in the global South or the global North or in conflict- or non-conflict-affected areas and whether domestic or transnational extractive companies are involved. Having said that, we do not wish to suggest that women who are subject to gender-based violence should be seen only as victims or that women’s experiences of violence in these contexts are the same.

that they are knitted from myriad diverging stories that emerge through social coordination, networks, and dialogue between individuals. Marie Campbell & Frances Gregor, *Mapping Social Relations: A Primer in Doing Institutional Ethnography* (Aurora, ON: Garamond Press, 2002) at 38–40 [Campbell & Gregor, “Mapping Social Relations”].

23. UN Working Group on Business and Human Rights (UNWGBHR), *Gender Lens to the UNGPs*, Office of the High Commissioner for Human Rights (30 November 2017) <<https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>> [UNWGBHR, *Gender Lens*].
24. Katy Jenkins, “Women, Mining and Development: An Emerging Research Agenda” (2014) 1 *Extractive Industries and Society* 329 at 329–30.
25. *Ibid* at 332–35.

First, we recognize the importance of not reproducing the stereotype of the monolithic woman as the quintessential victim, one who must always be protected from “evil” corporations and predatory subjects and entities alike. Women’s roles within, and experiences with respect to, resource extraction are varied; they may be victims or not and/or may be agents, workers, leaders, community members, activists, and/or beneficiaries.²⁶ The oversimplifications typical of rhetorical constructions of agency and victimhood, in both social, legal, and popular cultural narratives, have substantial effects on women’s lives.²⁷ This false dichotomy fails to understand the complexities that women live in their everyday/every night lives, with their divided allegiances and the spectrum of agency and subordination they may traverse on a daily basis. Instead of suggesting that the concepts of “victim” and “agent” are good for nothing, it is our view that using them as a simplistic binary fails to address the shifting and complex matrix of power through which women negotiate their identities and, most importantly, the different positions women occupy in our highly unequal societies.

Second, by acknowledging the intersectional nature of women’s experiences, we give space to a narrative whereby we see the complex intersections of gender, race, class, and other factors such as geopolitical position, language, sexual orientation, ethnicity, socio-economic status, religion, able-bodiedness, and sexuality. As mentioned above, institutional ethnography departs from people’s everyday experiences and from their materialities.²⁸ However, women’s experiences are not monotonous, uni-dimensional, and uniform. This recognition of women’s experiences as unique, complex, and intersectional allows us to point out the difficulties, but not the impossibilities, of female agency and resilience within these stories of marginalization and subordination.²⁹ Thus, survivors of gendered violence may understand how to traverse the spectrum of resilience and victimhood they deal with in order to empower

26. Jenkins argues that “women should be recognised as important actors in communities affected by mining” (*ibid* at 330). She identifies four interrelated aspects of this relationship in the context of both artisanal and large-scale mining projects in the global South: “[W]omen as mineworkers (both in relation to artisanal and small scale mining (ASM) and larger scale industrial mining); the gendered impacts of mining, and specifically the disproportionately negative impacts on women; women’s changing roles and identities in communities affected by mining; and finally gendered inequalities in relation to the benefits of mining” (*ibid*).

27. Ratna Kapur, “Revisioning the Role of Law in Women’s Human Rights Struggles” in Saladin Meckled-García & Basak Çali, eds, *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (London: Routledge, 2006) 93 at 98–99.

28. Smith, *Writing the Social*, *supra* note 11.

29. Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics” (1989) 1989:1 *University of Chicago Legal Forum* 139.

themselves and in order to understand and accept the hesitations and ambivalences of their experiences with gender-based violence. In critiquing this simplistic definitional strategy of agency versus victimhood, we move away from falling into the trap of the narrative of violence that organizes around women's "victimhood" as an essentialist, monolithic, one-dimensional, totalizing identity. Such a perspective risks the danger of transforming—from and within a patriarchal structure—women's suffering and weaknesses into what ontologically makes a "woman" and thereby reinforcing patriarchal constructions of gender, sex, and sexuality as fixed, determinate, inescapable, and, therefore, inevitable.³⁰

Seen through an intersectional lens, women may experience gendered violence discrimination and abuse associated with resource extraction not simply as women but, rather, as women who have a particular race, class, sexuality, age, level of able-bodiedness, and proximity to resource extraction projects, among myriad other factors. For example, many large-scale extractive projects are undertaken in remote rural areas and on, or near to, Indigenous peoples' lands and communities where there is a legacy of colonialism, increasing the vulnerability of Indigenous women and girls to such violence.³¹ Yet, while women's experiences of violence in the global South and the global North between countries and regions and cultures are unique, there appear to be some notable similarities in the causes and the multi-faceted nature of gendered violence associated with mining and oil and gas projects across the globe, and we provide a few examples below.

Gendered Violence in the Workplace

Mining and oil and gas extraction remain male-dominated industries and highly masculinized work environments.³² Adriana Eftimie, Katherine Heller, and John

30. Our theoretical take on women's experiences in this regard builds from Kimberlé Crenshaw's "intersectional" critique of the rhetoric of law. Crenshaw's critique has been among the most influential in exposing another invisibilized dichotomy hiding behind the one-dimensional "victim" versus "agent" characterizations of women who suffer violence: us (white, global North) versus them (the "other," minority, global South) antinomy. A single axis approach to understanding violence and discrimination against women fails dramatically; we cannot visualize all victims of violence as white women of the class, socio-economic status, and education to be able to access justice and resources to take advantage of civil rights remedies. See Crenshaw, *supra* note 29.

31. Konstantia Koutouki, Katherine Lofts & Giselle Davidian, "A Rights-Based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada" (2018) 27:1 *Review of European, Comparative and International Environmental Law* 63 at 63–64.

32. See e.g. Robyn Mayes & Barbara Pini, "The 'Feminine Revolution in Mining': A Critique" (2010) 41:2 *Australian Geographer* 233 at 240–42 (arguing that contrary

Strongman note that “[w]orldwide it is extremely rare to find any [extractive] companies with higher than 10% female employment, with many being less than 5%.”³³ Women working within the industry often face discrimination in terms of job opportunities, pay, and opportunities for promotion. For example, in the Canadian mining industry, women are under-represented at all levels of employment and may only be hired for “clerical and support-related occupations, and in administration and corporate services.”³⁴ Indigenous women face additional hurdles in this regard due to both racial and gender discrimination.³⁵ There are a variety of reasons for this under-representation, including the male-dominated work culture.³⁶

Women working within the industry may be subject to daily sexual harassment and other gendered violence in the workplace.³⁷ For example, the UN Special Rapporteur on Violence against Women, Dubravka Šimonović, noted in her report on her mission to South Africa that violence against women is “rife” within the South African mining industry: “[W]omen miners constitute a minority group underground and are routinely victims of sexual violence, harassment and abuses, such as male employees expecting sex from female subordinates.”³⁸ In Canada, despite some reported advancements in

to reports in the media of the feminization of the Australian mining industry, women managers adapt their behaviour to the masculinized culture and work to “de-gender” themselves, “disguising or dismissing [their] femininity” [*ibid*]; Clare Beckton & Umut Riza Ozkan, “The Pathway Forward: Creating Gender Inclusive Leadership in Mining and Resources” (2012) Centre for Women in Politics and Public Leadership 1 at 18 <<http://scieng-women-ontario.ca/en/files/2012/11/Women-in-Mining.pdf>> (noting that despite some improvements in culture of the Canadian mining industry with the younger generation of workers, “the male-dominated culture continues to exist through implicit, hidden, and subtler forms of biases in the workplace” [*ibid*]); Dean Laplonge, *So You Think You're Tough: Getting Serious about Gender in Mining* (Perth: Factive, 2014) at ii (arguing that “[c]ultural norms about masculinity are deeply embedded in the everyday business practices of mining,” with a gender composition of approximately 85 percent men in the industry [*ibid*]).

33. Adriana Eftimie, Katherine Heller & John Strongman, “Gender Dimensions of the Extractive Industries: Mining for Equity” in *Extractive Industries and Development Series* (Washington: World Bank, 2009) at 9 <http://siteresources.worldbank.org/EXTOGMC/Resources/eifd8_gender_equity.pdf> [Eftimie, Keller & Strongman, “Gender Dimensions”].
34. Beckton & Ozkan, *supra* note 32 at 13.
35. Raywat Deonandan, Kalowatie Deonandan & Brennan Field, “Mining the Gap: Aboriginal Women and the Mining Industry” (2016) SSHRC (pre-print) at 14 <<https://ruor.uottawa.ca/bitstream/10393/35187/1/deonandan%20-%20mining%20the%20gap%20SSHRC%20report.pdf>>.
36. Beckton & Ozkan, *supra* note 32 at 18.
37. Dubravka Šimonović, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Her Mission to South Africa*, UNHRC, 32nd Sess, UN Doc A/HRC/32/42/Add.2 (2016) at para 20 <<http://undocs.org/en/A/HRC/32/42/Add.2>>.
38. *Ibid*.

the mining industry in terms of addressing “blatant forms of discrimination,” including sexual harassment, gendered violence in the workplace remains a concern for women within the extractive industries.³⁹ For example, in the oil and gas industry in northern British Columbia, women reported daily sexual and other harassment, the expectation of sex from their male colleagues, and sexual assault, where some companies took action against the perpetrators, while others did nothing at all. Some women who were harassed or assaulted did not report these crimes because of fear of losing their jobs or jeopardizing their opportunities for promotion.⁴⁰

Domestic Violence

Violence against women in the context of resource extraction cannot be disassociated from the socio-economic changes brought by extraction projects for local communities. In the global South, in particular, traditional livelihoods of communities and gender roles may be disrupted, which may increase the power imbalances between men and women. NGO reports and other studies have noted that in some countries the shift from subsistence farming or other land-based economies to a cash-based economy has contributed to increased levels of domestic violence.⁴¹ Male members of a community may be employed in the extraction project and/or be the recipients of any compensation for land that is appropriated for the project. The increased cash has “a tendency . . . to translate into higher levels of alcohol consumption.”⁴² Regina Scheyvens and Leonard Lagisa’s research on logging in the Solomon Islands found that women’s greatest fear was violence at the hands of their intoxicated husbands.⁴³ Meentje Simatauw has noted that, in Indonesia, the displacement of Indigenous communities to accommodate large-scale mining projects has had a double impact on women in these communities. Not only have they lost their access to resources for their livelihood, but compensation for the displacement being paid only to the men “has [also] resulted in increased alcohol consumption, more bars and sex workers, increased violence against women, and increased violence in households.”⁴⁴ Similarly,

39. Beckton & Ozkan, *supra* note 32 at 18.

40. Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights and Energy Development in Northeast British Columbia, Canada* (London: Amnesty International, 2016) at 42–43, <https://www.amnestyusa.org/files/out_of_sight_out_of_mind_-_report_eng_web.pdf> [Amnesty International, *Out of Sight*].

41. Jenkins, *supra* note 24 at 334.

42. *Ibid.*

43. Regina Scheyvens & Leonard Lagisa, “Women, Disempowerment and Resistance: An Analysis of Logging and Mining Activities in the Pacific” (1998) 19:1 *Singapore Journal of Tropical Geography* 51 at 63.

44. Meentje Simatauw, “The Polarisation of the People and the State on the Interests of the Political Economy and Women’s Struggle to Defend their Existence: A Critique

Julia Byford, in her study of the social, environmental, and economic impacts of Placer Dome's mine on Misima Island in Papua New Guinea has found that the project undermined women's traditional status in their communities as landowners. The increase in cash from royalties and other compensation were paid to the men and helped to fuel "excessive alcohol consumption," and this translated into concomitant increase in violence against women, including domestic violence and rape.⁴⁵

Reports on the gendered impacts of resource extraction in Northern countries, like Canada, have noted the same link between large-scale extraction projects and domestic violence, where extractive workers fly in and fly out of industrial camps. Amnesty International Canada's study on energy projects in the Peace River District of British Columbia found that the predominantly young male workforce, returning home after living in these camps for weeks at a time and working under stressful conditions, may engage in "a pattern of destructive and anti-social behaviours." This might involve "excessive partying accompanied by drug and alcohol use" and lead to "violence in the host communities, including violence against women," such as domestic violence.⁴⁶ One interviewee stated that "[h]ow hard you work, how much you party, and how many toys you have—that's oil patch culture. . . . I don't get hit, though I get a lot of emotional abuse. But some women get hit because their men hit the bar first. They come home, they come through the door, and they explode."⁴⁷

Violence against Women in Local Communities

Large-scale mining and oil and gas projects bring with them significant numbers of transient, highly paid, predominantly male workers. Women living in communities near to resource extraction projects or in urban centres that act as a hub for the industry are at a heightened risk of sexual and other gendered violence. A study done by Isabel Cane, Amgalan Terbish, and Onon Bymbasuren on mining projects in three locations in South Gobi, Mongolia, found a link between

of Mining Policy in Indonesia" in Ingrid MacDonald & Claire Rowland, eds, *Tunnel Vision: Women, Mining and Communities* (Victoria: Oxfam Community Aid Abroad, 2009) 35 at 38.

45. Julia Byford, "One Day Rich; Community Perceptions of the Impact of the Placer Dome Gold Mine, Misima Island, Papua New Guinea" in MacDonald & Rowland, *supra* note 44, 30 at 30–31; see also Isabel Cane, Amgalan Terbish & Onon Bymbasuren, *Mapping Gender Based Violence and Mining Infrastructure in Mongolian Mining Communities*, International Mining for Development Centre (May 2014) at 22–26; Inter-American Commission on Human Rights (IACHR), *Indigenous Women and their Human Rights in the Americas*, OEA/Ser.L/V/II. Doc. 44/17 (17 April 2017) at para 105 <<http://www.oas.org/en/iachr/reports/pdfs/IndigenousWomen.pdf>> [IACHR, *Indigenous Women*].
46. Amnesty International, *Out of Sight*, *supra* note 40 at 37.
47. *Ibid* at 44.

the influx of a large number of mineworkers and increased incidences of violence against women, including rape, as well as increased sex work.⁴⁸ The Inter-American Commission on Human Rights (IACHR), in its study on the impacts of extractive industries on Indigenous peoples and Afro-descendant communities, found that “large-scale mining activities leave deep impacts on the lives and [on] occasions [*sic*], in the bodies of women.”⁴⁹ Indigenous women reported to the IACHR that, in addition to socio-economic impacts on the community and family that disproportionately affected the women, there was increased alcoholism among extractive workers as well as trafficking and rape of Indigenous women and girls by these workers.⁵⁰

Rebecca Adamson, discussing the social impacts of oil development in the Bakken oil fields of North Dakota, United States, notes that “[t]he rapid oil development brought an influx of cash and thousands of oil workers living in ‘man camps’ with time and money on their hands” and resulted in a significant increase in violent crimes, including murder, aggravated assault, theft, rape, and sex trafficking.⁵¹ Indigenous women who may live near industrial camps or in urban centres that serve as a hub for the extractive industry are at a heightened risk of gender-based violence, including sexual violence.⁵² Ginger Gibson and her colleagues point to the direct link “between the highly paid shadow populations at industrial camps, the hyper-masculine culture, and a rise in crime, sexual violence, and trafficking of Indigenous women” in northeastern British Columbia.⁵³ Resource extraction camps

48. Cane, Terbish & Bymbasuren, *supra* note 45 at 26–32.

49. IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction and Development Activities*, OEA/Ser.L/V/IL Doc.47/15 (December 2015) at para 319 <<http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf>>.

50. *Ibid* at paras 318–21. See also IACHR, *Indigenous Women*, *supra* note 45 at para 99.

51. Rebecca Adamson, “Vulnerabilities of Women in Extractive Industries” (2017) 2:1 *Indian Journal of Women and Social Change* 24 at 25. She notes that “the rates for murders, aggravated assaults and robberies tripled, while the rates for sex crimes, forcible rape, prostitution and sex trafficking, increased by 20.2 percent” (*ibid*).

52. Ginger Gibson et al, *Indigenous Communities and Industrial Camps: Promoting Healthy Communities in Settings of Industrial Change* (Victoria, BC: Firelight Group, 2017) at 22.

53. *Ibid*. Gibson et al reference a study based on Royal Canadian Mounted Police data from north-central British Columbia that “showed a 38 per cent increase in sexual assaults during the first year of the construction phase of an industrial project, as well as an increase in sex work in areas where there is an increase in industrial traffic” (*ibid*). See also Anupriya Sethi, “Domestic Sex Trafficking of Aboriginal Girls in Canada: Issues and Implications” (2007) 3:3 *First Peoples Child and Family Review* 57 at 60, who notes that “[a]lthough several factors contribute to the movement of girls, an emerging trend that a key informant pointed out, is the increased trafficking of girls due to the flourishing oil riggers and mining businesses in Alberta” (*ibid*).

that are located near Indigenous communities increase the risk of sexual and other violence against Indigenous women and girls who are “are particularly vulnerable to being victimized.”⁵⁴

Sexual violence is often used as an intimidation tactic by security forces against local women whether as part of a systematic attempt to displace the local population⁵⁵ or to discourage artisanal mining. For example, Barrick Gold Corporation’s security providers at the Porgera mine in Papua New Guinea “physically abused many local residents and landowners, and targeted women for vicious sexual assaults, including gang rapes” for almost a decade.⁵⁶ The Columbia and Harvard Human Rights Clinics’ report, that assessed the adequacy of the company’s operational-level grievance mechanism to provide redress to survivors of such gender-based violence, found that

[m]any of the sexual assault allegations presented . . . involved a similar pattern of conduct: mine security guards, sometimes in groups of five or more, would encounter a woman or group of women while patrolling on or near mine property, they would engage the woman with threats and violence, and then rape her. Many of the sexual assault victims described brutal assaults in which they were punched, kicked, or beaten with guns, sometimes resulting in severe injuries. In a number of cases, women reported being forced to chew and swallow the condoms used by the guards during the rape.⁵⁷

In addition, women human rights defenders are often targeted. Global Witness reports that in 2015 most of the killings of land and environmental defenders were

54. Gibson et al, *supra* note 52 at 22.

55. See e.g. John Harker, *Human Security in Sudan: The Report of a Canadian Assessment Mission*, Department of Foreign Affairs and International Trade (2000) <<http://www.paxvoorvrede.nl/media/files/human-security-in-sudan.pdf>>; Canadian Auto Workers Union et al, *Report of an Investigation into Oil Development, Conflict and Displacement in Western Upper Nile, Sudan*, European Coalition on Oil in Sudan (October 2001) <<http://www.ecosonline.org/reports/2001/SudanReportGagnon103001.pdf>> (where government of Sudan security forces engaged in rape and abduction of women living in villages near the oil fields as part of a wider strategy of terror to displace local populations that may harbour rebel forces and thereby protect oil extraction and development); see also *Caal v HudBay Minerals Inc and HMI Nickel Inc* (2012), No CV-11-423077, Amended Statement of Claim at paras 63–64 (ON Sup Ct J) (where eleven Mayan Q’eqchi’ women plaintiffs allege they were gang raped by security forces who were forcibly evicting them from their lands in and around the Canadian-owned Fenix mining project in Guatemala).

56. Human Rights Clinic (Columbia Law School) & International Human Rights Clinic (Harvard Law School), *Righting Wrongs? Barrick Gold’s Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned* (November 2015) at 1 <<http://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf>>.

57. *Ibid* at 22–23.

associated with the mining and other extractive industries and that Indigenous peoples were at the greatest risk of harm.⁵⁸ UN Special Rapporteur on the Situation of Human Rights Defenders Michael Forst notes that, in particular, “sexual violence is used to silence women human rights defenders. . . . In Latin America, for example, women defenders are among the most threatened environmental human rights defenders owing to the nature of their human rights work and to their gender.”⁵⁹

These examples demonstrate the very real risk for women of violence that comes with large-scale resource extraction projects. The next three sections explore the limitations of *UN Guiding Principles* in terms of providing appropriate guidance to states and extractive companies to prevent, and respond to, this pernicious gendered impact, the ways in which these principles privilege certain knowledge and actors, and, finally, how they contribute to the global structures that perpetuate women’s inequality and vulnerability to violence.

The UN Guiding Principles and the Peripheral Place of Women and Women’s Human Rights

Recognition of the differentiated impacts of business activity on women and men was noticeably absent from the early work of the SRSG and, in renewing the SRSG’s mandate in 2008, the UNHRC requested that, among other things, the SRSG “integrate a gender perspective throughout his work.”⁶⁰ Nonetheless, a draft of the *Guiding Principles* that was released for comment in late 2010 only included one sentence in the introduction that recommended that, in implementing the *Guiding Principles*, states and businesses should have “due regard to gender considerations.”⁶¹ The draft

58. See Global Witness, *On Dangerous Ground* (June 2016) at 8 <https://business-human-rights.org/sites/default/files/documents/On_Dangerous_Ground.pdf>.

59. Michel Forst, *Report of the Special Rapporteur on the Situation of Human Rights Defenders*, United Nations General Assembly (UNGA), 71st Sess, UN Doc A/71/281 (3 August 2016) at para 54 <https://www.protecting-defenders.org/sites/protecting-defenders.org/files/57d2a3364_0.pdf>.

60. UNHRC, *Mandate of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/RES/8/7 (18 June 2008) at para 4(d) <http://www2.ohchr.org/english/issues/globalization/business/docs/A_HRC_RES_8_7.pdf> [UNHRC, *Mandate of the Special Representative*].

61. See Kathryn Dovey et al, *Comments on the Draft “Guiding Principles” for the Implementation of the ‘Protect, Respect and Remedy’ Framework: Integrating a Gender Perspectives*, Editorial Comment, Institute for Human Rights and Business (2011) at 1–2 <https://www.ihrb.org/pdf/2011_01_28_Submission_on_Draft_Guiding_Principles-Integrating_gender_perspective_FINAL.pdf>.

Guiding Principles and their explanatory commentary provided no insights on how states or business actors should accomplish this goal.⁶²

References to Women and Women's Human Rights in the Text

The SRSR took feedback on this issue and made a number of changes to the *Guiding Principles* that are reflected in the final version. There is now some reference to the differentiated impacts of business activity on women and men, and the *Guiding Principles* incorporate a few sentences on the issue of gender-based violence including sexual violence against women. Nonetheless, one would be hard-pressed to say that a gender perspective has been integrated throughout the text of the document. For example, Guiding Principle 3 provides guidance to states on how they can meet their international legal obligations to protect the human rights of persons and groups that may be affected by business activity. The commentary to Guiding Principle 3 recommends that states advise corporations on “how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by . . . women.”⁶³ Guiding Principle 18 is directed at business actors and deals with aspects of corporate human rights due diligence (HRDD). Corporations must undertake HRDD as part of their responsibility to respect human rights.⁶⁴ The commentary to Guiding Principle 18 suggests that, in the course of identifying and assessing the nature of “actual and potential adverse human rights impacts,” corporations should “pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization and bear in mind the different risks that may be faced by women and men.”⁶⁵

Apart from these provisions and two general recommendations on non-discrimination laws and the potential for discrimination against vulnerable or marginalized persons in relation to access to justice respectively,⁶⁶ the main focus of the additions to the *UN Guiding Principles* is on women as potential victims of gender-based violence.⁶⁷ As noted above, gender-based violence against women,

62. *Ibid.*

63. *UN Guiding Principles*, *supra* note 2 at Annex I(B)(3).

64. *Ibid* at Annex II(B)(18).

65. *Ibid.*

66. *Ibid* at Annex I(B)(3), III(B)(26).

67. The Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (SRSR) produced several addenda and a companion report to the *UN Guiding Principles* on specific issues, but none of them elaborate on the issue of the differentiated impacts of business activity on women. See John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business*

and, in particular, sexual violence, is a crosscutting gendered impact of resource extraction. However, the *UN Guiding Principles* only raise the issue of sexual violence in relation to business activity in conflict zones. Guiding Principle 7 recommends that states provide business actors operating in “conflict-affected areas” with “adequate assistance . . . to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.”⁶⁸ There is no mention of violence against women, including sexual violence that may occur outside of conflict-affected areas, nor do the principles on HRDD directed at business actors identify the potential of sexual violence against women in any context as an issue.

From a feminist perspective, the narrow focus of the *UN Guiding Principles* on sexual violence in “conflict-affected areas” relies on the idea that such abstract moments of crisis are “exceptional,” and it ignores the daily manifestations of systemic discrimination and socio-economic marginalization of women. In considering gender-based violence as a risk only in situations of conflict, the *UN Guiding Principles* overlook the well-established fact that gender-based sexual violence perpetrated in situations of conflict is not an aberration but, rather, a reflection of the “structural gender inequalities that manifest themselves in the subordination of women in societies.”⁶⁹ Sexual violence that occurs in these extreme circumstances is directly connected to the discrimination against women, their marginalization, and the sexual violence they may face in their day to day lives.⁷⁰

This failure of the *UN Guiding Principles* to acknowledge the everyday nature of gendered sexual violence disregards the role of state institutions in contributing to and/or maintaining the oppression and inequality of women. In doing so, the *UN Guiding Principles* divert attention away from the broader and fundamental

Enterprises, UNGA, 17th Sess, UN Doc A/HRC/17/31 (21 March 2011); John Ruggie, *Addendum—Piloting Principles for Effective Company/Stakeholder Grievance Mechanisms: A Report of Lessons Learned*, UNHRC, 17th Sess, UN Doc A/HRC/17/31/Add.1 (24 May 2011); John Ruggie, *Addendum—Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, UNHRC, 17th Sess, UN Doc A/HRC/17/31/Add.2 (23 May 2011); John Ruggie, *Addendum—Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators*, UNHRC, 17th Sess, UN Doc A/HRC/17/31/Add.3 (25 May 2011).

68. *UN Guiding Principles*, *supra* note 2 at Annex 1(B)(7)(b).

69. Kirsten Anderson, “Violence against Women: State Responsibilities in International Human Rights Law to Address Harmful ‘Masculinities’” (2008) 26:2 *Netherlands Quarterly of Human Rights* 173 at 179; see also Miranda Alison, “Wartime Sexual Violence: Women’s Human Rights and Questions of Masculinity” (2007) 33:1 *Review of International Studies* 75; Celina Romany, “Women as *Aliens*: A Feminist Critique of the Public/Private Distinction in International Human Rights Law” (1993) 6 *Harvard Human Rights Journal* 87.

70. Jacqui True, *The Political Economy of Violence Against Women* (New York: Oxford University Press, 2012) at 19.

structures of discrimination and elite privilege on which the global economy has been built, while further entrenching the hierarchical gender and racial stereotypes of governance discourses. At a practical level, this approach removes this issue from the purview of business enterprises, including resource extraction companies, the majority of which operate in non-conflict-affected areas.

The Hierarchy of Human Rights in the UN Guiding Principles

Another concerning issue with the text of the *UN Guiding Principles* is its categorization of women's human rights (along with the human rights of other marginalized groups). Guiding Principle 12, which is one of several principles that lays out the normative content of the business responsibility to respect human rights, divides the human rights instruments applicable to corporate conduct into two categories. The minimum prescribed human rights content is set out in the text of Guiding Principle 12, which reads:

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights—understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.⁷¹

These instruments comprise what the *UN Guiding Principles* refer to as “[a]n authoritative list of the core internationally recognized human rights” and are applicable in all circumstances.⁷² The second category of rights is dealt with only in the commentary to Guiding Principle 12 and includes women's, children's, Indigenous peoples' and disabled peoples' rights, along with the rights of other minority groups.⁷³ These rights are termed “additional standards” that corporations *may* need to consider in particular circumstances.⁷⁴

We identify at least three interconnected problems with the hierarchy of applicable human rights norms established in the *UN Guiding Principles*. First, this division and prioritization of human rights is incompatible with the widely accepted UN doctrine established by the 1993 *Vienna Declaration and Programme of Action (VDPA)*,

71. *UN Guiding Principles*, *supra* note 2 at Annex II(A)(12). The International Bill of Rights consists of the *Universal Declaration of Human Rights*, 10 December 1948, UN Doc A/810 at 71 (1948); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*ICCPR*]; *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

72. *UN Guiding Principles*, *supra* note 2 at Annex II(A)(12).

73. *Ibid.*

74. *Ibid.*

adopted by the UN General Assembly.⁷⁵ The *VDPA* dispenses with the idea of any hierarchy among different human rights treaties. Article 5 states that “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”⁷⁶

The *VDPA* was a significant milestone for women’s rights.⁷⁷ It recognized “the human rights of women and of the girl-child [as] an inalienable, integral and indivisible part of universal human rights”⁷⁸ and “gender-based violence as a human rights concern.”⁷⁹ It called on states to mainstream women’s human rights concerns within the UN system.⁸⁰ By establishing a hierarchy of rights, the *UN Guiding Principles* destabilize this fundamental doctrine. This bifurcation of rights suggests to states and corporations that these rights are not relevant to everyday business operations and that corporations may therefore disregard women’s rights—and the rights of (other) vulnerable or marginalized groups—at their discretion.⁸¹ Indeed, a survey of the codes of conduct, and the human rights and other policies of a range of major extractive corporations, that explicitly adhere to the *UN Guiding Principles*, shows a marked absence of reference to women’s human rights instruments, and references to gender or women are mainly in relation to diversity in employment, non-discrimination in the workplace, or workplace harassment.⁸² Additionally, as

75. *Vienna Declaration and Programme of Action*, GA Res 157/23, UN Doc A/CONF.157/23 (1992) <<http://www.un-documents.net/ac157-23.htm>> [*Vienna Declaration*].

76. *Ibid.*, para 5.

77. Julie Mertus & Pamela Goldberg, “A Perspective on Women and International Human Rights after the Vienna Declaration: The Inside/Outside Construct” (1994) 26:2 *New York University Journal of International Law and Politics* 201 at 202.

78. *Vienna Declaration*, *supra* note 75, para 18.

79. Mertus & Goldberg, *supra* note 77 at 203.

80. Ursula O’Hare, “Realizing Human Rights for Women” (1999) 21:2 *Human Rights Quarterly* 364 at 382.

81. The *UN Guiding Principles* do note in the commentary to Guiding Principle 18, that the process of human rights due diligence should use “all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.” *UN Guiding Principles*, *supra* note 2 at Annex II(B)(18)).

82. Anglo American plc, <<https://www.angloamerican.com/>>; Barrick Gold Corporation, <<https://www.barrick.com/home/default.aspx>>; BHP Billiton Limited, <<https://www.bhp.com/>>; British Petroleum, <<https://www.bp.com/>>; Exxon Mobile Corporation, <<https://corporate.exxonmobil.com/en/>>; Freeport-McMoRan Incorporation, <<https://www.fcx.com/>>; Glencore Plc, <<http://www.glencore.com/>>; Goldcorp Incorporated, <<https://www.goldcorp.com/English/home/default.aspx>>; Newmont Mining Corporation, <<https://www.newmont.com/home/default.aspx>>; Polyus, <<http://www.polyus.com/en/>>; Rio Tinto Group, <<http://www.riotinto.com/>>; Shell International Limited, <<https://www.shell.ca/>>; Teck Resources Limited, <<https://www.teck.com/>>; Total SA, <<https://www.total.com/en/>>; Vale SA, <<http://www.vale.com/EN/Pages/default.aspx>>.

discussed below, some states have reflected this hierarchy both explicitly and implicitly in their National Action Plans (NAPs) for the implementation of the *UN Guiding Principles*.

Second, it suggests that women's human rights (and those of other marginalized groups) are not "equally universal, but . . . particular, biased, special interests,"⁸³ and, thus, of less relevance than supposedly "gender neutral" treaties such as the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Covenant on Civil and Political Rights (ICCPR)*.⁸⁴ A text such as the *UN Guiding Principles* that purports to take gender seriously must interrogate the seductive power of concepts such as "normal" and "special." "Gender" remains a slippery concept.⁸⁵ The danger with qualifying women's rights as "special interests" and of qualifying a particular behaviour or activity as "feminine" is the risk of essentializing. In turn, gender essentialism can be biologically reductionist, and it can help preserve rigid gender beliefs such as the ones that stereotype women as one-dimensional victims who lack agency and as vulnerable subjects rather than as resilient human beings.⁸⁶

Finally, the hierarchy of applicable human rights in the *UN Guiding Principles* also disregards the well-established understanding of why a specific universal convention on women's human rights was necessary. For example, feminist international human rights scholars have argued that "the development of international human rights law generally has been partial and androcentric, privileging a masculine world view."⁸⁷ Discrimination against women *vis-à-vis* men is only "a manifestation of the

83. Rosemary Hunter, "Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism" in Margaret Davies & Vanessa E Munro, eds, *The Ashgate Companion to Feminist Legal Theory* (New York: Routledge, 2016) 13 at 15.

84. It should be noted that the inadequacy of some the early general treaties, such as the *ICCPR*, *supra* note 71, and the *ICESCR*, *supra* note 71, in terms of protecting women's human rights was addressed in the Human Rights Committee's General Comment 28, *Article 3 (The Equality of Rights between Men and Women)*, UNHRC, 68th Sess, UN Doc CCPR/C/21/Rev.1/Add 10 (29 March 2000); and the Committee on Economic Social and Cultural Rights' General Comment 16, *Article 3 (The Equal Right of Men and Women to the Enjoyment of All Economic Social and Cultural Rights)*, ECOSOC, 34th Sess, UN Doc E/C.12/2005/4 (11 August 2005), respectively.

85. Marysia Zalewski, *Feminist International Relations: Exquisite Corpse* (London: Routledge, 2013) at 40.

86. Juanita Elias, "Davos Woman to the Rescue of Global Capitalism: Postfeminist Politics and Competitiveness Promotion at the World Economic Forum" (2013) 7:2 *International Political Sociology* 152 at 154.

87. Hilary Charlesworth, "What Are 'Women's International Human Rights'?" in Rebecca J Cook, ed, *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 58 at 60.

larger problem . . . [that] [w]omen are in an inferior position [to men] because they have no real power in either the public or the private worlds.”⁸⁸

Women’s powerlessness is reinforced by traditional international human rights law.⁸⁹ Rebecca Cook and others have pointed to the “sex-neutral norm that requires the equal treatment of men and women” in the *ICCPR* and the *ICESCR* as insufficient to address “the pervasive and systemic nature of discrimination against women” and the social causes of gender discrimination.⁹⁰ The language of non-discrimination and equality in the text of these foundational instruments “only gives women access to a world already constituted.”⁹¹ Hilary Charlesworth argues that even international instruments that specifically address women (apart from the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*) incorporate this “norm of formal nondiscrimination, providing that, in particular or general contexts, women should be treated the same as men.”⁹² This latter recognition, she notes, has been an important development in the international legal system; however, “it has not been adequate to address the subordination of women worldwide.”⁹³

CEDAW, which was adopted 40 years ago in 1979, and came into force in 1981, recognizes the structural subordination of women and seeks to address it.⁹⁴ As Rebecca Cook observes,

[it] progresses beyond the earlier human rights conventions by addressing the pervasive and systemic nature of discrimination against women, and identifies the need to confront the social causes of women’s inequality by addressing “all forms” of discrimination that women suffer.⁹⁵

The *UN Guiding Principles*, in this sense, are a step backward for the protection and empowerment of women. Not only do they fail to recognize and address the systemic and structural nature of discrimination against women, and the everyday experiences of women, including with respect to violence, but they also replicate and support the androcentric bias of traditional international human rights law.

88. *Ibid.*

89. *Ibid.*

90. Rebecca Cook, “Introduction: The Way Forward” in Cook, *supra* note 87, 3 at 11 [Cook, “Introduction”].

91. Charlesworth, *supra* note 87 at 64, citing Clare Dalton, “Where We Stand: Observations on the Situation of Feminist Legal Thought” (1987–88) 3 *Berkeley Women’s Law Journal* 1 at 5.

92. Charlesworth, *supra* note 87 at 59. *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) [*CEDAW*].

93. Charlesworth, *supra* note 87 at 59. Some human rights treaty bodies have subsequently developed interpretations of their respective treaties that address some of these issues. See note 84 above.

94. *CEDAW*, *supra* note 92.

95. Cook, “Introduction”, *supra* note 90 at 11.

Relations of Ruling: The UN Guiding Principles and State Practice

As mentioned above, it is the reproducibility and stability of texts, like the *UN Guiding Principles*, that facilitate governance at the level and in the form that we observe today.⁹⁶ Texts are hierarchically organized in what Smith calls a “two way street.”⁹⁷ They provide a basis for accountability, while, simultaneously, authoritative texts provide the concepts and categories used within subordinate texts. For example, the *UN Guiding Principles* were developed to implement the “Respect, Protect and Remedy” policy framework that the SRSG produced in 2008. In turn, the *UN Guiding Principles* give rise to subordinate texts, such as NAPs, which are policy documents in which states articulate priorities and actions they will adopt to support their implementation of the *UN Guiding Principles*.⁹⁸ Smith’s reminder about the hierarchical nature of intertextuality allows us to discern the process by which ideologies are constituted and perpetuated within institutions.

State practice with respect to women’s human rights, of course, is not simply influenced by the *UN Guiding Principles*. Women’s human rights remain deeply contested by states as evidenced by the large number of reservations to *CEDAW*.⁹⁹ However, the *UN Guiding Principles* guide and facilitate institutional processes in the context of the human rights impacts of business activity, including resource extraction. Thus, business actors are directed to engage in human rights due diligence, and states are encouraged to develop NAPs.¹⁰⁰ The prioritizing of certain human rights norms over others will have an impact on these institutional processes and documents. For example, in their NAPs, Norway and Switzerland have replicated explicitly the hierarchy of human rights norms set out in the *UN Guiding Principles*, where women’s rights are referred to as additional standards.¹⁰¹ The other NAPs that

96. Smith, *Writing the Social*, *supra* note 11 at 170.

97. Smith, *Institutional Ethnography*, *supra* note 6, at 186.

98. UNGA, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UNGA 69th Sess, UN Doc A/69/263 (5 August 2014) at paras 6–7.

99. UN Women, “Reservations to CEDAW” <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>.

100. UNHRC, *Resolution on Human Rights and Transnational Corporations and other Business Enterprises*, Res 26/22, UNHRC, 26th Sess, UN Doc A/HRC/RES/26/22 (27 June 2014).

101. Norwegian Ministry of Foreign Affairs, *Business and Human Rights: National Action Plan for the Implementation of the UN Guiding Principles* [*Næringsliv og menneskerettigheter Nasjonal handlingsplan for oppfølging av FN’s veiledende prinsipper*] (Oslo: Ministry of Foreign Affairs, 2015) <<https://globalnaps.org/wp-content/uploads/2017/10/NAP-Norway.pdf>>; Switzerland, *Report on the Swiss Strategy for the Implementation of the UN Guiding Principles on Business and Human Rights* (2016) <<https://globalnaps.org/wp-content/uploads/2017/11/switzerland.pdf>>.

do address gender have adopted this hierarchy implicitly by only mentioning gender or women's rights in relation to non-discrimination and equality in the context of employment.¹⁰² Further, the "relations of ruling" established by the *UN Guiding Principles* are evident in the fact that the vast majority of NAPs were produced or updated well after the Working Group on Business and Human Rights provided guidance to states in 2013, on addressing business-related impacts on the rights of Indigenous peoples, including Indigenous women, and in 2014, on integrating women's rights and gender into NAPs.¹⁰³ Thus, it appears to be the text of the *UN Guiding Principles* that primarily guides or influences the activities and responses of states with respect to women's rights and gender in the context of business activity, such as resource extraction, rather than the interpretive guidance of the Working Group on Business and Human Rights.

Having considered how women, their interests, and human rights are dealt with in the text of the *UN Guiding Principles*, the next section will delve deeper into the structure of the *UN Guiding Principles* and examine the particular knowledge upon

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102. See e.g. the national action plans of Belgium, Chile, Germany, Lithuania and Poland. Poland, *Polish National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights 2017–2020* (2017) <<https://globalnaps.org/wp-content/uploads/2017/11/nap-poland.pdf>>; Belgium, *Plan d'action national Entreprises et Droits de l'Homme* (2017) <<https://globalnaps.org/wp-content/uploads/2017/11/national-action-plan-belgium-1.pdf>>; Chile, *Plan de Acción Nacional de Derechos Humanos y Empresas* (2017) <https://globalnaps.org/wp-content/uploads/2017/11/national-action-plan-on-business-and-human-rights_.pdf>; Germany, *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights* (2017) <<https://globalnaps.org/wp-content/uploads/2017/11/nap-germany.pdf>>; Lithuania, *Lithuania's Action Plan on the implementation of the United Nations Guiding Principles on Business and Human Rights* (2015) <<https://globalnaps.org/wp-content/uploads/2017/10/NAP-Lithuania.pdf>>.
103. See UNGA, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Business-related Impacts on the Rights of Indigenous Peoples*, 68th Sess, UN Doc A/68/279 (7 August 2013) at paras 2, 3, 27, 31, 43, 52 as well as the recommendations; UNGA, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: National Action Plans on Business and Human Rights*, 69th Sess, UN Doc A/69/263 (5 August 2014) at paras 32, 41–42. The working group has also produced other guidance for businesses and states that includes reference to women and gender issues. See UN Working Group on Business and Human Rights, *Guidance on National Action Plans and Business and Human Rights* (November 2016) <http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf>; UNHRC, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on Opportunities for Small and Medium-sized Enterprises in the Implementation of the Guiding Principles on Business and Human Rights*, 35th Sess, UN Doc A/HRC/35/32 (24 April 2017).

which the principles draw and how the *UN Guiding Principles* operate to construct a particular reality in the way they structure the relationships between states, business enterprises, and persons, including women, who are subject to the impacts of business activity.

The State, Corporations, and Women in the UN Guiding Principles

We have already seen that there are few references to women in the text of the *UN Guiding Principles*, that these principles do not address the differentiated impacts of business activity on women in any crosscutting way, and that they overlook women's everyday experiences of violence. Additionally, pursuant to the hierarchy that the *UN Guiding Principles* establish of applicable human rights standards, women's rights (along with the rights of other marginalized groups) are treated as special interests rather than as universally and equally relevant. Together, these problematic aspects of the *UN Guiding Principles* negate the "pervasive and systemic nature of discrimination against women" and the violence it perpetuates.¹⁰⁴ However, the failure of the *UN Guiding Principles* to acknowledge the structural nature of women's oppression and women's marginalization, as well as the quotidian character of violence perpetrated against women, is indeed more profound and problematic than it seems at first sight. This section considers this contention, first, by considering whose knowledge is prioritized in the *UN Guiding Principles* and, second, by examining how the *UN Guiding Principles* privilege certain actors over others.

The Privileging of Knowledge

A key element of Smith's thinking, writing, and teaching is the importance of interrogating practices of knowing and knowledge that are taken for granted. The domestic sphere and the everyday nature of women's experience is often excluded from the male-oriented sphere of intellect, science, and rationality.¹⁰⁵ Smith points out that this type of marginalization of the everyday character of violence against women also evidences a profound epistemological disregard for women's experiences. It emerges from the rift between the two kinds of knowing. On the one hand, privileged and authoritative male ways of knowing involve the dominant and hegemonic masculine domains of "conflict," war zones, and commerce, which traditionally belong to the sphere of men, and whereby more public, serious, authoritative knowledge is produced under an aura of pseudo-urgency and relevancy. On the other hand, the invisibilized and marginalized women's ways of knowing often emerge in the spheres

104. See Cook, "Introduction", *supra* note 90 at 11.

105. Smith, *Texts, Facts and Femininity*, *supra* note 7 at 1–8.

of the domestic where the everyday/every night experiences of women take place and where their marginalization and violence is located and embedded within the historicities and particularities of their lived worlds.¹⁰⁶ For women working within, or ancillary to, the extractive industry, or living near extractive projects or urban resource extraction hubs, violence, including sexual violence, is an everyday/every night risk.

The text of the *UN Guiding Principles* is based on a particular androcentric neo-liberal ideology that upholds and endorses masculinized ways of knowing. “Ideology” can be understood here as the accumulation of powerful discourses at the institutional level, which then disseminate and have an impact on social relations.¹⁰⁷ As Ratna Kapur puts it, in our contemporary capitalist societies, sexuality and gender are administered and disciplined through a neo-liberal political rationality.¹⁰⁸ Moreover, Wendy Brown contends that neo-liberal rationality is a form of governance that not only refers to the market but also “spreads market values to all institutions and social action.”¹⁰⁹ This ideology shows a change from the ontological understanding of power as something that happens exclusively within a sovereign state and that works in a top-down fashion. This understanding of ideology allows us to see how power may accumulate at the level of some institutions, but then spreads to all institutions and social interactions in a way that neo-liberal “market demands for efficiency and stability are partly pursued in and through legal discourse as a normalising mechanism, which disciplines, corrects and regulates life.”¹¹⁰ This notion of concentration of power at the institutional level and the effects of marginalizing a woman’s experience within the text of the *UN Guiding Principles* extend far beyond the consequences of exclusion for an individual woman in a particular case. By directing the international community to privilege a specific kind of knowledge and by regarding women’s experiences as “special” or belonging to a minority, the text of the *UN Guiding Principles* helps to construct an institutional reality of the appropriate way to address the human rights impacts of business activity.

In turn, this constructed reality has tangible effects on the lives of women who become involved in, or are affected by, business activity, such as resource extraction, through their diverse roles as victims, agents, workers, leaders, activists, and beneficiaries. For instance, extractive companies that choose to implement the *UN Guiding Principles* by developing a policy on human rights and engaging in HRDD

106. Smith, *Institutional Ethnography*, *supra* note 6 at 184.

107. Campbell & Gregor, *supra* note 22 at 38–40.

108. Ratna Kapur, “Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India” (2013) 14:2 *Melbourne Journal of International Law* 317 [Kapur, “Gender, Sovereignty and the Rise”].

109. Wendy Brown, “Neoliberalism and the End of Liberal Democracy” in Wendy Brown, ed, *Edgework: Critical Essays on Knowledge and Politics* (Princeton, NJ: Princeton University Press, 2005) 37 at 39.

110. Kapur, “Gender, Sovereignty and the Rise”, *supra* note 108 at 331.

are unlikely to ensure that such a policy reflects the everyday nature of violence faced by women in the context of resource extraction, whether as employees, service providers, or as members of the local community. Equally, states are less likely to adopt and enforce laws, and adopt and implement policy, with respect to resource extraction that addresses this violent, life-threatening reality.

The Hierarchy of Relationships

In addition to privileging a certain type of knowledge, texts also establish a particular hierarchy of relationships between institutional actors and other actors. For example, Smith illustrates that the practice and processes of accounting are not simply a means to produce information but also importantly function as “an actual *organizer* of the relations articulating people’s work, particularly the processes of production and sales but also of management, to the capitalist project. . . . The local work organization of the shop floor is regulated by managerial /accounting technologies. They produce (for management) and enforce (for workers) a local order of accountability fully compatible with and interpretable in terms of the corporate system of accounting.”¹¹¹ One can understand the “relations of ruling” established by the *UN Guiding Principles* in a similar way. The *UN Guiding Principles* organize the relations between states, corporations, and women (within or affected by business activity) by establishing an “order of accountability” through the obligations and responsibilities allocated to states and corporations, respectively, and through the gaps and silences with respect to women.

In regard to states, Guiding Principle 1 sets out the international human rights law obligation on states to protect the human rights of individuals within their territory and subject to their jurisdiction, requiring states to exercise due diligence to ensure that third parties do not violate human rights.¹¹² In fulfilling their international human rights obligation to protect individuals from violations of human rights by corporate actors, states are also encouraged under Guiding Principle 3 to enforce domestic human rights laws “that are aimed at, or have the effect of, requiring business enterprises to respect human rights” and to periodically evaluate such laws and remedy any gaps as well as to ensure that laws do not restrict the ability of businesses to respect human rights.¹¹³

Guiding Principle 3 further recommends that states provide “effective guidance” to business actors “on how to respect human rights throughout their operations.”¹¹⁴ As noted above, the commentary to this principle suggests, among other things,

111. Smith, *Feminist Inquiry*, *supra* note 8 at 182–83 [emphasis in original].

112. *UN Guiding Principles*, *supra* note 2 at Annex I(A)(1).

113. *Ibid* at Annex I(B)(3)(a–b).

114. *Ibid* at Annex I(B)(3)(c).

that states ought to provide business enterprises with clear guidance including best practices and

advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.¹¹⁵

According to the *UN Guiding Principles*, such guidance and assistance to business actors should specifically also be provided with respect to business activity “in conflict-affected areas” and pay “special attention to both gender-based and sexual violence.”¹¹⁶

Discrimination, marginalization, and violence faced by women cannot simply be rectified by the application of non-discrimination laws that require women to be treated the same as men. Gender inequality is the result of structures of subordination that include factors such as poverty, socio-economic status, lack of access to health and education services, and systemic violence against women.¹¹⁷ Those structures are complex and respond to religious, cultural, and other values and traditions, which tend to be neglected by states, even though they have international human rights obligations to address them. There is no recognition in the *UN Guiding Principles* that these structural barriers are erected by, or with the complicity of, states and/or that states are responsible for failing to address the structural nature of inequality and discrimination against women. This deafening silence leaves one to speculate that either the SRSB was oblivious to this reality or that he naively expected that states themselves would identify any structural oppression of marginalized groups, such as women, and provide business enterprises with guidance on how to respect the human rights of such groups in this context.

With respect to corporations, it must be emphasized that the hierarchy of applicable human rights in the *UN Guiding Principles*, discussed above, was not simply a misunderstanding but had a specific purpose. The SRSB has hinted that one of the reasons for dividing the human rights applicable to business activity into the two categories—where women’s rights (and the rights of marginalized groups) are “additional standards” that might only be applicable in certain circumstances—was to “simplify” or translate the issue for business enterprises in order to make human rights concerns more comprehensible and, perhaps, more digestible for business

115. *Ibid* at Annex I(B)(3).

116. *Ibid* at Annex I(B)(7)(b).

117. Natalie Sokoloff & Ida Dupont, “Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence against Marginalized Women in Diverse Communities” (2005) 11:1 *Violence against Women* 38.

actors.¹¹⁸ In doing so, the *UN Guiding Principles* imply the sufficiency of formal equality norms.

In addition, the *UN Guiding Principles* recognize the fact that corporate groups (domestic or transnational corporations) can be made up of many legal entities (parent, subsidiary, and affiliated companies and other related business actors). In terms of the business responsibility to respect human rights, the *UN Guiding Principles* take an enterprise approach. Guiding Principle 13 requires businesses to:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.¹¹⁹

Corporations are therefore socially (as opposed to legally) responsible not only for the impacts of their own activities, including through a corporate group, but also responsible (although to a lesser extent) for the human rights impacts of their supply chain.

Nonetheless, the *UN Guiding Principles* are silent on several key aspects of corporate law that contribute to business impunity for violations of human rights, including the violation of the human rights of women. Guiding Principle 3, for example, encourages states to “[e]nsure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights.”¹²⁰ This provision, however, does not expressly address the problems posed by the fiduciary duty of directors and officers and the doctrines of separate legal personality and limited liability. Corporate law, at least in many common law jurisdictions that are home to globally active extractive corporations, restricts the persons to whom directors and officers owe a fiduciary duty. In the United States, for example, this duty is owed to the corporation and the shareholders, and these obligations have generally, although not always, been interpreted as the duty to maximize profit.¹²¹ By and large, US courts “refuse

118. See e.g. John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNHRC, 11th Sess, UN Doc A/HRC/11/13 (22 April 2009) at para 57 where the SRSG discusses demystifying human rights for businesses. See also the subsequent report of the SRSG that sets out the so-called authoritative list of rights which business actors must respect, John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UNHRC, 14th Sess, UN Doc A/HRC/14/27 (9 April 2010) at paras 58–61.

119. *UN Guiding Principles*, *supra* note 2 at Annex II(A)(13)(a)-(b).

120. *Ibid* at Annex I(B)(3)(b).

121. Leo E Strine Jr, “Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour” (2008) 58:3

to recognize an enforceable duty toward other stakeholders in the corporation, such as creditors, employees, or the like—with a possible exception for creditors of insolvent corporations.”¹²² In Canada, directors have the fiduciary duty to manage the business in the “best interests of the corporation.” While some courts have suggested that directors may consider a broader group of stakeholders,¹²³ this duty certainly does not require corporations to operate the business in a manner that protects and/or empowers women (except, perhaps, to the extent that such a course of action can be shown to positively affect the bottom line).

In the United Kingdom, amendments to the *Companies Act 2006* resulted in the incorporation of the principle of “enlightened shareholder value” into directors’ obligations with the view to addressing concerns about social responsibility. Section 172 imposes an obligation on directors to act “in good faith . . . to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to” a range of concerns, including “the impact of the company’s operations on the community and the environment.”¹²⁴ However, as Richard Williams observes, while this provision “gives the duty of loyalty in UK law a different look to the common law duty to act ‘bona fide in the best interests of the company,’” in other common law jurisdictions, it does “not represent any substantive change.”¹²⁵ The provision is permissive. It does not mandate directors to take into account any of the listed broader concerns, and, where such concerns are taken into account, it must be done for the benefit of the shareholders.¹²⁶ Therefore, similar

University of Toronto Law Journal 241 at 259. But see Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (San Francisco: Berrett-Koehler Publications, 2012) who argues that US law allows directors leeway in determining what is in the best interests of the company and that, in any event, the exclusive focus on short-term profit maximization can undermine the long-term value of a company (*ibid* at 8).

122. Arthur R Pinto & Franklin A Gevurtz, “United States” in Andreas M Fleckner & Klaus J Hopt, eds, *Comparative Corporate Governance: A Functional and International Analysis*, International Corporate Law and Financial Market Regulation (Cambridge: Cambridge University Press, 2013) 1042 at 1059.
123. See e.g. *Peoples Department Stores (Trustee of) v Wise*, 2004 SCC 68; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 [BCE]. But see J Anthony VanDuzer, “BCE v. 1976 Debentureholders: The Supreme Court’s Hits and Misses in its Most Important Corporate Law Decision Since *Peoples*” (2001) 43:1 University of British Columbia Law Review 205 at 228. VanDuzer argues that the effect of the Supreme Court of Canada’s decision in *BCE* will likely “reduce the effective accountability of directors and officers, even to shareholders” (*ibid*).
124. *Companies Act 2006* (UK), c 46, s 172.
125. Richard Williams, “Enlightened Shareholder Value in UK Company Law” (2012) 35:1 University of New South Wales Law Journal 360 at 361–62.
126. John Lowry, “The Duty of Loyalty of Company Directors: Bridging the Accountability Gap through Efficient Disclosure” (2009) 68:3 Cambridge Law Journal 607 at 616.

to Australia, Canada, New Zealand, and the United States, the UK fiduciary duty “promotes the goal of profit maximisation in the interests of the shareholders.”¹²⁷ In any event, as a practical matter, the increased and significant power of institutional investors has made directors and officers of public corporations more focused on profit and, thus, less likely to take such broader concerns into account unless those concerns align with, or support, the goal of profit maximization.¹²⁸

The doctrines of separate legal personality and limited liability, along with the capacity of corporations to be shareholders, facilitate the development of complex corporate structures that enable these business enterprises to operate in a variety of jurisdictions and, through these structures, to avoid regulation and to minimize the corporate group’s potential liability for any harms that may be caused to women. Thus, women harmed by water polluted by the subsidiary of a transnational mining company or who are the victims of sexual violence perpetrated by security forces or by employees of the company both within or outside the workplace, may be unable, even if they succeed in a lawsuit against the local subsidiary,¹²⁹ to execute the judgment if the latter is thinly capitalized or funds have been transferred to other entities within the corporate group.¹³⁰

Smith’s concept of “relations of ruling” become clear through an examination of the silences of the *UN Guiding Principles* with respect to these crucial issues, which have the effect of privileging the state and business enterprises in their relationships with the potential victims of business-related human rights violations, including women.¹³¹ This failure to recognize and address women’s subordinate status in our

127. Williams, *supra* note 125 at 363.

128. Strine, *supra* note 121 at 264. This is not to say that there may not be a business case for including a broader variety of concerns in corporate decision-making. Indeed, the UNEP Finance Initiative and United Nations Global Compact, *UN Principles for Responsible Investment* (2016) <<https://www.unpri.org/>>, which currently have over 2,100 signatories, are based on the premise that including environmental, social, and governance issues into investment analysis and decision-making processes increases long-term financial returns and reduces risk and is therefore consistent with the fiduciary duty of institutional investors. The principles themselves do not specifically reference gender, and a 2018 report on human rights and the extractive sector only specifically mentions or alludes to the human rights impacts of resource extraction on women related to equal opportunity, workplace harassment, human trafficking, and sexual exploitation. See UNEP Finance Initiative and United Nations Global Compact, *Digging Deeper: Human Rights and the Extractives Sector: Outcomes from PRI-Coordinated Engagement 2015–2017* (2018) <<https://www.unpri.org/download?ac=5081>>.

129. There are of course well-known obstacles to bringing law suits against business actors both in host and home states, some of which are identified in the *Guiding Principles*. See e.g. *UN Guiding Principles*, *supra* note 2 at Annex III(B)(26).

130. See e.g. *Yaguaje v Chevron Corporation*, 2017 ONSC 135.

131. In the drafting and revision of the *UN Guiding Principles*, the input of businesses and states were privileged over the voices and critiques of the less powerful actors, including

contemporary societies contributes to perpetuating the neo-liberal, capitalist, imperatives in the global political economy, entrenching the power of existing economic orders and constraining the possibilities, and space, for contestation and critique of the masculinized reproduction of corporate privilege.

The UN Guiding Principles and the Structural Bias of the International Legal System

A third level of examination considers certain dichotomies inherent in the structure of the text of the *UN Guiding Principles* and situates the principles in the neo-liberal gendered international legal system within which they are designed to “regulate” transnational and other business activity. In their influential feminist critique of international law, Hilary Charlesworth and Christine Chinkin argue that gendered dichotomies are an integral characteristic of the international legal system. Such dichotomies include, for example, “public/ private,” “international/domestic,” “action/passivity,” “binding/non-binding,” “independence/dependence.” These “binary oppositions” are gendered in the sense that the first term represents male, objective, or higher-value characteristics, while the second represents female, subjective, or lower-value characteristics.¹³² Examining these dichotomies is one means of exposing and exploring the silences of international law with respect to women.¹³³ For our purposes, they can be useful in revealing another level of the “relations of ruling” that are established by the text of the *UN Guiding Principles*.

The *UN Guiding Principles* provide a mix of mandatory and voluntary norms.¹³⁴ It is interesting to consider how these norms are allocated between actors and what are the potential consequences of this binary division of “obligations.” The mandatory norms refer exclusively to state conduct and are supplemented with non-binding

victims, non-governmental organizations, and some third world states. This was reflected in the final text. See Surya Deva, “Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles” in Surya Deva & David Bilchitz, eds, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 78 at 83–85.

132. Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) at 49–50.

133. *Ibid* at 49.

134. This has been referred to as “polycentric governance.” See e.g. Mark B Taylor, “The Ruggie Framework: Polycentric Regulation and the Implications for Corporate Social Responsibility” (2011) 5:1 *Etikk I Praksis: Nordic Journal of Applied Ethics* 9 at 23; see also Larry Catá Backer, “The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability and Polycentricity” (2012) 17:2 *Tilburg Law Review* 177 at 195.

recommendations for state action.¹³⁵ But they are also primarily directed at host states as opposed to home states. States are mandated to protect the human rights of persons subject to their jurisdiction, meaning they must exercise due diligence to prevent businesses from violating such human rights and take action to address such violations that are perpetrated primarily within their territories. On the other hand, states are only encouraged in Guiding Principle 2 to “*set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.*”¹³⁶

In Guiding Principle 4, home states are encouraged to take measures to ensure that state enterprises and agencies such as export credit agencies respect human rights in their support of transnational corporate activity, including undertaking human rights due diligence, “where appropriate.”¹³⁷ The commentary to Guiding Principle 3 states that,

[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and /or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuses abroad by business enterprises within their jurisdiction.¹³⁸

While the scope of the extraterritorial dimension of the obligation to protect remains contested,¹³⁹ in the drafting of the *UN Guiding Principles*, the SRSG reasserted the most conservative view of this obligation. This position fails to recognize the different ways in which home states can incur international responsibility for failing to regulate the transnational human rights behaviour of corporations headquartered within their jurisdiction or for providing government support for human rights violating corporations.¹⁴⁰ Perhaps more importantly, this articulation of the duty of

135. See discussion earlier in this article with respect to Guiding Principles 1 and 3.

136. *UN Guiding Principles*, *supra* note 2 at Annex I(A)(2) [emphasis added].

137. *Ibid* at Annex I(B)(4). But see Sara L Seck, “Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights” (2011) 48 *Canadian Yearbook of International Law* 51 at 111, where she suggests that reading Guiding Principle 1 and Guiding Principle 25 together makes it possible to argue that “at least in some circumstances, home states already have obligations to exercise jurisdiction to protect against and remedy human rights abuses” (*ibid*).

138. *UN Guiding Principles*, *supra* note 2 at Annex I(A)(2).

139. See e.g. Olivier de Schutter, “Towards a New Treaty on Business and Human Rights” (2016) 1:1 *Business and Human Rights Journal* 41 at 45; Claire Methven O’Brien, “The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal” (2018) 3:1 *Business and Human Rights Journal* 47.

140. See Robert McCorquodale & Penelope Simons, “Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law” (2007) 70:4 *Modern Law Review* 598.

home states within the *UN Guiding Principles* helps to entrench the status quo of home state regulation as “voluntary” and to provide both states and companies with grounds to contest the development of a more expansive understanding of the obligation to protect.¹⁴¹

A second notable aspect of the mandatory/voluntary divide in the *UN Guiding Principles* is reflected in the fact that, except to the extent that states may entrench the *UN Guiding Principles* through domestic law or a multilateral treaty, the norms directed at corporations remain social norms (responsibilities) that are generally only enforceable in the courts of public opinion¹⁴² rather than legal norms (obligations)

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141. De Schutter, *supra* note 139. This more expansive view is reflected in the practice of United Nations human rights treaty bodies, which over the last decade or so have consistently called on states to regulate corporations domiciled within their territory to ensure that such actors do not violate the human rights of individuals and groups when operating in other countries. See e.g. Human Rights Committee, *General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights on the Right to Life*, UNCCPR, UN Doc CCPR/C/GC/36 (30 October 2018) at para 22; Committee on Economic, Social and Cultural Rights, *General Comment 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UNCESCR, UN Doc E/C.12/GC/24 (23 June 2017) at paras 25–27; Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation 34 (2016) on the Rights of Rural Women*, UNCEDAW, UN Doc CEDAW/C/GC/34 (4 March 2016) at para 13; *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UNCESCR, 46th Sess, UN Doc E/C.12/2011/1 (20 May 2011); Committee on the Rights of the Child, *General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children’s Rights*, UNCRC, UN Doc CRC/C/GC/16 (17 April 2013) at paras 44–46; *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Sweden*, CEDAW, UN Doc CEDAW/C/SEW/CO/8-9 (2016) at para 35. The UNHRC, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, and the Committee on the Elimination of All forms of Discrimination Against Women have all called on Canada, in their concluding observations on Canada’s most recent periodic reports, to implement a legislative framework to regulate transnational mining companies and to provide effective judicial and non-judicial remedies for foreign plaintiffs alleging that Canadian extractive companies have violated their human rights. See UNHRC, *Concluding Observations on the Sixth Periodic Report of Canada*, UN Doc CCPR/C/CAN/CO/6 (2015) at para 6; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of Canada*, UN Doc. E/C.12/CAN/CO/6 (2016) at para 16; United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada*, UN Doc CEDAW/C/CAN/CO/8-9 (2016) at para 19.
142. John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business*

(protocol):/utpjournals.press/doi/pdf/10.3138/cjwl.31.1.106 - Penelope Simons <penelope.simons@uottawa.ca> - Thursday, April 04, 2019 12:07:58 PM - University of Ottawa IP Address: 137.122.64.1

enforceable as law.¹⁴³ There is a close interconnection between the international legal system and the neo-liberal global capitalist system.¹⁴⁴ Global economic power relations are entrenched in, and supported in part by, international law and the regulated and unregulated spaces it generates and sustains.¹⁴⁵ Powerful states have developed robust international trade and investment rules and compliance mechanisms in order to enable and protect transnational business activity.¹⁴⁶ These regimes can, in different ways, undermine the ability of host states to regulate in the public interest, such as to protect human rights.¹⁴⁷ At the same time, there has been relatively little action on the part of states to address the global governance gap with respect to the transnational conduct of corporations that may violate or contribute to the violation of human rights in a host state.¹⁴⁸ Moreover, international financial institutions have intervened in the

Enterprises, UNHRC, 8th Sess, UN Doc A/HRC/8/5 (7 April 2008) at para 54 [Ruggie, *Protect, Respect and Remedy Framework*]. The SRSG notes that the “courts of public opinion . . . [include] employees, communities, consumers, civil society, as well as investors – and occasionally [compliance will be enforced by] charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations – as a part of what is sometimes called a company’s social licence to operate” (*ibid*). However, in certain situations, these norms have been taken into account by courts in determining that such corporations owe a duty of care to tort victims. See e.g. *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414.

143. For the SRSG, the mandatory and voluntary norms set out in the *Guiding Principles* reflected the state of international law in 2011. See *Guiding Principles*, *supra* note 2 at para 14, which note that the normative contribution of the *Guiding Principles* “lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses” (*ibid*).

144. See generally Bhupinder Chimni, “International Institutions Today: An Imperial Global State in the Making” (2004) 15:1 *European Journal of International Law* 1 [Chimni, “International Institutions”]; Bhupinder Chimni, “Third World Approaches to International Law: A Manifesto” in Antony Anghie et al, eds, *The Third World and International Order: Law, Politics, and Globalization* (Leiden: Martinus Nijhoff, 2003) 47.

145. See generally Penelope Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” (2012) 3:1 *Journal of Human Rights and the Environment* 5 [Simons, “Invisible Hand”].

146. Chimni, “International Institutions”, *supra* note 144; William Tabb, *Economic Governance in the Age of Globalization* (New York: Columbia University Press, 2004) at 272.

147. With respect to international investment agreements, see generally J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013).

148. For discussion of the governance gap, see e.g. Sarah Joseph, “Taming the Leviathans: Multinational Enterprises and Human Rights” (1999) 46:2 *Netherlands International Law Review* 171; Surya Deva, “Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat’?” (2004) 5:1 *Melbourne Journal*

economic governance of host states (particularly those in the global South), often undermining their ability to regulate and control foreign business enterprises operating within their territory.¹⁴⁹ By maintaining the dichotomies between home and host state, on the one hand, and mandatory and voluntary norms, on the other, with respect to human rights regulation of business activity, the *UN Guiding Principles* constitute a crucial part of this system and serve to replicate the status quo.¹⁵⁰

Neo-liberal economic policy emphasizes the construction of market relations in society through the primacy of the deregulated economy and the venerating of private capital. The global power relations that are protected and maintained by the international legal system in support of business activity also play a role in maintaining the global inequality and subordination of women. Jacqui True notes that although globalization, among other things, has “expanded women’s formal economic participation,” it has left “unchanged the underlying patriarchal structures that perpetuate women’s inequality with men and their susceptibility to violence.”¹⁵¹ According to True, the interventions of international financial institutions in states of the global South, which also have required the liberalization of markets or provided funding for extractive industry projects, have “fail[ed] to address the gendered nature of underdevelopment, perpetuating women’s poverty and inequality and further exacerbating sexual and gender-based violence.”¹⁵²

Thus, it may be possible to argue that the failure of the *UN Guiding Principles* to acknowledge the reality of women’s inequality, and the soft regulation of business that these principles propose, contributes to the inequality and oppression of women at a global level. Given the broad support for the *UN Guiding Principles* among states and corporations, these principles, and how they structure the relationships amongst the various actors they address, have a significant impact in terms of shaping the institutional responses to this governance issue.

Conclusions

Drawing on the work of Smith, this article has engaged in a multilevel analysis of the *UN Guiding Principles’* consideration of the human rights and interests of women. It has argued that the *UN Guiding Principles* are a technology of governance that not

of International Law 37 at 39; Ruggie, *Protect, Respect and Remedy Framework*, *supra* note 142 at 3; see also Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (New York: Routledge, 2014) at 9–12 (for a discussion of the lack of progress towards addressing the gap).

149. Simons, “Invisible Hand”, *supra* note 145 at 22–26.

150. The SRSR recognizes in the introduction of the *Guiding Principles* that the principles do not challenge the structure of the international legal system. See footnote commentary in note 143 above.

151. True, *supra* note 70 at 33.

152. *Ibid* at 95.

only ignores women's ways of knowing and women's experiences but also shores up existing power relations. The *UN Guiding Principles* fail to "integrate a gender perspective throughout" the text as required by the UNHRC, to acknowledge the structural nature of women's inequality, and to provide appropriate guidance for states and business actors on how to ensure that women's human rights are not violated by business activity.¹⁵³

Additionally, the categorization of women's rights as "additional rights" that may only be applicable to business activities in some circumstances is not only bewildering but is also a step backwards in terms of the protection of women's human rights. The text of the *UN Guiding Principles* also privileges states and business enterprises in their relationships with the potential victims of business-related human rights violations, including women in two ways: first, by ignoring the role of the state in maintaining structures that perpetuate women's inequality and, second, by not expressly addressing the rules and doctrines of corporate law that allow business enterprises to prioritize profit maximization over other values and to avoid domestic regulation and liability for human rights abuses.

Finally, the *UN Guiding Principles* fail to challenge or disrupt the international legal structures that protect and facilitate business activity and that continue to undermine the ability of host states to regulate and control foreign business actors, and, in such omission, they arguably contribute to the global inequality and oppression of women. In all of these ways, the text of the *UN Guiding Principles* operates to discipline how business and human rights scholars and practitioners, governments, and corporations think about the regulation of the human rights impacts of business activities and to mould the institutional responses to these issues. As such, the text constitutes a reality of regulation that does little to address the systemic and structural nature of discrimination against women and the lived reality of the women affected by resource extraction.

Texts are created by people who have lives outside the texts they create, such as the SRSR, in the case of the *UN Guiding Principles*, and they help to govern the lives and actions of others whose subjectivity is unlikely to be fully captured within the textual record. Smith's concept of the text therefore helps us to understand how people contribute to relations of ruling in their daily work and how people's actions are guided by those ruling relations. Smith takes the ethical stance that people should be regarded as being experts in their own lives and links it to the inevitable selectivity of institutional realities that are constituted, in large part, through text. Smith's work accordingly helps us to understand why the effects of marginalizing a particular woman's experiences within the *UN Guiding Principles* texts ramify in very problematic ways beyond the consequences of marginalization for that woman. The textually constituted institutional reality will thereby exclude or limit certain experiences—in this case, women's experiences—from the realm of institutional concern—that is, from the concerns of corporations, business actors, states, and the international community.

153. UNHRC, *Mandate of the Special Representative*, *supra* note 60 at 4(d).

There are ongoing efforts to address the gender gap in the *UN Guiding Principles*. The Working Group on Business and Human Rights, for example, has initiated a set of consultations on gender and the *UN Guiding Principles* and will produce an interpretive document in 2019.¹⁵⁴ Any attempt to attend to this issue must go beyond simply adding references to women. A re-imagining of these important principles must take into account the depth and breadth of the exclusion of women, women's interests and knowledge, as well as the role of the *UN Guiding Principles* as the primary global response to the governance of business-related human rights violations.

About the Contributors / Quelques mots sur nos collaboratrices

Penelope Simons is an Associate Professor at the Faculty of Law (Common Law Section) at the University of Ottawa. Her research focuses on business and human rights and in particular on: the human rights implications of domestic and extra-territorial extractive sector activity; state responsibility for corporate complicity in human rights violations; the regulation of transnational corporations; gender and resource extraction; as well as the intersections between transnational corporate activity, human rights and international economic law. She has published widely on these issues. She co-authored, with Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) and with J. Anthony VanDuzer and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (Commonwealth Secretariat, 2013). Penelope is a member of the Human Rights Research and Education Centre at the University of Ottawa and the SSHRC-funded Canadian Partnership on Strengthening Justice for International Crimes. She was the recipient of the 2018 Walter S. Tarnopolsky award for human rights.

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154. See UNWGBHR, *Gender Lens*, *supra* note 23.