

Putting Women's Rights to Work: The Participation of Women on Company Boards As a Human Rights Law Issue



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Abstract Most of the legal scholarship on the participation of women on company boards focuses on European Union (EU) law and/or national law. In this chapter we take a novel approach by offering a critical reflection on the question to what extent international human rights law mandates the use of positive measures to improve the participation of women on company boards, and what obligations this entails on the state and on companies themselves.

We thereby use the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee's multi-layered conception of equality—consisting of formal, substantive and transformative equality—as framework to assess and critique human rights law.

This chapter shows that the proper implementation of CEDAW indeed requires States Parties adopt measures to tackle the underrepresentation of women in top

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corporate positions, though there is considerable discretion as to the content of these measures. Also under the United Nations Guiding Principles on Business and Human Rights (UNGPs) states should take an active stance towards the private sector on this topic. Responsibilities for companies are based on the UNGPs' corporate responsibility to respect. We argue that promoting the participation of women on company boards falls into the scope of what is currently expected from companies.

1 Introduction

Women filled only 16% of board positions in the world's largest Multinational Enterprises in 2020.¹ In Europe, 34% of all board positions in the largest listed companies were occupied by women and 17% of all leaders at the executive level were women in 2020.² These low numbers are caused by a complex set of factors—including the persistence of gender role stereotypes, horizontal sex segregation in the labor market (segregation according to occupation), vertical segregation (the lack of promotion of women throughout the ranks), the uneven distribution of care tasks among men and women, and other factors.³

In the past two decades, the female presence on company boards has been taken up by a broad array of social organizations and individual campaigners,⁴ who have succeeded in putting the issue prominently on the agenda of national governments, as well as regional and international organizations. The first country to adopt a law introducing gender quotas on company boards was Norway, in 2003. From Norway there was a 'snowball' effect towards other European countries.⁵ The result is that there is currently a variety of both regulatory and enforcement approaches at the national level to remedy the scarcity of women on corporate boards.⁶ These range from no action, to self-regulation by companies, to soft public law with soft targets, to hard public law with binding quotas.⁷ The European Commission put forward a proposal for a directive on 'improving the gender balance among non-executive directors of companies listed on stock exchanges' in 2012,⁸

¹OECD, 'What big data can tell us about women on boards' (2020). <https://www.oecd.org/gender/data/what-big-data-can-tell-us-about-women-on-boards.htm>.

²EWOB (2020). <https://europeanwomenonboards.eu/portfolio/gender-diversity-index-2020/>. See for an overview of measures and corporate boards in Europe: Oppenheimer (2019), pp. 87–97.

³See Raday (2019), pp. 45–60.

⁴E.g. Initiatives such as the 50/50 Women on Boards (2020), <https://www.5050wob.com>; EWOB (2022), <https://www.europeanwomenonboards.eu>.

⁵Machold (2013).

⁶Senden (2014), pp. 51–66.

⁷Senden (2014), pp. 51–66.

⁸European Commission (2012).

which—after negotiations stretching out over 10 years—will enter into force soon.⁹

This chapter aims to provide a critical reflection on the research question to what extent international human rights law mandates the use of positive measures to improve the participation of women on company boards, and what obligations this entails on the state and on companies themselves. We focus on two aspects in particular: first, what conceptions of equality underly human rights law's support of positive measures to create gender balanced company boards, and, second, what obligations human rights law envisages for the state and for corporations in this respect. We thereby use CEDAW's multi-layered conception of equality—consisting of formal, substantive and transformative equality—as framework to assess and critique human rights law.

The chapter employs legal doctrinal research as method, understood as appraising the validity, coherence and applicability of legal arguments.¹⁰ Our main primary sources are the CEDAW Convention and the interpretation of the Convention by the CEDAW Committee. We examined all CEDAW's General Recommendations, as well as all Concluding Observations from 2015 to the present. We systematically searched for the key words 'board', 'enterprise', 'representation', 'management' and 'corporate', to find relevant statements regarding women on boards. This time span provides the most recent results and is sufficiently broad to get a clear view of the Committee's interpretation of the Convention on this topic.

In terms of existing scholarship, we note that the EU's efforts to increase the participation of women on company boards has been analyzed extensively,¹¹ but the position of international human rights law on this topic less so.¹² There is no human right as such to become a company board member (if only!) so perhaps that already explains why there is not much scholarship—nor much activity from human rights bodies on the topic of the underrepresentation of women on company boards, as this chapter will show later. Perhaps many in the human rights community also do not consider the issue grave enough. Unlike, say, violence against women, it does not directly affect a large group of women. What is more, the women who stand to gain directly from positive measures to improve gender balance on company boards, are already privileged.

Critical human rights scholars and activists have identified fundamental contradictions between the notion of universal and indivisible human rights on the one hand, and global competitive capitalism on the other hand, which is characterized by

⁹European Parliament, 'Legislative Train Schedule. Area of Justice and Fundamental Rights. Gender Balance on Boards'. <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards>.

¹⁰Roux (2014), p. 178.

¹¹Elomäki (2018), pp. 53–68; European network of legal experts in gender equality and non-discrimination (2018); Havelková (2019), pp. 187–216; Szydło (2015), pp. 97–115; Senden (2016).

¹²See Tobler (2007); Meyersfeld (2013), p. 208; Raday (2019), pp. 45–60.

the commodification of human life.¹³ At the same time, however, scholars also warn that human rights have been co-opted by neoliberal politicians.¹⁴ Against this background, we agree with Grosser that the economic and political power of corporations ‘means that the ways in which they do or do not address gender equality have become increasingly important with respect to feminist agendas, and increasingly worthy of investigation’.¹⁵

Before proceeding further, two caveats are in order. The first concerns the terminology. Various terms have been used to refer to greater female participation on company boards, including ‘equal participation’, ‘gender balance’, ‘gender diversity’ and ‘parity’.¹⁶ While these terms signal differences in content, in this chapter we use these terms interchangeably, as international human rights law documents also do not consistently prefer one term over the other. We seek to capture all forms of positive measures to promote the participation of women on company boards. The second caveat concerns the gender binary (male/female). As far as the authors are aware, most existing national and international instruments that seek to enhance women’s participation on company boards do not explicitly challenge the gender binary, California being an exception.¹⁷ These instruments are based on an essentialization, namely that there are only two sexes; male and female.¹⁸ This paper will not further explore in depth whether that is problematic in the context of company boards,¹⁹ except to say that transwomen—and minority women more generally—are grossly underrepresented in company boards.²⁰ Whether transwomen can benefit from measures proactively seeking to increase the number of women on company boards could depend on the national legal context regarding gender recognition. Under international human rights law transwomen are included in the category of ‘women’, which means that this should be so according to the international standard.

In what follows, in order to set the scene we first outline various considerations that have been invoked to take action on the low number of women on boards (Sect. 2). Second, we turn to the question to what extent CEDAW entails an obligation for

¹³See Catalan (2021) and Moyn (2018).

¹⁴See Whyte (2019).

¹⁵Grosser (2021), pp. 1626–1627.

¹⁶See also Lépinard and Rubio-Marín (2018b), p. 1; Rubio-Marín (2018), p. 74.

¹⁷An exception is Californian Law AB 979 of 2020, which stipulates that ‘California-headquartered public companies have at least one director on their boards who is from an underrepresented community, defined as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”’ See Bell et al. (2020).

¹⁸See also Rosenblum (2008), p. 2886.

¹⁹Legal instruments that are based on the gender binary tend to exclude people who do not identify as either male or female, and therefore tend to be problematic. On the other hand, it is hard to completely avoid essentialism in the quest for social transformation. See Carbado and Harris (2019).

²⁰See e.g. Haridasani Gupta (2021).

states to ensure women's participation on company boards. As mentioned above, we use the CEDAW Committee's tripartite conception of equality to analyse these obligations. We include the UN Guiding Principles on Business and Human Rights (UNGPS) in our discussion (Sect. 3). Third, we briefly analyze the responsibilities of companies under human rights law to increase the number of women on company boards (Sect. 4), and then we conclude (Sect. 5).

2 Justifying More Participation of Women on Boards: Equality and the Business Case

In order to set the scene for the human rights law analysis, we will first outline the different considerations that have led to taking action on the issue of women's underrepresentation on corporate boards. The use of gender quotas and other measures to increase women's participation in decision-making has a longer history in the realm of politics than in the realm of economic governance.²¹ The movement to include gender quotas or other measures to promote the presence of women on company boards to some extent grew out of efforts to enhance women's participation in political life, but is also distinct from it. Comparative research by Lépinard and Rubio-Marín has shown that 'the adoption of corporate board quotas... rarely spark[s] mobilization from the traditional actors in the women's movement. Nor is the cause often framed as a matter of equality or equal rights. Rather, [company board quotas] have often been encouraged by businesswomen... often in the name of women's specific abilities in governance (i.e. risk averse attitudes) or in the name of diversity (the business case for diversity).'²²

The business case is founded on the belief that gender diversity on company boards ultimately improves profitability and increases shareholder value as it enhances productivity and innovation.²³ Significant research has found a positive link between women on boards and corporate financial performance, although the evidence is not conclusive.²⁴ Put bluntly, 'there is money at stake' for gender diversity in boardrooms.²⁵ This corresponds to a broader perspective on gender equality; that greater gender equality enhances societal economic prosperity and improves (sustainable) development outcomes.²⁶ Argued the other way around, 'misallocating women's skills and talent comes at a large (and rising) economic

²¹ See also Lépinard and Rubio-Marín (2018b), p. 6. For more of the history see Krook (2009).

²² See also Lépinard and Rubio-Marín (2018a), p. 447.

²³ See Gómez Ansón (2012), p. 25; Seierstad et al. (2017), p. 31; Binder et al. (2019), pp. 290–291; Morehead Dworkin and Schipani (2018), p. 105.

²⁴ See for an overview of research that is done e.g. Galbreath (2018), pp. 853–864.

²⁵ Hirsch (2021).

²⁶ See World Bank (2011); UN General Assembly (2015), para. 20.

cost'.²⁷ The business case for women on company boards has therefore frequently had the upper hand, for example in the initial reasoning behind the EU's draft directive on gender balanced company boards.²⁸ The business case is not necessarily formulated in terms of purely financial goals, however. The current EU Gender Equality Strategy 2020–2025, for example, stresses quality of decision-making and innovation: 'Having both women and men represented is crucial for successful leadership. Inclusive and diverse leadership is needed to solve the complex challenges that decision-makers face today. More inclusion and more diversity is essential to bring forward new ideas and innovative approaches that better serve a dynamic and flourishing EU society.'²⁹

Not surprisingly, the business case for gender diversity on corporate boards is also popular in the private sector itself. The topic is sometimes part of companies' voluntarily adopted Corporate Social Responsibility (CSR) policy. These CSR-policies rely strongly on business case arguments.³⁰ Having a CSR-policy in place as enterprise, however, is not equivalent to respecting human rights.³¹ This is also true for gender equality initiatives, including those related to corporate leadership. To begin with, having a policy in place on paper does not guarantee that human rights are protected in practice (otherwise human rights would be reduced to a tick-the-box exercise). The notions of CSR and of business respecting human rights (BHR) overlap to some extent as both strive towards socially beneficial action by business beyond merely profit-maximization and increasing wealth,³² but the fundamental difference is that 'rather than a privatization of human rights, a BHR perspective demands a politicization of corporate responsibility.'³³

Several scholars have argued that building upon the business case argument, without involving a normative rationale, may ultimately undermine equality outcomes.³⁴ An example of a corporate leadership initiative that has been criticized for its sole reliance on the business case argument, is the UN initiative entitled 'Women's Empowerment Principles' (WEPs).³⁵ The WEPs provide guidance to companies, amongst others, on the underrepresentation of women in business leadership roles.³⁶ Subtitled 'Equality means Business', the WEPs

²⁷ World Bank (2011), p. 3.

²⁸ Szydło (2015), pp. 97–115.

²⁹ European Commission (2020), p. 13.

³⁰ Wettstein (2020), p. 23.

³¹ Wettstein (2020), p. 23.

³² Wettstein (2020), p. 33.

³³ Wettstein (2020), p. 39. See for the differences between these two notions also e.g. Ramasastry (2015).

³⁴ See Fisher (2017), p. 393; Ramasastry (2015), p. 237; Roberts (2015), pp. 213–214.

³⁵ UN Women and the UN Global Compact (2017); See e.g. Ramasastry (2015), p. 237; Roberts (2015), pp. 213–214.

³⁶ UN Women and the UN Global Compact (2017), principle 1.

emphasize that the business case for promoting gender equality is financially compelling.³⁷

In human rights documents addressing the participation of women on company boards different rationales prevail. The low share of women among economic decision-makers was already addressed in the 1995 Declaration and Platform for Action that were adopted at the UN Beijing Fourth World Conference of Women. Stakeholders were convinced that '[w]omen's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development and peace'.³⁸ As such, they agreed that the low proportion of women among economic decision-makers reflects 'structural and attitudinal barriers that *need* to be addressed through positive measures'.³⁹ Affirmative action was seen as necessary cure to these barriers.⁴⁰ The Platform for Action proposed such affirmative measures to governments and the private sector, for instance to recruit more women in strategic decision-making positions and to create or strengthen mechanisms to monitor the access of women to such positions.⁴¹ In line with this, the Committee overseeing the International Covenant on Economic, Social and Cultural Rights (the CESCR Committee), urged States Parties to 'take appropriate steps, including through temporary special measures, to improve women's representation in the labour market, including at the upper echelons of the corporate hierarchy',⁴² in General Recommendation No. 24 from 2017.

In practice, initiatives to improve the participation of women on company boards often rely on a mix of normative justifications, combining some version of the business-case with more principled equality-based considerations.⁴³

3 State Obligations Under CEDAW to Ensure Women's Participation on Boards in Terms of Formal, Substantive and Transformative Equality

We now turn to the question to what extent CEDAW entails an obligation for states to ensure women's participation on company boards. In order to answer that question, we draw on the CEDAW Committee's multi-dimensional conception of

³⁷UN Women and the UN Global Compact (2017), principle 1.

³⁸UN (1995), para 13. Reminders of the low number of women in decision-making positions in the private sector are explicit in later documents see e.g. UN Women (2007), p. 6; UN Women (2015), p. 30.

³⁹UN (1995), paras. 186, 162. (Emphasis added).

⁴⁰Rubio-Marín (2018), p. 75.

⁴¹UN (1995), para. 192(a)(b), see also para. 177(b).

⁴²CESCR (2017), para. 9.

⁴³Lépinard and Rubio-Marín (2018b), p. 12.

equality, which informs all state obligations enumerated in the Convention.⁴⁴ The CEDAW Committee formulated three main obligations of Member States under the Convention in General Recommendation No. 25.⁴⁵ These obligations correspond to three conceptions of equality. The first is to ‘ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination’,⁴⁶ reflecting formal equality.⁴⁷ The second obligation is to ‘improve the de facto position of women through concrete and effective policies and programmes’,⁴⁸ reflecting substantive equality.⁴⁹ The third obligation is to ‘address prevailing gender relations and the persistence of gender-based stereotypes’ that hold on to unequal gender relations ‘in law, and legal and societal structures and institutions’.⁵⁰ This corresponds to transformative equality.⁵¹ The three obligations are intertwined and each is essential in themselves to come to full gender equality.⁵²

3.1 The Formal Equality Argument for Women’s Participation on Boards

Formal equality prescribes that men and women receive the same treatment. In the women on boards discussion this argument has been used to point out that it is simply a matter of individual fairness to appoint women to positions of power when they have the requisite qualifications, so as to give women the same opportunities as men.⁵³ For this to happen, it is a prerequisite that national laws are not discriminatory. In most countries around the world, to a greater or lesser extent, women continue to face formal legal barriers in the economic sphere that do not exist for men.⁵⁴ Examples would include certain professions that are by law male-only,⁵⁵

⁴⁴Cusack and Pusay (2013), pp. 54, 57.

⁴⁵CEDAW Committee (2004), paras. 6–7.

⁴⁶CEDAW Committee (2004), para. 7.

⁴⁷Cusack and Pusay (2013), p. 63; CEDAW Committee (2004), para. 4.

⁴⁸CEDAW Committee (2004), para. 7.

⁴⁹Cusack and Pusay (2013), p. 63; CEDAW Committee (2004), para. 4.

⁵⁰CEDAW Committee (2004), para. 7.

⁵¹Cusack and Pusay (2013), p. 63; CEDAW Committee (2004), para. 4.

⁵²CEDAW Committee (2004), para 6. The three goals are to be ‘implemented in an integrated fashion [. . .]’.

⁵³Senden (2014), p. 59.

⁵⁴Raday (2019), p. 51.

⁵⁵See e.g. CEDAW Committee (2016i), Communication No. 60/2013 (*Medvedeva v. Russia*). This case concerned the rejection of a woman’s application to become helmsperson-motorist on a boat owned by a private company because of a Labour Code provision.

restrictions on women owning land, and restrictions on married women registering a business.⁵⁶

Furthermore, formal equality is also at the basis of the state's obligation to exercise due diligence in making sure that companies do not discriminate on the basis of sex. The applicable provisions in this respect are Article 2(e) (due diligence) and Article 11 (equality in employment).⁵⁷ The due diligence obligation results from the state's responsibility to protect, and it requires states to 'react actively' so enterprises do not discriminate against women.⁵⁸ This obligation to protect women from discrimination by corporations extends to all substantive provisions in CEDAW and thus also to the field of employment that is enshrined in Article 11.⁵⁹ The state is obliged to protect women's right to receive equal pay (Article 11 (d) CEDAW), and women's right to have the same employment opportunities as men including promotion (Article 11(b) and (c)). In order to fulfil Article 2 (e) together with Article 11, the state is likely to intervene into the affairs of enterprises including in employment policy.⁶⁰

While formal equality is crucial as a first step in the elimination of all discrimination against women, only pursuing this approach has marked limitations and is not sufficient to live up to CEDAW's goal.⁶¹ The formal equality approach namely requires comparison and takes male-oriented social structures as the norm to which women must conform to. The underlying causes of inequality are not challenged. Rather, formal equality bolsters existing masculine structures and values, since women can only ask for those entitlements to the extent that men already enjoy them.⁶²

3.2 *The Substantive Equality Argument for Women's Participation on Boards*

3.2.1 **The CEDAW's Approach**

For substantive equality to be attained, biological, social and cultural differences and inequalities between men and women must be taken into account, which sometimes

⁵⁶Raday (2019), p. 51.

⁵⁷Christa Tobler has argued that the adoption of gender representation rules for company boards falls under Article 2 CEDAW. Tobler (2007), pp. 854–855.

⁵⁸Article 2(e) CEDAW; CEDAW Committee (2010), paras. 9, 10, 17.

⁵⁹Article 11 CEDAW; CEDAW Committee (2010), paras. 13, 36; CEDAW Committee (2017h), para. 24 under b; Byrnes (2012b), p. 86.

⁶⁰Meyersfeld (2013), p. 208; Raday (2012), p. 284.

⁶¹CEDAW Committee (2004), paras 8–11. In para 8 the Committee states: "In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men [. . .]".

⁶²Fredman (2013), pp. 223–224; Byrnes (2012a), p. 55; CEDAW Committee (2004), paras. 8–11.

requires non-identical treatment.⁶³ Unlike formal equality, substantive equality is an asymmetric concept; focusing on the disadvantaged group. In the CEDAW Convention, Article 3 and 4 in particular enshrine this notion of equality. Article 3 imposes a general positive duty upon States Parties to ensure the full development and advancement of women, so that they enjoy their rights equally with men.⁶⁴ Article 4(1) elaborates upon this. This article obliges States Parties to adopt where necessary *mandatory* temporary special measures to reach substantive equality.⁶⁵ In General Recommendation No. 25, which sets out the CEDAW Committee's understanding of Article 4(1) in depth, the Committee explained that substantive equality entailed both 'overcoming underrepresentation of women and a redistribution of resources and power between men and women'.⁶⁶ The Committee advises states to adopt temporary special measures whenever equal participation of women could be accelerated and/or when the redistribution of power and resources could be accelerated.⁶⁷ States then 'do not have the choice to remain inactive',⁶⁸ but the Committee does not dictate what forms temporary special measures should take precisely. The Committee recognizes that such measures can come in different forms, including quotas.⁶⁹

The CEDAW Committee has repeatedly addressed the underrepresentation of women in company boards in its Concluding Observations. The Committee is concerned about the low number of women in the private sector, by referring to women in 'managerial positions',⁷⁰ 'management positions',⁷¹ 'leadership positions',⁷² 'corporate boards',⁷³ 'executive positions',⁷⁴ 'decision-making

⁶³ CEDAW Committee (2004), para. 8.

⁶⁴ Article 3 CEDAW.

⁶⁵ CEDAW Committee (2010), para. 9; CEDAW Committee (2004), paras. 15, 18. According to the Committee Temporary special measures have a tripartite purpose. They should be invoked to (1) accelerate the improvement of the position of women to achieve substantive equality between men and women, (2) to effect the changes necessary to correct current and past (effects of) discrimination against women and to (3) provide women with compensation.

⁶⁶ CEDAW Committee (2004), para. 8.

⁶⁷ CEDAW Committee (2004), para. 39.

⁶⁸ Holtmaat (2003), p. 226.

⁶⁹ CEDAW Committee (2004), para. 22.

⁷⁰ CEDAW Committee (2020b), para. 20; CEDAW Committee, 'CEDAW Committee (2017f)', para. 32; CEDAW Committee (2017b), para. 35; CEDAW Committee (2017a), para. 22; CEDAW Committee (2016e), paras. 36–37; CEDAW Committee (2016j), para. 26; CEDAW Committee (2015d), paras. 28, 29; CEDAW Committee (2016a), para. 39.

⁷¹ CEDAW Committee (2016c), para. 24; CEDAW Committee (2016d), paras. 28–29; CEDAW Committee, 'Concluding observations on the combined eighth and ninth periodic reports of Sweden' (2018), 22; CEDAW Committee (2015b), paras. 23, 24; CEDAW Committee (2020c), paras. 37–38; CEDAW Committee (2017c), paras. 28–29.

⁷² CEDAW Committee (2020a), paras. 28, 41, 42; CEDAW Committee (2017a), para. 22.

⁷³ CEDAW Committee (2017d), paras. 28–29; CEDAW Committee (2019), paras. 21, 22, 43.

⁷⁴ CEDAW Committee (2019), paras. 21, 22, 43; CEDAW Committee (2017e), paras. 20–21. For Norway, the Committee refers to 'executive board members'.

positions'⁷⁵ and in particular in 'private-sector boards',⁷⁶ 'the boards of private companies',⁷⁷ '[the] supervisory board',⁷⁸ '[the] boards of directors',⁷⁹ and on 'management boards'.⁸⁰ In those Concluding Observations, the Committee proposes to enforce compliance with gender quotas,⁸¹ which can mean imposing sanctions,⁸² introducing fast-track selection processes for women,⁸³ creating part-time positions in high company ranks⁸⁴ or flexitime arrangements⁸⁵ and, lastly, promoting women's participation within business through training on leadership skills.⁸⁶ The Committee presents most of these remarks under either a subheading titled 'temporary special measures'⁸⁷ (Article 4) or 'employment'⁸⁸ (Article 11), with few exceptions.⁸⁹

⁷⁵CEDAW Committee (2018a), paras. 41–42; CEDAW Committee (2018b), paras. 22, 42–43; CEDAW Committee, 'Concluding observations on the combined third to fifth periodic reports of Malaysia' (2018), paras. 37–38; CEDAW Committee (2016j), para 26; CEDAW Committee (2015a), paras. 28–29; CEDAW Committee (2015d), paras. 28, 29.

⁷⁶CEDAW Committee (2018c), para 22.

⁷⁷CEDAW Committee (2020c), paras. 37–38; CEDAW Committee (2017c), paras. 28–29; CEDAW Committee (2015c), paras. 28–29; instead of 'companies', 'enterprises'; CEDAW Committee (2017g), paras. 24–25.

⁷⁸CEDAW Committee (2015a), paras. 28–29; CEDAW Committee (2015b), paras. 23, 24; CEDAW Committee (2020c), paras. 37–38; CEDAW Committee (2017c), paras. 28–29.

⁷⁹CEDAW Committee (2015d), paras. 28, 29; CEDAW Committee (2016f), paras. 28–29; CEDAW Committee (2018b), paras. 22, 42–43.

⁸⁰CEDAW Committee (2015e), paras. 15–16; CEDAW Committee (2016g), para. 33.

⁸¹CEDAW Committee (2016b), paras. 29–30; CEDAW Committee (2016a), para. 39; CEDAW Committee (2015c), paras. 28–29; CEDAW Committee (2017c), paras. 28–29; CEDAW Committee (2018c), para 22; See the following Concluding Observations on strict compliance with quotas: CEDAW Committee (2020c), paras. 37–38; CEDAW Committee (2020a), paras. 28, 41, 42; CEDAW Committee (2015d), paras. 28, 29. The Committee critiques Spanish policy because the existing legislation did not include sanctions for the non-enforcement of the required gender balance on the boards of directors of large companies.

⁸²CEDAW Committee (2020b), para 20 CEDAW Committee (2020a), paras. 28, 41, 42; CEDAW Committee (2017a), para 22; CEDAW Committee (2020c), paras. 37–38.

⁸³CEDAW Committee (2020a), paras. 28, 41, 42.

⁸⁴CEDAW Committee (2017b), para 35; CEDAW Committee (2018a), paras. 41–42; CEDAW Committee (2016e), paras. 36–37. The Committee expressed its critique because Switzerland and Luxembourg had regulations that excluded part-time employment for most managerial positions.

⁸⁵CEDAW Committee (2016h), paras. 30–31.

⁸⁶CEDAW Committee (2017g), paras. 24–25.

⁸⁷See e.g. CEDAW Committee (2017e), paras. 20–21; CEDAW Committee (2020a), paras. 28, 41, 42; CEDAW Committee, 'Concluding observations on the combined eighth and ninth periodic reports of Sweden' (2018), 22; CEDAW Committee (2020b), para. 20.

⁸⁸See e.g. CEDAW Committee (2020c), paras. 37–38; CEDAW Committee (2017f), para. 32; CEDAW Committee (2016e), par. 18; CEDAW Committee (2016j), para 26; CEDAW Committee (2016d), paras. 28–29; CEDAW Committee (2016c), para 24. In the Concluding Observations of Armenia, the Committee used the almost similar subheading 'Employment and economic empowerment'.

⁸⁹See e.g. the Concluding Observations of Slovenia, where the Committee placed the discussion under subheading 'participation in political and public life' and not under 'employment'. CEDAW Committee (2015b), para. 24;

These findings confirm that the proper implementation of CEDAW mandates States Parties to tackle the underrepresentation of women in top corporate positions, in order to achieve substantive equality. This requirement stems from Article 11 CEDAW read in conjunction with Article 4(1). While there is considerable discretion for the state to choose and give substance to the measure that they see fit for purpose, a failure to adopt any special measure without adequate justification can trigger state accountability. The Committee anticipates that some states prefer to be inactive: ‘States parties should provide adequate explanations with regard to any failure to adopt temporary special measures. Such failures may not be justified simply by averring powerlessness, or by explaining inaction through predominant market or political forces, such as those inherent in the private sector’.⁹⁰ While this is a general statement of the Committee, covering all sorts of different areas, it seems a particularly apt critique of states’ failure to accelerate the participation of women on company boards. The statement is also noteworthy for the Committee’s insistence that the State cannot allow market forces to dictate the pace towards gender equality.

The Committee does not, however, set a specific numerical goal for the participation of women that positive action measures should strive to reach in each State Party.⁹¹ Even so, it recommended to New Zealand in 2018 ‘to establish a set goal for achieving gender parity on private-sector boards.’⁹² In General Recommendation No. 25 the Committee also hints that parity (50/50) is the desired outcome, which would chime with the Committee’s emphasis on equality of result, rather than only equality of opportunity, which accords more with formal equality.⁹³ In General Recommendation No. 25 the Committee namely states: ‘Equality of results is the logical corollary of de facto or substantive equality. These results may be quantitative and/or qualitative in nature; that is, women enjoying their rights in various fields in fairly equal numbers with men, enjoying the same income levels, equality in decision-making and political influence’.⁹⁴

3.2.2 The UN Guiding Principles on Business and Human Rights

Next to CEDAW, soft law instruments on business and human rights addressing the issue of women on company boards are to a large extent also based on the substantive equality argument. The main relevant instrument is the UN Guiding Principles on Business and Human Rights (UNGPs), dating from 2011, which clarifies the obligations of states under international human rights law and the responsibilities of

⁹⁰ CEDAW Committee (2004), para 29.

⁹¹ See also Rubio-Marín (2018), p. 80.

⁹² CEDAW Committee (2018c), para 22.

⁹³ The distinction between equality of result and equality of opportunities is explained well in Fredman (2011), pp. 14–19.

⁹⁴ CEDAW Committee (2004), para 9.

companies regarding human rights.⁹⁵ This framework is all-encompassing: it applies to all states and all companies.⁹⁶

The three pillars of the UNGPs—Protect, Respect, Remedy—reflect differing social roles in regulating corporate conduct.⁹⁷ The Protect pillar prescribes that the state must protect against human rights abuses by third parties.⁹⁸ The Respect pillar, which is further analysed below in Sect. 4, prescribes that each company has a responsibility to respect human rights.⁹⁹ The Remedy pillar prescribes that the state must provide for access to appropriate and effective remedies for business-related rights abuses.¹⁰⁰ The supplementary Gender Lens report to the UNGPs, dating from 2019, provides specific guidance and illustrations on how to integrate a gender perspective in the implementation of all principles.¹⁰¹ The report builds on existing gender equality standards, involving inter alia CEDAW and the Beijing Declaration and Platform for Action.¹⁰² The report aims for substantive equality and includes a three-step gender framework—gender responsive assessment, gender transformative measures and gender transformative remedies.¹⁰³

The Protect Pillar elaborates on existing binding obligations to protect against abuses of enterprises and mirrors the state's due diligence obligations, such as Article 2(e) CEDAW.¹⁰⁴ States have to explain to business enterprises what is expected from them to respect human rights by giving concrete and specific guidance, such as to indicate expected outcomes and share best practices.¹⁰⁵ The underlying thought is that the state ought to take the lead in providing incentives and disincentives to induce businesses to respect human rights and remediate to adverse impact.¹⁰⁶ It is thus up to the state to indicate in detail how companies ought to respect women's rights and how they can contribute to achieving substantive

⁹⁵HRC (2011) From now on this chapter will refer to the following more user-friendly report containing the principles: HR/PUB/11/04 (UNGPs).

⁹⁶Deva (2017), pp. 62, 69.

⁹⁷Ruggie (2020), p. 74.

⁹⁸UNGPs, principles 1-12. The Guiding Principles are grounded in the state's tripartite responsibility to respect, protect and fulfil human rights.

⁹⁹UNGPs. See for companies the foundational principles and principle 14. See for the corporate responsibility to respect principles 11-24. See also: OHCHR (2012).

¹⁰⁰UNGPs principles 25–31.

¹⁰¹HRC (2019). See also the booklet that produces the Annex, which is the Gender Guidance for the Guiding Principles on Business and Human Rights, in a user-friendly manner: UNDP and UN Working Group on Business and Human Rights (2019); Kristiansson and Götzmann (2020), pp. 1, 38–39; Simons and Handl (2019), pp. 113, 149.

¹⁰²HRC (2019), paras. 7, 22–35.

¹⁰³Deva (2020), p. 20; HRC (2019), 'Introduction', 'Objectives' and referred to in different principles such as guiding principle 1(c).

¹⁰⁴UNGPs, principles 1-12; Ruggie (2020), p. 64.

¹⁰⁵UNGPs, principle 3(c) and commentary.

¹⁰⁶Deva (2020), p. 13.

equality.¹⁰⁷ Amongst others, it is proposed by the Gender Lens report that states should ‘encourage business enterprises to appoint a certain percentage of women to their boards and report on the gender pay gap throughout their operations’.¹⁰⁸ In light of substantive equality and the work of the Committee, the word choice of ‘encourage’ in this context surely is disappointing. On a positive note, the UNGPs together with the Gender Lens report again underline the necessary active stance of the state towards tackling the underrepresentation of women on company boards, as part of existing legal obligations.

3.3 The Transformative Equality Argument for Women’s Participation on Boards: Changing Power Relations

Whether laws and policies that aim for gender balanced company boards can be considered transformative depends on whether they challenge gendered power relations. The CEDAW Committee recognized the transformative approach when it held that states must take measures ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.’¹⁰⁹ The Committee emphasises that the position of women in society will not improve if the underlying causes of inequality are not adequately addressed.¹¹⁰ While measures that are grounded in formal and substantive equality are vital to eliminating all forms of discrimination against women, such efforts will, in the end, be ineffective if prevailing gender relations and gender-based stereotypes continue to exist in society and leave their mark on legal and societal structures and institutions.¹¹¹ According to the Committee, inherent to gender equality is that all human beings are free to ‘develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices.’¹¹²

Transformative equality is underpinned by Article 5 of the Convention, which focuses on modifying gender stereotypes and fixed parental gender roles.¹¹³ States

¹⁰⁷UNDP and UN Working Group on Business and Human Rights (2019), principle 1 and illustrative action c.

¹⁰⁸UNDP and UN Working Group on Business and Human Rights (2019), principle 2, illustrative action b.

¹⁰⁹CEDAW Committee (2004), para. 10. See also Holtmaat (2013), p. 112.

¹¹⁰CEDAW Committee (2004), para. 10.

¹¹¹Holtmaat and Tobler (2005), p. 408; CEDAW Committee (2004), para. 7.

¹¹²CEDAW Committee (2010), para. 22.

¹¹³Article 5 CEDAW prescribes that States Parties should take all appropriate measures to ‘(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function

have an obligation to modify and transform gender stereotypes of women (and men), eliminate wrongful ones and tackle them in social and institutional structures.¹¹⁴ Article 5 explicitly refers to the elimination of stereotypes that are 'based on the idea of the inferiority or the superiority of either of the sexes.'¹¹⁵

Gender stereotypes impede women's participation in company boards in various ways. To start, they create access barriers for women to enter corporate boards. The CEDAW Committee has recommended in its Concluding Observations to review social obstacles to women's access to decision-making positions in the private sector and to remove them by adopting holistic measures. An example of such a social barrier is the pressure on women to assume responsibilities at home.¹¹⁶ Intersectional discriminatory stereotypes impede women from minority backgrounds and migrant women in particular to make it into corporate boardrooms and other-decision making positions.¹¹⁷

Gender stereotypes continue to disadvantage women once they have been appointed on corporate boards.¹¹⁸ Women in leadership positions who show toughness are easily disliked, while women who show kindness or caring characteristics are likely viewed as lacking competitiveness.¹¹⁹ Women in economic leadership positions are thus in a 'Catch-22',¹²⁰ where they cannot get it right, especially minority women. Rosenblum writes: 'Women corporate leaders face the dilemma of performing masculinity, just as minorities confront performing whiteness.'¹²¹ What is more, there is the phenomenon of the 'glass wall', which entails that even where women have reached high-level management positions, they often do so in the 'softer' areas such as human resources, public relation and communication, and corporate social responsibility (CSR), where less economic power is wielded.¹²²

Research also questions to what extent women, once appointed, have the ability to change corporate culture at the lower tiers of the corporation.¹²³ Carbado and Gulati, for example, challenged the idea that minority managers will help minority

and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.'

¹¹⁴ Articles 2(f) and 5 CEDAW; CEDAW gave notice of masculine stereotypes in CEDAW Committee (2017h), paras. 4, 30(i); Biholar (2013), p. 37.

¹¹⁵ Article 5 CEDAW.

¹¹⁶ CEDAW Committee, 'Concluding observations on the combined third to fifth periodic reports of Malaysia' (2018), paras. 37–38; CEDAW Committee (2015e), paras. 15–16. For Denmark, the Committee points to stereotypes concerning the traditional roles of men and women in the family and society. CEDAW Committee (2017d), paras 28–29.

¹¹⁷ Carbado and Gulati (2004), p. 1645; CEDAW Committee (2015e), paras. 15–16.

¹¹⁸ Boulota (2013), p. 185.

¹¹⁹ Yarram and Adapa (2021), p. 3. See for more information on the social role theory and feminist ethics, Boulota (2013), p. 185.

¹²⁰ See for an early reference to this paradoxical position landmark decision of the US Supreme Court (1989) 490 U.S. 228, 44.

¹²¹ Rosenblum (2008), p. 2888.

¹²² Raday (2019), p. 56.

¹²³ Bertrand et al. (2019), pp. 191–239.

employees to climb upwards.¹²⁴ Some other studies, however, have included more optimistic findings.¹²⁵ The transformative power of positive measures to enhance women's participation on boards does to an important extent depend on this, because if there is no trickle down effect, than these measures only really benefit women at the top of the pyramid (i.e. empower only already relatively privileged women).

To conclude, it is questionable whether mandatory quotas or other positive measures to enhance the participation of women on company boards contribute to transformative equality. Critics argue that 'mandatory quotas result in tokenism rather than... structural change. They argue that they are not resulting in women achieving power in the boardroom.'¹²⁶ Boardroomquotas should be accompanied by other policies enabling women at all levels of the corporation to enjoy work-life balance and to progress in their careers. Moreover, the mere presence of women on boards will not necessarily bring about an improvement for all female employees as long as elements like corporate culture remain heavily founded upon 'the power of definition' of men.¹²⁷ Buikema defines the power of definition as 'the power to define who and what counts and who and what does not, what is major and what is a minor cultural or political issue'.¹²⁸ Arguably, the entire women on boards discussion presupposes the validity of the current capitalistic system; it seeks to give women a seat at the corporate table, not to get rid of that table and replace it with something else. That fundamental critique is not easy to operationalize—the capitalistic system is not likely to be overthrown anytime soon, although the efforts to create gender equality on company boards do challenge pure free market assumptions.¹²⁹ From the perspective of CEDAW's conception of transformative equality it behoves us to remain wary of an uncritical support of boardroom quotas.¹³⁰

4 Company Obligations and Responsibilities: The Corporate Responsibility to Respect

The state-centricity of the international human rights system has hindered the development of binding direct obligations for corporations. Though this model is under pressure,¹³¹ it is still mostly left to the state to protect individuals from harmful

¹²⁴ Carbado and Gulati (2004), p. 1645.

¹²⁵ See for example Gould et al. (2018), pp. 931–945; Biswas et al. (2021), pp. 659–680; Kirsch and Wrohlich (2020), pp. 44–49.

¹²⁶ Raday (2019), p. 55.

¹²⁷ Buikema et al. (2017), p. 4.

¹²⁸ Buikema et al. (2017), p. 4.

¹²⁹ See e.g. Bryson (1992), pp. 265–266.

¹³⁰ See in that sense also Elomäki (2018), pp. 53–68.

¹³¹ Negotiations are held for a new internationally legally binding instrument to regulate activities of corporations. While the current draft convention gives attention to integrating a gender perspective

conduct of companies.¹³² However, the Respect pillar of the UNGPs framework, introduced under Sect. 3.2.2, clarified that each company has a 'corporate responsibility to respect' human rights.¹³³ The standard of expected conduct for business is subject to change over time, depending on societal developments.¹³⁴ The significance of the company's responsibility to respect regarding the presence of women on boards will be the focal point of this paragraph.

The Gender Lens report to the UNGPs of 2019 acknowledges that 'the standards contained in the [CEDAW] Convention apply to all businesses as part of their responsibility to respect human rights under the Guiding Principles.'¹³⁵ Previously this was not so clear. According to the in 2011 released UNGPs, the rights that companies ought to respect at a minimum are enshrined in the International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and the Rights at Work. CEDAW (and other core human rights conventions) were reduced to 'additional standards' to be considered by business enterprises.¹³⁶

The question is whether companies are expected to act upon the underrepresentation of women on boards as part of the responsibility to respect women's rights. The corporate responsibility to respect was traditionally 'squarely'¹³⁷ based on a responsibility to do no harm, that may entail positive steps to prevent or mitigate harm.¹³⁸ Companies should avoid infringing on the rights of others and address such impacts when they occur.¹³⁹ The Gender Lens report transposes this into a responsibility to avoid infringing women's rights and to address adverse rights impacts. Companies must 'contribute to achieving substantive gender equality and avoid exacerbating or reproducing existing discrimination against women'.¹⁴⁰ The UNGPs, in this context, can hardly still be seen as a pure 'do no harm' framework.¹⁴¹

Under the corporate responsibility to respect, companies should take the steps that are needed to identify, prevent, mitigate and possibly remediate the human rights impacts—including impacts on their direct employees¹⁴²—of all their business

into company policies, the draft is likely to undergo many changes until a possible adoption. Therefore, the convention is at this moment not so relevant for the discussion held here. See OEIGWG (2021). See for scholarly discussion on direct human rights obligations on the part of companies Latorre (2020) and Bilchitz (2021).

¹³² See Lane (2018), pp. 6–9.

¹³³ UNGPs, introduction ('each company'). UNGPs, principles 14–24.

¹³⁴ López (2013), p. 68.

¹³⁵ HRC (2019), para. 24 and in Annex guiding principle 12.

¹³⁶ UNGPs, principle 12 and commentary; Deva (2017), p. 70.

¹³⁷ Wettstein (2013), p. 253.

¹³⁸ SRSG (2008), para. 55.

¹³⁹ UNGPs, principles 13, 17.

¹⁴⁰ HRC (2019), in Annex principle 11.

¹⁴¹ See also West (2021).

¹⁴² UNGPs, principles 13, 17; OHCHR (2012), p. 37; Meyersfeld (2013), p. 37; UN Working Group on the issue of human rights and transnational corporations and other business enterprises (2021), p. 15.

activities. This requires a continuous human rights due diligence process by corporations. Meyersfeld has described the corporate responsibility to respect as ‘a standard of performance implemented through the process of due diligence.’¹⁴³ Companies should integrate a gender perspective in the due diligence process, as also explained by the Gender Lens report.¹⁴⁴ Companies may in that process use ‘feedback loops’¹⁴⁵ to learn from previous findings.¹⁴⁶

Concerning the underrepresentation of women on company boards, a gendered human rights due diligence process would in the first place entail that the company investigates the reasons for this underrepresentation (identify the causes of the problem) and on that basis takes measures that ultimately increases the number of women. A range of measures could be envisaged. The Gender Lens report also encourages companies to ensure ‘equal representation’ on boards, and mentions affirmative action measures and professional development support.¹⁴⁷

Companies should also motivate their business partners to do the same.¹⁴⁸ The report explicitly recommends that companies aim for substantive equality as a normative principle, ‘although there may also be a business case for doing so’.¹⁴⁹

Based on the above, we conclude that the UNGPs expect companies to act upon the underrepresentation of women on their boards as part of the responsibility to respect women’s rights. For some, this may come as an unexpected stretch of ambition for the corporate responsibility to respect. However, a voluntary adopted preferential policy, for example, is in line with the broader responsibilities of companies and in that sense follows the spirit of not only the UNGPs but also CEDAW.¹⁵⁰

5 Conclusion

This chapter analyzed to what extent international human rights law mandates the use of positive measures to improve the participation of women on company boards, and what obligations this entails on the state and on companies themselves. Our analysis of the General Recommendations and Concluding Observations of the

¹⁴³ Meyersfeld (2013), p. 205.

¹⁴⁴ UNGPs, principle 17; HRC (2019), in Annex principle 17.

¹⁴⁵ The Organisation for Economic Co-operation and Development (OECD) coined the term ‘feedback loops’: companies must use their lessons learned from assessment, oversight and monitoring and their previously adopted measures. OECD (2018), p. 17.

¹⁴⁶ OHCHR (2012).

¹⁴⁷ HRC (2019), in Annex guiding principle 11, illustrative action (g).

¹⁴⁸ HRC (2019), in Annex guiding principle 11, illustrative action (g).

¹⁴⁹ UNGPs, principle 12, 17; HRC (2019), in Annex principle 12, illustrative action (a).

¹⁵⁰ As said before, the Committee strongly encourages the voluntary adoption of temporary special measures. See CEDAW Committee (2004), para. 32.

CEDAW Committee finds that the proper implementation of CEDAW indeed requires States Parties to tackle the underrepresentation of women in top corporate positions. While there is considerable discretion for the state to choose and give substance to the measure that they see fit for purpose, a failure to adopt any special measure to reduce underrepresentation without adequate justification can trigger state accountability. That means that the obligation under CEDAW is quite minimal, leans towards a due efforts commitment, and that it does not (yet) entail a concrete numerical goal, unlike for example the EU's women on boards proposal. The recommendation of the CEDAW Committee to New Zealand in 2018, to establish a set goal for gender parity on boards, provides an illustration of how States Parties could give substance to the obligation.

In our analysis of CEDAW we specifically focused on what conceptions of equality underly the CEDAW Committee's support of positive measures to create gender-balanced company boards. Our conclusion is that the Committee mainly bases itself on substantive equality in this regard. Arguably, however, transformative equality pulls into a different direction than formal and substantive equality on this issue. More women in boardrooms do not necessarily challenge the prevailing gender order, or have a trickle down effect for women lower on the corporate ladder, as long as work-life balance and corporate culture remains heavily founded upon male power of definition. It is doubtful whether measures to improve the participation of women on company boards alone are transformative.

The last part of the article discussed the responsibilities of companies in relation to the underrepresentation of women in board positions. All companies have a responsibility to avoid impacting on women's rights and to address such impacts when they do occur. We argued that companies should act upon the underrepresentation of women on boards because doing so falls under what is currently expected from companies under the responsibility to respect the UNGPs. However, to say that the expected standard on the issue is clear and convincing for all is simply a bridge too far at this moment.

Both national law and international law is developing fast when it comes both to gender equality and to business and human rights, so we do expect to see a more firm obligation to improve the participation of women in company boards in the future.

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