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SCHOLARLY ARTICLE

Gender-Transformative Remedies for Women Human Rights Defenders

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Abstract

In its 2019 report to the Human Rights Council, the United Nations (UN) Working Group on business and human rights emphasized that ‘gender-transformative’ remedies can bring ‘change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping’. This article aims to deepen our knowledge of such remediation for women human rights defenders who fight against corporate human rights abuses. Human rights remediation is highly fragmented. This has the advantage that remedies at one level can offer sources of learning for remedies at other levels. This article uses relevant communications that the UN Special Rapporteur on the situation of human rights defenders sent to states and corporations jointly with other Special Procedures (including the UN Special Rapporteur on violence against women and girls, its causes and consequences and the UN Working Group on discrimination against women and girls in law and practice) between 2011 and 2020 as a source of learning.

Keywords: Access to remedy; Critical feminist discourse analysis; Global value chains; UN Special Procedures; Women human rights defenders

1. Introduction

Women* experience adverse impacts of business activities differently and disproportionately due to, amongst others, the feminization of precarious labour and gender-neutral trade agreements.¹ Women have historically suffered discrimination and remedies have been instrumental in reinforcing such discrimination.² Remedies have subordinated women by

* All references to ‘women’ should be understood to include girls as well as transgender and intersex women. All factual details reported in the communications (and analysed in this article) should be considered as allegations.

¹ Human Rights Council (HRC), ‘Gender Dimensions of the Guiding Principles on Business and Human Rights – Report’, A/HRC/41/43 (23 May 2019) paras 2, 12 and 17 (‘Gender Dimensions’). This gender report focused on women, ‘considering that women have historically been discriminated against owing to patriarchal norms and power structures’. Ibid, para 9.

² Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (adopted 18 December 1979, entered into force 3 September 1981) (CEDAW). Article 1 of CEDAW explains what discrimination means for women. See Aleydis Nissen, ‘Round Table: When Corporations Disrespect Women’s

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replicating obstacles including gender stereotypes – generalized views or preconceptions about attributes or characteristics that are or ought to be possessed by women and men, or the roles that are or should be performed by men and women – that exist in society as a whole.³

However, remedies can also contribute to lived experiences of equality for all women. They can prevent the normalization of the disproportionate impact of corporate human rights abuses on women.⁴ Remediation is especially important for women who suffer interlocking forms of discrimination.⁵

The UN Working Group on human rights and transnational corporations and other business enterprises (WGBHR) discussed gender issues in the context of remediation in its 2019 report to the Human Rights Council (HRC).⁶ The WGBHR reinterpreted the 2008 ‘respect, protect and remedy’ framework and the 2011 UN Guiding Principles on Business and Human Rights (UNGPs) through a gender lens in its Gender Guidance.⁷ The WGBHR explained that remedies need to be gender-transformative.⁸ This means that they should combine ‘preventive, redressive and deterrent elements’ to bring ‘change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping’.⁹

The WGBHR – like the UN Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) in its General Recommendation 33 on Access to Justice for Women – recognized the important role of women human rights defenders (WHRDs).¹⁰ Human rights defenders (HRDs) are individuals and groups who, in their personal or professional capacity, strive to protect and promote human rights in a peaceful manner.¹¹ While all HRDs working on corporate accountability face grave challenges, there are specific and serious risks for people who serve as agents of social change in gender relations.¹² WHRDs are ‘women and girls working on any human rights issue, and people of all genders who work to promote women’s rights and rights related to gender equality’.¹³ Through litigation and a wide range of other activities, WHRDs enable discussions of masculinist practices and norms to generate social change.¹⁴ However, WHRDs (and their loved ones) are often targeted because of their advocacy. The UN Resolution 68/181 on Women Human Rights Defenders

Human Rights: Access to Good Quality Remediation’, *Human Rights Here* (5 January 2023), www.humanrightshere.com/post/round-table-when-corporations-disrespect-women-s-human-rights-access-to-good-quality-remediation (accessed 8 September 2023) referring to Judith Butler, *Excitable Speech* (Abingdon: Taylor & Francis Ltd, 1997) 75.

³ UN Human Rights Office of the High Commissioner (OHCHR), ‘Gender Stereotypes and Stereotyping and Women’s Rights’ (2014) www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/OnePagers/Gender_stereotyping.pdf (accessed 8 September 2023).

⁴ Rosemary Hunter et al, ‘Feminist Judgments: An Introduction’ in Rosemary Hunter et al (eds.), *Feminist Judgments* (Camden: Bloomsbury Publishing, 2010) 22.

⁵ Melisa Handl, Sara Seck and Penelope Simons, ‘Gender and Intersectionality in Business and Human Rights Scholarship’ (2022) 7 *Business and Human Rights Journal* 201, 213.

⁶ ‘Gender Dimensions’, note 1.

⁷ The *ibid* report contains the ‘Gender Guidance’ in its Annex.

⁸ ‘Gender Dimensions’, note 1, para 39.

⁹ *Ibid*.

¹⁰ *Ibid*, paras 20 and 45(d, e, i); ‘Gender Guidance’, note 7, paras 35, 43(e), 52(c) and 58(a, c); CEDAW Committee, ‘General Recommendation 33 on Women’s Access to Justice’, CEDAW/C/GC/33 (23 July 2015), paras 9 and 15(f, i).

¹¹ Special Rapporteur on Human Rights Defenders (SR on HRDs), ‘Report’, A/71/281 (3 August 2016).

¹² ‘Gender Dimensions’, note 1, para 20.

¹³ OHCHR, ‘Women Human Rights Defenders’, www.ohchr.org/en/issues/women/wrgs/pages/hrdefenders.aspx (accessed 8 September 2023).

¹⁴ Ki-Young Shin, ‘Governance’ in Lisa Disch and Mary Hawkesworth (eds.), *The Oxford Handbook of Feminist Theory* (Oxford: Oxford University Press, 2016) 315.

(2014) urged states to publicly acknowledge the important and legitimate role of WHRDs in the promotion and protection of human rights, democracy, the rule of law and development.¹⁵ Accordingly, states should create a safe and enabling environment and establish comprehensive, sustainable and gender-sensitive public policies and programmes that support and protect WHRDs.¹⁶

This article aims to deepen our knowledge of gender-transformative remediation for WHRDs who fight against corporate human rights abuses. The methodology starts from the idea that human rights remediation is highly fragmented. The benefit is that fora with gender expertise provide learning experiences for other fora.¹⁷ In particular, the communications sent by the UN Special Procedures – especially those who have expert authority or are willing to develop such authority – can offer an important source of learning because they have the advantage of experimenting frequently.¹⁸ The Special Procedures can decide to send communications to governments, corporations and other actors in relation to the information that they receive from anyone. A key function of such communications is to ‘make sure that remedies are available to the victim(s) or their families’.¹⁹

To compile the dataset, two research assistants and I first manually selected the communications sent by the Special Procedures that related to business and human rights issues (including but not limited to those co-written by the WGBHR) over one decade (2011–2020).²⁰ We then filtered all the communications in which the Special Rapporteur (SR) on HRDs was involved. It was hypothesized that this sub-set of communications can deepen our knowledge about gender-transformative remediation for WHRDs because this representative has specific knowledge of WHRDs and gender.²¹ Afterwards, the unique cases that concerned (a majority of) WHRDs were identified (see *Annexure*). Against the backdrop of a world still male-dominated, it was furthermore hypothesized that the communications in which the UN Special Procedures with a specific gender mandate were involved – the Special Rapporteur on violence against women and girls, its causes and consequences (SR on violence against women) and/or the Working Group on discrimination against women and girls in law and practice (WG on discrimination against women) – could, in particular, be insightful.

The structure of this article is as follows. *Section II* discusses the Gender Guidance and accompanying report that the WGBHR crafted in 2019, with a specific focus on gender-transformative remediation and WHRDs. Reference is also made to the CEDAW Committee’s General Recommendation 33. *Section III* introduces the methodology. First, the steps to compile the dataset of communications by the UN Special Procedures are discussed. Afterwards, it is explained why a critical feminist discourse analysis was best suited to distil lessons regarding gender-transformative remediation from this dataset. *Section IV* discusses which learning opportunities I could identify regarding gender-transformative remediation for WHRDs concerning business and human rights by conducting such an

¹⁵ UN General Assembly, Res 68/181 (30 January 2014). This provision is mentioned in THA 3/2020 (10 March 2020) and UZB 1/2017 (5 April 2017).

¹⁶ *Ibid.* This provision is mentioned in UZB 1/2017. See also ECU 2/2017 (3 November 2017); NIC 1/2017 (18 May 2017).

¹⁷ Eva Brems, ‘Developing the Full Range of State Obligations and Integrating Intersectionality in a Case of Involuntary Sterilization: CEDAW Committee, 4/2004, *AS v Hungary*’ in Eva Brems and Ellen Desmet (eds.), *Integrated Human Rights in Practice* (Cheltenham: Edward Elgar, 2017) 240.

¹⁸ Eva Brems, ‘Smart Human Rights Integration’ in Eva Brems and Salima Ouald Chaib (eds.), *Fragmentation and Integration in Human Rights Law: Users’ Perspectives* (Cheltenham: Edward Elgar, 2018) 17.

¹⁹ OHCHR, ‘What Are Communications?’, www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications (accessed 8 September 2023).

²⁰ OHCHR, ‘Communication Report and Search’, <https://spcommreports.ohchr.org/Tmsearch/TMDocuments> (accessed 8 September 2023).

²¹ SR on HRDs, ‘Report’, A/HRC/16/44 (20 December 2010), para 20.

analysis. The lessons relate to intersectionality, gender-based violence, discriminatory laws and care work. The final section (Section V) offers conclusions.

II. Gender-Transformative Remediation

The UN has formally been committed to gender mainstreaming since the adoption of the Vienna Declaration and Programme of Action in 1993.²² However, the UN historically marginalized and excluded women.²³ The UN's approach has been questioned because it puts women within existing structures that support the agenda of international capitalism, neoliberalism and the privileging of men in patriarchal social relations. For example, the UNGPs – which were drafted within a UN mandate which had an explicit gender component since 2008 – have been criticized because women's rights have wrongly been conceptualized as 'additional standards' (as opposed to authoritative core internationally recognized human rights).²⁴

The UNGPs reaffirm that human rights should foremost be protected domestically, as set out in the Charter of the UN.²⁵ According to Principle 26, states should take appropriate steps to ensure effective remediation when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers to remedies. Corporate respect for human rights exists independently of the ability or willingness of states to meet their human rights obligations and does not diminish these obligations. Businesses should have in place processes 'to enable the remediation of any adverse human rights impacts they cause or to which they contribute'.²⁶ The WGBHR specifies that a 'bouquet' of redressive, preventive and deterrent remedies should be available to rightsholders.²⁷ There are two reasons for this abundance mindset. First, 'different remedies may be more effective in different situations'.²⁸ Second, 'not all remedial mechanisms conceived in the UN Guiding Principles will be able to offer' the three interconnected functions of effective remediation.²⁹ Remedies should be able to redress (insofar as possible); pre-empt or prevent future abuses; and deter not only the scrutinized corporation but also others, from committing the same or similar abuses in the future.³⁰

While the UNGPs did not refer to gender in relation to remediation, the WGBHR did so on several occasions. In a 2013 report of an expert workshop on 'non-judicial access to remedy', the WGBHR wrote that women may 'experience harm in different ways' and that 'traditional dispute resolution systems may not appropriately or equally consider the perspectives of women'.³¹ In its guidance on National Action Plans (NAPs), the WGBHR noted that robust

²² UN General Assembly, 'Vienna Declaration and Programme of Action', A/CONF.157/23 (12 July 1993).

²³ Hillary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000).

²⁴ HRC, Res 8/7 (18 June 2008); Penelope Simons and Melisa Handl, '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' (2019) 31 *Canadian Journal of Women and the Law* 113, 121 (referring to Commentary to Principle 12 of the UNGPs).

²⁵ Charter of the United Nations, 1 UNTS 16 (adopted 26 June 1945, entered into force 24 October 1945).

²⁶ UNGP, Principle 15(c).

²⁷ WGBHR, 'Report', A/72/162 (18 July 2017), paras 7 and 12.

²⁸ *Ibid.*, para 39.

²⁹ *Ibid.*, para 41.

³⁰ *Ibid.*, para 40.

³¹ HRC, 'Report of the Expert Workshop Entitled "Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience" Held in Toronto in 2013', A/HRC/26/25/Add.3 (28 April 2014), para 34(i). See also, HRC, 'Visit to Thailand – Report', A/HRC/41/43/Add.1 (21 May 2019), para 99.

NAPs should deal proactively with the impact on women of issues concerning access to remedy.³² Accordingly, ‘governments should take into account differential impacts on women or men, and girls or boys, and make sure the measures defined in their NAP allow for the effective prevention, mitigation and remediation of such impacts’.³³

Initially, the WGBHR did not refer to gender-transformative remediation. In a 2013 report on indigenous people, the WGBHR noted that corporate remediation mechanisms should be ‘gender-sensitive’, ‘gender accessible’ and ‘gender-appropriate’.³⁴ In a 2017 report on access to effective remedies, the WGBHR repeated the term ‘gender sensitivity’. The WGBHR clarified the meaning of gender sensitivity by stating ‘unless States and businesses are sensitive to how different groups of rights holders, including women, experience adverse human rights impacts differently and may have unique remedial expectations, they will be unable to provide them with effective remedies’.³⁵ Women face challenges in accessing justice because of discriminatory laws, gendered roles, economic marginalization, social stigma, power imbalances, religious values and cultural norms.³⁶ Other frameworks in international law also refer to gender-sensitive remediation, including the Organization for Economic Cooperation and Development’s Due Diligence Guidance for Responsible Business and the third revised draft of the Treaty on Business and Human Rights.³⁷

In 2017, participants of the UN Forum on Business and Human Rights’ sixth session again stressed that women face unique business-related human rights abuses and subsequent barriers to remedy when speaking up and submitting complaints.³⁸ This time, it was noted that women needed to be involved in the design and evaluation of adequate and transformative remediation.³⁹ While this seems to be the first reference to gender-transformative remediation, this term was not clearly defined. Moreover, gendered dimensions seemed to be misunderstood to a considerable extent at the time. The UN Forum’s report noted that ‘participants addressed the role of trade unions and access to remedy for women in supply chains’ in paragraph 43.⁴⁰ While it was explained that legitimate unions play a role in addressing labour-related disputes, it was not acknowledged that unions often have strong masculinist cultures that exclude women’s voices and issues.⁴¹ To add to the confusion, paragraph 43 continued by describing ‘success stories’ in the horticulture sectors in Kenya and Uganda. However, the only recognized horticulture union in Kenya cannot be considered to be legitimate. This union has continually been bringing lawsuits against other unions that try to register and – in so doing – deprive women workers of a union that is tailored to their needs, including specific protection of their fundamental labour right of health and safety.⁴² Moreover, the union is unaware of gendered barriers

³² WGBHR, ‘Guidance on National Action Plans on Business and Human Rights’ (Geneva: OHCHR, 2016).

³³ *Ibid.* 3. See UN General Assembly, ‘Report’, A/69/263 (5 August 2014), para 42.

³⁴ UN General Assembly, ‘Report’, A/68/279 (7 August 2013), paras 42, 43 and 52. See also HRC (2019), note 31, para 99.

³⁵ WGBHR, note 27, para 82.

³⁶ *Ibid.*, para 30.

³⁷ Organisation for Economic Co-operation and Development (OECD), *Due Diligence Guidance for Responsible Business Conduct* (Paris: OECD, 2018) 41; Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. Third Revised Draft’ (17 August 2021), www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf, art 4.3.c (accessed 17 February 2023).

³⁸ HRC, ‘Report’, A/HRC/38/49 (23 April 2018), paras 79 and 80.

³⁹ *Ibid.*, 80.

⁴⁰ *Ibid.*, 43.

⁴¹ Michael McCann and George Lovell, *Union by Law* (Chicago: Chicago University Press, 2020) 236.

⁴² Aleydis Nissen, ‘Trade with the EU, Variable Geometry and Human Rights in the EAC’ (2021) 2 *Milan Law Review* 103, 114; Aleydis Nissen, ‘In Kenia is de Ene Rozenplantage de Andere Niet: “Klagen is Ontslag Vragen”’, *Knack*

to justice.⁴³ This is, amongst others, evidenced by the fact that Unilever had to defend its female workers against this union which represented a male worker who admitted to having attacked a female co-worker in her house.⁴⁴

In its 2019 report and the annexed Gender Guidance, the WGBHR finally considered gender-transformative remediation at a more fundamental level.⁴⁵ This report described in more detail that women affected adversely by business activities face additional barriers in seeking access to effective remedies.⁴⁶ The WGBHR clarified that women have historically been discriminated against owing to norms and power structures formed by the patriarchy.⁴⁷ Women are, amongst others, less likely to be able to afford the costs associated with pursuing justice.⁴⁸ The reason is that women are – in general – less economically empowered to obtain and spend resources due to, amongst others, the gender pay gap, a lower level of literacy, gender stereotyping and a disproportionate share in household responsibilities.⁴⁹ Their poor economic status makes it more difficult to overcome various other barriers, including with regard to physical access to remediation.⁵⁰ They also face additional legal barriers.⁵¹ Regulation plays a particular role in legitimizing social inequalities of power.⁵² Laws can work to support status quo norms and hierarchical relationships, serve to reproduce inequalities and foster exploitation and domination. For example, in various jurisdictions, laws prohibit women from exerting the legal capacity to represent themselves.⁵³ Women who face intersectional forms of discrimination have even fewer opportunities to overcome such barriers.⁵⁴

As a solution, the WGBHR proposed a three-step gender framework: gender-responsive assessments, gender-transformative measures and gender-transformative remedies.⁵⁵ States and businesses should periodically carry out gender-responsive assessments of laws, policies, norms, practices and activities to identify existing gender inequalities and discriminations, as well as the impact of their respective current and future actions or omissions.⁵⁶ Such an assessment process should make use of ‘sex-disaggregated’ data.⁵⁷ The assessment should be responsive: it should be able to respond to differentiated, intersectional and disproportionate adverse impacts on women’s human rights as well as to discriminatory norms and patriarchal power structures.⁵⁸ The assessment’s outcome

(24 October 2020), www.knack.be/nieuws/wereld/in-kenia-is-de-ene-rozenplantage-de-andere-niet-klagen-is-ontslag-vragen (accessed 8 September 2023).

⁴³ Female floriculture workers are five times less likely to file claims in Kenyan courts than male floriculture workers. Aleydis Nissen, ‘Business and Human Rights Through a Gender Lens’, *In the Long Run* (20 April 2020), https://aleydisnissen.com/gallery/publicationsp-inthelongrun_Cambridge_Nissen_2.pdf (accessed 8 September 2023).

⁴⁴ Aleydis Nissen, *The European Union, Emerging Global Business and Human Rights* (Cambridge: Cambridge University Press, 2023) 236–7.

⁴⁵ ‘Gender Dimensions’, note 1.

⁴⁶ *Ibid.*, para 30.

⁴⁷ *Ibid.*, para 9.

⁴⁸ ‘Gender Guidance’, note 7, para 52.

⁴⁹ *Ibid.*, para 52(a).

⁵⁰ *Ibid.*, para 52(d).

⁵¹ *Ibid.*, para 52(b). Legal barriers are further discussed in Section IV of this article.

⁵² Michael McCann, ‘Law and Social Movements: Contemporary Perspectives’ (2006) 2 *Annual Review of Law & Social Science* 17.

⁵³ World Bank, *Women, Business and the Law* (Washington, DC: World Bank, 2020) 3.

⁵⁴ ‘Gender Dimensions’, note 1, para 39.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, para 40.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, para 39.

should inform states and businesses in taking a full range of measures to achieve substantive gender equality in all spheres of life.⁵⁹ In turn, remedies should combine preventive, redressive and deterrent elements to change existing power structures that discriminate against women and achieve substantive gender equality.⁶⁰ The measures and remedies should be transformative in that they should be capable of bringing change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping.⁶¹ They should, in turn, inform future gender-responsive assessments.

This paragraph breaks down the elements that make up gender-transformative remediation according to the WGBHR. The patriarchy can be understood as the privileging of men in social relations: it is ‘an invisible but all pervasive, political and socially constructed system of male and masculinist domination’.⁶² This concept allows us to ‘connects the dots’ between different tangible and intangible aspects of women’s experiences ‘in both their political and their private lives, and linking these individual experiences to wider social structures and institutions’.⁶³ Unequal power relations can include various issues including – as argued in *Section IV* below – intersectional, capitalist and neoliberal dimensions. However, it was unfortunate that the WGBHR did not explicitly refer to these dimensions in relation to gender-transformative remediation.⁶⁴ It is well-established that patriarchal norms ‘need to be treated as part of a wider analysis that explores how the structures of male domination intersect with other dimensions of inequality’.⁶⁵ Finally, the WGBHR noted that gender-transformative remedies should pay attention to patriarchal norms and unequal power relations ‘that underpin’ discrimination, violence and stereotyping.⁶⁶ The WGBHR stressed that legal aid schemes should be available to all victims of gender-based violence against women.⁶⁷ At the same time, the WGBHR acknowledged that such violence has severe and irremediable impacts.⁶⁸ Such violence affects women disproportionately or is directed against a woman because she is a woman.⁶⁹ A figure in the 2019 report provides a number of illustrative actions to engage in gender-transformative remediation, such as addressing both specific and systematic abuses affecting women and engaging with governments and other stakeholders to reform discriminatory laws.⁷⁰

For states, the Gender Guidance emphasizes that ‘proactive and targeted measures to reduce additional barriers to justice that may be faced by women’ are required, ‘in line with [CEDAW Committee’s] General Recommendation No. 33’ on access justice, which interprets Articles 2(c), 3, 5(a) and 15 of Convention on the Elimination of all Forms of Discrimination

⁵⁹ Ibid, 40.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Judith Grant, ‘Experience’ in Disch and Hawkesworth, *note 14*, 229.

⁶³ Valerie Bryson, *The Futures of Feminism* (Manchester: Manchester University Press, 2021) 50.

⁶⁴ Compare Handl, Seck and Simons, *note 5*, 210.

⁶⁵ Bryson, *note 63*, 56–57.

⁶⁶ ‘Gender Dimensions’, *note 1*, para 39.

⁶⁷ ‘Gender Guidance’, *note 7*, para 52(e).

⁶⁸ Ibid, para 47.

⁶⁹ CEDAW Committee, ‘General Recommendation 19 on Violence against Women’, contained in UN General Assembly, ‘Report of the Committee on Elimination of Discrimination Against Women’, A/47/38 (1993); UN General Assembly, Res 48/104 (20 December 1993).

⁷⁰ The other actions that are mentioned in ‘Gender Dimensions’, *note 1*, para 39 and image are: offering a range of preventive, redressive and deterrent remedies; engaging women’s organizations and gender-sensitive experts to identify appropriate remedies; proposing remedies that could change discriminatory power structures and reduce violence against women. Gender-transformative remedies should be complemented by gender-responsive remedies. ‘Gender Guidance’, *note 7*, paras 1.2(f), 8(g), 22(b)(b), 27.4(d), 26.56(d) and 31.51.

against Women (CEDAW).⁷¹ General Recommendation 33 notes that states have obligations ‘to ensure that all women have access to education and information about their rights and remedies available, and how to gain access to them, and access to competent, *gender-sensitive* dispute resolution systems, as well as equal access to effective and timely remedies’.⁷² At the same time, this General Recommendation stresses that ‘effective access to justice optimizes the emancipatory and *transformative* potential of law’.⁷³ It also notes that states should ‘ensure an innovative and *transformative* justice approach and framework’.⁷⁴

Central to CEDAW Committee’s General Recommendation 33 on access to justice is the quest for justiciability, the ability and empowerment of women to make claims regarding their human rights.⁷⁵ Therefore, states parties to CEDAW are recommended to ‘cooperate with civil society and community-based organizations to develop sustainable mechanisms to support women’s access to justice’.⁷⁶ Article 7(c) of CEDAW obliges states to take all appropriate measures to eliminate discrimination against women in the political and public life and, in particular, to ensure to women, on equal terms with men, the right to participate in non-governmental organizations (NGOs) and associations concerned with the public and political life in the state.⁷⁷ NGOs and civil society entities should be encouraged to take part in litigation on women’s rights.⁷⁸ States should also ensure that WHRDs can access justice, and receive protection from harassment, threats, retaliation and violence.⁷⁹

In its 2019 report and the annexed Gender Guidance, the WGBHR also pays particular attention to women’s organizations and gender-sensitive experts as well as WHRDs.⁸⁰ WHRDs face additional risks, including misogynistic public shaming, online harassment and sexual violence.⁸¹ The WGBHR also mentioned the depiction of defenders as criminals.⁸² Furthermore, stereotypes about gender and deeply held ideas and norms about who women are and how they should be constitute an important limitation for women and their allies to voice their concerns and be heard.⁸³ Who they are, who they defend and their quest for corporate accountability attract opposition. WHRDs are only allowed to fight for rights ‘in limited, circumscribed ways’, and greater resistance to their work emerged in recent years due to rising populism and extremism.⁸⁴

With specific reference to WHRDs and remediation, the Gender Guidance contains three illustrative examples of actions that can contribute to gender-transformative remediation. First, states should put in place mechanisms to ensure that no reprisals or retaliatory actions are directed against WHRDs and other women seeking remedies.⁸⁵ Second, WHRDs should meaningfully participate in designing and administering operational-level grievance

⁷¹ ‘Gender Guidance’, note 7, para 52.

⁷² CEDAW Committee, note 10, para 11 (emphasis added).

⁷³ *Ibid.*, para 2 (emphasis added).

⁷⁴ *Ibid.*, 18(c) (emphasis added). However, this recommendation mostly resorts to the concept of gender-sensitive remediation in other paragraphs.

⁷⁵ *Ibid.*, paras 2 and 14(a).

⁷⁶ *Ibid.*, para 15(h).

⁷⁷ SR on HRDs, note 21, 20. This provision is also mentioned in NIC 1/2017, note 16; GTM 5/2012 (28 June 2012); KHM 4/2012 (4 June 2012); and PER 3/2012 (15 August 2012).

⁷⁸ CEDAW Committee, note 10, para 15(h).

⁷⁹ *Ibid.*, paras 8 and 15(e).

⁸⁰ ‘Gender Guidance’, note 7, para 62(c); ‘Gender Dimensions’, note 1, para 39 and Figure.

⁸¹ ‘Gender Dimensions’, note 1, para 20.

⁸² HRC, ‘Visit to Honduras’ (15 May 2020), A/HRC/44/43/Add.2, paras 66–75.

⁸³ ‘Gender Dimensions’, note 1, para 20 referring to HRC, ‘Situation of Women Human Rights Defenders Report’ (10 January 2019), A/HRC/40/60, para 6; ‘Gender Guidance’, note 7, para 52(a).

⁸⁴ SR HRDs, note 83, paras 6 and 23–24.

⁸⁵ ‘Gender Guidance’, note 7, para 52(c).

mechanisms in businesses.⁸⁶ Third, non-judicial grievance mechanisms should collect ‘sex-disaggregated’ data and consult women’s organizations and WHRDs to enable gender-responsive continuous learning.⁸⁷

III. Methodology

This section first discusses the steps undertaken to craft the dataset of communications from the Special Procedures. Afterwards, it explains why I used critical feminist discourse analysis to distil lessons regarding gender-transformative remediation from these data.

Dataset

The Special Procedures’ communications can offer an important source of learning.⁸⁸ While there is a discussion to which extent they can address root causes of rights abuses due to the nature of their mandates,⁸⁹ they have the benefit of experimenting frequently. This learning ‘extends beyond the body involved in the experiment’.⁹⁰

The Special Procedures can decide to send communications in relation to the information that they receive, from any individual, group, civil society organization, inter-governmental entity or national human rights body regarding alleged past, ongoing or potential abuses or concerns relating to bills, legislation, policies or practices that do not comply with international human rights law and standards.⁹¹ Most communications are sent to governments, but some are sent to other actors such as businesses. The Special Procedures present the allegations, request clarifications on them, and where necessary, ask that the violations are prevented, stopped, investigated or that remedial actions are taken. They also recall the applicable human rights provisions in these letters. The Special Procedures do not have the power or authority to enforce their recommendations. They do not require that the concerned state ratified an international or regional human rights treaty, or that the alleged victim exhausted domestic remedies to send a communication.

To create the dataset, we first manually selected all the communications that related to business and human rights issues (including but not limited to those in which the WGBHR was involved) between 2011 and 2020. 2011 was selected as the starting date for two reasons. First, the UNGPs were adopted in this year. Second, communications are systematically accessible on the UN’s website since December 2010 only. We found that approximately 934 out of 5,890 communications touched upon business and human rights in this time frame. We filtered the communications in which the SR on HRDs was involved. It was hypothesized that this sub-set of communications can deepen our knowledge about gender-transformative remediation for WHRDs because this representative has specific knowledge of WHRDs and gender. The former SR on HRDs, Margaret Sekaggya, stated in this regard that the mandate ‘consistently addressed the specificities of the situation of women human rights defenders and the particular challenges they face’.⁹² As a result, 394 communications relating to approximately 274 unique cases were identified.

⁸⁶ Ibid, 58(a).

⁸⁷ Ibid, 62(c).

⁸⁸ Brems, note 18, 189.

⁸⁹ Anne Gallagher, ‘Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System’ (1997) 19 *Human Rights Quarterly* 283, 292.

⁹⁰ Brems, note 18, 189.

⁹¹ HRC, ‘Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council’, contained in HRC, Res 5/2 (18 June 2007), www.ohchr.org/sites/default/files/Documents/HRBodies/SP/CodeOfConduct.pdf (accessed 8 September 2023).

⁹² SR on HRDs, note 21, para 6.

We added gender-disaggregated data. The UN provides (mostly accurate) gender-disaggregated data for its communications online,⁹³ but these data cannot be downloaded. Therefore, we added manually whether these communications concerned exclusively women, mainly women, mainly men, exclusively men, as many women as men, other, unidentified or a community of HRDs. In total, thirty unique cases that concerned (a majority of) WHRDs could be identified (see the *Annexure*). Other communications that contained the names of the same WHRDs or that were referenced in the thirty selected communications are included in the last column of the *Annexure* ('related communications'). Most communications were addressed to states, and some to corporations.

The sample refers to a wide range of WHRDs and industries. The following WHRDs are represented in the sample: representatives of NGOs and/or community, residents, academics, a lawyer, a blogger and a journalist. The sample also contains WHRDs from trade unions. WHRDs fight against human rights abuses in various industries. Most communications relate to alleged abuses in the mining and energy industries. Resource exploitation is known to be often linked to lethal and non-lethal attacks on HRDs.⁹⁴ Violence is used against WHRDs to silence, control and suppress their authority.⁹⁵ While the WBHR's 2019 report is generic in nature, it emphasized that the adverse impacts of natural resources exploitation are felt disproportionately by women.⁹⁶ The WGBHR explained that women who are dependent on land that is 'acquired for infrastructure and mining projects or to build a dam' may not 'receive a fair share' in such projects nor receive compensation for the loss of their livelihood or subsistence.⁹⁷ Community and NGO representatives also protested against corporations in the sectors of private property, livestock and palm oil. Various communications in the sample relate to the textile sector. The WGBHR report noted that this is a sector in which women workers are over-represented in supply chains.⁹⁸ Furthermore, there is one communication involving the media in Sri Lanka and a communication on a private detention centre in the United States. The WGBHR report briefly commented on the disproportionate and different impact of the privatization of public services on women.⁹⁹ Finally, there is one communication about unionized 'caring mothers' who are working in a state-funded programme. The WGBHR report also referred to the insufficient recognition and valuation of women's contribution to the economy.¹⁰⁰

Critical Feminist Discourse Analysis

Most feminist research pays attention to power and *how* knowledge is built.¹⁰¹ It seeks social transformation on behalf of women and other oppressed groups.¹⁰² At its core, feminist research is about moving away from androcentric biases to expand 'human potentiality' and

⁹³ Compare CEDAW Committee, *note 10*, para 20.

⁹⁴ Global Witness, 'Decade of Defiance' (2022), www.globalwitness.org/en/campaigns/environmental-activists/decade-defiance/#list-victims-2021 (accessed 8 September 2023).

⁹⁵ *Ibid.*

⁹⁶ 'Gender Guidance', *note 7*, para 17.

⁹⁷ 'Gender Dimensions', *note 1*, para 18.

⁹⁸ *Ibid.*, paras 12 and 23.

⁹⁹ *Ibid.*, para 17.

¹⁰⁰ *Ibid.*, para 11.

¹⁰¹ Sharlene Hesse-Biber and Deborah Piatelli, 'The Synergistic Practice of Theory and Method' in Sharlene Hesse-Biber (ed.), *Handbook of Feminist Research* (Thousand Oaks: Sage, 2011).

¹⁰² Mauro Zamboni, *The Policy of Law* (Oxford: Hart, 2007) 206; Michelle Lazar, 'Feminist Critical Discourse Analysis' (2007) 4 *Critical Discourse Studies* 141; Sharlene Hesse-Biber, 'Feminist Research: Exploring, Interrogating, and Transforming the Interconnections of Epistemology, Methodology, and Method' in Hesse-Biber, *note 101*.

ultimately bring ‘about changes in self and society’.¹⁰³ The CEDAW Committee recommends qualitative studies and critical gender analyses to learn more about those factors hindering or promoting women’s access to justice.¹⁰⁴

Critical feminist discourse analysis is, in particular, well-suited to investigate gender-transformative remedies because this method focuses on ‘social justice and *transformation* of gender’.¹⁰⁵ While critical discourse analysis allows us to reveal how power relations and other social practices are reflected as well as constituted by discourse, feminist critical discourse analysis reminds us that such practices are gendered.¹⁰⁶ Feminist critical discourse analysis is motivated by the need to change substantively the existing conditions of differences between male and female.¹⁰⁷ Such analysis considers how language reproduces, maintains, resists or transforms gender relations of power.¹⁰⁸ Such analysis is praxis oriented but needs to ‘mobiliz[e] theory in order to create critical awareness and develop feminist strategies for resistance and change’.¹⁰⁹ Feminist knowledge is not monolithic. Following Charlesworth’s advice, I approach this analysis as a ‘world traveller, using different modes of transport according to the terrain’.¹¹⁰ This approach can, in turn, enrich feminist human rights theory and help us ‘to understand why women suffer as they do’.¹¹¹ The ultimate goal is a ‘social *transformation* based on social justice that opens up unrestricted possibilities’.¹¹²

One way to engage in critical feminist discourse analysis is closely examining written records of institutions of domination to interpret and explain societal structures and norms.¹¹³ The communications in the dataset were colour-coded to identify any gender-transformative pronouncements. All references in the facts, soft law and hard law that sustained or rejected patriarchal norms and unequal power-relations that underpin discrimination, gender-based violence and gender stereotyping were coded. Data collection and analysis – based on pattern matching and cross-communication analysis – were placed in a dialectical relationship. Emerging themes were identified and clustered into categories. The UN’s practice to publish some communications as ‘image only’ PDFs complicated the coding process.

Critical feminist discourse analysis is as much a study of what is there, as of what is missing.¹¹⁴ While the SR on HRDs claimed to have consistently focused on WHRDs, the analysis paints a more mixed picture. Despite advances in the use of data to measure and address gender disparities in Special Procedures, the SR on HRDs failed to integrate a consistent gender-approach in their communications. This finding is in line with the

¹⁰³ Helen Longino, *Science as Social Knowledge: Values and Objectivity in Scientific Inquiry* (Princeton: Princeton University Press, 1990) 194; Denise Leckenby, ‘Feminist Empiricism: Challenging Gender Bias and “Setting the Record Straight”’ in Sharlene Hesse-Biber (ed.), *Feminist Research Practice* (Thousand Oaks: Sage, 2007) 5.

¹⁰⁴ CEDAW Committee, note 10, para 10.

¹⁰⁵ Lazar, note 102, 144–5 (emphasis added).

¹⁰⁶ *Ibid.*, 145; Shulamit Reinharz and Lynn Davidman, *Feminist Methods in Social Research* (Oxford: Oxford University Press, 1992) 151.

¹⁰⁷ Lazar, note 102, 143.

¹⁰⁸ *Ibid.*, 150–151.

¹⁰⁹ *Ibid.*, 145.

¹¹⁰ Hilary Charlesworth, ‘Feminist Critiques of International Law and Their Critics’ (1994) 13 *Third World Legal Studies* 1, 6.

¹¹¹ Lazar, note 102, 145; Brooke Ackerly, ‘Feminist and Activist Approaches to Human Rights’ in Michael Goodhart (ed.), *Human Rights Politics and Practice* (Oxford: Oxford University Press, 2013) 37.

¹¹² Lazar, note 102, 153.

¹¹³ *Ibid.*, 151.

¹¹⁴ Reinharz and Davidman, note 106, 162.

post-structural feminist idea that institutions can be a negative as well as a positive experience for women.¹¹⁵

Only half of the communications in the dataset engage with gender issues. Most insights can be discerned from the thirteen communications that have been co-written by the SR on violence against women and/or the WG on discrimination against women.¹¹⁶ Some lessons can also be found in BIH 1/2017 that has been communicated by the SR on HRDs and the Special Rapporteur on the environment and ZAF 3/2020, that has been written by these two Special Rapporteurs and the Special Rapporteur on extrajudicial, summary or arbitrary executions.¹¹⁷ While BIH 1/2017 provides lessons, it also reproduces androcentric bias of national institutions, by referring to the ‘ombudsman’ in Bosnia and Herzegovina.

In the fifteen other studied communications, there was ‘little or inadequate attention to the diverse experiences of women in’.¹¹⁸ Fourteen communications pay little or no attention to gender issues.¹¹⁹ There is one communication that can be considered to be inadequate: LKA 5/2013.¹²⁰ The UN Special Procedures barely commented on gendered dimensions and failed to refer to the applicable standards in a case concerning the state-owned Sri Lanka Broadcasting Corporation. The programme ‘Stoning the Sinner Woman’ broadcasted telephone calls which made threats to the life of a WHRD, Nimalka Fernando, in response to her calls for the protection of sex workers and improved sexual and reproductive rights. The communication mentions, amongst others, the following transcripts: ‘We cannot allow persons like Nimalka Fernando to live in this society’, ‘We should use a lorry and cause an accident’ and ‘There is something called cleaning in the army ... We should hand her over to the cleaning system’. Furthermore, Fernando’s ‘character was called into disrepute, with one caller referring to her as a prostitute’.¹²¹ The radio hosts allegedly actively endorsed such ideas. The Special Procedures did not address the biases and stereotypes in these statements or mention the special role that the media should play in raising awareness of violence against women.¹²² They did also not refer to gender-based violence as a form of discrimination that inhibits women’s ability to enjoy rights on a basis of equality with men (Article 1 of CEDAW) or to other relevant authoritative documents such as CEDAW Committee’s General Recommendation 19 on Violence against Women and the UN Declaration on the Elimination of Violence against Women.¹²³ Gender-based violence was only mentioned as a ‘token reference’ in a series of violations in HRC Resolution 13/13 on the Protection of HRDs.¹²⁴

¹¹⁵ Johanna Kantola, ‘State/Nation’ in Disch and Hawkesworth, note 14, 922.

¹¹⁶ ECU 2017, note 16; GTM 5/2012, note 77; KHM 4/2012, note 77; NIC 1/2017, note 16; PER 3/2012, note 77; THA 1/2013, note 77; THA 3/2020, note 15; UZB 1/2017, note 15; CAN 4/2020 (10 July 2020); GTM 4/2020 (7 May 2020); KEN 1/2020 (20 May 2020); KOR 3/2014 (18 August 2014); PHL 3/2012 (29 June 2012).

¹¹⁷ BIH 1/2017 (16 May 2019); ZAF 3/2020 (9 December 2020).

¹¹⁸ The WGBHR uses this expression in relation to states and businesses in ‘Gender Dimensions’, note 1, 44.

¹¹⁹ BGD 6/2014 (30 September 2014); GTM 2/2018 (14 February 2018); HND 4/2017 (17 May 2017); KAZ 2/2011 (28 July 2011); KAZ 3/2017 (12 December 2017); KGZ 4/2015 (22 December 2015); MMR 14/2013 (3 October 2013); PER 3/2015 (25 August 2015); PER 4/2017 (14 July 2017); PRY 1/2016 (8 July 2016); THA 4/2012 (25 July 2012); USA 2/2018 (8 February 2018); VNM 4/2017 (28 June 2017); OTH 12/2017 (21 August 2017). These communications do not go further than containing a reference to WHRDs in passing.

¹²⁰ LKA 5/2013 (26 November 2013).

¹²¹ *Ibid.*, para 2.

¹²² UN Economic and Social Council, ‘Integrations of the Human Rights of Women and the Gender Perspective’, E/CN.4/1999/68 (10 March 1999) 25(vii). See Katherine Sarikakis and Eliane Thao Nguyen, ‘The Trouble with Gender: Media Policy and Gender Mainstreaming in the European Union’ (2009) 31 *European Integration* 201.

¹²³ CEDAW Committee, note 69; UN General Assembly, Res 48/104 (20 December 1993).

¹²⁴ UN General Assembly, Res 13/13 (15 April 2010). Compare Gallagher, note 89, 319.

IV. Lessons

According to the WGBHR, gender-transformative remediation should bring change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping. The results of the critical feminist discourse analysis indicate that the Special Procedures considered the concept of patriarchy jointly with other concepts employed by feminist theorists looking for transformative change, namely, intersectionality, neoliberalism and capitalism. Furthermore, two actions recommended by the WGBHR to achieve gender-transformative remediation were put in action by the Special Procedures. They proposed remedies to reduce violence against women and they engaged with governments to reform discriminatory laws.

Intersectionality

As noted earlier, the WGBHR did not expressly refer to intersectionality but to ‘patriarchal norms complemented by other and unequal power-relations’ when defining gender-transformative remedies. The WGBHR said, however, that such remedies should feed into assessments that are able to respond to intersectional adverse impacts on women’s human rights. Handl, Seck and Simons recently argued that ‘problematizing the intersectional nature of oppression and discrimination in the [business and human rights] context’ is necessary to ‘move towards’ ‘more targeted responsive and *transformative* remedies’.¹²⁵

The influential term of intersectionality was coined by Kimberlé Crenshaw when she researched how US courts deal with discrimination that is based on both gender and race.¹²⁶ This term refers to the idea that people are subjected to interacting systems of power.¹²⁷ Women are not a monolithic class or group. Women may be affected differently by business activities in view of, amongst others, their access to age, caste, class, colour, disability economic resources, ethnicity, gender identity, indigenous status, language, literacy, marital status, migration status, minority status religion, residence in a rural location or sexual orientation.¹²⁸ They can, amongst others, be in armed conflict new mothers, pregnant, stateless and/or trafficked. In the dataset, intersectional dimensions are particularly apparent in communications KOR 3/2014, THA 3/2020, ECU 2/2017, NIC 1/2017, GTM 4/2020, BIH 1/2017 and KEN 1/2020.¹²⁹

KOR 3/2014 pays attention to elder WHRDs.¹³⁰ This communication was co-written by the SR on HRDs, the SR on violence against women and the Independent Expert on the enjoyment of all human rights by older persons. In the Republic of Korea, there is a particular awareness of older people’s different statuses.¹³¹ For example, Korean speakers use honorific speech to indicate their social relationship concerning their age, even if they have close working relationships.¹³² Regardless, there were allegations of excessive use of

¹²⁵ Handl, Seck and Simons, note 5, 213 (emphasis added).

¹²⁶ Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex’ (1989) 1 *The University of Chicago Legal Forum* 139, 140.

¹²⁷ Sophie Jacquot and Clémence Ledoux, ‘Les Partenaires Sociaux à l’Épreuve du Genre et de l’Intersectionnalité dans l’Union Européenne’ (2021) 4 *Politique Européenne* 11.

¹²⁸ ‘Gender Dimensions’, note 1, para 2.

¹²⁹ THA 3/2020, note 15; ECU 2/2017, note 16; NIC 1/2017, note 16; GTM 4/2020, note 116; KEN 1/2020, note 116; KOR 3/2014, note 116; BIH 1/2017, note 117.

¹³⁰ KOR 3/2014, note 116.

¹³¹ Aleydis Nissen, ‘Please Give me a Remedy: Women Human Rights Defenders Mobilise for Occupational Safety and Health’ (working paper).

¹³² Kyung-Joo Yoon, ‘Not Just Words: Korean Social Models and the Use of Honorifics’ (2005) 1 *Intercultural Pragmatics* 189.

force by government employees, private security and police officers against elder environmental WHRDs who were peacefully protesting against the construction of nuclear power transmission towers by the Korea Electric Power Corporation (KEPCO). The protesters feared that these towers would cause environmental destruction and damage to food crops. The Special Procedures emphasized that most residents were senior citizens in their seventies, who have been denied meaningful, participatory consultations with government agencies or KEPCO in the seven years prior to the communication. More than 2,000 officers were mobilized against 100 senior residents who conducted sit-in protests. The police disregarded 'the frail condition of the protestors' having 'only one ambulance on stand-by at the protest sites'. Furthermore, the police allegedly assaulted nine women, including three nuns. Three women fractured their limbs. Three other women felt sexually humiliated when they were dragged out of the sit-in site. In a previous protest, one 'elderly nun' was allegedly sexually, physically and verbally assaulted by KEPCO representatives. The Special Procedures mentioned the UN Principles for Older Persons, which indicate that older persons should be able to live in safe environments that are adaptable to personal preferences.¹³³ They should also participate actively in the policies that direct their well-being as integrated members of society. Specific reference was furthermore made to Article 4(c–d) of UN Declaration on the Elimination of Violence against Women. This article is further discussed below. While most communications in the dataset did not refer to issues that elder WHRDs face extensively, KHM 4/2012 discussed a peaceful protest against private property development by thirteen women by the Boeung Kak Lake community, including 'Nget Kun (aged 72)'.¹³⁴

THA 3/2020 – in which the SR on HRDs, the SR on the human rights of migrants, the WG on discrimination against women and other Special Procedures joined forces – did not directly comment on issues that migrant WHRDs face (contrary to some earlier communications related to THA 3/2020).¹³⁵ This is likely because the six WHRDs to which this communication referred were no migrant workers themselves. Nevertheless, the Special Procedures referred to the relevant international framework, including the UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children. THA 3/2020 can be contrasted with USA 2/2018, a communication on a privately owned detention centre where migrants were held in substandard conditions that was also co-signed by the SR on the human rights of migrants, but not by a Special Procedure with an explicit gender mandate.¹³⁶ This communication did not elaborate upon intersectional dimensions that female migrants face.

The SR on HRDs, the WG on discrimination against women and the Special Rapporteur on the rights of indigenous peoples joined forces with other Special Procedures to issue ECU 2/2017.¹³⁷ ECU 2/2017 noted that the Ecuadorian government signed a contract with a consortium of the Chinese National Petroleum Corporation and the China Petrochemical Corporation which directly affects the territories of the Sapara indigenous people. They explained that Gloria Ushigua, a Sapara WHRD, was accused of violent acts on television. Her traditional clothing was mocked 'in a racist and sarcastic manner'. In what is believed to be a case of mistaken identities, her sister-in-law Anaqueta Dahua Cují, was reportedly killed by four men while working on the land. Days after the murder, Dahua's daughter was reportedly held by several men and questioned about the activities and whereabouts of Ushigua. Reference was made to Article 7(c) of CEDAW and the provisions of UN Resolution

¹³³ UN General Assembly, Res 46/91 (16 December 1991).

¹³⁴ KHM 4/2012, note 77.

¹³⁵ THA 3/2020, note 15.

¹³⁶ USA 2/2018, note 119.

¹³⁷ ECU 2/2017, note 16.

68/181 on WHRDs. Furthermore, the obligation to consult freely and in good faith, guarantee the effective protection of the property and possession rights of indigenous peoples and sanction unauthorized intrusions on said lands in the International Labour Organization's (ILO) Convention 169 on Indigenous and Tribal Peoples was mentioned alongside various articles in the UN Declaration on the Rights of Indigenous People.¹³⁸ The communication mentioned gender-based violence against WHRDs with reference to Resolution 68/181. Indigenous WHRDs are at an increased risk of violence because they often lack formal titles over their lands and are typically advocating the preservation of lands and communities threatened by large-scale industrial projects.¹³⁹ ECU 2/2017 can be contrasted with the other communications in the dataset that were co-written by the SR on indigenous peoples, but not by a Special Procedure with an explicit gender mandate.¹⁴⁰ These communications do not elaborate upon intersectional dimensions that indigenous WHRDs face.

In the three above communications there seems to be considerable attention for intersectionality because Special Procedures with specific thematic expertise for certain people (older persons, migrants, indigenous peoples) joined forces with Special Procedures with gender expertise.

There are other communications that discuss intersectional dimensions. First, in NIC 1/2017 – which had not been co-written by the SR on indigenous peoples – the Special Procedures also briefly addressed intersectional dimensions faced by indigenous WHRD.¹⁴¹ This communication is further discussed below. Second, BIH 1/2017 addressed intersectional dimensions by noting '40 peaceful protestors ... who were mainly women from the village, including one who was *pregnant* formed a human block ... to prevent the entry of heavy machinery to the river bed'.¹⁴² Third, KEN 1/2020 – cowritten by the SR on HRDs and the WG on discrimination against women – also needs to be mentioned here. WHRD Ruth Mumbi defended the right to housing of 7,000 residents of Kariobangi who had been evicted by the Nairobi City Water and Sewerage Company.¹⁴³ The Communication referred to various intersectional dimensions. It questioned the economic vulnerability of the residents due to the restrictions, including isolation at home, that were in place during the Coronavirus SARS-CoV-2 disease (COVID-19) pandemic. It also noted that the eviction took place during the religious holiday of Ramadan, disproportionately impacting Muslim residents. Moreover, it explained that Mumbi was able to offer shelter to five families, 'mainly made up of single mothers'. Finally, the Special Procedures stressed that the government should provide more data of affected people disaggregated by 'gender, age, disabilities and other factors'.

It is now widely accepted that feminist scholars and activists have in the past not sufficiently recognized that all women's experiences are not the same.¹⁴⁴ Liberal feminists have, in particular, been criticized for overlooking this matter.¹⁴⁵ This approach over-emphasizes choice, an option that many women of less privileged walks of life do not have.¹⁴⁶ Gender-transformative remedies take into account the differentiated impacts that business activities have on women facing intersecting discrimination. The Special

¹³⁸ ILO Convention 169 on Indigenous and Tribal Peoples, 1650 UNTS 383 (adopted on 27 June 1989, entered into force on 5 September 1991); UN General Assembly, Res 61/295 (2 October 2007).

¹³⁹ SR on HRDs, note 21, 24 and 52–53.

¹⁴⁰ GTM 2/2018, note 119; HND 4/2017, note 119 and PRY 1/2016, note 119.

¹⁴¹ NIC 1/2017, note 16.

¹⁴² BIH 1/2017, note 117 (emphasis added).

¹⁴³ KEN 1/2020, note 116.

¹⁴⁴ Eline Severs, Karen Celis and Silvia Erzeel, 'Power, Privilege and Disadvantage: Intersectionality Theory and Political Representation' (2016) 36 *Politics* 346.

¹⁴⁵ Celeste Montoya, 'Institutions' in Disch and Hawkesworth (eds.), note 14, 367 and 376.

¹⁴⁶ Suzanne Bergeron, 'Formal, Informal and Care Economies' in Disch and Hawkesworth (eds.), note 14, 192–193.

Procedures have considered a range of interlocking forms of discriminations and referred to relevant soft and hard law. Nevertheless, they are still experimenting and do not always take intersectionality into account.

Gender-Based Violence

According to the WGBHR, gender-transformative remediation brings change to patriarchal norms and unequal power relations that underpin gender-based violence. While CEDAW does not explicitly refer to gender-based violence against women, it is considered to be discrimination within the meaning of Article 1 of this Convention.¹⁴⁷ Violence against women is ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life’.¹⁴⁸ Such violence takes a gender-specific form in both its nature and its impacts.¹⁴⁹ According to the CEDAW Committee, it is one of ‘the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated’.¹⁵⁰ It is a ‘social rather than an individual problem, requiring comprehensive responses’.¹⁵¹

While violence against women ‘at home’ garnered a considerable level of visibility, violence inflicted by corporate actors has remained under the radar until recently.¹⁵² Simons observed that there is no mention of the risk of gender-based violence or sexual violence outside of conflict-affected areas in the UNGPs.¹⁵³ Similarly, when Gallagher studied reports of Special Procedures in 1997, she found that they ‘tend to mention one type of violation only (usually sexual abuse)’.¹⁵⁴ The studied communications in the database are, however, more diverse and far-reaching. They acknowledge – like the WG on discrimination against women’s report on the structural and social underpinnings of gender discriminations – that WHRDs are often the target of gender-based violence.¹⁵⁵

First, several communications deal with sexual harassment. Sexual harassment was only theorized in the late 1970s.¹⁵⁶ It is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.¹⁵⁷ BIH 1/2017, for example, explains that ‘inappropriate comments with sexual connotations’ were designed to ‘humiliate’ WHRDs who protested against the construction of hydropower plants in Bosnia Herzegovina.¹⁵⁸ The police also pulled

¹⁴⁷ CEDAW Committee, note 69, para 6; PER 3/2012, note 77.

¹⁴⁸ UN General Assembly, Res 48/104 (20 December 1993), art 1; KHM 4/2012, note 77.

¹⁴⁹ Compare SR on HRDs, note 21, para 24.

¹⁵⁰ CEDAW Committee, ‘General Recommendation 35 on Gender-Based Violence against Women, Updating General Recommendation 19’, CEDAW/C/GC/35 (26 July 2017), para 10.

¹⁵¹ *Ibid*, para 9.

¹⁵² Compare Anne Lagerwall, ‘Les Droits de l’Homme Se Conjuguent-ils au Féminin?’ in Diane Bernard and Chloé Harmel (eds.), *Droits des Femmes Codes Commentés* (Brussels: Larcier, 2020) 21, 22.

¹⁵³ Penelope Simons, ‘Unsustainable International Law: Transnational Resource Extraction and Violence Against Women’ (2017) 26 *Transnational Law & Contemporary Problems* 415, 431 referring to Principle 7 of the UNGPs.

¹⁵⁴ Gallagher, note 89, 317.

¹⁵⁵ HRC, ‘Report’ (19 April 2013), A/HRC/23/50, note 15.

¹⁵⁶ Vicki Schultz, ‘Reconceptualising Sexual Harassment’ (1998) 107 *The Yale Law Journal* 1683, 1700.

¹⁵⁷ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), CETS 210 (adopted 11 May 2011, entered into force 1 August 2014), art 40. See also CEDAW Committee, note 69, para 11.

¹⁵⁸ BIH 1/2017, note 117.

traditional head scarves of some WHRDs. MMR 14/2013 alleges that a WHRD's clothes were 'partly torn' when she protested against the Letpadaung Copper Mine in Myanmar.¹⁵⁹ Another communication noted that two WHRDs 'were dragged by the hair'.¹⁶⁰ According to CAN 4/2020, a WHRD was allegedly handcuffed, beaten and harassed by private security personnel of the Canadian company Steppe Gold in Mongolia.¹⁶¹ They took her phone with a recording of a demonstration. After she managed to retrieve it, she placed it in her bra. The Special Procedures explain that the security personnel took it out of her bra and 'pretended to continue to search for her mobile phone on her person'.

Second, various WHRDs are intimidated, receive death threats and are attacked or murdered.¹⁶² They are punished for questioning the status quo gender stereotypes and power relations. KEN 1/2020 noted that Mumbi may be at risk of enforced disappearance for her legitimate work as a WHRD.¹⁶³ In THA 1/2013, two WHRDs who campaigned on behalf of the community in a land ownership dispute with a palm oil company were shot by unknown individuals.¹⁶⁴ In Guatemala, the Special Procedures noted 'a context of growing intimidations and insecurity for WHRDs' after the attempted murder of a WHRD who returned from a peaceful demonstration against the mining industry.¹⁶⁵ In GTM 4/2020, the Special Representatives expressed concern that during a demonstration for their rights in Guatemala City, WHRDs were photographed, watched and intimidated by the *Oficina Nacional del Servicio Civil* ('National Civil Service Office').¹⁶⁶

Third, WHRDs are at risk of being ridiculed or abused by other people, including people working in remediation mechanisms, due to stereotypes about women's psychology and biology.¹⁶⁷ Violating gender norms is weaponized through mental health diagnoses.¹⁶⁸ For example, Elena Urlaeva, head of the NGO *Pravozashchitni Alians Uzbekistana*, who worked with international organizations to free people – mainly women and children – from slavery in Uzbek cotton fields, has allegedly been arbitrarily arrested and forcibly detained in a psychiatric institution several times.¹⁶⁹ Amongst others, she was mocked, ridiculed and detained the day before she was planning to meet representatives of the ILO and the World Bank.

Fourth, technological developments created new risks for WHRDs. For instance, WHRDs allegedly received death threats via text message following their protests.¹⁷⁰ Gender-based violence is sometimes displayed on social media. After Le My Hanh peacefully demonstrated against environmental pollution by Formosa Plastics, she was beaten up and attacked with pepper spray.¹⁷¹ Later, one of the attackers posted a video of the assault on his Facebook page along with a threatening message. In NIC 1/2017, Cunningham Wren received the message 'we are going to annihilate you, if you want war you will have war, war means blood'.¹⁷² Another problem addressed in this communication is doxing, the publication of

¹⁵⁹ MMR 14/2013, note 119.

¹⁶⁰ PER 3/2012, note 77.

¹⁶¹ CAN 4/2020, note 116.

¹⁶² Such gender-based violence against women is also mentioned in ECU 2/2017, note 16; CAN 4/2020, note 116; HND 4/2017, note 119; ZAF 3/2020, note 117.

¹⁶³ KEN 1/2020, note 116.

¹⁶⁴ THA 1/2013, note 77.

¹⁶⁵ GTM 5/2012, note 77.

¹⁶⁶ GTM 4/2020, note 116.

¹⁶⁷ Simone de Beauvoir, *The Second Sex* (New York: Vintage Books, 2011) 283.

¹⁶⁸ Dean Spade and Craig Wilse, 'Norms and Normalisation' in Disch and Hawkesworth (eds.), note 14, 555.

¹⁶⁹ UZB 1/2017, note 15.

¹⁷⁰ CAN 4/2020, note 116; KEN 1/2020, note 116.

¹⁷¹ VNM 4/2017, note 119.

¹⁷² NIC 1/2017, note 16.

private or identifying information on the internet to harass WHRDs *en masse*.¹⁷³ The address, phone number and email address of Vilma Nuñez de Escorcia were published in the ‘traitor’s gallery’ on a ‘Nicileaks’ website. She is the founder of the Nicaraguan Center for Human Rights, an organization dedicated to legal aid of indigenous and Afro-descendant communities affected by the construction of the interoceanic canal in Nicaragua.¹⁷⁴ Some companies even sell spy software that can be used to hack and leak private information of WHRDs.¹⁷⁵

As noted above, LKA 5/2013 omitted relevant normative frameworks on gender-based violence. Other communications that mention such violence have similar problems.¹⁷⁶ In all these communications, the WG on discrimination against women or the SR on violence against women were not involved. This is in line with Gallagher’s observations that ‘women and their concerns remain on the sidelines of United Nations’ activity’.¹⁷⁷

Nevertheless, communications that were co-written by the WG on discrimination against women or the SR on violence against women mentioned relevant frameworks on gender-based violence. Three communications referred to the WG on discrimination against women’s report A/HRC/23/50.¹⁷⁸ THA 3/2020 and UZB 1/2017 referred to concerns ‘about systemic and structural discrimination and violence’ faced by WHRDs as noted in HRC resolution 31/32. Three communications mentioned gender-based violence against WHRDs with reference to Resolution 68/181 on WHRDs.¹⁷⁹ Accordingly, states should recognize the important role of the women’s movement and NGOs worldwide in raising awareness and alleviating the problem of violence against women. States should facilitate their work and cooperate with them at local, national and regional levels. BIH 1/2017 cited a HRC resolution on environmental HRDs.¹⁸⁰ It noted that the resolution, ‘strongly condemns the killing and ... and abuses against environmental human rights defenders, including women and indigenous human rights defenders’.¹⁸¹

Four communications mentioned Article 4(c–d) of UN Declaration on the Elimination of Violence against Women.¹⁸² States are obliged to exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women. To this end, states should develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.¹⁸³ Women who are subjected to violence should get access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they suffered.¹⁸⁴ States should also inform women of their rights in seeking redress through such mechanisms.¹⁸⁵ In the same vein, NIC 1/2017 referred to CEDAW Committee’s General Recommendation 19 on Violence against Women’s clause that states parties have to ‘adopt measures to investigate and punish acts of violence and compensate

¹⁷³ Council of Europe, *The Digital Dimension of Violence Against Women as Addressed by the Seven Mechanisms of the EDVAW Platform* (Strasbourg: Council of Europe, 2022) 8.

¹⁷⁴ NIC 1/2017, note 16.

¹⁷⁵ Council of Europe, note 173, 28.

¹⁷⁶ BGD 6/2014, note 119; HND 4/2017, note 119; MMR 14/2013, note 119; PER 3/2015, note 119; VNM 4/2017, note 119.

¹⁷⁷ Gallagher, note 89, 285.

¹⁷⁸ GTM 4/2020, note 116; THA 3/2020, note 15; UZB 1/2017, note 15.

¹⁷⁹ ECU 2/2017 note 16; GTM 4/2020, note 116; CAN 4/2020, note 116.

¹⁸⁰ BIH 1/2017, note 117 referring to HRC, Res 40/11 (21 March 2019).

¹⁸¹ *Ibid.*

¹⁸² GTM 5/2012, note 77; KOR 3/2014, note 116; PER 3/2012, note 77; PHL 3/2012, note 116.

¹⁸³ KOR 3/2014, note 116; PHL 3/2012, note 116.

¹⁸⁴ PHL 3/2012, note 116.

¹⁸⁵ *Ibid.*

victims, violations of women's rights by private individuals'. Finally, CAN 4/2020 and ZAF 3/2020 considered the Working Group on the use of mercenaries' report on 'the gendered human rights impacts of private military and security companies'.¹⁸⁶ Personnel of such companies 'who have committed acts of sexual and gender-based violence need to be investigated and brought to justice ... and ... effective remedies [need to be] accessible to women, girls, men, boys and LGBTI victims'.¹⁸⁷ There is a need to take into account the knowledge and context-specific understanding of 'victims themselves and with local experts, including women leaders' to design or revise the grievance mechanisms, processes and outcomes.¹⁸⁸ These pronouncements are in line with the WGBHR's Gender Guidance which stressed that gender-transformative remediation should be available to women who experience gender-based violence.¹⁸⁹ The Gender Guidance also stressed that states should ensure that corporations 'that cause, contribute to or are directly linked to sexual harassment and gender-based violence are held accountable swiftly'.¹⁹⁰

In sum, gender-transformative remediation addresses the varied forms of direct and structural gender-based violence suffered by WHRDs who call out corporate human rights abuses with reference to relevant international soft and hard law on women's rights. In so doing, it recognizes that violence against WHRDs brings significant economic advantages to industries and state powers alike. Gender-based violence against 'the bodies and lives' of WHRDs is used to 'undermine their resistance' as 'part of the extended neo-liberal extractive battlefield'.¹⁹¹ Amongst others, gender-transformative remediation proves Bryson's claim that 'any causal link between capitalism and particular non-economic aspects of gendered oppression, such as sexual violence, is ... unclear' wrong.¹⁹²

Discriminatory Laws

The WGBHR noted that gender-transformative remedies requires engaging 'with governments and other stakeholders to reform discriminatory law'.¹⁹³ Legislation often reflects the interests of dominant and privileged groups.¹⁹⁴ Women's issues are frequently not 'seen' by legal systems. There are essentializing assumptions about gender that are thought to be 'natural' and 'neutral', while they are, in fact, 'man-made'.¹⁹⁵ Since the 1980s, feminist scholars have questioned whether the state can, therefore, be considered as a 'sister in arms'.¹⁹⁶ They agree that the state is an inherently patriarchal entity that formally structures gender inequality. Yet, feminist theory struggles with considering to what extent

¹⁸⁶ UN General Assembly, 'Report on the Gendered Human Rights Impacts of Private Military and Security Companies', A/74/244 (29 July 2019).

¹⁸⁷ ZAF 3/2020, note 117 referring to UN General Assembly, note 186.

¹⁸⁸ CAN 4/2020, note 116 referring to UN General Assembly, note 186.

¹⁸⁹ 'Gender Guidance', note 7, para 14(e).

¹⁹⁰ *Ibid.*

¹⁹¹ Kalowatie Deonandan and Colleen Bell, 'Discipline and Punish: Gendered Dimensions of Violence in Extractive Development' (2019) 31 *Canadian Journal of Women and the Law*, 24, 39–40, 49 and 53.

¹⁹² Bryson, note 63, 203.

¹⁹³ 'Gender Dimensions', note 1, para 39.

¹⁹⁴ Maina Kiai, 'Reclaiming Civic Space Through U.N. Supported Litigation' (2015) 12 *SUR International Journal on Human Rights* 245, 246; Martin Krygier, 'Good, Bad, and "Irritant" Laws in New Democracies' in Jan Zielonka (ed.), *Media and Politics in New Democracies: Europe in a Comparative Perspective* (Oxford: Oxford University Press, 2014) 126; Anthony Mills and Katherine Sarikakis, 'Reluctant Activists? The Impact of Legislative and Structural Attempts of Surveillance on Investigative Journalism' (2016) 3 *Big Data & Society* 1, 10.

¹⁹⁵ Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998) 189.

¹⁹⁶ Seung-Kyung Kim and Kyounghee Kim, *The Korean Women's Movement and the State: Bargaining for Change* (London: Routledge, 2013) 4–8.

the state needs to be interrogated, and to what extent fruitful engagement with the state is possible.¹⁹⁷ While some feminists turned their backs on the state, others focused on getting seats at the table.

Bartlett argued that ‘asking the woman question’ requires exposing those features of the law that are non-natural and non-neutral, and how they might be corrected.¹⁹⁸ Ten communications demonstrate that there is a pattern of criminalization of WHRDs through regulations.¹⁹⁹ For example, ECU 2/2017 stressed that Ushigua ‘would have been notified of the existence of criminal charges against her for terrorist acts, sabotage and obstruction of public roads’. The WGBHR previously commented that the ‘criminalization of dissent’ depletes the resources of HRDs, and disproportionately ‘preys on’ women’s subordinate economic and social status (discussed in Section II above).²⁰⁰ In so doing, criminalization ‘causes rejection in their social environment’ and ‘exacerbates existing social inequalities’.²⁰¹ Criminality is thus contextualized and no longer associated with the masculine.²⁰² However, only communications that have been co-written by a Special Procedure with a gender mandate communicated on gender dimensions in the criminalization of dissent.²⁰³

THA 3/2020 by the SR on HRDs, the WGBHR and other Special Procedures is particularly interesting from a gender-transformative perspective. It called out legislation that challenges the legitimacy of criticism. It considered strategic lawsuits against public participation (SLAPPs) that had been filed by the poultry farm Thammakaset, a supplier of the food conglomerate Betagro.²⁰⁴ While the legal costs associated with bringing SLAPPs are often treated by corporations as a potential cost of doing business,²⁰⁵ they can be a considerable burden in terms of human capacities and financial resources on the part of WHRDs. Four women, including the journalist Suchanee Cloitre, and two men who had called out alleged exploitative working conditions of migrant workers in a farm of Thammakaset, were targeted by defamation and libel suits, on the basis of Articles 326 and 328 of Thai Criminal Code. Chen and her co-authors famously argued in this regard that women’s activities are often not regulated by the protective arm of the state, but inside the punitive arm of the state.²⁰⁶

In a truly gender-transformative fashion, the Special Procedures stressed that the WGBHR had previously asked the Thai government to ‘review the legal basis of all business-related civil and criminal defamation cases to ensure that no strategic lawsuits against public participation are pending’.²⁰⁷ These words recognize that women struggling for their rights are also struggling to have their enjoyment recognized by laws and remediation mechanisms.²⁰⁸ In so doing, they call out the myth that SLAPPs have no

¹⁹⁷ Kantola, note 115, 915–917.

¹⁹⁸ Katharine Bartlett, ‘Feminist Legal Methods’ (1990) 103 *Harvard Law Review* 829, 837.

¹⁹⁹ See also ECU 2/2017, note 16; GTM 2/2018, note 119; KAZ 2/2011, note 119; KAZ 3/2017, note 119; KHM 4/2012, note 77; MMR 14/2013, note 119; PER 4/2017, note 119; THA 3/2020, note 15; THA 4/2012, note 119; VNM 4/2017, note 119.

²⁰⁰ HRC, note 82, 66–75; Deonandan and Bell, note 191, 43–44.

²⁰¹ Inter-American Commission of Human Rights Defenders, ‘Criminalization of Human Rights Defenders’ OEA/Ser.L/V/II (31 December 2015), para 223.

²⁰² See Lacey, note 195, 198; Linda Mulcahy, ‘Watching Women: What Illustration of Courtroom Scenes Tell Us About Women and the Public Sphere in the Nineteenth Century’ (2015) 42 *Journal of Law and Society* 53, 54.

²⁰³ ECU 2/2017, note 16; KHM 4/2012, note 77; THA 3/2020, note 15.

²⁰⁴ THA 3/2020, note 15. See also OTH 10/2020 (10 March 2020).

²⁰⁵ Laurence Burgorgue-Larsen, ‘Entre Le Mot, Le Sujet et la Sanction, La Diffamation en Question(s)’, in Laurence Burgorgue-Larsen and Gwénaële Calvès (eds.), *La Diffamation Saisie par Les Juges en Europe* (Paris: Pedone, 2019) 127.

²⁰⁶ Martha Chen, Françoise Carré and Sally Roever, ‘Conclusion’, in Martha Chen and Françoise Carré (eds.), *The Informal Economy Revisited* (London: Routledge, 2020) 262–263.

²⁰⁷ THA 3/2020, note 15 and OTH 10/2020, note 204 referring to HRC, note 31 (2019), para 99.

²⁰⁸ Compare Ackerly, note 111, 33.

basis in law.²⁰⁹ Narratives that present SLAPPs as ‘baseless lawsuits’ conceal that restrictive legislation that excessively constrains corporate respect for human rights and protects power and privileges in our current neoliberal system exists.

The Special Procedures expressed their concern that these legal proceedings ‘may foster a climate of harassment and defamation against women human rights defenders in the country, who are at increased risk of having their work delegitimized on the basis of their gender’. The Special Procedures referred to the HRC resolution 31/32 to ‘ensure the protection’ of WHRDs. They communicated that Cloitre’s lawyer had argued – before her conviction – that ‘the complaint lacked merit as it amounted to judicial harassment against the journalist and woman human rights defender’. They referred to a report of the SR on HRDs which ‘makes specific reference to women human rights defenders being specifically vulnerable to subjection to strategic lawsuits by businesses, which aim to intimidate and silence them’.²¹⁰ The Special Procedures noted that ‘special measures’ are needed to protect WHRDs ‘as they face additional risks and threats, as apparent even in the context of SLAPP cases filed by Thammakaset’. This is in line with the Gender Guidance which stresses that states should put in place mechanisms to ensure that no reprisals or retaliatory actions are directed against WHRDs seeking remedies.²¹¹

The radical feminist MacKinnon was one of the first to assert that ‘the definition of women in law and in life is *not ours*’.²¹² Similarly, Bartlett wrote that the law fails to take into account the experiences and values that ‘seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women’.²¹³ Over the years, feminists have developed expansive strategies to de-gender our world. Gender-transformative remediation supports them by addressing status quo conventions and hierarchical relationships in legislation that serve to reproduce inequalities and foster exploitation and domination. The Special Procedures have, hitherto, demonstrated how this can be done by addressing the disproportionate impact that criminal and defamation laws have on WHRDs by preying on their subordinate economic and social status. Gender-transformative remediation should also focus on other laws with a similar impact, such as laws that limit access to information.

Care Work

The WGBHR did not expressly refer to neoliberalism and capitalism but to ‘patriarchal norms complemented by other and unequal power-relations’ when defining gender-transformative remedies. Nevertheless, the WGBHR wrote that ‘women’s contribution to economy is either not recognized (e.g., household work) or is undervalued (e.g., in feminized occupations and industries)’ in its 2019 report.²¹⁴ Furthermore, the WGBHR stressed that ‘women carry out the majority of care work (e.g., caring for children, elderly and sick persons and persons with disabilities in families), but most do not get paid for this work’.²¹⁵ Stereotypes reinforce artificial gendering of human activity in which care work is not seen as work.

²⁰⁹ See, for example, Tess Lowery, *What You Should Know About How Companies Gag Environmental & Human Rights Voices* (New York: Global Citizen, 2022).

²¹⁰ THA 3/2020, note 15 and OTH 10/2020, note 204 referring to SR on HRDs, note 83.

²¹¹ ‘Gender Guidance’, note 7, para 52(c).

²¹² Catherine MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1989) 71.

²¹³ Bartlett, note 198, 837.

²¹⁴ ‘Gender Dimensions’, note 1, para 11.

²¹⁵ *ibid.*

Marxist and socialist feminists teased out the relationship between capitalist production and social ‘reproduction’.²¹⁶ The flexible ‘labour of love’ – which is disproportionately carried out by women – serves to sponsor the productive labour force and capitalist accumulation in the neoliberal era.²¹⁷ Marxist feminists considered the artificial subordination of women within the market. They blamed the familial ideology for prescribing how women’s cheap reproductive work should subsidize productive work to benefit capitalists. Socialist feminists emphasized, in particular, that not only capitalists benefit from women’s reproductive labour.²¹⁸ Individual men also receive the fruits of their labour at home, while they profit from the gendered division of labour at work. As conventions created by humans, Marxist and socialist feminists do believe that institutions are not structured fixedly. However, ‘once entrenched, they gain a potent hold over the popular imagination’.²¹⁹ Worse, ‘once “naturalized”’, they ‘gain impressive stability that makes them enormously difficult to *transform*’.²²⁰

The SR on HRDs and other Special Procedures, nevertheless, tried to transform this reality in two communications to Guatemala.²²¹ For 25 years, Guatemala had been running a system where disadvantaged women worked as carers for babies and children up to seven years from poor families. The Special Procedures wrote that the system was set up under the pretence of allowing the mothers of these minors to work outside the home.²²² The ‘caring mothers’ gained half of the minimum wage without social benefits. The UN experts explained, for example, that a woman who had been working as a ‘caring mother’ for 18 years cut her foot at work. As she did not have social security or the resources to go to the doctor, she continued working. Ultimately, she was hospitalized and her foot was amputated.

Guatemala found that the ‘caring mothers’ were ‘volunteers’, even though the Guatemalan Human Rights Ombudsperson determined that there is an employment relationship with the *Secretaría de Obras Sociales de la Esposa del Presidente* (‘The President’s Wife’s Secretary of Social Work’). The Special Procedures emphasized, therefore, the implementation of recommendations issued by national human rights institutions such as the Ombudsperson. Half of the ‘caring mothers’ organized collectively with the approval of the *Ministerio del Trabajo y Previsión Social* (‘Ministry of Labour and Social Welfare’). Yet, other authorities wanted to deregister the union of the ‘caring mothers’. The Special Procedures – taking into account that the ‘caring mothers’ carried out various tasks, including child rearing, cooking, and cleaning for more than 60 hours per week for less than half the minimum wage – considered them as ‘workers’ or even ‘slaves’ under the ILO fundamental labour rights conventions 29 and 105.²²³ In recent years, feminists have increasingly drawn attention to the fact that the lack of remuneration is one of the indicators of forced labour.²²⁴ In a gender-transformative fashion, the Special Procedures noted that the lack of recognition as workers is based on gender stereotypes about women’s role in society and the lack of recognition of the care work carried out disproportionately by

²¹⁶ See, for example, Evelyn Reed, *Woman’s Evolution from Matriarchal Clan to Patriarchal Family* (New York: Pathfinder Press, 1973).

²¹⁷ Lydia Hayes, *Stories of Care: A Labour of Law Gender and Class at Work* (London: Palgrave Macmillan, 2017) 2 and 26.

²¹⁸ See, for example, Bryson, note 63, 194.

²¹⁹ Montoya, note 145, 368–369.

²²⁰ *Ibid* (emphasis added).

²²¹ GTM 4/2020, note 116; GTM 9/2020 (19 August 2020).

²²² GTM 9/2020, note 221.

²²³ ILO Convention 29 on Forced Labour, 39 UNTS 55 (28 June 1930, 1 May 1932); ILO Convention 105 on the Abolition of Forced Labour, 320 UNTS 291 (25 June 1957, 17 January 1959).

²²⁴ Aleydis Nissen, ‘The EU Should Not Ignore the Female Face of Forced Labour’ (working paper).

women.²²⁵ The Special Procedures communicated that states must eliminate the underlying causes of pay differences between men and women, such as the preconceived idea that there are differences in productivity between men and women.²²⁶ They furthermore expressed that neoliberal globalization weakened several state functions that are important for gender equality, such as the provision of quality care services, which are increasingly privatized or non-existent.²²⁷ They wrote that it is up to the state to incorporate the care economy as an integral part of the macroeconomic policy because current economic models exploit women's unpaid work.²²⁸ Decent wages and conditions are needed to value care work.²²⁹

The Special Procedures observed that discrimination, forced labour and violations of the freedom of association may have been facilitated by the fact that the affected women had no other options to make a living. The Procedures explained that the 'caring mothers' found it practically impossible to abandon their work 'in the absence of other alternatives to improve their living conditions'. They stressed that there should be equal pay for work of equal value and that Guatemala should respect the right of women to access decent work.²³⁰

The Special Procedures also emphasized intersectional dimensions. They noted that the system targeted women with a 'low educational profile', indigenous women and/or biological mothers.²³¹ Various 'caring mothers' were single mothers and widows living in poverty.²³² The persistent nature of gender, class and race were replayed after the 'caring mothers' started protesting and claiming their rights. The Special Procedures reported that the National Civil Service Office said that they would 'constitute a danger for the children who were beneficiaries of the programme, because they did not meet the education, capacity and suitability requirements to care for children' (while many of them had more than twenty years of experience in care work).²³³

Interestingly, the Procedures did not go as far as explicitly questioning the nature of the jobs that are available to these women, as various Marxist and socialist feminists have done. For example, Bergeron wrote that the majority of workers worldwide carry out microtasks in 'flexible' forms of low-paying labour in which women are disproportionately represented to subsidize capitalist growth.²³⁴ Nevertheless, the Special Procedures referred to CEDAW Committee's 2017 Concluding Observations on Guatemala to increase women's access to decent work, promote their transition from work in the lowest-paid professions to employment in the formal sector, and ensure that women working in informal and agricultural sectors are covered by social protection.²³⁵

Finally, the Special Procedures were critical of the decision of the National Civil Service Office to abruptly close the 'caring mothers' programme, while measures to combat COVID-

²²⁵ GTM 4/2020, note 116 referring to Article 5 of CEDAW and UN Committee on Economic Social and Cultural Rights (CESCR), 'General Comment 23 on the Right to Just and Favourable Conditions of Work', E/C.12/GC/23 (7 April 2016).

²²⁶ GTM 4/2020, note 116, referring to CESCR, 'General Comment 16 on Equal Enjoyment of Economic, Social and Cultural Rights', E/C.12/2005/4 (11 August 2005).

²²⁷ GTM 9/2020, note 221, referring to HRC, 'Women's Human Rights in the Changing World of Work – Report', A/HRC/44/51 (16 April 2020).

²²⁸ *ibid*; GTM 4/2020, note 116 referring to HRC, 'Thematic Report', A/HRC/26/39 (1 April 2014).

²²⁹ GTM 4/2020, note 116.

²³⁰ *ibid*, referring to CESCR, 'General Comment 18 on the Right to Work', E/C.12/54/R.2 (11 August 2005).

²³¹ GTM 4/2020, note 116.

²³² GTM 9/2020, note 221.

²³³ GTM 4/2020, note 116.

²³⁴ Bergeron, note 146, 197. See Bryson, note 63, 11.

²³⁵ GTM 4/2020, note 116, referring to CEDAW Committee, 'Concluding Observations on Guatemala', CEDAW/C/GTM/CO/8-9 (22 November 2017).

19 prevented social dialogue and access to effective remedy.²³⁶ Regardless, the government answered that it ‘could not provide repairs’.²³⁷ The Special Procedures asked Guatemala to ensure that children in need of the programme continue to have access to a care system ‘that allows their mothers to work’ and that caregivers can enjoy decent, equitable and satisfactory working conditions.²³⁸ They requested measures to compensate or relocate the ‘caring mothers’ to other paid programmes.²³⁹

The conclusion of this analysis is that the concept that is central to gender-transformative remedies – the patriarchy – cannot be used ‘in isolation’. It is ‘bound up with the logic of the global capitalist economy’.²⁴⁰ Accordingly, capitalism ‘mobilizes patriarchy in its quest for profit’.²⁴¹ While the WGBHR did not go as far as stating that gender-transformative remediation should change capitalist and neoliberal power relations explicitly in its 2019 and Gender Guidance, the Special Procedures clearly questioned such unequal relations in GTM 4/2020 and GTM 9/2020. The Special Representatives thus refuted the idea that women should work ‘for love rather than money’ even outside the home.²⁴²

V. Conclusions

This article provided insights into the features of gender-transformative remediation for WHRDs who fight against corporate human rights abuses. According to the WGBHR, gender-transformative remediation should bring change to patriarchal norms and unequal power relations that underpin discrimination, gender-based violence and gender stereotyping.

Gender-transformative approaches typically seek to go beyond simple incorporation in order to reappraise the existing structures. They address ‘the root causes of inequality and generate changes in the social structures that produce or maintain inequalities’.²⁴³ Achieving gender-transformative viewpoints in business and human rights remediation does not happen automatically, and requires extensive resources to challenge the apparent realities made to appear natural and neutral. WHRDs are a focal area of support because they build broad coalitions, add visibility and pool resources to take on cases against corporations. There is power in numbers, coming together and collectively speaking. WHRDs can leave a lasting mark, bringing transformative changes for women.

With the help of critical feminist discourse analysis, this article distilled lessons on gender-transformative remediation for WHRDs from the communications relating to business and human rights issues that the UN Special Procedures co-wrote. While it had been claimed that the Special Rapporteur on HRDs would have consistently focused on WHRDs, not all the studied communications address specific challenges that WHRDs face. The communications that were co-written by Special Procedures with a specific gender mandate provided most lessons.

First, gender-transformative remediation considers the concept of patriarchy jointly with other concepts used by feminists that fall under the umbrella term ‘unequal power relations’. Feminist theorists looking for transformative change have long analysed the relationship between the patriarchy and intersectionality, neoliberalism and capitalism. Gender-transformative remediation thus questions neoliberal values of individualism that

²³⁶ GTM 4/2020, note 116; GTM 9/2020, note 221.

²³⁷ GTM 9/2020, note 221.

²³⁸ GTM 4/2020, note 116.

²³⁹ GTM 9/2020, note 221.

²⁴⁰ Bryson, note 63, 56.

²⁴¹ *Ibid.*, 232.

²⁴² *Ibid.*, 143.

²⁴³ Emanuele Lombardo and Petra Meier, ‘Policy’ in Disch and Hawkesworth (eds.), note 14, 625.

produce and reproduce intersecting gendered, racial and other hierarchies across time and place.

Second, gender-transformative remediation teases out the systematic nature of various and emerging forms of gender-based violence that sustains hierarchical and market-based commitments of corporations and states alike. Gender transformative remedies label gender-based violence against WHRDs for what it is: ‘a normative violence that is functional to patriarchy ... to maintain the interests of powerful economic groups’.²⁴⁴

Third, gender-transformative remediation supports WHRDs by addressing the role that legislation plays in legitimizing gendered inequalities of power. The Special Procedures have, hitherto, focused on the disproportionate impact that criminal and defamation laws have on WHRDs by depleting their resources and preying on their less empowered economic status and less favourable social status. Gender-transformative remediation calls out business-oriented criminal and defamation laws and all other laws that disproportionately disempower WHRDs, including laws that limit funding to NGOs and laws that limit information. Such laws prey on the subordinate position of WHRDs. They have a disproportionately negative impact on women who have fewer opportunities to access information and education.

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²⁴⁴ Red Latinoamericana de Mujeres Defensoras de Derechos Sociales y Ambientales et al, *Informe Sobre la Situación de Riesgo y Criminalización de las Defensoras del Medioambiente en América Latina*, (Cajamarca: Acosta Publicidad y Creatividad, 2021) 3.

Annexure: Business and human rights communications involving WHRDs issued between 2011 and 2020

Communication	WHRD category	Industry	Co-written by Working Group on Discrimination against Women and Girls in Law and Practice and/or Special Rapporteur on violence against women, its causes and consequences	Summary of allegations	Related communications (the underlined communications have also been co-written by the UN Special Rapporteur on HRDs)
BGD 6/2014	NGO	Textile	No	Nine days after workers began a hunger strike over unpaid wages at Hossain Market in Dhaka, police prevented 7 WHRDs from providing them medicine and saline. The WHRDs were attacked, arrested and detained.	BGD 1/2011
	Trade union				
	Academic				
BIH 1/2017	27 residents	Energy	No	Excessive use of force by special police unit forces against 27 residents (including 25 women), and charges laid against 23 residents (including 22 women) of Kruščica village who peacefully defended a river and surrounding environment from the construction of hydropower plants.	
CAN 4/2020	Community	Mining	Yes	Physical and sexual harassment of the WHRD for her work defending the	<u>MNG 1/2020</u> ; <u>OTH 50/2020</u>

(Continued)

Communication	WHRD category	Industry	Co-written by Working Group on Discrimination against Women and Girls in Law and Practice and/or Special Rapporteur on violence against women, its causes and consequences	Summary of allegations	Related communications (the underlined communications have also been co-written by the UN Special Rapporteur on HRDs)
				land and environmental rights of her community facing the establishment of the Steppe Gold mine in Dornod.	
ECU 2/2017	Community	Mining	Yes	Legal proceedings, intimidation and surveillance against the WHRD, an activist against oil exploitation in the territories of the indigenous Sápara people. Murder of her sister-in-law in what is believed to be a case of mistaken identities.	<u>ECU 4/2007</u>
GTM 5/2012	Community	Mining	Yes	Two men approached the WHRD who was returning from a protest to defend her community's territory and the environment in the face of mining expansion in San José del Golfo and San Pedro Ayampuc. One of these men attempted to murder her.	<u>GTM 6/2013</u>
GTM 2/2018	Community	Mining	No	The WHRD was opposed against the eviction of 56 families from the indigenous community of Chabilchoch on a property disputed with the company Lisbal SA. She was detained for two days and prosecuted for the crimes of 'aggravated usurpation', 'threats' and 'illegal detention'.	<u>GTM 7/2016</u>

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Communication	WHRD category	Industry	Co-written by Working Group on Discrimination against Women and Girls in Law and Practice and/or Special Rapporteur on violence against women, its causes and consequences	Summary of allegations	Related communications (the underlined communications have also been co-written by the UN Special Rapporteur on HRDs)
GTM 4/2020	Trade union	Nursery	Yes	Women care for the children of other low-income workers in slave-like conditions. They were stigmatized by the government after claiming their rights. They were at risk of losing their only source of income after the government announced its intention to stop the programme.	<u>GTM 9/2020</u>
HND 4/2017	NGO / Community	Energy	No	Irregularities in the investigations and criminal proceedings related to the murder of the WHRD who denounced human rights abuses in the development of a hydroelectric project of Santa Bárbara and Intibucá. Smear campaigns, intimidation and attacks against other HRDs afterwards.	HND 4/2013; HND 2/2016; HND 3/2016; HND 4/2016; HND 9/2016; <u>OTH 8/2017</u> ; <u>OTH 9/2017</u>
KAZ 2/2011	Trade union	Mining	No	Employees of Karashanbasmunbay company in Mangistau province went on strike. The WHRD was, amongst others, found guilty of organising an unauthorised demonstration. She was also under criminal investigation for 'inciting social hatred'.	KAZ 4/2011
KAZ 3/2017	Trade union	[labour rights]	No	Sentencing of the WHRD under counts of 'abuse of office', as well as threats	

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				against one fellow trade unionist and her son, in relation to her activism.	
KEN 1/2020	NGO	Private property development	Yes	Threats made against the WHRD who was at risk of enforced disappearance for defending the right to housing of the 7,000 residents of Kariobangi in Nairobi during the COVID-19 pandemic. The residents were evicted to use their land for a private development project.	
KGZ 4/2015	NGO	[i.a. labour rights]	No	The WHRD – who defends labour rights – was refused entry into the Kyrgyz Republic by immigration officials at the airport. She was accused of violating migration law.	KGZ 2/2015
KHM 4/2012	Community	Private property development	Yes	Arrests, charges and convictions against 13 WHRDs for land disputes in Phnom Penh. They gathered peacefully at a press conference organized by 18 families whose homes had been buried in the sand by a private developer.	KHM 6/2011
KOR 3/2014	Residents	Energy	Yes	Excessive use of force by government employees, private security and police officers against 14 residents who were protesting against the construction of nuclear power transmission towers by the Korea	

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				Electric Power Corporation in Miryang.	
LKA 5/2013	NGO representative and lawyer	Media	No	Death threats against the WHRD that were broadcast by a state-owned radio station. The presenters endorsed and encouraged the threats.	
MMR 14/2013	Residents	Mining	No	Police forces arrested protestors during a peaceful demonstration against the Letpadaung Copper Mine project in Monywa. Nine protestors were released after signing a declaration that they would not protest again. WHRD Ohn Hla was charged and sentenced to two years in prison with hard labour.	MMR 11/2012; MMR 6/2013; MMR 10/2013
NIC 1/2017	NGO	Mining	Yes	Acts of intimidation, defamation and death threats, against the 4 WHRDs because of their activism against the construction project of the interoceanic canal in Nicaragua.	NIC 2/2008; NIC 1/2015
PER 3/2012	NGO	Mining	Yes	Two WHRDs were beaten by the police when they wanted to check on people who had been arrested by about 20	Communications of 11 April 2007 and 15 May 2009.

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				riot police during a peaceful demonstration against the Conga mining project in Cajamarca.	
	Lawyer				
PER 3/2015	NGO	Mining	No	An employee of the Yanacocha mining company threatened to ‘disappear’ the WHRD. Later, a group of about 30 police officers and 50 community members intimidated her. The company also placed employees on the perimeter of her land to monitor her home.	<u>PER 1/2014;</u> <u>PER 1/2016</u>
PER 4/2017	NGO	Mining	No	Criminal investigations targeting the WHRD who is concerned about the Las Bambas mining project in the provinces of Cotabambas and Grau.	
PHL 3/2012	NGO / Community	Mining	Yes	A Terrestrial Mining Corporation employee was overheard expressing the intention to kill HRDs, mentioning several HRDs by name. The employee fired shots at the house of two WHRDs afterwards. Another defender was killed.	PHL 7/2012
PRY 1/2016	Lawyer	Livestock	No	Following a complaint by two German ranching companies, the Supreme Court found a law for the return of	

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Communication	WHRD category	Industry	Co-written by Working Group on Discrimination against Women and Girls in Law and Practice and/or Special Rapporteur on violence against women, its causes and consequences	Summary of allegations	Related communications (the underlined communications have also been co-written by the UN Special Rapporteur on HRDs)
				traditional land to the Sawhoyamaya community unconstitutional. The WHRD who criticized the Court was accused of making a 'serious mistake' by the Supreme Court's President.	
THA 4/2012	Trade union	Textile	No	The WHRDs led a peaceful assembly of 400 labour activists to follow up on the authorities' announcement to provide assistance to 2,000 workers who were dismissed by Triumph International. Law enforcement caused auditory trauma to several demonstrators.	
THA 1/2013	Community	Palm oil	Yes	The WHRDs were fatally shot by unknown individuals. They were involved in a land rights dispute between their community of Khlong Sai Pattana and a palm oil company. This community has been the target of previous violent incidents including threats and intimidation.	
THA 3/2020	Journalist	Livestock	Yes	Information received concerning the continued judicial harassment of WHRDs for denouncing conditions	THA 1/2016; THA 7/2016; THA 1/2018; THA 3/2018;

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				of migrant workers at a poultry farm of the Thai company Thammakaset.	THA 1/2019; <u>OTH 10/2020</u>
	Academic				
	NGO				
	NGO				
USA 2/2018	NGO	Private detention	No	Migrants were held in substandard conditions in a facility of the GEO group, a business which owns and runs the Northwest Detention Centre in Tacoma. The WHRD who campaigned against immigration detention would be deported.	
UZB 1/2017	NGO	Textile	Yes	Arbitrary arrest and detention in a psychiatric institution of the WHRD and verbal attacks against the WHRD in police custody. The WHRD has monitored incidents of contemporary slavery in the cotton industry in Uzbekistan.	UZB 23/2005; UZB 8/2006; UZB 1/2007; UZB 6/2009; UZB 5/2010; <u>UZB 2/2016</u>
VNM 4/2017	Blogger	Mining	No	Arbitrary detention of one WHRD and violent attack against another WHRD who called out environmental pollution caused by toxic waste	<u>VNM 6/2013</u> ; VNM 5/2016; VNM 1/2017; <u>VNM 2/2017</u>

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Communication	WHRD category	Industry	Co-written by Working Group on Discrimination against Women and Girls in Law and Practice and/or Special Rapporteur on violence against women, its causes and consequences	Summary of allegations	Related communications (the underlined communications have also been co-written by the UN Special Rapporteur on HRDs)
				discharge from the Formosa Steel plant in Ha Tinh.	
ZAF 3/2020	Community	Mining	No	Assassination of the WHRD who opposed the expansion of a coal mine in the region of KwaZulu-Natal.	<u>OTH 82/2020</u>
OTH 12/2017	Academics	Mining	No	Abusive defamation lawsuits by Mineral Sands Resources and its directors against the South African WHRDs for having made statements in an academic forum regarding the company's activities in the Western Cape Province.	