

20 January 2017

Submission by the Legal Resources Centre to the Committee on Economic, Social and Cultural Rights: Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (E/C.12/60/R.1)

Introduction

1. The Legal Resources Centre (“**LRC**”) is an independent, public interest law firm and registered not-for-profit organisation based in South Africa. The LRC provides legal services to vulnerable and marginalised peoples, including those who suffer discrimination, are homeless or landless. In much of its work, the LRC encounters the negative effects of business activities on rural peoples’ social and economic development, including in the work that the LRC has done to assist mine-affected communities to access legal services. Through this work the LRC has gained an understanding of the context in which mining and rural development projects can affect the surrounding communities’ social, economic and cultural rights. The LRC has also made submissions to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises during its second session in October 2016.
2. We have had regard to the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (“**Draft General Comment**”). In this submission, we address the following two aspects of the Draft General Comment:
 - 2.1 Firstly, with reference to Part III(A)(8) of the Draft General Comment: General Obligations – we submit that the right to freely pursue economic, social and cultural development should be included as one of the general obligations identified in the Draft General Comment, and that this should be read to include free, prior and information consent (“**FPIC**”) as an element of this right; and

2.2 Secondly, with reference to Part III(B)(13): Specific Obligations Linked to Business Activities – we submit that customary and indigenous legal norms should be expressly identified as requiring recognition.

3. We deal with each of these in turn below.

The right to self-determination and to freely pursue economic, social and cultural development

4. The notion of the right to freely pursue economic, social and cultural development is an important part of the International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”), as contained in particular in sub-articles 1(1) and (2).¹ However, no express reference is currently made to this provision in the Draft General Comment. We submit that this provision is directly relevant to the scope of the Draft General Comment, and would urge the Committee to include reference to this under the section on general obligations.

5. We stress in this regard that individuals and communities must be participants in their own development and in the choices made for achieving such development. We recognise that seeking to define the ambit of the right is a complex matter, but we urge the Committee to acknowledge the role of community participation as an element of the right to development, particularly where business activities affect community land and resources.

6. Notably, article 2(3) of the United Nations Declaration on Development states that the right to development includes active, free and meaningful participation in development”. Further clarity on the ambit of the right has been provided by the African Commission on Human and Peoples’ Rights (“**African Commission**”) in interpreting the right to development as contained in the African Charter on Human and Peoples’ Rights:²

¹ Sub-articles 1(1) and (2) of the ICESCR provides as follows:

“(1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

² Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) / Kenya Communication 276/03 at paras 277-282. (Own emphasis added.)

“[T]he right to development is a two-pronged test, [...] it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development [...] recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development. [...] Freedom of choice must be present as a part of the right to development. [...] The conditions of the consultation failed to fulfil the African Commission’s standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role. Furthermore, the community representatives were in an unequal bargaining position, [...] being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community.”

7. It is apparent, therefore, that a community’s right to be fully informed and have the option to refuse any development is essential to ensure that development is pursued freely as contemplated in the ICESCR. FPIC is thus an essential component of the right to development. The elements of FPIC comprise the following:
 - 7.1 Free: The community’s decision is made free from any obligation, duty, force or coercion. Ideally, alternative development options should also be available to the community to ensure that the decision is based on real choice.
 - 7.2 Prior: The community has the right to make the development choice prior to any similar decisions being made by government, finance institutions or investors – prior to applications for financial support even being lodged. In other words, the community’s right to FPIC is not realised if they are presented with a project as a *fait accompli*. This is at a far earlier stage than simply considering adequate remedies for violations.

- 7.3 Informed: The community must be able to make an informed decision through provision of sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Such information should be objective and protect peoples' rights to full and timely disclosure of all relevant information, including knowledge of alternative development approaches. The community should be afforded enough time to digest and debate the information.
- 7.4 Consent: The community's decision may be to reject the proposed development. They can say no. We submit that the possibility of meaningful participation depends on this.
8. The LRC submits that state parties should be encouraged in the Draft General Comment to create mechanisms and institutions aimed at insuring that peoples affected by corporate activity can effectively exercise their right to self-determination and their freedom to pursue their development having the right of FPIC of any proposed development activity. This must also necessarily include the right of access to all relevant information in a timely and accessible manner in order for communities to make informed decisions.
9. Moreover, the LRC submits that the Draft General Comment should suggest ways in which state parties can ensure that development projects are pursued on an equitable basis with affected communities. In this regard, we submit that development must be people-centered and driven by the vision that a particular community sees for themselves. Such an approach requires that communities remain free to determine the trajectory of development projects and ensure that they benefit on an equal basis. The LRC urges the Committee to follow the approach of the African Commission which places emphasis on empowering communities to determine their own development paths, rather than being mere spectators, and to endorse an equitable model to development that places affected people at the center of business activities.
10. As noted in the Draft General Comment, state parties must effectively prevent the infringements of economic, social and cultural rights in the context of business activity.³ The goal of the Draft General Comment ought, therefore, not to be limited to mitigating the impacts of corporate activity, but should instead extend to changing the very power dynamic of development. FPIC should be recognised as a substantive element of the

³ See para 17 of the Draft General Comment.

right to free development, with the aim of ensuring that development is positive and the process is generally regarded by community members to be legitimate. FPIC should be clearly expressed as an ongoing requirement for business activities that affects local communities.

Customary and indigenous legal norms

11. The LRC notes that communities' customary laws and norms are routinely disregarded or not recognised when asserted against corporations and other business entities. Responding to this problem requires understanding of customary law in context thus recognition of these laws must not be limited to use rights where people are simply compensated for their crops. Customary rights comprise a complex and varying bundle. For example, land is often communally owned and then divided into family parcels. While some community members may have rights to grow crops at certain times of the year, others may have livestock grazing rights after harvest. The community may then agree that the field must be left fallow to recover soil fertility. The LRC thus urges the Committee to place emphasis on the contextualised recognition of customary legal norms where business activities intersect with cultural life. The recognition of customary law by state parties will ensure that the article 1 of ICESCR is respected and that indigenous peoples are protected.

Conclusion

12. The LRC appreciates the opportunity to make submissions on the Draft General Comment. Lastly, the LRC urges the Committee to consult with affected communities directly and ensure that their perspectives on ICESCR and business activities are a prominent feature of the Draft General Comment.
13. Should you require any further information, please feel free to contact us at avani@lrc.org.za / simone@lrc.org.za.

LEGAL RESOURCES CENTRE
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