

**EUROPEAN MASTER'S PROGRAMME
IN HUMAN RIGHTS AND DEMOCRATISATION**

**WOMEN AT WORK:
TAKING A GENDER APPROACH TO
THE BUSINESS AND HUMAN RIGHTS
FRAMWEWORK**

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Year: 2010/2011

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2nd Semester University: University of Nottingham

ABSTRACT

This thesis aims to address the ‘gender’ question within the business and human rights discourse. The main question to be addressed is whether, and to what extent, the present business and human rights discussion takes into account the gender dimensions of human rights and labour rights issues arising in the workplace and whether this is sufficient to provide protection in certain areas of employment affecting women due to gender inequality and discrimination. To guide this gender perspective an analysis of the main legal instruments of the UN and the ILO will be provided especially where they address gender-based discrimination and inequality in the economic field. Addressing the situation of women workers seems to be justified where favourable conditions of work could contribute to women’s economic empowerment. The ILO MNE Declaration, the OECD MNE Guidelines and the Women’s Empowerment Principles will be discussed. The first two pillars of the UN Framework will be the main reference point to address the gender perspective in relation to business and human rights. The final part will also focus on what would be the best way forward in the business and human rights discussion to guarantee respect for human rights and labour rights of women in employment context.

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LIST OF ABBREVIATIONS

Convention on the Elimination of All Discrimination against Women	CEDAW
Export processing zones	EPZs
Footnote (internal to work)	(<i>nn</i>)
Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework	GPs
ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value	ILO C111
ILO Convention concerning Discrimination in Respect of Employment and Occupation	ILO C100
ILO Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities	ILO C156
ILO Convention concerning the revision of the Maternity Protection Convention	ILO C183
ILO Declaration on Fundamental Principles and Rights at Work (1998)	ILO Declaration
ILO Convention concerning Minimum Standards of Social Security	ILO C102
ILO Convention concerning Occupational Safety and Health and the Working Environment	ILO C155
ILO Convention concerning Termination of Employment at the	ILO C158

Initiative of the Employer

International Covenant on Civil and Political Rights	ICCPR
International Covenant on Economic, Social and Cultural Rights	ICESCR
International Labour Organization	ILO
Multinational Corporations	MNCs
Multinational Enterprises	MNEs
OECD Guidelines for Multinational Enterprises.	OECD MNE Guidelines
Organisation for Economic Co-operation and Development	OECD
Page/pages	p/pp
Paragraph/paragraphs	para/paras
Together with	t.w.
The UN "Protect, Respect and Remedy" Framework for Business and Human Rights	UN Framework
Transnational corporations	TNCs
Tripartite declaration of principles concerning multinational enterprises and social policy	ILO MNE Declaration
UN Special Representative of the Secretary General John Ruggie	SRSG
United Nations	UN
Women's Empowerment Principles	WEP
Cambridge University Press	CUP
Editor/editors	ed/eds
Oxford University Press	OUP

INTRODUCTION

For the last half century there has been an increase of female participation in the labour force.¹ One of the reasons for this appears to be the recent globalisation process. This process can be identified by the technological innovations and increased flow of goods, services and capital and increased privatisation.² The liberalisation of trade and finances form an intrinsic part of the economic globalisation, which in essence boosts the linkages between the economic sectors across the globe.

Multinational corporations (MNCs) are one of the actors that have gained influence due to the economic globalisation.³ Increasingly corporations seem to be able to affect the human rights situation in countries through their commercial behaviour, especially where they operate in developing countries. Corporations can affect a wide variety of human rights and labour rights. A governance gap exists in relation to the conduct of MNCs, operating outside their home state, and the effects their conduct has on the human rights situation in the host state. It is in this particular context that the business and human rights discussion has arisen.

A part of the increased job opportunities for women could be linked to this increasing influential and expanding role MNCs have in the global economy. In certain cases, as for example in export processing zones (EPZs) in developing countries, corporations provide first level entry jobs for many women. Although this could be regarded as a positive aspect of the globalisation process and the role of MNCs, it appears that throughout sectors controlled by corporations where female workers are prevalent, their human rights are discarded, which essentially puts them in a particular vulnerable situation.

¹ UN DAW, Razavi, S. 'Globalization, Employment and Women's Empowerment' (14 November 2001) EGM/POV/2001/BP.1, p. 24.

² UN DAW, Bisnath, S., 'Topic 1: Poverty in a globalizing world at different stages of women's life cycle. Globalization, Poverty and Women's Empowerment' (19 November 2001) EGM/POV/2001/EP.3, p.2.

³ Shelton, D., 'Protection human rights in a globalized world', in Kinley, D. (ed) *Human Rights and Corporations* (Ashgate, Aldershot 2009), pp. 186-187.

Admittedly, both men and women in labour contexts in developing countries and more generally worldwide face human rights and labour rights violations. However, the particular attention on women is justified where addressing and enforcing women's rights can contribute to their economic empowerment through employment. This is due to the fact that women often face occupation segregation, are often employed in lower level and low-skill jobs, face problems in managing work and family responsibilities and deteriorating conditions of work. Whilst acknowledging that women throughout the world face discrimination to various extents in employment, this empowerment through employment and rights realisation can prove to be particularly relevant in developing countries' situations. Contributions to economic empowerment of women could be realised, where corporations take initiatives to promote the role of women and gender-equality, throughout their operations, which challenge persistent cultural or other impediments for women's empowerment.⁴

The question at the centre of this thesis will be whether and to what extent the present business and human rights discussion takes into account the gender dimensions of human rights and labour rights issues in the workplace and whether this is sufficient to provide protection in certain areas of employment affecting women due to gender inequality and discrimination. In relation to this, it will be elaborated what would be the best way forward in the business and human rights discussion to guarantee respect for human rights and labour rights of women specifically.

Chapter 1 provides a background to the business and human rights discussion. This chapter aims to explore the existing linkages between globalization, the business and human rights discussion and women as participants in the labour providing sectors within developing countries and as those who are affected by business operations. The particular role of MNCs in developing countries elucidates the need to address within the developing framework of business and human rights. Some definitions and clarification will be provided for the use of the concepts 'multinational corporations' and 'export processing zones'.

⁴ Coleman, I, 'Women and the Global Economy' [Winter 2011] Yale Journal of International Affairs p.29.

Chapter 2 will serve to clarify why it is necessary for the development of a business and human rights legal framework to incorporate a gender perspective. The concept of empowerment of women through employment and realisation of rights plays an important role in arguing for this incorporation.

Under current international human rights law and international labour law specific focus and protection has been provided to women in the context of employment. Therefore an overview of women's human rights and labour rights that need to be incorporated in the discussion on business and human rights obligations is provided. The basis for this legal discussion will be the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Discrimination against Women (CEDAW) and the main conventions related to gender equality as produced by the International Labour Organization (ILO). This will serve to answer to what extent such protection could be incorporated in the business and human rights discussion to enhance the gender perspective within this discussion.

The final part of this chapter provides an overview of gender dimensions of human rights and labour rights issues derived from those sectors in the EPZs in developing countries in the South-Asian and Southeast Asian regions, where female workers form a significant part of the labour force. EPZs, as established in many developing countries, are the focus of attention due to the presence of MNCs in these zones. It will be analysed to what extent these issues adhere to human rights and labour rights.

Chapter 3 will elaborate on the current legal framework in relation to corporations and their human rights responsibilities. This chapter has the aim to address the gender perspective of the main general documents of the current business and human rights discourse. If a sound and firm basis for human rights obligations for corporations is to be established at some point in time, this has to incorporate women from the initial departure point of the discussion. Any developments in this field need to be comprehensive in order to effectively protect and promote human rights.

The main reference point will be the United Nations Framework for Business and Human Rights as developed by the UN Special Representative of the Secretary General (SRSG) John Ruggie. The SRSG was appointed in 2005 to clarify the responsibilities of states and corporate actors in the business and human rights development.⁵ His 2008 report articulated the ‘protect, respect and remedy’ framework. This report elaborates upon the state duty to protect against human rights violations by third parties, the corporate responsibility to respect and the need to have effective remedies in place.⁶ Recently the final report on the Guidelines Principles (GPs) has been published. The aim is to clarify the ‘protect, respect and remedy’ framework from a practical perspective.⁷

Other documents, such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises⁸, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy⁹ and the Women’s Empowerment Principles¹⁰ will also be discussed.

It is analysed whether the business and human rights discourse takes into account a gender perspective and in what way it can best move forward to protect women’s rights against corporate misconduct, taking into account the examples from EPZs. Some suggestions will be provided, linking the gender perspective to the business and human rights documents.

⁵ OHCHR Res. 2005/69 ‘Human rights and transnational corporations and other business enterprises’ (2005) UN Doc. E/CN.4/RES/2005/69.

⁶ UN HRC ‘Protect, Respect and Remedy: a Framework for Business and Human Rights. Report of the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (7 April 2008) UN Doc A/HRC/8/5. (UN Framework)

⁷ UN HRC ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. Report of the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (21 March 2011) UN Doc A/HRC/17/31, par. 10-12.

⁸ OECD, ‘OECD Guidelines for Multinational Enterprises. Recommendations for Responsible Business Conduct in a Global Context.’ (25 May 2011). (OECD MNE Guidelines)

⁹ ILO, Tripartite declaration of principles concerning multinational enterprises and social policy, (Geneva 2006). (ILO MNE Declaration)

¹⁰ UN Women and UN Global Compact, Women’s Empowerment Principles, <<http://bit.ly/aMHZhD>> 2009, consulted on 16 May 2011. (WEP)

The dissertation will be concluded by providing some final views on the topic and issues as discussed throughout the chapters. It will be undertaken to clarify to what extent the current business and human rights discussion takes women's issues and gender issues arising in employment context into account. The conclusion will also provide some recommendations.

CHAPTER 1 – Business and Human Rights, Globalisation and Developing Countries: The Link

This chapter will provide a general background to the current business and human rights discussion. In addition, the focus will be on the situation of women and multinational corporations in developing countries in the context of economic globalisation. The findings will be linked in the final part to serve the further discussion in the following chapters.

1 Background to the Business and Human Rights Discussion

The business and human rights discussion is not a recent development. The origins of this debate can be traced back to the 1960's and 1970's within the context of the discussion for a 'New International Economic Order', which was influenced by the decolonization process as well as the ideological views as existed during the Cold War. The uprising of the discussion took, therefore, place within a context different to the current one.¹¹ One of the first attempts to put MNCs within the context of human rights can be traced back to the Draft United Nations Code of Conduct on Transnational Corporations from 1983. This document, however, was never adopted. Nevertheless, it

¹¹ Francioni, F., 'Alternative Perspectives on International Responsibility for Human Rights Violations by Multinational Corporations' in Benedek, W., de Feyter, K. and Marrella, F. (eds), *Economic Globalisation and Human Rights* (CUP, Cambridge 2007), p. 246.

does indicate a substantial discussion about the matter of corporations and their human rights obligations by elaborating on possible voluntary guidelines or obligatory conditions where they operate in countries.¹²

The rise of the discussion on the human rights obligations of MNCs must be seen within the context of globalisation. Globalisation is a process which can be identified by technological innovations, the increased open borders allowing the flow of goods, capital and service and the increased access to information.¹³ This open world market is by some perceived as a process through which economic growth and higher standards of living will result from. Globalisation can also be perceived as leading to the demise of the state as increasingly policies and rules enacted by states are deemed to succumb under the pressure of market power.¹⁴

Another aspect of globalization is the progressive privatisation processes within countries resulting in the increasing responsibilities of private actors within fields previously covered by the public sector. Globalization, as stated, comes with increased capital flows, which has led to an increased concentration of wealth, and consequently, to the increased power in the hands of MNCs.¹⁵

Economic globalisation, that boosts economic interdependence between states, the increased world trade and international financial transfers,¹⁶ has an impact on the existing social, economic and political situations within all countries. These effects are not always straightforward.¹⁷ One of the main actors benefiting vastly from economic globalization is the multinational corporation, as the processes identical to economic globalization facilitate the increase of the power of MNCs, either due to increase in revenues and/or due to their influence on states.¹⁸ Due to this increased concentration of economic power in the hands of MNCs, facilitated by changes in the international

¹² UNCTAD 'International Investment Instruments' (2005) UNCTAD/DITE/4(Vol. XIV) p. 161. <<http://bit.ly/nNA3P5>> visited on 19 April 2011.

¹³ Un Doc. EGM/POV/2001/EP.3 (2001) (n2) p. 2.

¹⁴ Idem, (n2) p. 3.

¹⁵ Alston, P., 'The 'Not-a-Cat' Syndrome. Can the International Human Rights Regime Accommodate Non-State Actors' in Alston, P. (ed), *Non-State Actors and Human Rights* (Oxford, OUP 2005), p. 17.

¹⁶ Perulli, A (n11), p.93.

¹⁷ Momsen, J.H. *Gender and Development* (2nd edn Routledge, Oxon 2004), p. 192.

¹⁸ Shelton, D., (n3) pp. 186-187.

economic structure¹⁹ they have acquired a position through which they can have an impact on the human rights within countries.²⁰

Various situations illustrate how MNCs can impact on human rights, for example, reports of alleged child labour being used in the tobacco fields in Kazakhstan that are used for cigarettes production by an international company established in the United States.²¹ A well known example concerns the operations of Shell (Royal Dutch Petroleum) in Nigeria. In addition to environmental damage the oil-extracting operations of Shell have in certain areas of Nigeria, including the ‘Ogoni-land’, the company is accused of being involved in torture and murders.²²

These examples also reflect the lack of human rights protection where the host state of the MNC is either unwilling or unable to protect the rights of its people and equally so where the home state is unable to exercise any power given that the human rights violations occurred outside its national territory. In addition, where there is no legally binding document obliging corporations to adhere to human rights, the existence of a governance gap in relation to the conduct of MNCs outside the home state and the human rights implications arising from this conduct comes to the front. There is currently no internationally legally binding document that regulates corporate behaviour from a human rights perspective. The human rights development has in general not foreseen ways to address human rights violations by other actors than States in the existing legal instruments. Neither is the regulation of corporate conduct and accountability highly developed within national legal systems.²³

MNCs can impact on all human rights, thus civil, political, economic, social and cultural rights, and labour rights. These rights include the right to equal pay for equal work, right to equality at work, the right to non-discrimination, equal recognition and

¹⁹ Francioni, F (n11) p. 245.

²⁰ Idem, p. 246.

²¹ Kramer, A.E., ‘Philip Morris Is Said to Benefit From Child Labor’, The New York Times (14 July 2010) <<http://nyti.ms/a2wDn3>> consulted on 19 April 2011.

²² Earth Rights International, ‘Wiwa v. Royal Dutch Shell Case History’ <<http://www.earthrights.org/legal/wiwa-v-royal-dutch-shell-case-history>> consulted on 19 April 2011.

²³ Shelton, D., (n3) p. 187.

protection under the law and the right to an adequate standard of living.²⁴ These rights appear to be affected throughout various labour sectors and throughout various regions.²⁵

While it must be acknowledged that many initiatives have been taken by many MNCs through the adoption of corporate codes of conduct as part of corporate social responsibility²⁶, the initiatives taken by governments in terms of legislation still lags behind. Meanwhile, there are cases brought against MNCs for their direct or indirect human rights abuses in host states.

One of the most discussed national legal document is the Alien Tort Claims Act, which provides the United States district courts the possibility to adjudicate cases where MNCs have violated the laws of nations or a treaty adopted by the United States.²⁷ However, recent developments in litigation concerning the ATCA show that the wide interpretation of this Act has been narrowed. In a 2009 case a United States Court of Appeal in New York seem to have effectively limit possibilities for holding multinational corporations accountable. Meanwhile an appeal had been submitted to the Supreme Court of the United States, but this was dismissed. Therefore the interpretation of the ATCA still remains open. Nevertheless, this 2009 case does seem to effectively limit possibilities for holding MNCs accountable under the ATCA.²⁸

Cases against corporate abuses have also been brought in countries like the United Kingdom, Japan and Belgium.²⁹ Despite these developments the governance gap for corporate behaviour still highlights the need to develop a legal framework in order to

²⁴ United Nations Human Rights Council 'Addendum. Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse. Report of the Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (23 May 2008) UN Doc A/HRC/8/5/Add.2 p. 3.

²⁵ *Idem*, par. 26-27.

²⁶ Reinisch, A., 'The Changing International Legal Framework for Dealing with Non-State Actors' (n15) p.44. See for example the Nike Code of Conduct <<http://bit.ly/3X5YRD>> consulted on 19 April 2011). Another example is the Siemens Code of Conduct for Siemens Suppliers: <<http://bit.ly/oqvKFC>> consulted on 19 April 2011.

²⁷ Steinhardt, R.G., 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria' (n15) p.195.

²⁸ United States Court of Appeals for the Second Circuit, the Presbyterian Church of Sudan v. Talisman Energy Inc 2 October 2009. See also: Waggott, G., 'Canadian Multinationals and Alien Torts' <<http://bit.ly/qcJbX3>> consulted 16 May 2011.

²⁹ Steinhardt, R.G. (n27, n15) p.218.

address and identify human rights obligations for MNCs when they undertake activities in country contexts outside their home state, especially within developing countries.

2 Economic Globalisation and the Impact on Women

It can be questioned whether, or to what extent, globalization has an impact on the position of women not only the international level but also on local levels. The direct impacts of economic globalisation processes on women are difficult to distil.³⁰ Taking into account that women in developing countries are often disproportionately affected by poverty³¹, these globalisation processes could become an issue that can either positively or negatively affect their situation in employment.³²

One issue that could be brought into relation with economic globalisation and women is the rise of informal economy in developing countries as there is a higher concentration of female workers in informal jobs compared to male worker. Women are often found in lower paid jobs in the informal sector.³³ Informal economy provides are areas of work in which workers are employed that are not officially recognised or recorded or regulated by the state. Examples of jobs in the informal economy include home workers, sweatshop workers and industrial workers, street vendors, garbage pickers and domestic workers.³⁴ Often workers in the informal economy lack protection and do not have access to benefits and are therefore subject to a high degree of vulnerability.³⁵

Much criticism has been expressed, especially from civil society actors, concerning these negative effects of globalization on women. The increased possibilities for transfer of communication technologies and transportation have led to flexibility for companies

³⁰ Momsen, J. (n17) p. 197.

³¹ UNIFEM, Chen, M. et. al. 'Progress of the World's Women. Women, Work & Poverty' (2005) p. 35 and 54.

³² Momsen, J., (n17) p. 196.

³³ International Labour Conference (90th Session) Report VI: Decent work and the informal economy (Geneva 2002), p.31. (ILO 2002)

³⁴ Idem, pp. 1-3.

³⁵ Idem, p. 33-34.

to easily establish production places at various locations.³⁶ This in turn has resulted in pressure on many developing countries to compete with other countries to keep and attract companies and their investments, eventually leading to lower regulation, standards and, therefore, protection. This seems particularly to be the case where countries have resorted to the establishment of many EPZs, where it is estimated that in the beginning of this century women took up 80 percent of the total labour force.³⁷ This race to the bottom is considered to be one of the consequences of globalization. This concept can be defined as a process through which investments, information and technologies are increasingly shifted from countries where there are high living wages and regulations to countries where they lack such conditions and thus benefit the MNCs. Typically such a process involves minimal control over national boundaries that fosters easy migration by these corporations, lowering of taxes and wages and the relaxation of restrictions for these corporations.³⁸ This phenomenon where legal standards are lowered for competitive reasons, could possibly affect the position of female workers.

The increased competition among countries has, however, also led to labour increase in many developing countries, resulting in lower unemployment levels.³⁹ Globalisation could, therefore, bring new economic opportunities for women by providing them the possibility to challenge the persistent inequalities, for example through employment opportunities.⁴⁰

Trade liberalisation can be argued to have brought employment opportunities in general and thus also for women in developing countries such as in Bangladesh and Sri Lanka.⁴¹ It is even argued that the industrialisation is not only based on increased exports but is

³⁶ Momsen, J., (n17) p. 197.

³⁷ Shelton, D., (n3) p. 203-204.

³⁸ UNCTAD 12th session 'Globalization, development and poverty reduction: their social and gender dimensions', Note by the UNCTAD secretariat (14 February 2008) TD/422 par. 21-22. (UNCTAD 2008)

³⁹ Ibid, Box 1.

⁴⁰ Neumayer, E. and de Soysa, I., 'Globalisation and the Empowerment of Women: An Analysis of Spatial Dependence via Trade and Foreign Direct Investment' (5 November 2010)

<<http://ssrn.com/abstract=1489927>> accessed 11 March 2011 p. 4.

⁴¹ ILO 2002 (n33) p.33.

also ‘female-led’.⁴² The flows of capital and increased investment have had a certain positive impact on the expansion of export oriented manufacturing sectors in developing countries.⁴³ Manufacturing of goods, such as garments and shoes, are becoming cheaper as developing countries are keeping the prices low due to low technology, development and wages in these sectors. These latter factors have been viewed to be caused by the gender inequalities and biases against women in these sectors. However where trends in certain sectors shift to higher skilled jobs, a defeminisation of labour in sectors has been observed.⁴⁴ The highly progressive standardisation of production processes and high competition in certain sectors has increased the demand for low-skilled labourers, which are often women⁴⁵ who could face deploring working conditions.⁴⁶

Thus economic globalisation could affect the situation of women in both positive and negative ways. The former is through the increased job opportunities, while the latter is through the less favourable conditions of work that could lead to the exploitation of women workers.⁴⁷

3 Multinational Corporations and Developing Countries

There are various ways to define multinational corporations. In the business and human rights discussion these corporations are referred to in various ways, for example transnational corporations (TNCs) or multinational enterprises (MNEs). The OECD MNE Guidelines describes these enterprises as entities that are established in more than one country and are related in such a way that they could coordinate their business operations through various means. One of the entities could prove to have ‘significant influence’ over one or more other entities. The extent to which these entities exercise

⁴² Razavi, S, ‘Globalization, Employment and Women’s Rights’ (2002) *Economie mondialisée et identités de genre* <<http://bit.ly/nDU3cx>> accessed 7 July 2011, p.36.

⁴³ UNCTAD 2008 (n3), par. 11.

⁴⁴ Idem, pp. 37-38.

⁴⁵ Momsen, J., (n17) p. 196. See also: ILO 2002 n33 p.34.

⁴⁶ ILO 2002 n33 p.34.

⁴⁷ Idem, p.34.

autonomy can vary. These companies could be private or state-owned or a combination thereof.⁴⁸ Therefore the reference to MNCs in the present discussion is to grasp this definition.

Many developing countries are open for foreign investments by companies due to the perceived positive impact these investments may have, such as increase of jobs, promotion of training and technologies and development of skills.⁴⁹ As a consequence many developing countries do not undertake effort to put in place a supervising mechanism to oversee corporate behaviour. In some cases this leads to lack of interest on the part of the government to address violations of human rights or officials may give assistance in these abuses by providing, for example, military or police forces.⁵⁰ Corporations are thus major powerful actors in many developing countries due to their investments and contributions to economic growth.

However, where this power of MNCs exceeds the power and abilities of developing countries' governments, there could be harmful effects for the societies of these countries.⁵¹ The power of these MNCs then becomes an obsolete aspect that is not able to be influenced by any governmental power, particularly where MNCs can easily change country locations with weaker regulatory systems.⁵² The then existing imbalance between governments and MNCs could well result in a deteriorating human rights situation.⁵³ While this distorted relationship between MNCs and governments could just as well exist all around the world, it has been shown that a large number of corporate human rights abuses have occurred within developing countries, in conflict affected areas and in countries with a weak legal system.⁵⁴

⁴⁸ Article I.3 OECD MNE Guidelines (n8).

⁴⁹ Nam, C.Y.J., 'Competing for Foreign Direct Investment through the creation of Export processing Zones: The Impact on Human Rights' in De Schutter, O. (ed) *Transnational Corporations and Human Rights* (Hart Publishing, Portland 2006), p.166.

⁵⁰ Ratner, S.R., 'Corporations and human rights: a theory of legal responsibility' (n3) p. 250.

⁵¹ UN Doc. A/HRC/8/5 (n6) paras. 2-3.

⁵² Ratner, S.R., n3 p. 251.

⁵³ UN Doc. A/HRC/8/5 (n6) para. 12.

⁵⁴ *Idem*, par. 16.

3.1 Multinational Corporations and Export Processing Zones in Developing Countries

EPZs are zones of industries that are set up by host state governments and are based on special regulations that provide incentives for foreign investors.⁵⁵ These incentives include tax exemptions, duty-free imports of goods and material, low costs for establishments and provision of services and infrastructure that are more advanced compared to the rest of the country. There are also EPZs where countries provide incentives by simply waiving the application of human rights or labour rights through relaxation of or exemptions from certain laws and regulations. Such exemptions are, however, not necessarily the rule in EPZs. Therefore equal standards could be applied both within and outside EPZs.⁵⁶ Some EPZs have developed from zones for simple assembly to high-tech zones and finance zones. These zones are a worldwide phenomenon and thus not only concentrated in developing countries.⁵⁷

The role of MNCs in EPZs is of relevance as these zones are particularly aimed at attracting foreign investments. Initially, EPZs were established to attract the subsidiaries of foreign multinational corporations.⁵⁸ EPZs also have domestic factories and thus are not solely composed of foreign firms.⁵⁹ EPZs provide MNCs the possibility to locate production processes throughout various places in the world with the aim to use the advantages in terms of costs and resources.⁶⁰

EPZs are used for importing materials that need to be exported again after a small process of assembling or processing. These zones have industries that are labour-intensive and do not necessarily require high-skilled labour. However, there is a

⁵⁵ Nam, C.Y.J., (n49) pp. 161-162.

⁵⁶ Idem, pp. 162-163.

⁵⁷ Idem, pp. 161-162.

⁵⁸ ILO and United Nations Centre on Transnational Corporations, *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (Geneva 1988) p. 19.

⁵⁹ Idem, p. 28.

⁶⁰ Wick, I., 'Women working in the shadows – The informal economy and export processing zones' (2010), p. 26.

noticeable trend that these zones move towards more skilled and technological processing methods.⁶¹

Some developing countries perceive EPZs as beneficial for employment, transfer of training and skills and for development. Thus EPZs are policy tools of government to create employment for their subjects. It seems that many EPZs have indeed contributed to the creation of employment in developing countries.⁶²

These zones are not necessarily always detrimental to human rights and workers rights.⁶³ Nevertheless the main concern regarding EPZs is that labour laws and other regulations are not upheld by host governments, particularly developing countries. Other views on this matter of EPZs contend that compared to the conditions in working environments outside the EPZs, the latter still provide higher wages and better conditions. Still, the purpose of EPZs is to attract foreign investment from MNCs. This purpose of the host governments tends to forego the necessity to protect and enforce human rights and labour rights in these zones.⁶⁴

The lack of enforcement of labour laws within these EPZs has various reasons. Governments believe that lowering labour standards will lead to decreasing labour costs, which investors seek for. Also cheap labour is perceived to be a comparative advantage of developing countries. That is a part of economic activities which they are able to offer best. If labour standards and other regulatory measures will be imposed in EPZs developing countries' governments fear this will affect their comparative advantage.⁶⁵

The role of women in EPZs is quite significant as there is a high percentage of female workers in EPZs employment providing sectors as these zones provide opportunities for women seeking to enter the formal economy.⁶⁶ Female workers are particularly found in

⁶¹ International Labor Organization, 'Labour practices in the footwear, leather, textiles and clothing industries' Report for discussion at the Tripartite Meeting on Labour Practices in the Footwear, Leather, Textiles and Clothing Industries, TMLFI/2000 (Geneva 2000), p. 82. (ILO 2000)

⁶² Idem, p. 165-166.

⁶³ Nam, C.Y.J., (n49) pp. 161-162.

⁶⁴ Idem, p. 164.

⁶⁵ Idem, p. 166-168.

⁶⁶ ILO 2000, (n61) p. 83.

places where labour is low-skilled.⁶⁷ The garment sector is the main sector in EPZs. It is labour intensive and continuously seeks for low labour costs.⁶⁸ For example, in Bangladesh where garment industries are most prevalent in EPZs, women take up the great majority of the existing labour force.⁶⁹ Also apparel industries in EPZs provide many women with employment opportunities, as for example in Sri Lanka.⁷⁰

4 Connecting the Dots

This chapter aimed to address the linkages between the concepts of economic globalisation and the rising power of MNCs and its consequences for women in developing countries. If globalisation has an impact on employment levels in developing countries, this could well lead to an increase in female labourers. However, the concentration of female workers in certain sectors, in addition to, low conditions of work and low wages affect the positive aspects of this access to employment. Given the increasing role of MNCs in developing countries they operate in, especially in EPZs, it seems important to address the situation of female labourers. This is exactly where the business and human rights discourse by taking a gender perspective can contribute to.

CHAPTER 2 - Gender Issues arising within the Employment Context

The present chapter first focuses how employment opportunities created by economic globalisation could contribute to the empowerment of women particularly in developing countries and what this concept of empowerment entails. This highlights why it is

⁶⁷ International Labor Office, Milberg, W., and Amengual, M., Economic development and working conditions in export processing zones: A survey of trends (Geneva 2008), p. 13. (ILO 2008a)

⁶⁸ ILO 2000, (n61) p. 83.

⁶⁹ ILO 2008a, (n67) p. 36.

⁷⁰ Idem, p. 47.

important that the business and human rights framework takes into account a gender perspective.

The second part will first discuss the human rights and labour rights of women as currently provided in international instruments and highlight which rights of women need to be taken into account within the employment context. Examples of gender issues arising within the situation of MNCs operating in EPZs in various Asian countries will be discussed. Given the focus on the gender perspective of the business and human rights developments the chapter aims to provide an overview of gender issues, as covered by human rights and labour rights, which are relevant for such a gender perspective.

1 Women and Economic Empowerment

Despite increased job opportunities, especially in the developing world, women still face many inequalities at work, such as gender discrimination in work conditions, pay and hiring and dismissal practices.⁷¹ Nevertheless, it is argued that employment can contribute to the economic empowerment of women.

For women to truly gain economic empowerment through employment, it is required that measures are taken to address gender discrimination in various aspects of employment.⁷² The concept of empowerment and women is therefore useful to discuss given the fact that the business sector could both positively and negatively contribute to gender equality, which is an important element for women's economic empowerment.⁷³ It is moreover interesting to study how the business and human rights discourse could

⁷¹ Pearson, R, Seyfang, G., 'I'll tell you what I want...': women workers and codes of conduct' in Jenkins, R.O., Pearson, R. and Seyfang, G. (eds) *Corporate Responsibility and Labour Rights : Codes of Conduct in the Global Economy* (London, Earthscan 2002) pp. 44-45.

⁷² Esplen, E. and Brody, A., *Putting Gender Back in the Picture: Rethinking Women's Economic Empowerment*, Bibliography no. 19, BRIDGE Institute of Development Studies University of Sussex (December 2007) p.5.

⁷³ UNFPA, 'Women's Economic Empowerment: Meeting the Needs of Impoverished Women' Workshop Report (2007), p.7.

contribute to the economic empowerment of women by addressing gender inequalities and gender discrimination at work. Thus there appears to be an ‘economic case’ for gender equality⁷⁴ and this underlines the additional importance of gender for the business and human rights discourse.

Economic empowerment is considered to be an important factor to contribute to equality between women and men. The process of economic empowerment contributes to women’s ability to exercise power over economic choices and decisions concerning their lives. To achieve economic empowerment women must be able to have equal access to the economic market, economic resources as well as economic opportunities. It also requires addressing inherent gender inequality within the labour market.⁷⁵ Empowerment allows women to develop themselves as productive workers.⁷⁶ The process of empowerment requires changes in legislation and institutions.⁷⁷

Empowerment can be achieved through three interrelated concepts, namely agency, resources and achievements, in which agency is the ability to make choices, and in addition, to challenge the persisting power relation, resources are the medium through which power can be exercised and achievements relates to the extent to which the ability to make choices has or has not been realized.⁷⁸ Empowerment requires therefore that women have equal capabilities, opportunities and equal access to resources.⁷⁹

⁷⁴UN Millennium Project, ‘Taking action: achieving gender equality and empowering women’ Taskforce on Education and Gender Equality (2005) <<http://www.unmillenniumproject.org/documents/Gender-complete.pdf>> accessed 30 June 2011, p.33-34. (UN Millennium Project 2005)

⁷⁵ Sida, ‘Women’s Economic Empowerment: Scope for Sida’s Engagement’ (Sida working Paper) (30 December 2009), p.9.

⁷⁶ Neumayer, E. and de Soysa, I., (n40) p. 3.

⁷⁷ Idem, p. 12.

⁷⁸ Kabeer, N ‘Gender Equality and Women’s Empowerment: A Critical Analysis of the Third Millennium Development Goal’ (March 2005) 13(1) Gender and Development <<http://www.jstor.org/stable/20053132>> accessed 11 March 2011 pp. 14-15.

⁷⁹ UN Millennium Project 2005, (n74) p. 33.

2 Women's Empowerment through Employment

In the last 50 years a trend of increased participation by women in labour is noticeable. This so-called feminisation of labour trend is particularly prevalent in export-oriented sectors, especially in clothing and textiles sectors, non-agricultural sectors, service-related sectors and EPZs within developing countries. However, the reason for employing women in these sectors relates to various stereotypes. For example, the perception exists that women are cheaper labourers than men. Women are also assumed to have fewer skills than their male counterparts. The increased open trade markets exacerbate the differences in payment between female and male labourers. Such trends are unlikely to positively boost the empowerment of women through employment.⁸⁰

An important concept of empowerment is the ability to make choices. This is especially so where employed female workers gain independence and, for example, are able to exercise more freedom with regard to their private life. Paid work could eventually lead to more positive changes in the personal circumstances of women, such as delay in marriage and ability to negotiate.⁸¹ In some countries (for example Bangladesh), the empowerment of women can be noticed where working women have gained a more influential role within households with regard to decision-making.⁸² The modernization that comes with globalization could challenge persisting patriarchal structures and inherent discrimination against women in countries, especially through the empowerment of women by raising the realisation of their economic and social rights. This must also be seen in a context where countries with higher economic and social standards influence countries with lower standards through their engagement in trade and capital investment.⁸³ More importantly empowerment of women can be seen where women are no longer perceived as a burden to the family's economic situation, when they bring money home.⁸⁴ Access to employment could increase women's bargaining

⁸⁰ Esplen, E. and Brody, A. (n72) pp. 3-7.

⁸¹ Kabeer, N. (n78) p. 19.

⁸² Esplen, E. and Brody, A. (n72) p. 4.

⁸³ Idem, pp. 6-8.

⁸⁴ Un Doc EGM/POV/2001/BP.1 (n1) p. 35.

power within their household, increase their self-esteem and mobility and allow women to experience new ideas and increase their knowledge.⁸⁵

Despite this, empowerment of women can be constrained where conditions of work are unequal and exploits women's labour.⁸⁶ Therefore, an aspect that can contribute to the empowerment of women is addressing and realisation of women's rights at work⁸⁷ as to ensure that women's work conditions meet certain standards. In this regard it is observed that feminisation of labour in Asia, an aspect linked to globalisation, does not entail as such the empowerment of women. The context in which this process takes place tends to subject women to vulnerabilities such as exploitation and marginalise them as a working group.⁸⁸

Women's rights are highly important to achieve priorities within economic and social policy frameworks and measures.⁸⁹ Importantly, the contribution to the empowerment of women is more likely to be realized where businesses acknowledge the persistent gender inequalities at their workplace or where they hire sub-contractors to employ workers and to address gender inequalities in supply chain management. Addressing gender equality with regard to hiring, pay and work conditions could well contribute to the empowerment of their female employees.⁹⁰

Economic empowerment is a concept which the business and human rights discourse needs to take into account and address where a gender perspective is taken. The focus of this discussion should not merely about addressing human rights violations of corporations, but take into account the wider context in which corporations operate. This could be realised through measures and actions which aim to contribute to the improvement of the situation of a significant part of the world's labour force – women.

⁸⁵ UN Millennium Project 2005, (n74) p 89.

⁸⁶ Kabeer, N, (n78) p. 20.

⁸⁷ UN Doc. EGM/POV/2001/EP.3, (n2) p. 12.

⁸⁸ Idem, p 297.

⁸⁹ Heyzer, N., 'Making the Links: Women's Rights and Empowerment Are Key to Achieving the Millennium Development Goals' (March 2005) 13(1) Gender and Development <<http://www.jstor.org/stable/20053131>> accessed 11 March 2011 p. 9.

⁹⁰ Banerjee, S., *Violence Against Women in Globalising Asia* (Global Media, Delhi 2009) p 297.

3 Human Rights and Labour Rights: Correlation or Division?

Although, the following analysis covers human rights, women's rights and labour rights, it is debated whether and to what extent labour rights and human rights can be linked within the globalisation context. Human rights and labour rights show inherent differences in their nature.

Human rights aim to mitigate the power of states, while labour rights have an effect on private actors. The business and human rights discourse now aims to link human rights with private actors, but the primary aim of human rights is to regulate the relationship between states and individuals, whereas labour rights require states to deal with private actors. Within an employment context labour rights provide certain guarantees for workers in their relationship with the employer.⁹¹ Labour rights also have a facilitative function as they aim to increase the ability of workers to engage with employers in a fair manner.⁹² Human rights and labour rights also differ in another respect. Whereas the former focuses on individuals, the latter puts more emphasis on the collective through which individuals can emancipate. Clearly, this is mainly so in case of the freedom of association.⁹³ Finally, the emphasis of both sets of rights seems to differ. Labour rights aim to facilitate a certain outcome through collective movements and human rights focus on the outcome itself which is achieved through a legalistic approach.⁹⁴

Despite such differences both labour rights and human rights could be seen as conferring rights to individuals. At the same time, both set of rights could have a broader significance. Just as human rights inform the business conduct and their responsibilities under the current business and human rights framework, labour rights could complement human rights in this regard and be used to guide and regulate

⁹¹ Kolben, K, 'Labour rights as human rights?', *Virginia Journal of International Law* (2010) 50(2) p. 469.

⁹² *Idem*, p. 470.

⁹³ *Idem*, pp.470-471.

⁹⁴ *Idem*, p. 472.

business activities and corporate conduct.⁹⁵ This necessitates approaching both set of rights in relation to corporate conduct. The comprehensiveness of the developments could otherwise be compromised, as it is essentially within this business and human rights discussion and the relation to the protection of individuals in employment context, which brings the significant relationship of both sets of rights to the front.

4 Human Rights and Labour Rights of Women: An Analysis of the Current State

Gender concerns both the rights of men and women and the enjoyment thereof. It relates to ‘cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women’⁹⁶. Gender includes therefore not only sex, but additional perspectives related to a man or a woman. The particular emphasis on women within this gender perspective is justified where certain assumptions put women in disadvantaged positions as to the enjoyment of their rights. Such assumptions negatively affect the conditions leading to equality between men and women.⁹⁷ Gender equality therefore refers to the extent to which men and women enjoy human rights on the basis of equality.⁹⁸ It takes into account that certain forms of discrimination against women exists.⁹⁹ Measures on gender equality are for the benefit of both women and men. The reason, however, for the particular emphasis on women is due to their marginalised position in the economic context and as participant in this context. Women

⁹⁵ Dine, J, *Companies, International Trade and Human Rights* (CUP:Cambridge, 2005) p. 186.

⁹⁶ UN CESCR ‘General Comment 16. The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the ICESCR)’ (11 August 2005) UN Doc. E/C.12/2005/4 par. 14.

⁹⁷ *Idem*, par. 14.

⁹⁸ Hernandez-Truyol, B.E., ‘Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution’ in Askin, K.D. and Koenig, D.M. (eds) *Women and International Human Rights Law Volume I* (Transnational Publishers, New York 1999) p. 29. See also: UN Doc. E/C.12/2005/4, (n96) par. 14.

⁹⁹ Cassel, D., and Guzman, J., ‘The Law and Reality of Discrimination against Women’, (n98) p.304.

face many inequalities that are structural and therefore are compared to men found in economic insecure positions.¹⁰⁰

What follows in the next part is an analysis of international standards that are relevant for women in the employment context. The basis is provided by both United Nations (UN) and ILO instruments, which to a certain extent overlap. The ILO produced international labour standards which reflect worker's rights through international conventions and other instruments. Many of these standards are or have been covered by the UN, through its main human rights conventions¹⁰¹, especially the ICESCR. As recognized in the Vienna Declaration¹⁰² the violation of women's rights amount to human rights violations. Therefore women's rights are part of the universal human rights¹⁰³, which justifies the focus on this particular group in their position as workers in the current world economy. These rights should guide and inform where a gender perspective is taken by business and human rights discourse.

4.1 Non-Discrimination and Equality

References to non-discrimination principles in general and in relation to the economic and social life can be found in various international instruments. For example, the Universal Declaration of Human Rights¹⁰⁴ provides in article 2 and article 7 that no distinction must be made in the enjoyment of the right set forth in the UDHR and that everybody has right to be protected on the base of equality before the law.

One of the main international instruments for the protection of women's rights, including in the economic and social sphere, is the CEDAW.¹⁰⁵ Article 1 CEDAW defines discrimination as any 'distinction, exclusion or restriction' based on sex that

¹⁰⁰ SIDA, Women's Economic Empowerment: Scope for SIDA's Engagement, Working Paper (30 December 2009) p.14

¹⁰¹ Steinhardt, R.G., (n27, n15) pp.214-215.

¹⁰² Vienna Declaration and Programme of Action, World Conference on Human Rights (adopted 12 July 1993, Vienna) A/CONF.157/23.

¹⁰³ Idem, par. 11 and 18.

¹⁰⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

¹⁰⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

affects the enjoyment and exercise of rights and freedoms by women in, among others, the economic and social field. Discrimination of women can take place directly or indirectly. Whereas the former occurs where women are treated differently solely on the basis of their characteristics and sex, the latter takes place where for example a law or policy has the effect that, while not being directly visible in first instance, women are discriminated once these are implemented.¹⁰⁶ Discrimination in the enjoyment of rights based on equality in law (de jure discrimination) and discrimination arising from other factors than from legal measures (de facto discrimination), must both be identified and eliminated.¹⁰⁷ This is clearly covered by the CEDAW provisions.

Under article 2 CEDAW State parties are required to eliminate all forms of discrimination against women. States are required to guarantee the equality between men and women through legislation and other measures. Article 2.e CEDAW, in particular, makes the point that State parties are required ‘to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise’.¹⁰⁸ This latter is an important provision as it requires state parties to regulate the behaviour of private entities with the particular emphasis to protect women from discrimination by such entities.

In addition to the CEDAW, the ICESCR¹⁰⁹ is an important instrument for the protection of human rights for women in the economic and social sphere. Under article 2.2 ICESCR State parties have to put in place legislative measures and undertake other efforts to ensure that the rights provided in the ICESCR are enjoyed by all people without discrimination. This article is immediately applicable and State parties need to eliminate both formal and substantive discrimination. Formal discrimination focuses on the policies and laws the State has enacted that perpetuate discrimination, while substantive discrimination focuses on discrimination in practice.¹¹⁰ This provision must

¹⁰⁶ UN Doc. E/C.12/2005/4, (n96) paras. 12-13.

¹⁰⁷ UN-NGO Group on Women and Development, Tomaševski, K., *Women and Human Rights*, Women and World Development Series (Zed Books Ltd., London/New York 1995) p. 44.

¹⁰⁸ Article 2 CEDAW, (n105).

¹⁰⁹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 January 1976) 993 UNTS 3

¹¹⁰ CESCR, ‘General Comment 20. Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)’ (10 June 2009) UN Doc E/C.12/GC/20 paras. 7-8.

be read together with the substantive provisions in article 6-15 ICESCR.¹¹¹ Thus article 2.2 together with article 6 ICESCR forbids discrimination with regard to the exercise of the right to work. Although the ICESCR does not provide a definition of discrimination, it appears from the work of the Committee on Economic, Social and Cultural Rights (CESCR) that it interprets discrimination as any ‘distinction, exclusion, restriction or preference’ based on various grounds including race, sex and religion.¹¹² Article 2.2 ICESCR does not include any reference to private actors the CESCR requires State parties to regulate the conduct of third actors as well as to protect against violations of economic, social and cultural (ESC) rights by those actors.¹¹³

Article 3 ICESCR provides that State parties need to guarantee equal access to the enjoyment of ESC rights to both women and men. It elaborates further on the prohibition of discrimination in article 2.2 ICESCR¹¹⁴ by emphasising the need to effectively ensure equality.¹¹⁵ The State obligations in this regard can be divided into the obligation to respect, the obligation to protect and the obligation to fulfil. While the obligation to respect requires State parties to refrain from any actions or inactions resulting in undermining the equal rights of men and women, the obligations to protect and to fulfil, are of a more active nature. The former obligation requires State parties to adopt measures to eradicate prejudices and stereotypes, to adopt legislation to ensure equality and moreover to ensure that third parties, including private parties, do not interfere with the enjoyment of the ESC rights. The latter obligation requires State parties to undertake effort as to ensure that women and men enjoy ESC rights on an equal basis.¹¹⁶

Article 26 ICCPR¹¹⁷ provides that states should prohibit discrimination and that all persons are equal before law and should receive equal and effective protection against discrimination. This provision is an autonomous right and prohibits discrimination in all

¹¹¹ Sepulveda, M., *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerpen/Oxford/New York 2003) p. 380.

¹¹² *Idem*, p. 383.

¹¹³ *Idem*, p. 391.

¹¹⁴ UN Doc. E/C.12/2005/4 (n96) par. 2.

¹¹⁵ Sepulveda, M., (n110) p. 405.

¹¹⁶ UN Doc. E/C.12/2005/4, (n96) par. 18-21.

¹¹⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

areas covered by State measures and legislation. The non-discrimination principle extends beyond the provisions contained in the ICCPR.¹¹⁸

The importance of non-discrimination in the employment context is reiterated by the ILO Declaration from 1998.¹¹⁹ This document provides that the ILO member states need to promote, respect and realise the principle of non-discrimination in employment and occupation, even if they have not ratified the Conventions concerning this principle (article 2 ILO Declaration). ILO Convention no. 111 Discrimination¹²⁰ and Convention no. 100 Equal Remuneration Convention¹²¹ inform the non-discrimination principle of the ILO Declaration.¹²² ILO C111 provides in article 1.a that discrimination is ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’.¹²³

The value of this ILO Declaration lies in the fact of its acceptance and affirmation by governments and social actors of the universality of the fundamental principles as proclaimed.¹²⁴

There are positive aspects to emphasize this particular set of principles in the ILO Declaration. It allows governments and other actors to prioritise and focus on these specific standards. Also the declaration provides a more flexible approach compared to legal provisions in conventions and it appeals more to governments and employers given the lack of a sanctioning mechanism.¹²⁵ It has also been expressed that the ILO Declaration allows the ILO to link its work as to deal with pressing issues in reality,

¹¹⁸ UN Human Rights Committee CCPR, ‘General Comment 18 Non-Discrimination’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) HRI/GEN/1/Rev.9 (Vol. I) par.12.

¹¹⁹ ILO, ILO Declaration on Fundamental Principles and Rights at Work (Geneva 18 June 1998) article 2.d.

¹²⁰ ILO Convention concerning Discrimination in Respect of Employment and Occupation (Geneva 25 June 1958). (ILO C111)

¹²¹ ILO Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (Geneva 29 June 1951). (ILO C100)

¹²² ILO, Elimination of discrimination in respect of employment and occupation <<http://bit.ly/pmP5J8>>. accessed 19 May 2011.

¹²³ ILO C111, article 1.a.

¹²⁴ Kellerson, H. ‘The ILO Declaration of 1998 on fundamental principles and rights: A challenge for the future’ *International Labour Law Review* (1998) 137(2) p. 227.

¹²⁵ Alston, P., ‘“Core Labour Standards” and the Transformation of the International Labour Rights Regime’ *European Journal of International Law* (2004) 15(3), p. 459-460.

such as the effects of trade liberalisation. With the ILO Declaration the ILO has taken an integrated approach to economic and legal aspects of its work.¹²⁶

The ILO Declaration has received some critique in as it limits the focus and the emphasis on the four provided standards on freedom of association, forced labour, child labour and discrimination. The justification for this limited selection could be questioned, given the lack of any clear economical or legal criteria for such a selection.¹²⁷ Additional critique has been expressed to the use and emphasis on ‘principles’ over ‘rights’ where the former appears to be weaker in force than the latter, while these principles have been covered in binding international conventions.¹²⁸ For present purposes it is deemed important to emphasise the inclusion of non-discrimination in the ILO Declaration as a fundamental principle, but at the same time other issues rising within an employment context must also be acknowledged.

4.2 Right to Work and Conditions of Work

The UDHR elaborates in article 23 UDHR that everybody has the right to work and to receive equal pay for equal work. Article 24 UDHR provides the right rest and leisure and limitation to the working hours.

Relevant to the economic rights of women is article 11 CEDAW on equality in employment. According to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) State parties need to adopt the ILO C100 on Equal Remuneration as part of the implementation of the CEDAW.¹²⁹ The comprehensiveness of article 11 CEDAW is given in its coverage of a great variety of economic and social rights. The provision protects the right to work based on equality,

¹²⁶ Langille, B.A., ‘Core Labour Rights – The True Story (A Reply to Alston)’, *The European Journal of International Law* (2005) 16 (3), p. 436-437.

¹²⁷ *Idem*, p.483-485.

¹²⁸ Alston, P., 2004 (n124) p.458.

¹²⁹ Committee on the Elimination of All Forms of Discrimination against Women, ‘General Recommendation 13: Equal remuneration for work of equal value’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (27 May 2008) HRI/GEN/1/Rev.9 (Vol. II).

the right to equal opportunities in employment, the right to freely choose a profession including the right to not be guided into ‘female jobs’, the right to equal remuneration, the right to social security and the right to protection of safety and health, which covers the right to be free from sexual harassment, at the workplace.¹³⁰ In article 11 (2) CEDAW emphasis is put on issues regarding maternal leave and marital status and the need for State parties to eliminate discrimination based on these grounds. Also states are required to ensure social benefits without the loss of employment.¹³¹

Article 6 ICESCR provides for the right to work.¹³² The right to work is an important human right given that work is a means to generate income and therefore for survival.¹³³ It is according to the CDESCR important to realise other human rights and is a part of human dignity. The right to work can contribute to the development of the individual where work is chosen freely and with consent.¹³⁴ Work as referred to in this provision must be of decent nature. Therefore it must be ensured that workers receive an income through which they can support themselves and their families.¹³⁵

The CDESCR considers that under the right to work states are obliged to assure that individuals can freely choose or accept work and that they are not unfairly deprived of their jobs. It is emphasized that the freedom to choose a job is important for both the personal development of an individual as well as for the inclusion of this person in the social and economic environment. The CDESCR recognizes that there are international factors, which are beyond states’ control, creating obstacles and affect the realization of article 6 ICESCR.¹³⁶ The core obligations under the right to work are to ensure access to employment, especially for disadvantaged and marginalised group of people and to avoid taking measures resulting in discrimination and inequality and to adopt a national strategy plan.¹³⁷

¹³⁰ Oosterveld, V.L., ‘Women and Employment’ (n98) p. 384.

¹³¹ *Idem*, p. 384.

¹³² Moreover article 8 (3) (a) ICCPR also provides for the right to work.

¹³³ Ssenyonjo, M, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Portland 2009) p. 284.

¹³⁴ *Idem*, p. 284.

¹³⁵ Also referred to in article 7 (a) (ii) ICESCR. See: CDESCR, ‘General Comment 18: The right to work (art.6)’, (n117).

¹³⁶ *Idem*, par. 4.

¹³⁷ *Idem*, par.31.

In relation to women's right to work the CESCR elaborates upon the fact that states need to undertake comprehensive efforts to eliminate gender discrimination¹³⁸ (article 2.2 ICESCR together with¹³⁹ article 6 ICESCR). Sex discrimination exists where, for example, women are allocated into lower level jobs due to the presumption that they are less skilled than men.¹⁴⁰ Pregnancy should not be an obstacle for the access to employment nor should it be a ground based on which loss of employment could be justified. It must also be taken into account that women often face more barriers in access to education and therefore are faced with many compromises in terms of employment opportunities.¹⁴¹ Article 3 ICESCR t.w. article 6 ICESCR requires state parties to ensure equality in access to decent work.¹⁴²

Article 6 and article 7 ICESCR are interdependent.¹⁴³ The latter provision is an elaboration of the general nature of the right to work as provided in article 6 ICESCR.¹⁴⁴ Article 3 ICESCR (equality in enjoyment of ESC rights) and article 2.2 t.w. article 7 ICESCR (just and favourable conditions of work, including the right to safe working conditions)¹⁴⁵ provides that State parties need to identify issues as to eliminate any gender-based discrimination and ensure equality in working conditions, for example in pay.¹⁴⁶ Article 7.a.i ICESCR emphasises that women must be provided with equal pay for work of equal value and that fair wages must be provided. Article 7.a.ii ICESCR elaborates that wages should allow workers to have a decent living. In addition, article 7 (d) ICESCR provides that a reasonable limitation to working hours as well as rest time need to be ensured. State parties are required to monitor private sector entities in their compliance with national laws regarding working conditions. Furthermore States need to identify the constraints women face where they have both professional and family responsibilities.¹⁴⁷

¹³⁸ *Idem*, par. 13.

¹³⁹ Hereafter: 't.w.'.

¹⁴⁰ UN Doc E/C.12/GC/20, (n109) para. 20.

¹⁴¹ CESCR, General Comment 18: The right to work (art.6)', (n134, n117) par. 13.

¹⁴² *Idem*, par. 23. See also: Ssenyonjo, M, 2009 (n132) p. 286.

¹⁴³ *Idem*, par.8.

¹⁴⁴ *Idem*, par.2.

¹⁴⁵ See article 7 (b) ICESCR.

¹⁴⁶ CESCR, 'General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)' (n117) par. 24.

¹⁴⁷ *Idem*, par. 24.

Finally, in article 10 ICESCR it is provided that working mothers should be provided maternity leave and medical and other benefits.¹⁴⁸ It is considered that pregnancy should not constitute a ground for loss of employment.¹⁴⁹ Maternity benefits are a specific element of the right to social security as provided by article 9 ICESCR.¹⁵⁰

ILO C100¹⁵¹ provides that equal pay shall be given to work of equal value. The concept ‘work of equal value’ aims to avoid a narrow interpretation by providing a possibility to measure different types of work, whilst not requiring that the type of work needs to be the same in order to receive the same wage. The convention also applies a wide definition of remuneration as it covers certain benefits and bonuses, in order to avoid discrimination occurring through these ways.¹⁵² States are obliged to ensure this standard through national laws, regulations, collective agreements or mechanisms for wage determination (article 2 ILO C100).

ILO C111 aims to promote equal opportunity and treatment in employment.¹⁵³ In addition to the grounds mentioned in the convention like sex, political opinion and religion, state parties can extend the list of discriminatory grounds.¹⁵⁴ Discrimination in access to vocational training and access to employment and the conditions of work is prohibited.¹⁵⁵

ILO C111 does not foresee discrimination based on family responsibilities. Therefore Convention no.156 on Workers with Family Responsibilities¹⁵⁶ is a supplement to this non-discrimination convention.¹⁵⁷ The convention requires states to adopt measures, to the extent that national conditions allow, that ensure workers with family responsibilities can exercise their right to work and which take into account the needs related to conditions of work and social security and to develop and promote services

¹⁴⁸ CESCR, ‘General Comment 19: The right to social security (art.9)’, (n117) par. 19.

¹⁴⁹ CESCR, General Comment 18, (n134, n117) par. 13.

¹⁵⁰ CESCR General Comment 19 (n117) par. 19.

¹⁵¹ ILO C100, n126.

¹⁵² Oosterveld, V.L., (n129, n98) p. 377.

¹⁵³ *Idem*, p. 378.

¹⁵⁴ ILO C111, article 1(b).

¹⁵⁵ *Idem*, n125 article 1(3).

¹⁵⁶ ILO Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva 23 June 1986). (ILO C156)

¹⁵⁷ Oosterveld V.L., (n129, n98) p. 378.

such as child-care.¹⁵⁸ Family responsibilities are not a valid ground for dismissal (article 8 C156). Also in relation to termination of employment (ILO Convention no 158) it is provided that grounds such as sex, pregnancy, family responsibilities and absence due to maternity leave are prohibited.¹⁵⁹

Convention no. 183 Maternity Protection¹⁶⁰ provides an indication for the period of maternal leave, namely 14 weeks. According to article 6 (1) ILO C183 women must be provided with cash benefits according to national law when they take a period of leave.¹⁶¹ This convention applies to all employed women, without any exclusion.¹⁶² Convention no.102 Social Security¹⁶³ is relevant for the specific situation of women whereas it provides that State parties need to ensure minimum standards on maternity benefit.

ILO Convention concerning Occupational Safety and Health and the Working Environment (C155) refers to a safe and healthy work environment. The Convention is applicable throughout all economic activities carried out by branches and to all its workers.¹⁶⁴ States need to adopt a national policy concerning occupational health and safety (article 4.1 C155) as well as national regulation as required to ensure the implementation of the national policy.

4.3 Gender-based violence

Gender-based violence is a form of discrimination against women, which compromises the enjoyment of rights and freedoms based on equality with men.¹⁶⁵ These rights include the right just and favourable conditions within employment.¹⁶⁶ Violence against women in the workplace clearly can take the form of both physical violence (for

¹⁵⁸ Article 4a, article 4b, article 5b ILO C156 respectively.

¹⁵⁹ ILO, Convention concerning Termination of Employment at the Initiative of the Employer (Geneva 1982) Article 5.d-e. (ILO C158)

¹⁶⁰ ILO Convention concerning the revision of the Maternity Protection Convention (1952 Revised) (15 June 2000 Geneva).

¹⁶¹ ILO, Maternity at Work – A review of national legislation, (Geneva 2010), p. 17. (ILO 2010)

¹⁶² *Idem*, p. 35.

¹⁶³ ILO, Convention concerning Minimum Standards of Social Security (28 June 1952 Geneva).

¹⁶⁴ ILO, Convention concerning Occupational Safety and Health and the Working Environment (Geneva 1981), Article 1.1 and 2.1.

¹⁶⁵ CEDAW General Recommendation 19, (n128) par.1.

¹⁶⁶ *Idem*, par.7.h.

example corporal punishment) as well as psychological violence (for example threats or coercion).¹⁶⁷ Gender-based violence must be seen in a wide context within the gender relations as they exist within the economy and, more specifically, in the employment relationship.¹⁶⁸

Sexual harassment at the workplace is a form of violence against women and falls within the prohibition of discrimination in employment (article 1 conj. article 11 CEDAW). This particular form of harassment impedes equality in the working environment¹⁶⁹ and endangers the safety and health of female workers.¹⁷⁰ According to a former Special Rapporteur on violence against women ‘sexual harassment strikes at the heart of women's economic self-sufficiency, disrupting women's earning capacity by forcing them out of the workplace ...’.¹⁷¹ Women, especially young, single or divorced women, are subject to a higher degree of becoming victims of sexual harassment in work. Also situations where women have male supervisors appear more likely to lead to situations of sexual harassment.¹⁷²

ILO C111 on discrimination covers sexual harassments as it is a manifestation of discrimination based on sex. Sexual harassment can be physical violence as well as coercion.¹⁷³ Sexual harassment can furthermore include insults or remarks of sexual nature, gestures related to sexuality, requests for sexual favours and threats of dismissal or other negative consequences where sexual demands are not given.¹⁷⁴ Another example of the manifestation of sexual harassment is where a woman has to work in a

¹⁶⁷ International Labour Conference (98th Session) Report VI: Gender equality at the heart of decent work, (Geneva 2009), p. 34. (ILO 2009)

¹⁶⁸ ILO, ABC of women workers’ rights and gender equality (2nd ed. Geneva 2007), p. 191. (ILO 2007)

¹⁶⁹ Idem, para. 17.

¹⁷⁰ Phillips, R., (n98) pp. 275-277.

¹⁷¹ UN ECOSOC, Commission on Human Rights, ‘Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy’ (12 February 1997) E/CN.4/1997/47, C. Sexual Harassment.

¹⁷² ILO, McCann, D., *Sexual harassment at work: National and international responses*, Conditions of Work and Employment Programme Series No. 2 (Geneva 2005) p. 5.

¹⁷³ Phillips, R., (n98), p. 257.

¹⁷⁴ ILO 2007, (n167) p. 165.

hostile environment.¹⁷⁵ Where women endure such harassment, they often face lack of services and facilities to cope or deal with their situation.¹⁷⁶

From the business perspective it is of particular relevance to pay attention to sexual harassment on the workplace as it could affect the work relations and the work attitude of individual employees.¹⁷⁷ Important to note is that it is considered that addressing inequality and discrimination based on gender within the employment context could contribute to the economic empowerment of women, which could contribute to elimination of violence against women.¹⁷⁸

5 General Gender Issues arising within Export Processing Zones

This paragraph is an elaboration of current human rights and labour rights issues that female workers face, particularly where they work in sectors in EPZs in which MNCs operate. The following overview of gender issues, which often stand in contrast to the provisions provided by the international instruments discussed in the preceding section, may become the centre focus of a gender perspective taken in discussion on business and human rights. These issues, as will be seen, are often of particular relevance for women in employment context.

It must be noted here, that comparative data on the working conditions within EPZs are not much developed despite many attempts by organisations to assess the quality of employment in these zones.¹⁷⁹ Therefore the information used will serve to provide a general observation of working conditions EPZs. These general observations will be elaborated by selected examples from countries in South and Southeast Asia. This particular region has been chosen because it is estimated to hosts the most EPZs.

¹⁷⁵ ILO, 'Sexual Harassment at Work – Factsheet' <http://bit.ly/n6cJ5p> accessed 17 May 2011. See also: Oosterveld, V.L., (n129, n98) p. 381.

¹⁷⁶ ILO, *Labour and Social Issues relating to Export Processing Zones*, Report for Discussion at the Tripartite Meeting Export processing Zones-Operating Countries (Geneva 1998) p. 33. (ILO 1998)

¹⁷⁷ ILO 2007 (n167) p. 165.

¹⁷⁸ UN ECOSOC, 'Full employment and decent work: intensification of efforts to eliminate all forms of violence against women' in Note by the Secretariat (17 December 2007) E/CN.5/2008/8, para.9.

¹⁷⁹ Wick, I. 2010, (n60) p. 28.

However, China takes up a significant part of this share of numbers of EPZs.¹⁸⁰ Still in the remaining Asian countries over 14 million workers are employed in EPZs.

Not only the magnitude of the presence of EPZs, but also and due to the fact that women are a significant labour source for the EPZs in Asia¹⁸¹ this region will be focused upon. The examples derive from those sectors in EPZs where female employment is high like the electronics, textile and garment sectors.¹⁸² It must be acknowledged here that the picture of gender issues arising from the selected region could fit to a certain extent the picture arising from EPZs and female workers in other regions, such as Central and South America. Case studies on EPZs in this region have found similar gender issues.¹⁸³ Notwithstanding this, the examples from the Asian countries will guide the present overview.

EPZs show an interesting example of a link between trade liberalisation and flow of investments, both elements of economic globalisation, and human rights and labour rights.¹⁸⁴ Due to the business activity of many MNCs in EPZs and the interest of host states to develop their economies through these zones on the one hand and the many reported violations of labour rights and human rights occurring in EPZs and the high percentage of female workers in certain sectors of these EPZs¹⁸⁵ on the other hand, these zones provide a good opportunity to explore the applicability of and the gender perspective taken by the current business and human rights developments.

¹⁸⁰ International Labour Office, Biyenge, J.S., 'ILO Database on Export Processing Zones', Working Paper (Geneva April 2007) <http://www.ilo.org/public/libdoc/ilo/2007/107B09_80_engl.pdf> accessed 4 July 2011.

¹⁸¹ UNDP, 'Power, Voice and Rights – A Turning Point for Gender Equality in Asia and the Pacific Asia-Pacific Human Development Report (2010), p. 61. (UNDP 2010)

¹⁸² OECD, Engman, M., O. Onodera and E. Pinali 'Export Processing Zones: Past and Future Role in Trade and Development', OECD Trade Policy Working Papers No. 53 OECD Publishing (2007) <<http://dx.doi.org/10.1787/035168776831>>, Box 3.

¹⁸³ See the case studies on the Caribbean Garment Workers and Maquiladora Workers . Oosterveld, V.L., (n129, n98) p. 391-391 and 393-395.

¹⁸⁴ Idem, p. 388.

¹⁸⁵ Idem, p. 389.

5.1 Women's Reality in Export Processing Zones: Gender-based Discrimination and Inequality

One of the first observations of EPZs is the high percentage of female workers, which is between 70 to 90 percent.¹⁸⁶ In Asia most female workers in EPZs are young and unmarried. These workers are particularly concentrated in garment, textile, apparel and consumer electronics sectors.¹⁸⁷ Many women prefer to work in EPZs, rather than to work in the agricultural sector or as a domestic worker. Thus EPZs have provided women with entry into formal jobs that on general level provide higher wages and conditions compared to other choices.¹⁸⁸

The preference of young women for work in EPZs is based on discriminatory views. Female labour is considered to be cheaper than male labour.¹⁸⁹ This could be the result of, for example, the perception of women not being the primary breadwinners in households.¹⁹⁰ Women are considered to be more productive within the sectors in which they are concentrated. Other reasons for such preference include that 'women are deemed to have "nimble fingers"...women are regarded as more obedient and less prone to worker unrest...women are seen to be more suited to tedious work and that women are thought to be more reliable and susceptible to training than men'¹⁹¹. The types of jobs women are hired to do in the named sectors are often low-skilled.¹⁹²

Therefore a general feature that appears is that the types of jobs female workers are hired to do in EPZs, result in gender segregation in employment,¹⁹³ which is constituted by discriminatory practices and views. Segregation in employment often results in negative effects on the level of wages in a certain sector and could possibly results in

¹⁸⁶ ILO 2008a, (n67) p. 13.

¹⁸⁷ UN Research Institute for Social Development, Braunstein, E., 'Foreign Direct investment, Development and Gender Equity. A Review of Research Policy', Occasional paper 12 (January 2006) p. 15.

¹⁸⁸ ICFTU, Behind the Brand Names: Working conditions and labour rights in export processing zones, (December 2004), p. 11. (ICFTU 2004) See also: ILO 2008a, (n67) p. 13.

¹⁸⁹ Wick, I. 2010, (n60) p. 30.

¹⁹⁰ SOMO, 'Gender Aspects in the Latin American Garment Industry', SOMO Paper (April 2011) p.2.

¹⁹¹ Braunstein, E. 2006 (n186) p. 15.

¹⁹² ILO 2008a, (n67) p. 13.

¹⁹³ Oosterveld, V.L. n106 p. 390. See also: ILO 2007, n173 p. 76.

exacerbating the gender pay gap.¹⁹⁴ Such division in labour occupation based on gender discriminations exists where women and men are divided into different types and levels of jobs.¹⁹⁵ For example, in EPZs in Bangladesh it was found that most female workers were production workers, instead of technical workers.¹⁹⁶ A study on garment and non-garment sectors within EPZs in Dhaka in Bangladesh shows that 72 percent of the workers in the garment industry are women, in contrast to 23 percent in the non-garment sectors. In these sectors men occupied often the high-skilled positions, such as supervisors. Other sectors where women were employed are the electronic and footwear industries.¹⁹⁷ Findings in Sri Lankan EPZs show that 75 percent of the female workers were in the low-skilled positions such as packer, helper or machine operator.¹⁹⁸ Another study on EPZs in Sri Lanka shows that 80 percent of the workers in the garment and textiles sectors in EPZs are female.¹⁹⁹ 80 percent of workers in the Philippines' EPZs are women.²⁰⁰ Similar observations appear in Bangladesh, where women take up 64 percent of the work in EPZs.²⁰¹

The segregation in labour in EPZs could be linked to earlier discrimination women have faced in access to education, but it could as well be linked to stereotypes and perceptions on gender roles and thus is the clear result of inequality.²⁰² The elimination of gender segregation requires reassigning and reassessing areas of employment as it exists in society which could encounter discrimination of women in the world of work.²⁰³

Another form of discrimination women face is found in the hiring and firing practices within EPZs. For example, women face dismissal when they get pregnant. Such

¹⁹⁴ UN Millennium Project 2005, (n74) p. 94.

¹⁹⁵ *Idem*, p. 144.

¹⁹⁶ Braunstein, E. 2006 (n186) p. 18-19.

¹⁹⁷ Zohir, S.C., *Gender Balance in the EPZ: A Socio-Economic Study of Dhaka Export Processing Zone in Bangladesh*, Bangladesh Institute of Development Studies Final Report (February 2001) pp. 13-14.

¹⁹⁸ Hancock, P., Middleton, S. and Moore, J., 'Export Processing Zones (EPZs), globalisation, feminised labour markets and working conditions: A study of Sri Lankan EPZ workers' (2009) 10 *Labour and Management in Development*, p.15.

¹⁹⁹ *Idem*, p. 7-8.

²⁰⁰ UNDP 2010, (n180) p. 61.

²⁰¹ Murayama, M and Yokota, N., 'Revisiting Labour and Gender Issues in Export Processing Zones: The Cases of South Korea, Bangladesh and India', Institute of Developing Economies Discussion Paper No. 174 (October 2008) pp. 18-19.

²⁰² ILO 2007, (n167) p. 145.

²⁰³ Wick, I. 2010, (n60) p. 47.

practices were found in a study on transnational clothing manufacturing firms in Indonesia.²⁰⁴ Another study in EPZs in the Philippines has also found practices of dismissal where women are in their fourth month of pregnancy. After childbirth women were not allowed to return to their work.²⁰⁵

Wages within EPZs are similar or even higher compared to sectors outside those EPZs. For example, in the apparel sectors in EPZs in Asia, no significant difference in wage payment was found compared to the sectors outside the EPZs.²⁰⁶ A study in the three largest EPZs in India, also suggests the same. It was found that wages within EPZs were not lower or in some cases slightly lower compared to the sectors outside these EPZs.²⁰⁷ A general picture of EPZs in Bangladesh indicates that the wages paid to workers are higher than for workers outside EPZs.²⁰⁸ In Sri Lankan EPZs, similar trends have been found.²⁰⁹ Thus wages within EPZs appear as such not be an 'issue'.²¹⁰

Still certain specific questions could be posed in this regard. First, whether gender-based discrimination leads to a gender pay gap within EPZs. In this regard it must be mentioned that the previously discussed study on the three largest Indian EPZs concludes that no evidence suggests the existence of gender-based discrimination regarding wages.²¹¹ Despite this, the general picture arising of EPZs and female workers is that they are discriminated in wages and other benefits.²¹² It is even estimated that female workers earn 20 to 50 percent less than their male counterparts in the same zones.²¹³ Moreover the hiring of female workers is often based on the view of female

²⁰⁴ Frynas, J.G. , 'The Transnational Garment Industry in South and South-East Asia. A Focus on Labour Rights', in Frynas, J.G. and Pegg, S. (eds) *Transnational Corporations and Human Rights* (Palgrave Macmillan, New York 2003) p. 169.

²⁰⁵ ICFTU, 'Philippines: a union foothold in the export processing zones', Briefing No.5 (August 2003) p.8.

²⁰⁶ ILO 2008a, (n67) p. 13.

²⁰⁷ Aggarwal, A., 'Impact of special economic zones on employment, poverty and human development', Indian Council for Research on International Economic Relations Working Paper No. 194, (May 2007), p. 24.

²⁰⁸ ILO 2008a, (n67) p. 35 and 47.

²⁰⁹ Sivananthiran, A., 'Promoting decent work in export processing zones (EPZs) in Sri Lanka', at <<http://www.ilo.org/public/french/dialogue/download/epzsrilanka.pdf>>, p.2, consulted on 28 June 2011.

²¹⁰ Cling, J. and Letilly, G., *Export Processing Zones: A threatened instrument for global economy insertion?* DIAL document de travail, (2001) DT/2001/17 p. 19.

²¹¹ Idem, p.. 24

²¹² ICFTU 2004, (n187) p.11-12.

²¹³ <<http://www.imfmetal.org/index.cfm?l=2&c=8459>> accessed 28 June 2011.

labour as cheap labour²¹⁴, which would result in women being paid less compared to men. A second issue is whether the wages paid within EPZs, even where they are higher than those paid by local factories in the same sectors, amount to ‘living’ or ‘decent’ wages.²¹⁵ A third issue, which is relevant to discuss, as EPZs are associated with receiving exemptions from national law, is the applicability of minimum wage laws in EPZs. Clearly the first issue affects mainly women, whereas the second and third issue could affect both men and women in the same way. Still, these issues also could have their gender-based discrimination aspects.

The gender pay gap, which is the difference in what men and women on average earn, is a major issue that women face throughout the world. On average it appears that women earn 75 percent of what men earn in an hour. The cause of differences in pays can be traced back various factors such as, educational levels, skills and seniority. Discrimination is the main cause, as jobs executed by women often are found at the lower ends of pay and other classifications.²¹⁶

In specific instances gender pay gaps appear within EPZs. In the textile, clothing and footwear sectors within EPZs a general observation arises that women earn less in comparison to men working in the same sectors.²¹⁷ A study in seven Sri Lankan EPZs found that male workers were paid more in wages on average compared to female workers in the same zones. Discrimination in wages was found to exist also due to segregation in jobs, where male workers received the jobs considered that were more of a technical nature.²¹⁸ In a survey in garment and textile sectors of five EPZs in Bangladesh, female workers were found to be paid significantly less compared to male workers (1590 and 1550 taka respectively 2080 and 2180 taka (rounded off)).²¹⁹

In general it appears that minimum wages are guaranteed for some workers in EPZs.²²⁰ This appeared to be the case in Sri Lankan EPZs, where wages were the same as or even

²¹⁴ ILO 2008a, (n67) p. 13.

²¹⁵ *Idem*, p. 35.

²¹⁶ ILO 2007, (n167) p. 74.

²¹⁷ ILO 2000 (n61) p. 23.

²¹⁸ Committee for Asian Women, Bharathi, D., ‘Tears of the Emerald Isle: Women Garment Workers in EPZs of Sri Lanka’ (2007) p. 4.

²¹⁹ ILO, Al Faruque, A., ‘Current Status and Evolution of Industrial Relations System in Bangladesh’ (2009), p. 45-47 and Table 5.5.

²²⁰ ILO 2008a, (n67) p. 35.

higher than the minimum wages.²²¹ Minimum wage laws are also respected in most Indonesia EPZs for some workers.²²² Studies in EPZs in Bangladesh show that the lack of trade union activism leads to legislation on minimum wages being sidestepped.²²³

In some instances countries have repealed the applicability of minimum wage laws, as for example the Philippines have done with regard to the garment manufacturing sectors. An additional issue is that many countries fail to enforce national existing laws in EPZs, which could compromise the rights of workers. For example, in the Philippines it was found that in 89 EPZs labour laws were not strictly enforced.²²⁴ The CEDAW Committee has referred to the lack of protection of female workers in Sri Lankan EPZs due to weak enforcement of laws.²²⁵

While minimum wages are relevant for both male and female workers in EPZs, respecting minimum wages has a particular gender aspect. Importantly, setting and enforcing minimum wages can contribute to reducing the gender pay gap. Such measures must however not lead to lowering the existing wages and it is one of the ways through which the gender pay gap can be addressed. Another reason for the significance of minimum wages for women is that these policies protect those who are in disadvantaged positions, especially women who are often, as in EPZs, found in the lower-skilled and therefore lower paid jobs.²²⁶

Another question is whether the wages provided are living wages. It appears that minimum wages provided in Indonesian EPZs do not necessarily constitute a decent or a living wage.²²⁷ For example, in Sri Lanka the wages earned in EPZs are just above the poverty line, therewith making it questionable whether this is a decent wage.²²⁸ Also minimum wages of garment workers in Sri Lankan EPZs do not take into account

²²¹ *Idem*, p. 47.

²²² ILO, Sivananthiran, A., Promoting Decent Work In Export Promotion Zones in Indonesia, p. 15-16. At: <http://www.ilo.int/public/french/dialogue/download/epzindonesie.pdf>, consulted on 29 June 2011.

²²³ ICFTU 2004, (n187) p. 8.

²²⁴ *Idem*, p. 9.

²²⁵ UN Doc. A/57/38 Sri Lanka, 2002,

<http://www2.ohchr.org/english/bodies/cedaw/docs/co/Sri%20LankaCO26.pdf>, par. 290.

²²⁶ Rubery, J. and Grimshaw, D., Gender and the minimum wage, Paper prepared for the ILO conference Regulating for Decent Work (Geneva July 2009) p. 18-19.

²²⁷ *Idem*, p. 16.

²²⁸ *Idem*, p. 47.

increase of inflation.²²⁹ In a case study in IT factories in the Philippines it was found that the provided minimum wages were inadequate, despite the fact that it met legal conditions. This situation subsequently leaves the, mostly female, workers no choice but to work overtime.²³⁰ Earning a living wage is important for both men and women. However, where women enter into formal economy through jobs in EPZs could be of particular relevance for their empowerment and therewith their independence that they receive a living wage.

Another gender issue that arises in EPZs concerns the respect for maternity rights.²³¹ Maternity protection is an important condition for women to have equal opportunity in employment as otherwise they would face unequal treatment due to their reproductive role.²³² It appears that in the Asian region only 23 per cent of the countries provide maternity benefits according to the ILO C183. Not only is maternity protection important for equal employment opportunities, it is also of importance for women to maintain their health.²³³ Despite the acknowledged importance of maternity protection, women continue to face widespread discrimination on the ground of maternity issues.²³⁴

Also in this matter various results arise from country contexts. For example, a comparison between garment workers within EPZs and outside EPZs in Bangladesh showed that a great part of the female workers within EPZs received maternity benefits in contrast to the latter.²³⁵ In a study within the textile industry in Bangladesh, however, it was found that a great majority of female workers do not receive maternity coverage.²³⁶ Other countries such as Viet Nam, fail to enforce legislation on social

²²⁹ Middleton, S. and Hancock, P., 'Gender, Status and Empowerment: A study among women who work in Sri Lanka's Export Processing Zones (EPZ's)', Social Justice Research Centre (September 2009) p. 8.

²³⁰ SOMO, 'Configuring labour rights - Labour Conditions in the Production of Computer Parts in the Philippines', (July 2009) p. 9-10 and p.26.

²³¹ OECD Engman, M., et al. 2007, (n181) Box 3.

²³² ILO 2007, (n167) p. 128.

²³³ International Labour Conference (100th Session), 'Report I(B): Equality at work: The continuing challenge', Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (Geneva 2011) par. 95.

²³⁴ *Idem*, par. 99.

²³⁵ ILO 2008a, (n67) p. 37.

²³⁶ Oxfam, 'Trading Away Our Rights – Women Working in Global Supply Chains', 2004, p. 5.

security and health services in EPZs, which particularly affect women employed in these zones.²³⁷

Gender-based violence appears to persist throughout EPZs in various forms. A general survey within textile, clothing and footwear sectors within EPZs found that while, sexual harassment seems to be decreasing, it still persists and that particularly young women are affected.²³⁸ The extent to which situations of violence exist is difficult to assess, but certain reports in EPZs in developing countries show instances of this forms of violence against women.²³⁹

In Sri Lanka, for example, research has shown that sexual harassment at the workplace in EPZs is very common, though often it is excused as female workers are perceived to provoke such behaviour against them.²⁴⁰ In a research within two Sri Lankan EPZs 38 percent of the female workers stated to have been victimized themselves or to have witnessed abuse committed against a colleague. These women also stated that they would forego reporting such issues, due to fear of losing their jobs.²⁴¹ In EPZs in Dhaka, Bangladesh, a survey has shown that verbal abuse was very common. Instances of physical abuse were not much reported, but it still appeared to occur within factories. Female workers also stated to be bothered by advances from their male colleagues.²⁴²

Other forms of violence also persist in EPZs, such as physical and psychological violence. Within footwear and clothing sectors in Indonesian EPZs, 57 respectively 59 percent of the workers have witnessed abuse by supervisors, which included giving arbitrary fines, and physical violence as well as humiliation and punishment such as cleaning of toilets.²⁴³

²³⁷ CEDAW, 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Viet Nam' (2 February 2007) UN Doc CEDAW/C/VNM/CO/6 par. 23.

²³⁸ ILO 2000, (n61) p. 74.

²³⁹ ILO 1998, (n175) p.33.

²⁴⁰ Hancock, P. 'Power, Women's Empowerment and the Gender Empowerment Measure: Voices from Sri Lankan Factory Women Working in Export Processing Zones' (2005) 6(1) *Labour and Management in Development Journal*, p. 10.

²⁴¹ *Idem*, p. 9.

²⁴² Zohir, S.C., 2001, (n196) p. 55.

²⁴³ Pearson R., and Seyfang, G., 2002, (n71) p 47.

Some experiences of violence do not directly relate to the workplace, but occur where female workers have to commute between the work place and their residence. For example, in a survey in two Sri Lankan EPZs, it was found that female workers were subject to public harassment²⁴⁴ and workers avoid unwanted attention by walking in groups to and from work.²⁴⁵ Similar situations are observed in Bangladesh, particularly, where female workers of EPZs have been physically or sexually intimidated on their way to work or their homes.²⁴⁶

Safety and health conditions at workplaces in EPZs concerns both men and women. In general, the recent trend, as noticed by the ILO, is that these conditions in EPZs are overall improving.²⁴⁷ However, many sectors in EPZs, such as female concentrated sectors in textile and apparel, have periodic peaks of orders and strict deadlines, which together with bad management policies could lead to deteriorating conditions.²⁴⁸ Notorious conditions within the EPZs are for example that women are forced to work in continuous shifts without breaks, whereas being late, taking toilet breaks or talking is sometimes even fined.²⁴⁹ Common found problems include overcrowded workplaces,²⁵⁰ but also exposure to heat and dust as found in electronic sectors in EPZs in the Philippines.²⁵¹ The World Health Organization has discussed the effects of working conditions in EPZs on the health of workers. Accordingly, poor ventilation, accidents, stress at the job and exposure to toxic chemicals create unsafe and unhealthy situations seriously impairing and affecting workers' health.²⁵²

²⁴⁴ Hancock, P. 2005, (n239) p. 10.

²⁴⁵ Samath, F., *Conditions Worsen for Women Workers*, 24 March 2009

<<http://www.ipsnews.net/news.asp?idnews=46242Z>> accessed 28 June 2011. See also: Kannangara, A., 'Need for eradicating sexual harassment at workplaces stressed'

<<http://www.dailynews.lk/2003/09/18/new24.html>>, accessed 28 June 2011.

²⁴⁶ Pearson R., and Seyfang, G., 2002, (n71) p 47.

²⁴⁷ ILO 2008a, (n67) p. 35.

²⁴⁸ Lang, A., 'Trade Agreements, Business and Human Rights: The case of export processing zones', (April 2010) Working paper no. 57 Corporate Social Responsibility Initiative p. 19.

²⁴⁹ Hancock, P. et al. 2009, (n197) p. 4.

²⁵⁰ ILO 2008a, (n67) p. 37.

²⁵¹ Leilanie Lu, J., 'Gender, Information Technology and Health: The Case of Women Workers in Export Zones in the Philippines' (2007) 8(4) *Journal of International Womens Studies* p. 99.

²⁵² Loewenson, R., 'Globalization and occupational health: a perspective from southern Africa' (2001) 79 *Bulletin of the World Health Organization* <<http://bit.ly/nffV7K>> accessed 29 June 2011.

Neck and back pain from repetitive work and lung problems due to exposure to chemicals are common problems in EPZs and were found in Sri Lankan EPZs.²⁵³ In another survey in Sri Lankan EPZs it was found that workers, mostly consisting of female workers, were exposed to ‘occupational health hazards such as dust pollution, continuously standing for long hours and hand injuries’.²⁵⁴ In a research within manufacturing and electronics sectors in EPZs in the Philippines, among female workers, it was found that the most prevalent health issues were of ergonomic nature, the exposure to heat, overtime and work, poor ventilation and exposure to chemicals.²⁵⁵

Clearly, male workers could equally be affected by bad conditions in work. However, according to the WHO work conditions in EPZs, as those mentioned earlier, could affect the health of young women working in these zones as stress can affect reproductive health, which could lead to miscarriages, pregnancy problems and poor fatal health.²⁵⁶

Long working hours and, the often mandatory, overtime, is another common problem in EPZs.²⁵⁷ Among Sri Lankan EPZs it was found that 41 per cent of women and 37 per cent of men in the EPZ stated to work mandatory overtime hours.²⁵⁸ Also a study in electronic sectors in the Philippines EPZs shows that women take up overtime and that this is often mandatory.²⁵⁹ Some work overtime even in fear of losing their job.²⁶⁰ The choice to work overtime is facilitated by the fact that workers earn a poor wage with the normal hours of work. Therefore they are left with no other option than to work more hours.²⁶¹ A related issue to working hours are the conditions for rest and leisure. Very common conditions are work scheduled on holidays, lack of breaks throughout the working days and facing difficulties to obtain sick leave.²⁶²

²⁵³ Middleton, S. and Hancock, P. 2009, (n228) p. 8.

²⁵⁴ ILO 2008a, (n67) p. 47.

²⁵⁵ Leilanie Lu, J., 2007, (n250) p. 333.

²⁵⁶ Loewenson, R. 2001, (n51).

²⁵⁷ ICFTU 2004, (n187) p. 12.

²⁵⁸ ILO 2008a, (n67) p. 47.

²⁵⁹ Leilanie Lu, J., 2007, (n250) p. 99.

²⁶⁰ Women Working Worldwide, Mather, M., ‘Garment Industry Supply Chains’, 2004, p. 9.

²⁶¹ ILO 2008a, (n67) p. 34.

²⁶² Frynas, J.G. 2003, (n203) p. 173.

This issue impacts both men and women in EPZ employment. It is however important to note that the work of the women does not necessarily stop with their formal labour. Many women have responsibilities within family and community to carry out and thus may need more flexibility in working hours.²⁶³

Other issues related to EPZs that require attention, though not necessarily related to human rights or labour rights are the instabilities in jobs that affect women. It Whereas EPZs are increasingly shifting towards higher-skilled sectors, such as information technology and services²⁶⁴ a decrease of female labour in EPZs is noticed.²⁶⁵ Whether such a trend of diversification of labour will continue to take place throughout the world could be questioned²⁶⁶, but it could affect the continued participation of women in labour, taking away the benefits formal jobs in EPZs could bring, especially through wages and empowerment.

Another trend that is noticeable is the increased shift to the outsourcing of work by foreign companies to sub-contractors and often into the informal economy, such as home workers. Where this trend continue to occur, it appears that women tend to be placed at the least valued part of the production process and it also mitigates the extent to which women can benefit from formal employment in EPZs.²⁶⁷ It must be acknowledged, therefore, that training and other employment-related development is needed for women to remain in formal employment sectors.

6 Conclusion

It has appeared that one of the foremost observation of the direct effects of economic globalisation on women is the increased job opportunities for women in certain sectors within the developing world. This increased access to jobs could positively contribute to the economic empowerment of women. It appears that the increased job opportunities

²⁶³ ILO 1998, (n175) p.31.

²⁶⁴ ILO 2009, (n166) par. 206-207.

²⁶⁵ ILO 2008a, (n67) p. 13.

²⁶⁶ Wick, I. 2010, (n60) p. 30.

²⁶⁷ Braunstein, E., 2006 (n186) p. 16.

do not necessarily come with secure and favourable conditions and tend to exacerbate existing gender stereotyping. In this regard it is observed that the process of empowerment of women could be better facilitated where conditions of work are based on non-discrimination and equality.

Such conditions in work could be measured against the currently existing provisions in international instruments. The CEDAW, ICESCR and ILO Conventions and the ILO Declaration as discussed provide important provisions concerning the women-employment relationship. These instruments uphold the right to non-discrimination and equality in relation to the right to work and conditions of work, including benefits, wages and safety and health conditions. In relation to women's economic empowerment the issues concerning wages, occupational segregation and sexual harassments, are important to address.

The examples from EPZs in selected countries exposed issues such as occupational segregation, the gender pay gap, lack of enforcement of labour laws, weak safety and health conditions, that lead to gender inequality and gender-based discrimination, which breach the provisions of the CEDAW, the ICESCR and ILO Conventions as well as the ILO Declaration. While some of the issues constitute clear discrimination against women and violate the equality principle, such as gender-based division in labour and the gender pay gap,²⁶⁸ other issues, such as the non-applicability of labour regulation such on minimum wage and unsafe and unhealthy conditions at the workplace, affect both men and women, although here too women may be disproportionately affected. Therefore it appears the women's rights, human rights and labour rights provided by the UN and the ILO instruments are often sidestepped for the purpose of the domestic economic policies.

It could be argued that states need to have ratified all these documents to invoke their obligations to implement the provisions discussed earlier. The EPZ countries from which examples were derived, thus Sri Lanka, Bangladesh, Indonesia, India, Philippines and Viet Nam, are all state parties to the CEDAW, ICESCR, ICCPR, ILO C100 and ILO C111. Viet Nam is in addition party to ILO C155. The other ILO conventions

²⁶⁸ UN ECOSOC, 'Full employment and decent work: intensification of efforts to eliminate all forms of violence against women' in: Note by the Secretariat (17 December 2007) E/CN.5/2008/8, par.6.

discussed earlier, namely ILO C156, ILO C158, ILO C183, ILO C102 and ILO C155 are not signed by these countries.²⁶⁹ Despite that ratification of these latter instruments are relevant for the protection of the respective fields covered by these non-ratified ILO instruments, the protection provided by the ratified instruments cover to a certain extent the issues within provided for in the non-ratified instruments. These could still serve as guidance for states, where they enact national legislation in the fields covered by these non-ratified ILO conventions. Clearly, to uphold the protection of human rights and labour rights it is significant for states to become bound by international instruments, as this allows procedures to monitor country situations in respect of those instruments.

Overall the disregard of human rights and labour rights as appears from the gender issues arising within EPZ context necessitates exploring the role of states and corporations in addressing these issues. It could be argued that the provided overview of identified gender-related employment issues, which are protected and covered by human rights and labour rights in the discussed international instruments, should inform the gender perspective taken by the business and human rights discourse. Equally important, this gender perspective should also aim to address those gender issues. If prioritisation of such rights is required, issues such as the gender wage gap, the discrimination in access and within work and sexual harassment, are relevant given that addressing these issues could be significant to the economic empowerment of women. However, comprehensiveness requires taking all the highlighted gender issues into account to contribute to the protection of women at work.

CHAPTER 3 - Taking a Gender Approach to Business and Human Rights

This chapter discusses several documents that are significant for the business and human rights framework, in addition to the WEP. The initial sections will provide a short introductory overview of the UN Framework and the Guiding Principles, the

²⁶⁹ See Annex 1 attached.

WEP, OECD Guidelines and the ILO MNE Declaration. These documents will be assessed from a gender perspective. In the final part an attempt is undertaken to apply interpretations of these documents to women working for MNCs operating in EPZs. Possible improvements, which may be required for these documents to contribute to the protection of women's rights and their empowerment, will also, be explored.

1 The United Nations Efforts within the Business and Human Rights Developments

Within the UN various initiatives have been taken to explore the implications of human rights for corporate conduct. The following sections provide a short overview of the UN Framework and the Guiding Principles as developed by the Special Representative of the Secretary-General John Ruggie. Some background information and substantial issues that have arisen during the development of this framework are provided. The section concludes with a discussion of the WEP, which is a different UN initiative.

1.1 The United Nations Framework and the Guiding Principles on Business and Human Rights.

The SRSG John Ruggie was appointed by the UN Secretary-General in 2005²⁷⁰ to identify standards regarding corporate responsibility and accountability in relation to human rights²⁷¹ and clarifying the role of States.²⁷² This mandate resulted in the report on the UN Framework.²⁷³ The initial mandate was renewed in 2008²⁷⁴ and allows the

²⁷⁰ United Nations, The UN 'Protect, Respect and Remedy' Framework for Business and Human Rights, September 2010 <<http://bit.ly/guqdZh>>, accessed 30 May 2011.

²⁷¹ UN Doc. E/CN.4/RES/2005/69, (n5) par. 1.a.

²⁷² *Idem*, par. 1.b.

²⁷³ UN Doc. A/HRC/8/5, (n6). See also: UNGA Human Rights Council 'Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session' (18 June 2008) UN Doc. A/HRC/8/7.

²⁷⁴ UN Doc. A/HRC/8/7, (n272) par. 4.

SRSO to research and provide information on the State duty to protect from human rights abuses by corporations²⁷⁵ and also to elaborate on the corporate responsibility to respect.²⁷⁶ He is furthermore mandated to ‘integrate a gender perspective’ throughout his work.²⁷⁷ The Guiding Principles (GPs) are produced in the final report of the SRSO²⁷⁸ and provide guidance on the implementation of the UN Framework. It is explicitly stated that these principles do not serve as new international obligations.²⁷⁹

The UN Framework is undertaken with the aim to reduce the existing governance gap in relation to the corporate conduct that results from the globalisation processes.²⁸⁰ The Framework aims to assist governments, corporations and other social actors to address human rights issues.²⁸¹

The first principle addressed is the State duty to protect. This principle has its roots in existing interpretation of the main UN human rights instruments and related obligations.²⁸² The duty provides that States have to take all necessary measures and other steps with the aim to prevent human rights harm caused by third parties within their territory or jurisdiction. The duty to protect also provides that States need to prevent and investigate human rights abuses by third parties and also to punish and provide redress where required.²⁸³ Currently it has not been established whether States also have a duty to protect or prevent human rights harm by corporations abroad. Treaty bodies of the main UN human rights conventions seem increasingly to encourage home States to take regulate corporate behaviour where act in another State.²⁸⁴

The SRSO makes various suggestions regarding the policy aspects of the State duty to protect.²⁸⁵ Policy incoherence with regard to human rights exists where States fail to implement human rights obligations and where State departments are not aligned with

²⁷⁵ *Idem*, par. 4.a.

²⁷⁶ *Idem*, par. 4.b.

²⁷⁷ *Idem*, par. 4.d.

²⁷⁸ UN Doc. A/HRC/17/31, (n7).

²⁷⁹ *Idem*, p. 6.

²⁸⁰ UN Doc A/HRC/8/5 (n6) par.11.

²⁸¹ *Idem*, par.17.

²⁸² *Idem*, par. 18.

²⁸³ *Idem*, par. 18.

²⁸⁴ *Idem*, par. 19.

²⁸⁵ *Idem*, par. 29-31.

each other where their individual fields cross the area of human rights.²⁸⁶ This incoherence in policies is found in both home and host State practices. Host states, for example, provide many incentives to foreign companies to attract investment while foregoing their obligations as a State to protect their citizens from human rights abuses by private or other actors.²⁸⁷

The corporate responsibility to respect human rights is a principal responsibility, in addition to adhering to the national law of countries where a company operates.²⁸⁸ The content of this responsibility is guided by the International Bill of Human Rights (UDHR, ICCPR and ICESCR) and by the eight core ILO conventions²⁸⁹ and the ILO Declaration.²⁹⁰ In order to carry out the responsibility to protect companies must take various steps. Due diligence is required whereby companies must inform themselves and address and prevent the human rights effects of their conduct. From a procedural aspect companies need to assess the country context in which they operate and need to assess the human rights impacts of their own operations. Due diligence processes must at least involve the adoption of policies by the company, integration of company-wide policies, tracking the developments and they must conduct impact assessments.²⁹¹

The third pillar is the access to remedies. From the State perspective the regulatory duty need to be complemented with enforcement through putting in place effective judicial mechanisms. States could in addition establish non-judicial mechanisms.²⁹² The corporate responsibility to respect needs to be complemented by non-State mechanisms through which those affected by the corporation's conduct in their enjoyment of human

²⁸⁶ *Idem*, par. 33.

²⁸⁷ *Idem*, par. 34-37.

²⁸⁸ UN Doc. A/HRC/8/5, (n6) par. 54-55.

²⁸⁹ In addition to ILO C100 and ILO C111, these core conventions include: ILO C87 Freedom of Association and Protection of the Right to Organise Convention, (1948); ILO C98 Right to Organise and Collective Bargaining Convention (1949); ILO C29 Forced Labour Convention, (1930); ILO C105 Abolition of Forced Labour Convention (1957); ILO C138 Minimum Age Convention (1973); ILO C182 Worst Forms of Child Labour Convention (1999) <http://bit.ly/pmhsme> accessed 5 July 2011.

²⁹⁰ UN Doc. A/HRC/8/5 (n6) par.58.

²⁹¹ *Idem*, para. 56-64.

²⁹² *Idem*, para.82-84.

rights can seek remediation.²⁹³ This final pillar will not be discussed in the following parts.

According to the GPs States should, as part of the States obligation to protect, consider adopting laws which require companies to respect human rights. These laws could cover the areas of non-discrimination, labour and environment law. States should also provide guidance to corporations as to how they can respect human rights in practice. Such guidance must reflect issues of gender and situations women face.²⁹⁴ Policy coherence has two aspects. ‘Vertical policy coherence’ requires states to have policies and regulations in place to effectively implement their human rights obligations, whereas ‘horizontal policy coherence’ requires states to facilitate their agents and departments to act in accordance with the states’ human rights obligations in their respective fields of operation.²⁹⁵

While acknowledging the benefits of attracting investments, the SRSG notes that investment contracts can affect the policy space of states. Therefore States must ensure that they remain in the position to adequately protect human rights within their jurisdictions and that contractual obligations do not impair the need to address human rights issues.²⁹⁶

According to the GPs the corporate responsibility to respect requires corporations to avoid actions that have as a consequence that states find themselves in a situation where they are unable to adequately address human rights situations.²⁹⁷ The GPs indicate that corporations might be required to give particular attention to specific groups of individuals, including women, whose human rights are affected by corporations’ conduct.²⁹⁸ While the responsibility to respect applies to all sorts of enterprises,

²⁹³ *Idem*, par.82 and 86.

²⁹⁴ UN Doc. A/HRC/17/31, (n7) Annex par.3.

²⁹⁵ *Idem*, Annex par.8.

²⁹⁶ *Idem*, Annex par. 9.

²⁹⁷ *Idem*, Annex par. 11.

²⁹⁸ *Idem*, Annex par. 12.

independent of their size, organisational structure or sector, the methods required to meet the responsibility does vary from one enterprise to the other.²⁹⁹

To meet the responsibility to respect the GPs recommend that corporations adopt a policy statement regarding their human rights adherence.³⁰⁰ Corporations are also guided to put in place policies that allow them to be informed the about human rights impacts of their business conduct and that allows external actors to see their adherence to human rights.³⁰¹ Conducting due diligence in relation to the possible adverse human rights impacts from corporate operations is highly significant for all corporations. Corporations need to identify individuals that are at particular risk of being affected, identify the human rights that are of particular relevance in the given situation, and assess the way through which these identified individuals can be affected by the corporate conduct.³⁰² It is stated that special attention needs to be devoted to groups that could be subject to higher risks of being affected. In this respect the difference through which women and men are affected must be taken into account.³⁰³ Another guiding principle for the business responsibility to respect is that this principle applies independent of the country contexts where the corporations operate.³⁰⁴

1.2 Women's Empowerment Principles

The WEP³⁰⁵ was established in 2010 by UNIFEM and the UN Global Compact. The principles draw inspiration from the Calvert Women's Principles, which was the first voluntary code of conduct with an exclusive focus on women's empowerment.³⁰⁶ The

²⁹⁹ Idem, Annex par. 14.

³⁰⁰ Idem, Annex par. 16.

³⁰¹ Idem, Annex par. 21.

³⁰² Idem, Annex par. 17.

³⁰³ Idem, Annex par. 18.

³⁰⁴ Idem, Annex par. 23.

³⁰⁵ Women's Empowerment Principles (2010) <<http://bit.ly/h1GNUt>> accessed 3 June 2011. (WEP 2010)

³⁰⁶ <<http://www.calvert.com/womensPrinciples.html>> accessed 3 June 2011.

main aim is to guide businesses to adapt and develop policies to contribute to the realisation of the empowerment of women.³⁰⁷

WEP 1 focuses on gender equality as supported by top-level positions in companies. WEP 2 focuses on equality issues within work conditions. These include recruitment processes, equal pay for work of equal value and flexibility within work.³⁰⁸ WEP 3 refers to safety and health conditions. It provides that companies need to take into account the different impacts certain conditions of work can have on men and women and protect them from dangerous work and risks to reproductive health.³⁰⁹ An important sub-principle is that companies need to put in place a zero-tolerance policy for sexual harassment.³¹⁰ Also companies are advised to identify security issues, especially where women travel to and from work, and address these issues after consultation with the workers.³¹¹ WEP 4 focuses on education and training and development. Companies need to provide opportunities for women to advance within their work and promote women into non-traditional work.³¹² Also companies need to ensure equality in access to trainings and related programmes of development.³¹³ WEP 5 requires companies to promote empowerment practices in the supply chain.³¹⁴ WEP 6 principle focuses on the community activities companies can take, while WEP 7 is focused on public reporting.

The WEP do not require corporations to subscribe. Therefore the extent to which the WEP is disseminated is difficult to assess, but at the time of adoption 40 companies have signed a statement supporting the document.³¹⁵ Given that the WEP are linked to UNGC through the elaboration of the gender dimension relevant for the Compact,³¹⁶ it could be considered that the WEP informs companies linked to the UNGC.

³⁰⁷ UN Global Compact and UNIFEM, 'Women's Empowerment Principles', Booklet/Guidance material p. 4 'Introduction' <http://bit.ly/dyMUtx> accessed 3 June 2011. (WEP Booklet)

³⁰⁸ WEP 2010, (n304) Principle 2.a-c.

³⁰⁹ Idem, Principle 3.a.

³¹⁰ Idem, Principle 3.b.

³¹¹ Idem, Principle 3.e.

³¹² Idem, Principle 4.a.

³¹³ Idem, Principle 4.b.

³¹⁴ Idem, Principle 5.a.

³¹⁵ Bexell, M., 'Global Governance, Legitimacy and Gender. UN-Business Partnerships For Women's Rights', SGIR conference (September 2010) < <http://bit.ly/pRPeIX> > accessed 13 May 2011.

³¹⁶ See: <<http://bit.ly/aMHZhd>>, accessed 4 July 2011.

The WEP is a useful tool for corporations as it goes beyond the mere reference to non-discrimination, and is thus elaborate as to the gender issues arising within employment contexts. Such issues include ensuring safety and health conditions and well-being of women. Some issues do not necessarily fall within the protection of human rights, but are relevant for the employment context, such as security of women during the travel between home and work. The value of the WEP lies in the fact that it is the only international document putting the gender perspective at the core of the business and human rights discussion.

The principles in the WEP are of a general nature, but they cover the core indicative areas of concern in relation to female workers. Therefore it could be linked to the UN Framework as well, especially in relation to the second pillar,³¹⁷ as it clearly points out the main issues that arise within the employment context from a gender perspective, while maintaining and preserving the broad and general nature of the current business and human rights documents. Although the WEP contains human rights elements, such as equal pay for equal value, other elements, indicate more practical aspects to ensure gender equality at work, such as adoption and integration of policies.³¹⁸ It is this linking of existing rights and practical approaches that makes the WEP a highly useful document to better inform corporate conduct in the context of the corporate responsibility to respect.

2 - The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises

The OECD MNE Guidelines were developed as part of the OECD Declaration on International Investment and Multinational Enterprises in 1976.³¹⁹ They form a set of recommendations directed towards MNEs by government members of the OECD and

³¹⁷ Dovey, K, 'Putting Gender on the Business and Human Rights Agenda' Scoping Paper, Realizing Rights: The Ethical Globalization Initiative (June 2009) p.14.

³¹⁸ WEP 2010, n323 Principle 3.

³¹⁹ OECD, 'The OECD Guidelines for Multinational Enterprises' Policy Brief, (June 2001) p.1.

several other states³²⁰ and were updated in May 2011.³²¹ The states accepting the OECD Guidelines have made a binding commitment to implement them.³²²

The OECD Guidelines indicate that corporations need to obey the national law of the countries where they operate. This is their primary obligation.³²³ Enterprises need to respect international human rights of persons that are affected by their business operations.³²⁴ Companies should not seek any exemptions from human rights and health, safety and labour standards.³²⁵

The Human Rights Chapter of the OECD Guidelines is inspired by the UN Framework.³²⁶ Accordingly states have the primary duty to protect human rights and enterprises should respect human rights and address infringements of human rights. Corporations also need to prevent adverse impacts on human rights, in which they are involved directly or where this occurs through their business relationships.³²⁷ The expectation that corporations need to respect human rights is considered a globally recognized standard of conduct. Corporations can have an effect on a great variety of human rights and need to recognize and respect rights of specific groups in society, including women.³²⁸

The Employment and Industrial Relations chapter provides relevant principles on labour rights. Companies should carry out business operations taking into regard the principles of equality and non-discrimination within the context of the applicable law and

³²⁰ These countries include Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. See: < <http://bit.ly/fbw6S1> > and < <http://bit.ly/ojWEvq> > accessed 10 July 2011.

³²¹ OECD Ministerial Meeting, 'OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context', OECD Guidelines for Multinational Enterprises – Text and Commentary, 25 May 2011. (OECD MNE Guidelines Text and Commentary 2011)

³²² Idem, Preface par. 1.

³²³ Idem, I Concepts and Principles par. 2.

³²⁴ Idem, II General Policies par. 1-2.

³²⁵ Idem, par. 5.

³²⁶ Idem, IV Human Rights.

³²⁷ Idem, Human Rights, par. 3.

³²⁸ Idem, pp. 29-31.

regulations and international law.³²⁹ This chapter is inspired by the provisions of the ILO Declaration³³⁰ and the ILO MNE Declaration.³³¹

The non-discrimination principle applies to ‘such terms and conditions as hiring, job assignment, discharge, pay and benefits, promotion, transfer or relocation, termination, training and retirement’. Corporations are expected to provide equal opportunities at work for both men and women. Grounds such as pregnancy or marital status should not lead to discrimination within employment.³³²

With regard to health and safety within employment, companies need to adhere to prevailing requirements. Companies are encouraged to raise the level of safety and health in employment throughout their operations.³³³ In respect to providing training, corporations are encouraged to employ adequate numbers of local workers. They are also encouraged to invest in trainings and equal access to those opportunities for women and other groups.³³⁴

The OECD Guidelines clearly emphasise that compliance with the internal laws of a state should not pose an impediment to respecting international human rights law.³³⁵ An important guideline regarding the latter is that corporations should not seek exemptions from applicable labour, health and safety and human rights standards when operating in host state jurisdictions.

The OECD Guidelines are applicable in EPZs as they apply throughout the operations of the MNCs.³³⁶ Also the OECD Declaration on International Investment and Multinational Enterprises emphasizes the important role played MNCs in investments.³³⁷ While the human rights chapter of the OECD Guidelines refers to

³²⁹ *Idem*, V Employment and Industrial Relations, Chapeau and par. 1.e.

³³⁰ See Chapter 2.

³³¹ See next section.

³³² OECD MNE Guidelines Text and Commentary 2011, (n320) V Employment and Industrial Relations p.37.

³³³ *Idem*, p. 38.

³³⁴ *Idem*, pp. 38-39.

³³⁵ *Idem*, IV Human Rights p. 30.

³³⁶ A Clapham, *Human Rights Obligations of Non-State Actors* (OUP, Oxford 2006) p. 203.

³³⁷ OECD MNE Guidelines Text and Commentary 2011, (n320) ‘Declaration on International Investment and Multinational Enterprises’.

women as a group to be taken into account by corporations, a more gendered perspective has been taken in the part concerning labour standards. This includes reference to the applicability of the non-discrimination principle to specific issues. More importantly, the OECD Guidelines explicitly state that reproductive related issues should form a basis for non-discrimination. Thus MNCs operating in EPZs within developing countries should take account of discrimination of women in employment as well as discrimination in working conditions and employment opportunities that appear to disproportionately affect female labourers.

Given that the document is inspired by the work of the UN and the ILO for its human rights and employment chapters it does not appear to go much beyond the issues discussed in these documents. It must be noted, however, that given the influential membership of the OECD and the implementation and promotion process that has been provided, through the establishment of National Contact Points in each member state,³³⁸ it retains a significance stance within the business and human rights framework.

3 – Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The ILO MNE Declaration was adopted in 1977 and most recently amended in 2006.³³⁹ The principles are recommendations to governments, employers' and employees' organizations which they can voluntarily accept to observe. The aim of the ILO MNE Declaration is to encourage corporations to positively contribute to economic and social development.³⁴⁰

The General Policies provides that the parties to the ILO MNE Declaration should respect the sovereign rights of States as well their national laws and they should respect international instruments, including the UDHR, the ICCPR and the ICESCR and the

³³⁸ OECD MNE Guidelines Text and Commentary 2011, (n320) I Concepts and Principles par. 11.

³³⁹ ILO MNE Declaration 2006, (n9) p.1.

³⁴⁰ Idem, par. 7.

ILO Constitution. The parties are required to contribute to the realisation of the ILO Declaration.³⁴¹ MNEs are required to adapt their policies to the country context and not come into conflict with the development and social goals set within the country.³⁴² Home states are expected to promote social policies taking into account the ILO Declaration and labour and social laws and regulations within the host country.³⁴³

The ILO MNE Declaration provides that particularly developing countries need to develop policies to promote employment.³⁴⁴ In this regard MNCs are required to promote employment opportunities and conditions, especially where they operate in developing countries.³⁴⁵ Both governments and MNCs are required to implement the principles of equality in opportunity and in employment within their policies and practices.³⁴⁶

With regard to employment security, governments and MNEs are required to take measures to deal with the impact MNEs have on employment levels.³⁴⁷ MNEs are particularly required to promote employment security in countries where discontinuation of their operations may have negative effects on employment.³⁴⁸

In relation to training, the ILO MNE Declaration provides that government should establish policies facilitating vocational and other training. These policies serve as a framework within which MNEs can put in place policies to provide training.³⁴⁹ MNEs need to ensure that training is provided to all their workers in the host country, where necessary, to serve both the companies' goals as well as development goals. Where MNEs operate in developing countries they are required to participate in various

³⁴¹ *Idem*, par.9.

³⁴² *Idem*, par. 10.

³⁴³ *Idem*, par. 12.

³⁴⁴ *Idem*, par. 13-14.

³⁴⁵ *Idem*, par. 16.

³⁴⁶ *Idem*, par. 21.

³⁴⁷ *Idem*, par. 24.

³⁴⁸ *Idem*, par. 25.

³⁴⁹ *Idem*, par. 29.

programmes to develop skills and contribute to development policies of the government.³⁵⁰

The section on conditions of work and life is divided in various parts. The first section deals with wages, benefits and work conditions. It is provided that wages and work conditions as offered by the MNEs ‘should not be less favourable... than those offered by comparable employers in the country concerned’.³⁵¹ Where such employers do not exist MNEs should provide the best conditions possible within the policy framework as established by the government. Such conditions should be adequate to provide for basic needs of workers.³⁵² With regard to safety and health, the ILO MNE Declaration states that governments should ensure that both MNEs and national companies adhere to safety and health regulations. MNEs are required to uphold the highest standards in safety and health conditions that adhere to the national requirements.³⁵³

An important element of the ILO MNE Declaration is its focus on employment security. It requires MNEs to take into account the effects that their operations, or a shift in their operations might have on employment levels, particularly in developing countries. This is highly relevant for EPZs as the locations and the sectors are easily interchangeable. MNEs need to avoid negatively affecting development and social goals that are put in place in the country of operation. The principle on employment promotion could be highly relevant for female workers in developing countries as EPZs labour sectors often do not provide them with such employment-related development opportunities. Importantly the conditions applied in EPZs should not be of lesser nature as to the conditions outside the EPZ in the same sectors. As MNEs are expected to have in place the highest conditions of health and safety within the context of national laws and regulations, it seems of particular importance that MNEs in EPZs do not seek to receive exemptions from applicable national standards on safety and health in work environments.

³⁵⁰ Idem, par. 30-31.

³⁵¹ Idem, par. 33.

³⁵² Idem, par. 34.

³⁵³ Idem, par 37-38.

The ILO MNE Declaration lays down recommendations that governments should enact policies ensuring the equality of treatment and opportunity in employment. MNEs should adopt policies within such a framework provided by governments and thus also be guided by the principle of equality.³⁵⁴ The value of the ILO MNE Declaration in relation to EPZs lies in the wide range of labour-specific issues it discusses, such as training, employment security and work conditions, which are sometimes not elaborated in other documents. Also it directs MNEs to adopt policies and also refers to developing countries and their role in terms of policy-adoption. Although the ILO MNE Declaration as such does not reflect a gender perspective, it is by applying the equality and non-discrimination principle that a certain gender approach is taken. It provides, therefore, a useful labour rights addition to the work of the UN in the field of business and human rights.

4 The Business and Human Rights Legal Framework from a Gender Perspective

What follows, is an analysis of the first and the second pillars of the UN Framework, namely the state duty to protect and the corporate responsibility to respect, given its usefulness for the discussion of the situation of female workers in EPZs from a gender perspective. Several questions will guide this section:

- a. To what extent does the current framework take into account the gender aspects related to business and human rights?
- b. Do these considerations, more specifically, suffice to contribute to realisation of women's rights and therewith the empowerment of women, taking into account the discussion of female workers in EPZs of Chapter 2?
- c. If not, what would need to be enhanced?

³⁵⁴ ILO MNE Declaration 2006, (n9) Employment par. 21-22.

4.1 The UN Framework and Guiding Principles from a Gender Perspective

The most noticeable effort to incorporate gender issues in the UN Framework, for example, is that the SRSG was given the explicit mandate to incorporate a gender perspective throughout his work. This is an important step towards full comprehension of gender within the business and human rights framework. According to the view of the SRSG his mandate only allows for the elaboration of broad and general principles for the implementation of the UN Framework and thus is not aimed at addressing individual rights.³⁵⁵ Notwithstanding this, the mandate's requirement to incorporate a gender perspective throughout his work does allow to give attention to specific gender issues arising within the business and human rights context.

It appears that a general approach has been taken to incorporate a gender perspective in the SRSG's work as the 'General Policies' clearly state that the GPs need to be implemented in a non-discriminatory manner by giving particular attention to rights of women and men, the risks they face as well as the marginalization that certain individuals groups face in society.³⁵⁶ The result is that states and corporations need to take into account the particular situation of women and their rights throughout the implementation process of the GPs.

4.1.1 The State Duty to Protect

The SRSG has dealt quite extensively with the state duty to protect, which has various dimensions.³⁵⁷ This duty is part of the typology of obligations as often used by, for

³⁵⁵ Expert Workshop on Integrating a Gender Perspective, 'Integration a gender perspective into the UN 'Protect, Respect and Remedy' Framework' (New York 29 June 2009), 'A. Introduction' <<http://bit.ly/pE92Yy>> accessed 3 June 2011.

³⁵⁶ UN Doc. A/HRC/17/31, (n7) Annex 'General Principles'.

³⁵⁷ UNGA HRC 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises – Addendum: State responsibilities to

example, special procedures and the treaty bodies of the UN to interpret human rights obligations of states parties that arise from the international human rights instruments.³⁵⁸ The duty requires states to prevent third actors from violating human rights and to investigate and punish those actors where violations occur.³⁵⁹

One of the methods to fulfil the duty to protect is through the adoption and enforcement of legislation and other measures. Taking legislative actions belong to the minimum obligations of states to protect human rights abuses by third actors. The link between corporate operations and the adoption of legislation is particularly established, by the treaty bodies, in the areas of non-discrimination and safe conditions of work.³⁶⁰ In general the UN treaty bodies do not provide any specific suggestions for the content of such legislation, except on certain specific occasions.³⁶¹ The CESCR has stated that adopting legislation might be ‘indispensable’, for example on discrimination.³⁶² The CESCR also interprets the state duty to protect as requiring from states to prevent interference in the enjoyment of the right to work by third actors.³⁶³

The first Guiding Principle (GP 1) refers to the fundamental nature of the state duty to protect.³⁶⁴ Adopting appropriate legislation by host states is an important first step to protect individuals’ rights from third actor abuses, in this case corporations. It appears that GP 1 does not make an attempt to provide guidance on the content of such

regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries’ (13 February 2007) A/HRC/4/35/Add.1.

³⁵⁸ UN OHCHR, ‘State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations’ Core Human Rights Treaties. Report no. 4: ‘Individual Report on the United Nations Convention on the Elimination of All Forms of Discrimination against Women’, Prepared for the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (September 2007) par.9. (CEDAW Report no. 4, September 2007)

³⁵⁹ UN OHCHR, ‘State Responsibilities to Regulate and Adjudicate Corporate Activities under the United Nations’ Core Human Rights Treaties. Report no. 2: Individual Report on the International Covenant on Economic, Social and Cultural Rights’ Prepared for the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (May 2007) par. 8. (CESCR Report no. 2, May 2007)

³⁶⁰ UN Doc A/HRC/4/35/Add.1, (n356) par. 44.

³⁶¹ *Idem*, par. 42-43.

³⁶² CESCR, ‘General Comment 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)’ 14 December 1990, (n117) par. 3.

³⁶³ CESCR Report no. 2, May 2007, (n358)par. 30.

³⁶⁴ UN Doc A/HRC/17/31, (n7) Annex par.1. Although the Guiding Principles have not yet been numbered, it is chosen to describe the general principles first and then provide the number according to the paragraphs in which they are discussed in the Annex of the Report of the SRSG.

legislation in relation to corporate conduct, despite the fact that such guidance would have been welcome. Although the General principles provide that the GPs should be implemented with due regard to the rights and risks women and men may face, general reference to non-discrimination and the rights of women would have contributed more to the 'gender perspective' of GP 1 (article 2 CEDAW, article 2.2 t.w. article 3 ICESCR, article 2.d ILO Declaration, article 1 ILO C111). While it is recognized that the adoption of laws as such is not the main problem, as it is for the enforcement of these laws³⁶⁵, reference to rights of specific groups of individuals in this GP 1 would be particularly valuable as it is a foundational principle. Especially, restating the importance of fundamental human rights and labour rights would reinforce the link between these rights and the obligation to take legislative and other measures under the duty to protect.

UN treaty bodies also provide guidance for the implementation of this state duty. The CESCR requires states to take efforts to eliminate discrimination at work, especially wage discrimination, discrimination of women in the workplace, sexual harassment and discrimination based on the ground of sex.³⁶⁶ States are required to address the gender pay gap,³⁶⁷ ensure equal opportunities for men and women, through increasing women's participation in labour³⁶⁸ and to criminalise sexual harassment.³⁶⁹ Also various recommendations have been given on working conditions. The CESCR has directed to adopt legislation regarding minimum wages³⁷⁰ and strict laws on safety and health in work environments.³⁷¹ The CEDAW has made recommendations that States should undertake more effort to provide equal pay for women and to combat gender-based segregation in work. States should also play an important role in ensuring safe and

³⁶⁵ Lang, A. 2010, (n247) p.20.

³⁶⁶ CESCR Report no. 2, May 2007, (n358) par.98.

³⁶⁷ *Idem*, par.99.

³⁶⁸ *Idem*, par.101.

³⁶⁹ *Idem*, par.103.

³⁷⁰ *Idem*, par.107.

³⁷¹ *Idem*, par.110.

healthy conditions at work for women.³⁷² The CEDAW Committee has specifically pointed to the importance of providing protection in EPZs.³⁷³

Host states of EPZs should take into consideration the particular situation of female and male workers and ensure protection of human rights and labour rights according to the risks these workers face. Especially where EPZs have sectors where female employment levels are significant, it seems justified that states put in place policies and legislation for the protection of these workers taking into account the specific gender issues of human rights and labour rights in employment that affect women disproportionately (article 2 chapeau t.w. article 2.b CEDAW). For state parties to CEDAW, article 2.e CEDAW is of particular relevance given the requirement to eliminate discrimination by any enterprise through legislation and policies.³⁷⁴ Although several state parties have made reservations to article 2 CEDAW, the CEDAW Committee considers that such reservations go against the object and purpose of the CEDAW³⁷⁵ (article 18 Vienna Convention on the Law of Treaties 1969).³⁷⁶ For other states the ILO Declaration is of importance as principle 2.d states non-discrimination to be a fundamental principle to which states need to adhere whether they are parties of the relevant ILO conventions or not. Additional efforts should be taken to prevent MNCs operating in EPZs infringing upon the right to work (article 7 ICESCR and article 11 CEDAW).

Given that many EPZs provide first-entry employment for women, state measures should aim to cover the needs of this particular group of workers with a view to empower them. In addition to enacting legislation concerning labour rights and human rights, including prohibiting sexual harassment (article 2 chapeau t.w. article 2.e CEDAW, ILO C111), discrimination in employment and wages (article 2.e-f t.w. article 11 CEDAW, article 2.2 t.w. article 7.a ICESCR), gender discrimination (article 2 CEDAW, article 2.2 t.w. art. 3 ICESCR) and unsafe and unhealthy working conditions (art. 7.b. ICESCR t.w. article 11.f CEDAW, article 8 ILO C155), states must ensure

³⁷² CEDAW Report no. 4, September 2007, (n357) par.108-109.

³⁷³ *Idem*, par.111.

³⁷⁴ *Idem*, par.53.

³⁷⁵ See: <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>, consulted on 19 June 2011.

³⁷⁶ VCLT 1969 (entered into force 27 January 1980) 1155 UNTS 331

<http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> accessed 11 July 2011.

harmonised regulations are applied inside and outside EPZs.³⁷⁷ The CESCR considers that detracting existing laws, for example on unlawful dismissals, are retrogressive measures that violate the ICESCR.³⁷⁸ Thus for example where States repeal laws on minimum wages or withdraw the application of these to EPZs, this should be considered as a retrogressive measure in violation of the ICESCR. Host states of EPZs need to adopt legislation and other measures to address gender-based inequality and gender-based discrimination, which would be an important step to contribute to the economic empowerment of women.³⁷⁹

Although maternity protection and reproductive health related instruments (e.g. ILO C183) are not widely implemented in many countries, including those discussed in Chapter 2, these countries could consider endeavouring to cover such issues in terms of policies and other measures and be guided by international provisions such as article 11.2.b CEDAW and article 10 ICESCR. States should take all possible measures in the economic and social field with the aim to advance women (article 3 CEDAW). Although the EPZs particularly attract young, unmarried women, the provision of maternity protection could allow more women to benefit from employment, provided that other conditions of work adhere to human rights and labour rights standards. In case host states are in need of assistance and guidance in relation to enacting and enforcing labour laws and human rights, they should seek this at the international level.³⁸⁰

The SRSG elaborates upon the fact that states should enforce laws which require corporations to respect human rights and guide corporations on how to adhere to this responsibility.³⁸¹ According to the SRSG this lack of legal cohesion requires states to consider what steps need to be taken in order to effectively enforce laws and regulations in, among others, the area of non-discrimination. Despite the reference to the latter principle, it would have served the gender perspective in a positive way if reference to

³⁷⁷ Lang, A. 2010, (n247) p. 25.

³⁷⁸ CESCR Report no. 2, May 2007, (n358) par. 48.

³⁷⁹ UN ECOSOC 'Full employment and decent work: intensification of efforts to eliminate all forms of violence against women' in Note by the Secretariat (17 December 2007) E/CN.5/2008/8 par.6 and 11.

³⁸⁰ ILO, 'Report of the InFocus Initiative on export processing zones (EPZs): Latest trends and policy developments in EPZs' (Geneva March 2008) GB.301/ESP/5 par. 49.

³⁸¹ UN Doc A/HRC/17/31, (n7) Annex par. 3.a and 3c.

prohibitive grounds of non-discrimination were more explicitly stated in relation to this principle on the enforcement of laws.

Possible emphasis could have been placed in the GPs on the enforcement of laws for the protection of women derived not only from the CEDAW and the ICESCR, but also fundamental rights arising from the ILO Declaration and supporting ILO Conventions. For example, the CEDAW Committee has pointed out that states have in place legislation to guarantee equal pay for work of equal value, but that implementation is lagging behind. Therefore the CEDAW Committee explains that enforcing this legislation is required to ‘overcome the gender-segregation in the labour market’.³⁸² This latter issue is prevalent in many EPZs, as women are mainly employed in low-skilled sectors. Clearly, enforcement of laws is also relevant for other areas where women face discrimination. It would make a contribution to the protection of women’s rights in the economic and social field, where states with MNCs operating in EPZs, enforce applicable legislation and therewith forego the arguments that withhold them to do so, namely international competitiveness and cheap labour as their comparative advantage.

Enforcement of applicable and existing laws in EPZs is an issue of great significance. The weak enforcement of laws and monitoring is considered to be one of the causes of the human rights and labour rights abuses in many of the EPZs.³⁸³ Host states with EPZs in the developing world consider labour issues separately from considerations regarding trade as well as foreign investment.³⁸⁴ The cause of this lack of enforcement derives from the lack of adequate resources to address human rights and labour rights issues. Another reason is the perception of many governments that enforcing lower standards of labour will be an attractive condition for foreign companies to establish in EPZs for competitive reasons.³⁸⁵

The state duty to protect under international human rights law requires host states to establish effective means to protect those affected by the business operations within

³⁸² CEDAW Report no. 4, September 2007, (n357) par.55.

³⁸³ Lang, A., 2010, (n247) p. 20.

³⁸⁴ *Idem*, p. 20

³⁸⁵ *Idem*, p. 21.

EPZs. For example, the CESCR has provided that states have to enact legislation to protect the right to the highest attainable health (article 11 ICESCR) from manufacturing industries.³⁸⁶ Given that EPZs attract foreign companies based on the provision of special incentives, which could lead to businesses operating in a way not in accordance with human rights, it is highly significant that particular human rights protection is assured³⁸⁷ and not sidestepped in negotiations with the MNCs concerning their operation in EPZs.

It is furthermore acknowledged that states should as part of their duty to protect provide guidance to corporations on how to meet their responsibility to respect. The SRSG provides that states should advise on gender issues and effective ways to deal with them by corporations in their operations.³⁸⁸ Therefore, where states have undertaken, or are about to undertake initiatives to guide corporate behaviour in relation to human rights, such guidance must reflect methods to deal specifically with gender issues that are relevant for corporations in their operations. Although it is not clarified how such guidance should take place, the guidance to corporations should refer on methods to deal with relevant gender issues.³⁸⁹ This indicates that where States establish policies for corporate behaviour gender issues should take an important part of the focus of these policies. The provision of guidance can be general and be provided by both the home state and the host state. Guidance could be understood to be advice thus it is not legally binding.

In relation to EPZs and host states, the latter could indicate what areas of human rights and labour rights of persons working in the designed zone should be given particular attention by MNCs. Where the zones have sectors with a high level of female workers in the workforce, best practices and methods derived from these contexts should be reflected in such guidance. This guidance needs to be in line with the existing international instruments discussed earlier. To take into account relevant gender issues the country context is also of relevance and as such should be incorporated in advice

³⁸⁶ CESCR Report no. 2, May 2007, (n358) par. 33.

³⁸⁷ *Idem*, p. 9.

³⁸⁸ UN Doc A/HRC/17/31, (n7) Annex par. 3.c.

³⁸⁹ *Idem*, par. 3.c.

provided to foreign firms operating in EPZs. Adjusting policies and actions to the specific country context is relevant as employment of women and its effects on their empowerment differs from country situation to other.³⁹⁰ Clearly, as guidance seems to be a preventive measure, it should be provided at the early stages of establishing relationships with the MNCs. Guidance could, for example, be provided through incorporation of references to be taken into account in policies relating to corporate activities or through elaborating a framework with guidelines.

The SRSG also refers briefly to possible extraterritorial regulation by home states for corporations operating outside these states. Accordingly, the SRSG has found, in the Guiding Principle on extraterritorial regulation, that states are not obliged to regulate the corporations' extraterritorial operations, but nor are they prohibited from enacting such legislation. There appear to be 'strong policy reasons' to clearly lay out what is expected from corporations when they operate abroad.³⁹¹ The SRSG has pointed out that a variety of approaches can be followed to elaborate the expectations, as set by home states, for their corporations abroad. These could include national policies and measures, soft law instruments from international organizations and national extraterritorial legislation.³⁹² Although the discussion on extraterritorial prescriptive jurisdiction is not yet settled in international law, it is an important aspect of the future development of the business and human rights discussion.

One of the main aspects to fulfil the state duty to protect is through the adoption of appropriate and effective policies. While policies should reflect human rights obligations of states, the SRSG could have elaborated in detail the minimum references for such policies. Thus policies could reflect, for the purpose of a 'gender perspective', the protection of certain human rights of specific groups at risk, especially women. On a general level, ensuring policy coherence allows human rights to be reflected at all stages of policy making relating to foreign companies and other economic and trade considerations. Especially the lack of horizontal policy coherence leads to economic and

³⁹⁰ UNRISD Razavi, S and Vivian, J., 'Introduction' in Miller, C. and Vivian, J.M. *Women's employment in the textile manufacturing sectors of Bangladesh and Morocco* (Geneva 2002) pp.15-16.

³⁹¹ UN Doc A/HRC/17/31, (n7) Annex par.2.

³⁹² Idem, Annex par.2.

trade issues being dealt with separately from development and social issues.³⁹³ As EPZs are formed on the basis of government policy considerations,³⁹⁴ a relevant link between the UN Framework and the EPZs can be established here.

The ILO elaborates an approach for states through which they, or regulators, could guide firms to comply with existing legislation. This so-called ‘pedagogical approach’ combines regulation with a sanction mechanism, but with a particular emphasis on increasing the abilities and willingness of companies to comply with applicable human rights and labour standards. Such an approach requires the demonstration of a problem-solving method as well as showing best practices by regulators. A pedagogical approach could result in improvements of working conditions, especially if these policies are combined with additional regulatory incentives.³⁹⁵

Also in EPZs this pedagogical approach could bring improvements in working conditions. An example has been provided with regard to excessive overtime, which as discussed in Chapter 2, is a common situation within many EPZs. The reduction of overtime requires various changes, including higher salaries for workers and the decrease of pressure on companies through adjustments in the productions processes. Specific interventions, undertaken by the ILO, in the production process have led to a reduction of overtime in factories in Sri Lanka and Viet Nam. Such interventions have included identifying the causes of production delays, simplification of the work process as well as training.³⁹⁶ This approach could prove to be valuable in identifying gender issues in EPZs and addressing them accordingly. For example, policies could be aimed at specific aspects of work conditions such as unhealthy and unsafe which affect women disproportionately (reproductive health).

The Guiding Principle on investment contracts and their implications for international human rights obligations of these States is highly relevant for host states. Where MNCs seek investment in developing countries’ EPZs, these states need to ensure they do reflect the human rights and other relevant areas that such investments may affect.

³⁹³ Lang, A., 2010, (n247) p. 24

³⁹⁴ *Idem*, p. 9.

³⁹⁵ ILO 2008a, (n67) p.55-57.

³⁹⁶ *Idem*, p.55-57.

While recognising that specific issues regarding gender could not be incorporated in this GP, general reflection of the importance of these contracts to take into account the affect on specific human rights based on the type of operation or sector could have been stated. This would also contribute to the gender perspective, despite the lack of specific indications on gender matters.

Where states engage in business relations with companies they should promote respect for human rights by these entities. According to the CESCR, states need to take into account the obligations from the ICESCR where they enter into contractual relationships with MNCs. This is part of the duty to respect human rights.³⁹⁷ It is less clear from the work of the CEDAW Committee whether it considers that State parties should take into account the impact agreements with MNCs could have on women's rights.³⁹⁸ Nevertheless, it seems difficult to justify sidestepping specific human rights and labouring rights concerns when states enter into negotiations with economic actors.

This GP on investment contracts could be interpreted as requiring host countries of EPZs, when they enter into a contractual relationship with MNCs, to respect human rights in such contracts. Investment contracts should reflect a proper balance between business aims on the one hand and the need for human rights protection on the other hand. Host states need to actively ensure that human rights, social, economic and labour conditions are not undermined by the operations of MNCs in these zones and these issues should be taken into account in the early stages of development of policies relating to EPZs. Since MNCs operating within these zones bring certain economic expectations, the host states need to ensure that economic conditions provide that they have a social connotation in order to be socially valuable.³⁹⁹

States should particularly reflect the situation of certain groups of workers in EPZs, such as women, who might be subject to heightened risk of human rights and labour rights abuses. These considerations could thus lead to incorporating human rights and labour rights standards, which are relevant for a part of the work force into EPZs, in

³⁹⁷ CESCR, 'General Comment 18: The right to work (art.6)', (n117) par. 33.

³⁹⁸ CEDAW Report no. 4, September 2007, (n357) par.149.

³⁹⁹ Lang, A. 2010, (n247) p. 25-26.

contracts. Host states should take all steps to ensure that protection is provided for female and male workers on the basis of equality and non-discrimination. Foregoing the reflection of consideration of particular gender issues in contracts where there is a high percentage of female workers in EPZs seems difficult to justify.

Policy coherence could be guaranteed where states integrate human rights into the economic considerations related to EPZs and MNCs. Thus rather than separate policies on economic and social aspects, it is suggested to take into account the social issues within the decision-making processes concerning the operation of MNCs in EPZs. Such implementation of human rights concerns in economic considerations could take place by making the promotion of human rights the aim of economic-policy considerations.

⁴⁰⁰ The CESCR considers that policies on certain rights, thus including the rights to work, should involve corporations. Such policies need to be targeted at certain corporate sectors that require particular attention.⁴⁰¹ The CEDAW Committee also underlines the importance of policy development involving various stakeholders, among them corporations. It has emphasised the importance of reflecting the impact on women's rights when designing and establishing economic policies by governments.⁴⁰²

It is of great importance to understand that economic policies can also have gender dimensions and, once put in place, could affect women. For example, where economic policies aim at growth and expansion of international trade, in specific sectors, such as textile and manufacturing, this could lead to increase of job opportunities for women.⁴⁰³

Consequently this requires specific attention to their situation as workers. Another example is the adoption of policies that target the elimination of gender-segregation at work. For individual MNCs, the host state governments could consider not only the social aims their operations in EPZs could serve in general, but also specifically for men and women working in EPZs. Where for example, governments aim to empower women through employment policies, they must ensure that the way operations are carried out serve the goal of empowerment of women, taking into account the concept

⁴⁰⁰ *Idem*, p.26.

⁴⁰¹ CESCR Report no. 2, May 2007, (n358) par.55.

⁴⁰² CEDAW Report no. 4, September 2007, (n357) par.70-71.

⁴⁰³ UNCTAD 'Globalization, development and poverty reduction: their social and gender dimensions' (Accra 14 February 2008) TD/422, Box 3.

of empowerment as viewed within the society. The realisation of women's rights can be a part of the process for empowerment. Therefore women's rights promotion could be part of the goals set for such MNC operating in EPZs. States could include specific expectations regarding human rights improvements the MNCs could bring into the design process of these EPZs. Such aspirations should take into account the contributions to the near and long-term future, but also the particular groups of workers.

One of the methods to realise such integration of human rights could be achieved by conditioning the operation of MNCs in EPZs. This would serve as a protection mechanism against the incentives provided to MNCs in EPZs. Thus where MNCs want special incentives, they need to adhere to the human rights conditions and serve certain social goals. Such compliance could well lead to adherence to human rights and labour rights standards within EPZs. This is of particular relevance for GP 9, where host states enter into contracts with MNCs. Where the latter do not meet up to the set conditions this could lead to withdrawal of provided incentives.⁴⁰⁴

This approach of imposing 'human rights conditionality'⁴⁰⁵ is not much used as countries compete for the attraction of foreign companies through the provision of appealing incentives. Nevertheless the use of this approach of conditions-based provision of incentives is suggested by the ILO as a method which could contribute to the improvement of working conditions in EPZs. Governments could provide incentives to MNCs where they establish facilities for their workers, such as child-care facilities or provide educative programs or similar training.⁴⁰⁶ Such an approach is also supported by the CESCR.⁴⁰⁷

The extent to which these types of policies fall within the scope of the state duty to protect is questionable. It appears to be far-reaching for states at the lower ends of development to condition the attraction of MNCs based on incentives. Despite this, states remain the primary actors responsible for protecting their citizens against human

⁴⁰⁴ CESCR Report no. 2, May 2007, (n358) par.81. See also: UN Doc A/HRC/17/31, (n7) Annex par.9.

⁴⁰⁵ Lang, A. 2010, (n247) p. 27.

⁴⁰⁶ ILO, 'Employment and social policy in respect of export processing zones (EPZs)', (Geneva 2003) GB.286/ESP/3, par. 24.

⁴⁰⁷ CESCR Report no. 2, May 2007, (n358) par. 73.

rights abuses by third entities. As such putting policies in place requiring third actors, like MNCs, to adhere to a set of human rights or to serve the social and development goals of the country through their operations (and to the extent this is possible), seems justifiable.⁴⁰⁸ If governments allow MNCs to operate in EPZs and facilitates these corporations, it is not more than expectation requires that governments serve their citizens as well by addressing the social consequences of their economic priorities. Where the government allows a MNC to operate within a certain framework, such a framework would be incomplete if the workers' needs would be neglected. Provision of economic incentives is as such not opposable, clearly, but where the government foresees that such incentives could have negative effects, at least a basic supporting mechanism should be established to mitigate possible negative consequences. An implication of this would be to discontinue the provision of those incentives, where corporations abuse human rights and labour rights.⁴⁰⁹ In this regard it could be suggested to develop a framework agreement among states that host EPZs with the aim to lay down standards to prevent possible deteriorating labour and human rights issues within EPZs. Such an agreement could counter the 'competition' argument, where states argue to be in a disadvantaged position where they uphold higher standards. This agreement could establish the respect for the international bill of human rights and the ILO Declaration and related conventions as a minimum requirement where states take trade policy decisions.⁴¹⁰

Monitoring and promotional measures are additional methods through which the state duty to protect could be fulfilled.⁴¹¹ The SRSR has found that many of the UN treaty bodies require that states put in place independent monitoring mechanisms for third actors, including MNCs. In this regard the CESCR has pointed out that such mechanisms could be required in situations of employment. The CESCR requires State parties to establish labour inspection mechanisms to monitor compliance with working

⁴⁰⁸ Lang, A. 2010, (n247) p.27.

⁴⁰⁹ *Idem*, p. 28.

⁴¹⁰ Nam, C.Y.J., 2006, (n49) p.170. This specific idea is from Bhala, R., 'Clarifying the Trade-Labour link' (1998) 37 Columbia Journal of Transnational Law, p.39.

⁴¹¹ UN Doc A/HRC/4/35/Add.1, (n356) paras. 39-41 and paras. 68-71.

conditions.⁴¹² These mechanisms need adequate resources and facilities.⁴¹³ Establishment of monitoring mechanisms could be relevant for the above discussed policies concerning conditions for MNCs. The CEDAW Committee interprets that State parties need to ensure that national monitoring mechanisms also focus on the situation of women, both in public and private sphere.⁴¹⁴ Promotional measures have the aim to guide corporations to consider and take account of human rights in their conduct. Awareness-raising campaigns and programs fall within such a group of measures. Governments could have an educating role in this regard.⁴¹⁵

4.1.2 Corporate Responsibility to Respect

Moving forward to the corporate responsibility to respect it appears that some GPs indicate that corporations' policies and conduct need to take into account the specific situation of women. Although the responsibility is not framed as a duty, the firmness of the responsibility is nevertheless elaborated in such a way that it is difficult for corporations to derogate from it. The SRSR clearly expresses the point that corporations 'should' respect human rights.⁴¹⁶

The GP referring to the content of the corporate responsibility to respect acknowledges that in certain circumstances additional standards need to be taken into account, such as those applying to women.⁴¹⁷ The reference to women in this regard is welcome, but it could have been elaborated in more detail by referring to the CEDAW⁴¹⁸ or perhaps less controversially, referring to drawing inspiration from existing documents on women's

⁴¹² CESCR Report no. 2, May 2007, (n358) par. 58.

⁴¹³ *Idem*, par. 40.

⁴¹⁴ CEDAW Report no. 4, September 2007, (n357) par.73.

⁴¹⁵ *Idem*, par. 68-69.

⁴¹⁶ UN Doc A/HRC/17/31, (n7) Annex par. 11.

⁴¹⁷ *Idem*, Annex par.12.

⁴¹⁸ Dovey, K, Grosser, K., Kemp, D. And Meyersfeld, B., 'Comments on the draft 'Guiding Principles for the implementation of the 'Protect, Respect and Remedy' Framework: Integrating a gender perspective', January 2011, p. 4 < <http://bit.ly/nYmbVH>> accessed 26 May 2011.

rights or by underlining the significance of taking into account the gender-related issues in the context of employment and corporate conduct.

This would mean that corporations should respect women's rights where they operate within EPZs in developing countries, especially where female labour participation is significant for their operations and thus justifies special attention. On the same level, corporations would need to take into consideration specific gender issues related to employment. Non-discrimination in employment opportunities (article 3 t.w. article 6 ICESCR), in work conditions, such as wages (article 11 CEDAW, article 7 ICESCR and article 1 ILO C111) should be adhered to. Considering the provision of maternity benefits (for example article 46 ILO C102 and article 4 (1) ILO C183), while being less common among developing countries, is particularly justified where female workers are a significant part of the workforce. Although these provisions do not provide obligations for corporations, they could well guide the corporate responsibility to respect. Other issues that corporations need to take into account are the safety and health conditions in the work environment, that could be guided by article 11 CEDAW and article 2.2 t.w. article 7 (b) ICESCR and more generally ILO C183.

The ILO MNE Declaration recommends corporations to comply with national standards on safety and health. In addition it provides useful guidance where MNCs can promote employment, address job insecurities and ensure work conditions in accordance with national law.

The WEP also provides clear guidance for business conduct in this matter as it refers to providing a living wage, having in place a zero tolerance on violence against women in the workplace, taking into account the different effects of work conditions on the safety and health of female and male workers and the promotion of women in non-traditional jobs. Examples of company initiatives have been provided, such as recognising the achievements of women through training and education, targeted policies and programmes concerning safety and health issues for women and designing programmes that fit to the needs of female workers.⁴¹⁹ Also treaty bodies, like the CESCR, expect

⁴¹⁹ WEP Booklet, (n306) 'Principles at Practice: Company Examples' p.4-5.

corporations to respect specific rights, such as the right to work.⁴²⁰ As stated earlier actions taken by the MNCs themselves, could contribute to the process of empowerment of women through employment.

Guiding Principle under paragraph 11 (GP 11) states that the responsibility to respect also requires corporations not to infringe on states' capability to meet their human rights obligations.⁴²¹ GP 11 seems to be applicable to situations of female workers in EPZs as the responsibility to respect applies throughout the operations of corporations wherever they may be. It seems therefore that whenever a MNC operates within an EPZ, it first, needs to avoid undermining the human rights obligations of the host states in the negotiations leading to the conclusion of, or terms of, the contract with host states, and secondly, to respect and take due regard of individuals at particular risk, which for example in the case of the garment, textile and electronic sectors within the EPZs are mostly female workers. The ILO MNE Declaration adds an important dimension, by specifically referring to the fact that corporations should avoid conflict with social and development goals of the host country.⁴²²

In order to guide businesses on meeting their responsibility to respect the SRSO clarifies certain methods MNCs could put in place. One of these methods is to adopt a policy commitment which must reflect its human rights expectations from business partners and others involved in its operations. Corporations need to ensure policy coherence in their business relationships.⁴²³

It is important for corporations that their policy statements are committed to gender-equality. It appears that where MNCs operate in EPZs their policy statements should be applied to these zones, as these zones would be part of their 'wider business activities and relationships'.⁴²⁴ In the case of female workers in EPZs, such policy commitments should take due regard of the particular issues that could arise in employment of these workers. Inspiration could be drawn from the WEP, whereas it guides corporations to

⁴²⁰ CESCR Report no. 2, May 2007, (n358) par.84.

⁴²¹ UN Doc A/HRC/17/31, (n7) Annex par. 11.

⁴²² ILO MNE Declaration 2006, (n9) par. 10.

⁴²³ UN Doc A/HRC/17/31, (n7) Annex par. 16.

⁴²⁴ *Idem*, par. 16.

enact policies that are ‘free from gender-based discrimination’, to enact a zero-tolerance policy concerning sexual harassment at the workplace and to enact policies that are ‘gender-sensitive’.⁴²⁵

Another method of adhering to the responsibility to respect is by conducting human rights due diligence.⁴²⁶ As this is a significant part of this responsibility, a gender perspective should be incorporated throughout all the steps of due diligence. This is currently lacking in the GPs. Gender aspects should, for example, be reflected in development of policies and when the corporation reports on its performances.⁴²⁷ As such, due diligence is important where MNCs are about to operate in EPZs as this method requires an assessment of the risks their activities might bring for human rights in such zones. To act with due diligence corporations could put in place several mechanisms. These include making assessments whereby corporations consult with stakeholders or experts, especially where their operations could bring particular risks for women. Such assessments should depart from an international human rights perspective.⁴²⁸ This latter requirement could bring that corporations need to take into account the non-discrimination principle as stated in article 3 ICESCR, article 1 ILO C111 and article 2 CEDAW.

The SRSG mentions that where needed rights of specific groups of individuals as well as the potential risks of women and men should be taken into account. Therefore assessments should take a gender perspective in order identify the specific risks for men and women.⁴²⁹ As such the policy commitments must be integrated along with the findings of the impact assessments throughout business operations.⁴³⁰ Other elements of the human rights due diligence processes are establishing tracking performances and reporting.⁴³¹ These elements should include gender-disaggregated data in order to effectively become aware of and deal with specific affects of business operations on

⁴²⁵ WEP Booklet, (n306) WEP 1-3.

⁴²⁶ *Idem*, par. 16-21.

⁴²⁷ Dovey, K 2009, (n316) p. 14.

⁴²⁸ UN Doc A/HRC/17/31, (n7) Annex par. 18.

⁴²⁹ Dovey, K 2009, (n316)p. 14.

⁴³⁰ UN Doc A/HRC/17/31, (n7) Annex par. 19.

⁴³¹ *Idem*, par. 20-21.

female workers.⁴³² The Guiding Principle under paragraph 17 of the Annex could be an important supplement to the human rights impact assessment as states could undertake such assessments where they allow MNCs to operate in EPZs. Both approaches could then be implemented in the early stages of designing the operation or establishment of EPZs.⁴³³

Companies should bring an end to human rights violations over which they have a certain influence or where they have influence over actors violating human rights. However, the SRSG continues to state that where the relationship is crucial for the corporation business relations could continue whilst corporations make efforts to mitigate the consequences of human rights abuses.⁴³⁴ This allows for an interpretation that where MNCs have influence over actors *operating in or managing EPZs* they should make every effort to the mitigation of human rights violations. Even where EPZs are controlled by private entities, as this increasingly appears to be the case,⁴³⁵ MNCs operating in EPZs should endeavour to meet their responsibility by using their leverage over such actors. In this regard the special situation of female workers would, depending on the prevailing situation, require specific action. In situations where such leverage is lacking, corporations should consider to end their business relationships, as the SRSG has pointed out.⁴³⁶

A general principle applicable to corporations is to adhere to their responsibility despite the context in which they operate and to respect international human rights even where this might lead to conflicting conditions.⁴³⁷ Therefore even in economic zones based on incentives provided by host countries, MNCs need to respect human rights. Where at an early stage of the relationship between the MNC and the host state human rights consideration are implemented in the EPZs establishment process and both their efforts are combined, this could benefit the workers in EPZs. Especially, where the gender dimensions of the human rights and labour rights are taken into count this could serve

⁴³² Dovey, K. et. al. 2011, (n417) p. 4.

⁴³³ Lang, A. 2010, (n247) p. 26.

⁴³⁴ UN Doc A/HRC/17/31, (n7) Annex par. 19.

⁴³⁵ Lang, A. 2010, (n247) p. 3.

⁴³⁶ UN Doc A/HRC/17/31, (n7) Annex par. 19.

⁴³⁷ Idem, par. 23.

the empowerment through the realisation of rights of female workers in sectors controlled by MNCs in EPZs.

5 Concluding Remarks

This chapter has aimed to capture current developments in the field of business and human rights and has looked at various documents in the current framework from a gender perspective. Particular attention has been devoted to the recently adopted Guiding Principles of the SRSG Ruggie and the first and second pillars of the UN Framework.

The OECD Guidelines, the MNE Declaration and the WEP, all highlight relevant aspects of the gender. Though the former document is inspired by the work of the UN and the ILO, the adoption of the document by its member states and the establishment of NCPs form a significant part of the OECD's contribution to the current business and human rights discussion. The ILO MNE Declaration provides important additions which are generally not reflected in human rights documents. Therefore, more coherence is encouraged between existing business and human rights soft law instruments by taking into account the specific issues that the ILO highlights.

The UN Framework and the Guiding Principles provide a broad overview of the state duty to protect and the corporate responsibility to respect. While the GPs take a general approach to incorporate a gender perspective, it could be argued that more effort could have been undertaken to reflect –gender- as a matter of importance within this UN initiative. Several GPs could have elaborated more in general or in detail reference that would contribute to a better incorporation of a gender perspective. While taking into account the broad nature of the GPs, the fact that a general approach is taken to incorporate a gender perspective throughout this work, should be welcomed. Nevertheless, much more needs to be done in order to contribute in a holistic and

elaborative way, as to ensure that the corporate responsibility to respect and the state duty to protect can address gender issues arising within employment contexts.

The WEP is a highly significant effort to incorporate a gender perspective in the development of business and human rights. Its guidance to corporations could contribute to those corporations taking a gender approach when adhering to their responsibility to respect. More importantly, more effort could be done to link the content of the WEP as an integral part of the corporate responsibility to protect, as far the WEP concerns human rights and labour rights.

CONCLUDING VIEWS AND SOME PROSPECTS

This dissertation has attempted to provide the case for the incorporation of a gender perspective within the developing business and human rights framework. This business and human rights discussion can be traced back as to the early 1960s and 1970s. Ever since, various attempts have been taken to explore possible means to regulate and guide corporate behaviour in relation to their human rights impact. The rise of the business and human rights discussion must be seen in a wider context of the globalisation processes, especially the economic globalisation. The economic globalisation and the actors driving this process bring various challenges. One the hand it is perceived that globalisation could result in an increased standard of living, but on the other hand it is argued that globalisation weakens the role of state. Despite the stance one takes on the effects of globalisation, it is clear that the consequences of those effects much depend on the response taken by states and other actors on the international and national level.

This is the case for MNCs, whose increasing role in terms of wealth and the influence outside their home states has provoked responses from states and civil society. The impact of corporations through their operations varies from sector to sector and country to country. Increasingly cases have appeared which expose the extent to which corporations can affect human rights in countries. What is clear is that MNCs could

affect a broad variety of human rights (civil, political, economic, social and cultural) and labour rights. Although there are noticeable cases within national jurisdiction of countries against MNCs, international law appears to be lagging behind the current developments and does not provide a binding legal document to regulate corporate conduct or to hold MNCs accountable. There is currently a governance gap within the field of business and human rights.

One of the interesting aspects to explore within the relationship between economic globalisation and MNCs is the position of developing countries and that of women in particular. Many countries in the developing world aim to increase and boost their economies. One of the measures taken by these states is to open up for investments by foreign companies. While such investments could bring many benefits, such as transfer of knowledge and technologies and jobs, countries seem to be unwilling or unable to promote and enforce human rights and labour rights regulations and policies where investments appear to have detrimental effects on these rights. A noticeable example is the EPZs, which are established to attract foreign investment by mainly foreign companies. The attraction of these companies goes hand in hand with the provision of incentives by host state governments. These incentives could lead to disregard of labour rights and workers rights in these zones. The lack of enforcement of laws in EPZs is another common problem.

A close look at the operations of MNCs in EPZs in developing countries reveals that those operations as such do not necessarily result in grave violations of human rights and labour rights. Nevertheless, the incentives and exemptions provided to MNCs and weak enforcement of laws within EPZs continue to contribute to the significant undermining of worker's rights in the EPZs. It therefore remains that the overall picture arising from EPZs, especially in the developing world, is concerning as to the human rights and labour rights conditions.

EPZs provide a good example to explore the situation of female workers given the high concentration of female workers in sectors operated in EPZs by MNCs. By exploring situations in EPZs in particularly South and Southeast Asia a greater understanding of

the specific gender issues arising in employment context that give rise to discrimination of women and the inequality female workers face compared to men has been developed. These issues include the existence of gender discrimination in terms of occupational segregation and hiring and firing practices, gender pay gap, wages that are not sufficient to qualify as a living wage, lack of provision of minimum wages, especially due to weak enforcement, unsafe and unhealthy working conditions, lack of maternity benefits and gender-based violence in the form of sexual harassment. This specific context provides means of assessing the extent to which the present business and human rights developments takes into account a gender approach, that may subsequently could contribute to address discrimination and inequalities faced by workers, especially women.

The importance of focusing on the improvement of the situation of women in employment lies in the fact that employment may bring about economic empowerment for women. This requires that employment contexts meet conditions that are conducive to lead to their economic empowerment. Opportunities into first entry level jobs as such do not contribute to the empowerment process of women. Rather it the positive aspects of employment may be mitigated where women face stereotypical and discriminatory attitudes. Women are often concentrated in low-skilled jobs at the lowest end of waged employment. These practices are more likely to contribute to women's labour exploitation rather than their empowerment. Thus women need to be able to access decent and productive work that takes their particular situation into account. The conditions that such work need to adhere to in order to contribute to the economic empowerment should meet the protection provided by international instruments concerning human rights at work and labour rights.

Clearly the examples of working conditions and gender-based discrimination and inequality derived from EPZs throughout countries from South and Southeast Asia lead to the conclusion that the human rights provided in the International Bill of Human Rights as well as the CEDAW are undermined. Labour rights as guaranteed by the core ILO Conventions and those on gender equality and the ILO Declaration are also sidestepped. The protection provided under the CEDAW and ICESCR are extensive and

in some cases treaty bodies have elaborated on the responsibilities of States and third actors in the private sector. Both non-discrimination and equality in relation to access to work and working conditions are guaranteed by both instruments.

The CEDAW in article 11 covers a wide range of issues that are necessary for women in an employment context, from the right to work as an inalienable right to the protection of safety and health conditions at work with special attention to the reproduction function. Maternity and marriage are mentioned as non-discriminatory grounds to effectively protect the right to work. Article 2.e CEDAW is of significance for corporations, as States can regulate corporate conduct with the inclusion of guarantees for women exercising their right to work. It allows for a gender perspective in such regulation. Article 6 together with article 7 ICESCR provide additional guarantees as it refers to remuneration which will provide a decent living for workers and their families and to rest and leisure time as well as reasonable working hours. These additional references can clearly apply to women and men to similar extents.

Taking into account the non-discrimination principle (article 2.2 ICESCR) and the principle of equality for women compared to men (article 3 ICESCR) it could be concluded that this instrument also allows for a gender approach to rights at work through legislation and other measures (article 2.1 ICESCR). The ILO C111 and C100 on non-discrimination in employment and equal remuneration, which are essentially the basis for the fourth principle of the ILO Declaration, are also of significance when discussing gender discrimination and inequalities at work. ILO conventions extend beyond these principles through other conventions such as those dealing on maternity protection and safety and health conditions of these latter instruments have not been signed and ratified by many states, but they do provide insightful and useful guidance for States for policies concerning the areas concerned.

Overall existing international instruments afford a wide coverage of and protection for gender aspects arising within an employment context, taking into account the situation of women in terms of the discrimination and inequality they face. This allows for an assessment of the extent to which the current business and human rights legal

framework is taking a gender perspective into account. This framework, consisting of the UN Framework and Guiding Principles, the OECD Guidelines and the ILO MNE Declaration, each have their own approach to the role of States and companies in relation to human rights and labour rights. The WEP is also touched upon given that it indicates how corporations can bring a gender approach to their conduct.

The ILO MNE Declaration provides an elaborate overview of issues arising within employment contexts. The areas it covers, such as employment security and training, are highly relevant for workers in EPZs. A gender perspective is taken by referring to the non-discrimination and equality principles in relation to working conditions. A positive aspect of both this document as well as the OECD MNE Guidelines is that they refers to the role of corporations in relation to human rights and labour rights, and thus they are not merely state-oriented. Nevertheless, the documents' gender perspective lies in the reflection of the requirement to apply the principle of non-discrimination and the principle of equality in relation to its guidelines and recommendations.

The UN Framework, which elaborates the state duty to protect and the corporate responsibility to respect, has provided an analysis of what states and corporations can initiate to prevent and address human rights abuses by the latter. Corporations are required to take into account the International Bill of Human Rights, the core ILO conventions and the ILO Declaration when they carry out their responsibility to respect. While a general approach taken to incorporating a gender perspective for the implementation of the GPs is to be welcomed, more explicit references to gender aspects in the GPs could have been highlighted or emphasised, which consequently could have provided a valuable contribution to a 'gender perspective' of the SRSG's work.

The state duty to protect, which is dealt with extensively by the SRSG Ruggie, requires states to enact legislation and other measures and to address human rights abuses by companies through investigation, punishments and remedies. Given that this duty has also been elaborated by the UN treaty bodies, specific reference to the human rights of women within business contexts, would have contributed to the gender perspective.

A relevant aspect in the GPs is the reference to the significance of enforcement of laws by states. In this regard the non-discrimination principle needs to be taken into account, and, including the grounds for this principle could have provided better guidance in relation to gender. Similarly where states are required to provide guidance for corporate conduct the SRSG indicates that gender issues are among the concepts which should be included in such guidance. Such indications are however not reflected upon where the SRSG refers to the adoption of policies by states. Inclusion of minimum requirements for these policies, such as a gender approach or the rights of specific groups at risk, would contribute more to a gender perspective. An important GP concerns the investment contracts that states enter into. The SRSG points out that states need to ensure that they retain their policy space. It would have served the gender perspective better if there had been reference to the fact that for example it was referred to the fact that states need to take into account the type of sector and operation of these contracts and their effects on human rights.

In relation to the corporate responsibility to respect the SRSG has also taken a gender approach with respect to certain principles. Corporations should not infringe on the human rights obligations of states and need to take these into account when they enter into relationships with states. Also corporations need to put in place a policy statement which respects human rights. Human rights due diligence is another method referred to through which corporations can adhere to their responsibility to respect human rights. It would make a significant contribution whereas the guiding principles would have required corporations to include a gender perspective throughout all the steps that need to be taken to conduct due diligence. It is important policy statements include and adhere to gender equality.

In this respect the WEP may serve as a useful guidance. However, it needs to clearly distinguish the human rights aspects from other issues touched upon in the WEP Principles. Given the gender-focus of the document, it could serve as a benchmark for corporations' conduct, policy statements and the steps needed to ensure human rights due diligence.

The documents discussed above take into account certain aspects of gender, namely non-discrimination and the principle of equality at work. The UN Framework and Guiding Principles clearly go further by referring in the general policies to women as a specific group to be taken into account. It appears that the current discourse of business and human rights does not comprehensively incorporate a gender perspective in order to effectively contribute to the respect and the protection of human rights and the labour rights, in particular, of women in the employment context, despite general references to the prohibition and the elimination of gender-based discrimination and gender-based inequality. It needs, as outlined above, to go further. Therefore various suggestions can be provided for the incorporation of a gender perspective throughout the current business and human rights discourse, especially the work of the SRSG Ruggie:

- The UN Treaty bodies could through their work indicate how states could reflect the rights contained in the UN instruments which they supervise, where they undertake to guide and regulate corporations in the field of human rights. Highlighting particular aspects of employment-related rights that need to be taken into account by private entities could also prove to be highly significant.
- While gender-based discrimination and women's inequality compared to men are the most apparent issues coming forth within employment contexts, it is necessary for the business and human rights discourse to take in account not only these gender aspects, but to go beyond them. Certain issues arising within work could affect women disproportionately, while not necessarily constituting discrimination and inequality. It is important to identify these issues, such as unhealthy work conditions affecting women's reproductive health or the lack of enforcement of minimum wages that could negatively affect the gender pay gap, as to address them through the business and human rights discussion.
- Emphasis on both human rights and labour rights is important. Distinguishing these set of rights within the business and human rights framework does not seem justified. Although it is acknowledged that corporations can affect a wide variety of human rights, corporate conduct could just as well affect labour rights.

Moreover, labour rights could also guide corporate conduct moving beyond the provision of rights to individuals.

- The WEP could provide useful guidance for corporations to execute their responsibility to respect. Through its human rights and practical approach the WEP could inform with useful indications for adhering to the corporate responsibility.
- Enforcement of laws needs to receive continuous attention. International assistance, for example through the ILO, could contribute to addressing human rights and labour rights issues arising in certain employment contexts.
- Economic policies need to reflect social aspects. More specifically, incorporation of a gender approach in these policies could contribute to addressing issues women face in employment due to discrimination and inequality. This should form a part of the state duty to protect through policies.
- With regard to the specific situation of EPZs, a fresh look could be taken into how an framework agreement among states hosting EPZs could contribute to addressing human rights and labour rights issues of workers in these zones, with special focus on female workers.
- The human rights conditionality approach, which links the human rights with incentives provided to corporations, could also contribute to the protection of gender issues arising within employment.

The incorporation of a gender perspective into policies and legislation as part of the business and human rights framework is clearly not easy or straightforward. The general nature of the current framework also does not allow for a more detailed incorporation of gender aspects. Also caution is needed whereas singling out women as a special group that requires specific protection could lead to undermining the recognition of their capabilities in the economic field as women's work could be perceived as an additional burden in terms of costs. The promotion of a gender perspective through the development of business and human rights could be valuable and could contribute to addressing discriminatory working conditions towards women, but with the overall aim to contribute to their economic empowerment. For this to take place it is necessary to

identify what issues arise within the employment context and to see how they affect men and especially women. It is by this means that a gender approach may be able to contribute comprehensively to the gender perspective through the business and human rights discourse and thereby eventually contribute to the economic empowerment of women.

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ANNEX 1

	CEDA W ⁴³⁹	ICESC R ⁴⁴⁰	ICCPR ⁴⁴¹	ILO C100 ⁴⁴²	ILO C111 ⁴⁴³	ILO C156 ⁴⁴⁴	ILO C158 ⁴⁴⁵	IL O C1 83 ⁴⁴⁶	ILO C102 ⁴⁴⁷	ILO C155 ⁴⁴⁸
BANGLADESH	6-11-1984*	5-10-1998	6-09-2000	28-01-1998	22-06-1972	X	X	X	X	X
INDIA	9-07-1993	10-04-1979	10-04-1979	25-09-1958	3-06-1960	X	X	X	X	X
INDONESIA	13-09-1984	23-02-2006	23-02-2006	11-08-1958	7-06-1999	X	X	X	X	X
PHILIPPINES	5-08-1981	7-06-1974	23-10-1986	29-12-1953	17-11-1960	X	X	X	X	X
SRI LANKA	5-10-1981	11-06-1980	11-06-1980	1-04-1993	27-11-1998	X	X	X	X	X
VIET NAM	17-02-1982	24-09-1982	24-09-1982	7-10-1997	7-10-1997	X	X	X	X	3-10-1994

* All dates are the dates on which the instruments entered into force.

⁴³⁹ <<http://bit.ly/bLdtfE>> accessed 3 May 2011.

⁴⁴⁰ <<http://bit.ly/64bPHA>> accessed 3 May 2011.

⁴⁴¹ <<http://bit.ly/RNE8e>> accessed 3 May 2011.

⁴⁴² <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C100>> accessed 3 May 2011.

⁴⁴³ <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111>> accessed 3 May 2011.

⁴⁴⁴ <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C156>> accessed 3 May 2011.

⁴⁴⁵ <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C158>> accessed 3 May 2011.

⁴⁴⁶ <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C183>> accessed 3 May 2011.

⁴⁴⁷ <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C102>> accessed 3 May 2011.

⁴⁴⁸ <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C155>> accessed 3 May 2011.