

Written contribution on General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

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The undersigned are scholars and teachers of human rights at the University of Connecticut, USA. Faculty at the University of Connecticut are actively engaged with business and human rights issues and have contributed to the implementation of the Covenant and the UN Guiding Principles on Business and Human Rights. As members of the Business and Human Rights Initiative at the University of Connecticut, we wish to express our support for the work undertaken by the Committee and the Rapporteurs. We believe that the General Comment is an important step in ongoing collective efforts to clarify, facilitate, develop, and enforce respect of business enterprises for economic, social, and cultural rights and the indispensable role of states and other social and political entities in ensuring their fulfillment.

Taking note of the above-mentioned, we submit the following comments on the draft General Comment:

1. Protecting vulnerable and marginalized populations. *Certain groups are particularly vulnerable to the potentially negative impacts of business activities. States Parties should specifically address the rights of vulnerable and marginalized populations under the Covenant and other UN conventions. Although the draft General Comment discusses the impact of business activities on vulnerable and marginalized populations, we suggest adding the following specific references to these impacts, as discussed below.*

a. Children

Discussion of the obligation to protect should address the impact of business activities on children's economic, social, and cultural rights.¹ **Paragraph 18** should note the obligations of States Parties to "take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights."²

Further, the obligation to fulfil also applies to the provision and management of services that are critical to the enjoyment of children's economic, social and cultural rights (e.g., clean water, sanitation, education, transport, health, and energy). **Paragraph 28** should clarify that "[s]tates are not exempted from their obligations...when they outsource or privatize services that impact on the fulfilment of children's rights."³

¹ See International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), UN Treaty Series, vol. 993, p. 3, entered into force Jan. 3, 1976, art. 10.3.

² See CRC/C/GC/16 (General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights), para. 28.

³ Ibid., para. 33.

b. Workers in textiles and other light manufacturing industries

Paragraph 23 focuses on violations of human rights defenders in the extractive industry, reflecting, in part, broader patterns in human rights reporting and advocacy.⁴ However, violations of the rights of human rights defenders in the textile industry, as well as in other light manufacturing industries, are also prevalent. To cite one example, the practice of blacklisting workers who attempt to organize trade unions is common, particularly in export processing zones.⁵ Accordingly, **paragraph 23** should include a reference to violations in light manufacturing in order to highlight another vulnerable group involved in defending the rights of workers.

c. Treatment of undocumented migrants

Paragraph 11 addresses the particular vulnerabilities of women who are overrepresented in the informal economy and who are less likely to enjoy social security and social protection supports. **Paragraph 11** should also highlight the particular vulnerabilities of migrant workers in an irregular situation, as well as refugees and asylum-seekers, who often face substantial barriers to securing non-exploitative work. Moreover, this population is particularly vulnerable to exploitation by employers in societies where irregular status is accompanied by criminalization, arbitrary detention, or deportation without due process. In this regard, **paragraph 11** should reference the necessity to protect such individuals or groups against labor exploitation and to preserve rights to social protection within the guidelines established by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁶

2. Addressing deficits resulting from privatization. *Paragraph 22 acknowledges that privatization does not reduce responsibility of states to protect, stating “States Parties should ensure that privatization does not lead to a situation in which the enjoyment of Covenant rights is undermined by the inability to pay.” However, this is already the situation with regard to numerous economic, social, and cultural rights. For example, both the right to health and the right to adequate housing have been significantly impacted by privatization processes that often condition enjoyment of these rights on the ability to pay.*⁷ *A fundamental question, therefore, is to*

⁴ For example, complaints filed under the National Contact Points (NCP) process for the OECD Guidelines for Multinational Enterprises are disproportionately concentrated in the extractive sector (i.e., mining, oil and gas) vis-à-vis light manufacturing, financial services, and agriculture. See Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese and Virginia Sandjojo, *Remedy Remains Rare*, OECD Watch, June 2015 (“OECD Watch”), pg. 12.

⁵ See Andrew Lang, *Trade Agreements, Business and Human Rights: The case of export processing zones*, Corporate Social Responsibility Initiative, John F. Kennedy School of Government, Harvard University Working Paper No. 57 (Apr. 2010), pg. 18.

⁶ See CMW/C/GC/2 (General Comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families), paras. 60-71.

⁷ See Benjamin Mason Meier and Ashley M. Fox, *Development as Health: Employing the Collective Right to Development to Achieve the Goals of the Individual Right to Health*, 30 Hum. R. Qty. 259 (2008), pg. 285-86; A/71/310 (Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context), paras. 22-23.

what extent and in what manner states should respond to already-existing deficits and trends to decentralize responsibility for the realization of economic and social rights.

To address the above-mentioned question, we suggest adding the following clarifications:

- In **paragraph 19**, the list of obligations in the second sentence might be revised to include the obligation to regulate the cost of health services and medicines to assure their affordability.
- In **paragraph 22**, a sentence could be added to underscore that local governments play a critical role in mediating claims of rights-holders and other local stakeholders, such as businesses, and have an obligation to observe human rights norms.⁸
- In **paragraph 22**, the last sentence might be revised to clarify that States Parties' obligation to regulate includes the option of providing subsidies to improve access to, as well as the quality of, privately provided services.

3. Addressing the infringement of economic, social, and cultural rights resulting from the enforcement of commercial rights. *Business enterprises are the beneficiaries of rights under various national laws and international economic treaties that enable their operations, investment, and other activities. States Parties should ensure that the enforcement of such rights does not conflict with, or otherwise infringe on, the fulfillment of economic, social, and cultural rights under the Covenant. We cite several examples in the comments below that might be integrated into the General Comment.*

a. Trade and investment rights and access to health services and the right to work

States Parties have entered into numerous investment and trade agreements. Many of these agreements have deleterious impacts on the right to health (including access to essential medicines) and the right to work, both directly and indirectly. **Paragraph 20** could be revised to clarify that States Parties should be obligated to review their trade and investment agreements currently in force and take such action as necessary to ensure that these agreements do not infringe on economic, social, and cultural rights under the Covenant.

b. Intellectual property and participation in cultural life

While **Paragraph 20** broadly acknowledges the role of intellectual property on the fulfilment of cultural rights, it should expressly address its impact on the ability to participate in cultural life.⁹ This may be done by revising the fifth sentence to acknowledge that intellectual property frameworks should also encourage cultural and artistic activities in addition to research and development. Further, the last clause of the seventh sentence could be revised to include

⁸ See A/HRC/28/62 (Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha), paras. 16-20, 71.

⁹ See A/HRC/28/57 (Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed: Copyright policy and the right to science and culture).

reference not just to the right to enjoy the benefits of scientific progress but also the right to participate in cultural life.

The right to participate in cultural life extends to individuals with disabilities.¹⁰ Accordingly, **Paragraph 20** could be revised by adding a reference to national intellectual property laws that potentially restrict the cultural rights of disabled persons and by recommending that States Parties ratify the Marrakesh Treaty.¹¹

4. Acknowledging the impact of climate change. *Climate change threatens the ability of individuals to enjoy numerous rights under the Covenant, including, inter alia, safe and healthy working conditions, adequate food, and physical and mental health. The international community has newly committed to collective action with the ratification of the Paris Agreement, which acknowledges that the obligation of states to respond to climate change is interconnected with their obligations to respect, promote, and consider human rights.*¹²

The draft General Comment could be revised to make explicit the implications of climate change mitigation and adaptation on States Parties' obligations to respect, protect, and fulfill. Specifically, for example: **paragraph 16** could cite the need to consistently enforce existing environmental laws; **paragraph 19** could cite the enactment of new regulations needed to reduce greenhouse gas emissions; **paragraph 28** could encourage States Parties to fund the development of alternative energy sources and facilitate private sector financing; and **paragraph 37** could cite, as an example, the obligation to deter businesses from engaging in cross-border "environmental dumping" and similar practices.

5. Overcoming barriers to effective remedies. *Victims encounter numerous and substantial barriers in seeking redress for violations of their economic, social, and cultural rights. We wish to highlight two important obstacles that are not expressly addressed in the draft General Comment and suggest measures that States Parties may take to enable victims to overcome them.*

a. Addressing *de facto* barriers to participation in judicial proceedings

While paragraph 46 takes note of "practical" barriers to remedy, it largely focuses on *de jure* constraints on the ability of victims to participate in judicial proceedings. However, meaningful participation may be equally hindered by practical and procedural barriers.¹³ To account for this, **paragraph 46** could be revised to clarify the obligation of States Parties to provide material and technical support to victims. Examples include travel support and language translation services to ensure that victims can participate in judicial proceedings and access evidence pre-trial.

¹⁰ Convention on the Rights of Persons with Disabilities (Jan. 24, 2007), G.A. Res. 61/106, art. 30.

¹¹ See Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (June 27, 2013), entered into force Sept. 30, 2016.

¹² See FCCC/CP/2015/L.9/Rev.1 (United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement, Dec. 12, 2015), annex, preamble.

¹³ A/HRC/17/31 ("UN Guiding Principles"), art. 26, Commentary. See also OECD Watch, p. 4 (noting the burdens of filing a complaint under the NCP process).

b. Remedying shortcomings of non-judicial mechanisms

Paragraph 50 largely recites the principles for non-judicial mechanisms set forth in the UN Guiding Principles.¹⁴ **Paragraph 50** would be strengthened by identifying specific ways that States Parties can enhance these mechanisms in light of prevalent barriers. For example:

- *Rights-compatible*: Non-judicial mechanisms should default to the highest legal standard—whether national constitutional law or international human right law—as the baseline for establishing thresholds for harm and fulfillment.
- *Legitimate*: To engender trust among stakeholders, States Parties should enact mandatory public disclosure by companies regarding information needed to ensure accountability, including information about supply chain management and government procurement.
- *Transparent*: States Parties should be obligated to ensure the availability and dissemination of information on the outcome of negotiations between companies and stakeholders to the general public and most importantly, to the members of affected communities. Towards that end, businesses and host communities would benefit from a government-supported registry of outcomes-based data by which to judge the performance of individual companies with respect to remedies.
- *Based on engagement and dialogue*: The extensiveness of consultation with stakeholders should be addressed. States Parties should develop a graded system for rating the quality of consultation based on frequency/iteration, scope, and depth.¹⁵

We appreciate the opportunity to provide input on the draft General Comment and look forward to participating in future discussions on its content and implementation.

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¹⁴ See UN Guiding Principles, art. 31.

¹⁵ See Sphere Handbook, Humanitarian Charter and Minimum Standards in Humanitarian Response, <http://spherehandbook.org> [accessed 1/18/17] (an example of an existing template).