## Submission to UN Committee on Economic, Social and Cultural Rights on its draft 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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**I. Introduction**

1. We welcome the engagement of the UN Committee on Economic, Social and Cultural Rights (“CESCR”) with the topic of business and human rights and state obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the context of business activities in particular. Whereas the draft General Comment (“draft GC”) purports to articulate states parties’ existing legal obligations under the ICESCR,[[3]](#footnote-3) we however consider that the draft GC does not accurately reflect the status quo in international human rights law concerning the scope and content of states’ extraterritorial human rights obligations. Accordingly, we first present observations with respect to jurisdiction in international human rights law (II); attribution (III); and positive obligations (IV). We then demonstrate a number of significant inaccuracies in the account of extraterritorial human rights obligations presented in the draft GC (V). Part VI concludes.

**II. ‘Jurisdiction’ in international human rights law**

2. Albeit the ICESCR does not explicitly do so, most human rights treaties define the obligations of states by reference to the concept of ‘jurisdiction’. This concept is understood in international human rights law as being primarily limited to acts and omissions occurring on the territory of the state concerned. Exceptionally, jurisdiction has been recognised to exist in relation to acts that take place beyond a state’s borders, in two scenarios:

a) the state exercises “effective overall control” of some geographical area beyond its own borders (the “spatial model” of jurisdiction)[[4]](#footnote-4)

b) a person is brought under the control of a state, most frequently, by the actions abroad of its military or police, so that the state “exercises authority or control over an individual” outside its own territory (the “personal” or “state agent authority and control” model of jurisdiction).[[5]](#footnote-5)

3. Given space constraints, it is beyond the scope of this submission to examine relevant authorities in detail.[[6]](#footnote-6) However, it can be surmised without significant doubt that, bar certain scenarios involving some kinds of state-owned enterprises, neither of the above exceptions to the rule that states parties’ jurisdiction under human rights treaties is territorial applies so as to establish home state jurisdiction in relation to the acts of TNCs in a host state.

4. The ICESCR contains no jurisdictional limitation. Nonetheless, general principles of international law, as well as the practice of states, lead to very similar results.

**III. Attribution**

5. In the first place, it is axiomatic that a state is only responsible for acts or omissions which are both attributable to the state and in violation of an obligation binding on the state.[[7]](#footnote-7) Attribution of acts (or omissions) to states is regulated by Articles 4 to 11 of the ILC’s Articles on State Responsibility.

6. Article 4 provides that states are responsible for the acts of their organs, including de facto organs. Article 8 provides that states are responsible for the acts of non-state actors where these are done under the state’s instructions or where the state otherwise ‘directs or controls’ such actions.[[8]](#footnote-8)

7. In Bosnian Genocide, the ICJ held that:

“[A] State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State’s responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 [of the ILC Articles on State Responsibility]…. This is so *where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed*...”[[9]](#footnote-9)

8. Except for certain state-owned enterprises, in certain limited circumstances, businesses cannot be assimilated to the status of de facto organs of the state, nor do they generally act under the instructions, direction or control of states.

9. This means that the only basis for a state to be responsible for the acts of non-state actors not meeting these two criteria is as a result of an omission constituting a violation of a positive obligation to do the acts in question. The following explains why there are no such positive obligations in relation to extraterritorial acts by non-state actors.

**IV. Positive obligations**

10. Positive obligations may require states to protect rights-holders against abuses committed by private persons or entities, for instance, through deterrent measures, such as legislation, policies or operational steps in the case of specific known threats.[[10]](#footnote-10) It is also true that complicity oracquiescence with the acts of individuals can, by virtue of positive obligations, in certain circumstances engage state responsibility.[[11]](#footnote-11)

11. But the fact that some positive obligations require states to prevent human rights abuses by non-state actors within their territorial jurisdiction does not entail any obligation to regulate the activities of TNCs abroad, as a matter of law. This is the position reflected in the UN Guiding Principles on Business and Human Rights and, it is submitted, one which remains correct.

12. Put in human rights terms, one reason for this is the requirement of the existence of a “sufficient nexus”,[[12]](#footnote-12) that is, the requirement that the defaults of the state or specific public actors should have “sufficiently direct repercussions”[[13]](#footnote-13) on human rights, given the intervention, between the home state and offending TNC activities, of host state laws and regulating authorities, as well, in many cases, as a “corporate veil” of some form or other between home and host-country corporate entities. It must also be acknowledged that, in human rights law, positive obligations are circumscribed by requirements of reasonableness, their scope furthermore influenced by the need for states to balance rights and interests and potential resource implications. Such factors might be expected to weigh heavily in the context of an alleged state duty, of global application, to control non-state actors operating in the sovereign territory of other states.

**V. Extraterritorial human rights obligations in the draft General Comment**

13. Given the above, the approach the draft GC takes to the topic of extraterritorial obligations cannot be said to be consistent with the existing state of international human rights law, in light of general principles of international law.

14. Extraterritorial obligations are addressed principally in Section C of the draft GC. Here it is stated that: “States parties are required to take necessary steps to prevent human rights violations abroad by corporations over which they may exercise influence, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant” (para. 31). For this proposition the draft GC claims as authority: i) Art. 56 of the UN Charter, in which, it indicates, the duty of UN member states to “take joint and separate action” to promote human rights “is expressed without any territorial limitation” (para. 32); ii) the ICJ’s decision in the *Wall* case which, according to the draft GC, acknowledges “…the extraterritorial scope of the core human rights treaties, focusing on their object and purpose, legislative history and the lack of territorial limitation provisions in their text” (para. 32).

15. However, contra, as we have described above, the threshold for extraterritorial obligations applied by international human rights law is much higher than that of a theoretical possibility to influence, as indicated here by the draft GC. Art. 56 UN Charter is a duty of cooperation in relation to existing human rights obligations (under Art. 55[[14]](#footnote-14)) it cannot enlarge those obligations, particularly with respect to their territorial scope; while extraterritoriality in the *Wall* case turned on acts attributable to the state at issue, on grounds of territorial control (cf. Section II above) and not acts of non-state actors (cf. Section III above). Further, the draft GC’s formulation fails to define the conditions under which “the sovereignty and obligations of host states” are not infringed, a matter that would not appear easy to resolve.

16. Similarly, the draft GC claims that extraterritorial human rights obligations “… arise when a State Party may exercise control, power, or authority over business entities or situations located outside its territory, in a way that could have an impact on the enjoyment of human rights by people affected by such entities’ activities or by such situations” (para. 33). While specific authority is not advanced for this principle, the draft GC refers to the Maastricht Principles, which it claims “provide a partial restatement of international human rights law as it have [sic] developed in this area in recent years” (id.), as well as to CESCR General Comments Nos. 14 and 15, in support of similar text included at para. 36.[[15]](#footnote-15)

17. Para.33’s formulation is inconsistent with established legal principles, for reasons discussed above. The fact that a state has jurisdiction to regulate non-state actors (e.g. as nationals) does not mean that it has a duty to exercise that jurisdiction.

18. In addition, given its failure to define relevant conditions, the draft GC is indeterminate and incapable of giving rise to legal certainty. While acceptable in the context of policy guidance, this is an insupportable deficiency in the context of the draft GC’s purported exposition of international law.

19. Moreover, CESCR General Comments are not in themselves authoritative, nor do they qualify as subsequent practice.[[16]](#footnote-16) Nor have states been uniformly supportive of the most basic of these obligations, namely of an obligation to respect economic, social, and cultural rights in situations of mere economic effect.[[17]](#footnote-17) Some have been categorically negative.[[18]](#footnote-18) The Maastricht Principles have no legal status, being no more than an academic commentary, even if they are presented in a form modelled on the work of the International Law Commission.[[19]](#footnote-19)

20. At para. 37, the draft GC asserts, citing the ILC’s Articles on State Responsibility,[[20]](#footnote-20) that “[w]hereas States Parties would not normally be held internationally responsible for any violation of economic, social and cultural rights which is caused directly by a private entity’s conduct, it would be in breach of its obligations under the Covenant if the violation reveals its failure to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other intervening causes have also played a role in the occurrence of the violation…”

21. Once again, however, this formulation fails to acknowledge that jurisdiction, and hence obligations, will almost always be lacking in the home state-TNC scenario, and that the test which para. 37expresses, for responsibility based on positive obligations, is linked to specific narrow exceptions to the general presumption that jurisdiction is territorial.

22. At para. 39, the draft GC refers to an “Extraterritorial obligation to fulfil”. Whereas it initially describes an “expectation”, under CESCR, on States Parties to take collective action through international cooperation to fulfil economic, social and cultural rights outside their territories, by para.40 this is referred to as an “obligation”, implying a legal status which, for reasons already stated, in reality it does not have.

23. Under the heading of Remedies in Part IV, the draft GC claims, citing Article 8 of the Universal Declaration of Human Rights and CESCR’s General Comment No. 9, that States Parties “have the obligation to guarantee access to effective remedies, and to reparation…, preferably through courts” which “extends to rights violations in the context of business activities, whether the harm to victims occurs on the territory of the State Party concerned or outside its territory” (para. 41), in which context it is further suggested that States Parties have a “duty to take necessary steps to address” obstacles to access to justice.

24. However, the right to a remedy requires the violation of a substantive right subject to protection under the relevant international instrument, which in turn requires, as seen above, state responsibility for an internationally wrongful act, and thus state jurisdiction and attribution, in the case of acts of non-state actors harming human rights. The failure to acknowledge these limitations renders the draft GC’s expression of this principle misleading.

**VI. Conclusion**

22. There can be little doubt that abuses in which transnational corporations are implicated remain a grave threat to universal and effective enjoyment of human rights and that it is incumbent on states to address this, as a matter of policy coherence as well as one of ethics.

23. While we appreciate CESCR’s efforts to highlight this situation, the draft GC fails to distinguish the analysis of existing legal obligations from the expression of a particular set of views, which do not in fact enjoy the legal basis claimed for them, about the current state of human rights law and how it should in future evolve. If such an approach may have the virtue of promoting debate, on the other hand, it is also apt to cause confusion, and to undermine the authority of human rights law and institutions, an outcome that is far from being in the interest of the victims of human rights abuses.

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3. The draft GC is intended “[to clarify the] duties of the State under the [ICESCR] to ensure that the activities of businesses contribute to and do not impede the realization of economic, social and cultural rights” (para.1) and “to provide guidance on the international law obligations [of states] under the Covenant in the context of business activities” (para.4). [↑](#footnote-ref-3)
4. E.g. *Loizidou v Turkey,* App.No.15318/89, Judgment (Preliminary Objections), 23 March 1995, para. 62, *Bankovic and Others v Belgium and Others* [GC] (dec.), App. No. 52207/99; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion* (9 July 2004), 136, paras.107-112; *Armed Activities on the Territory of the Congo (Congo v Uganda)*, Judgment 19 December 2005, paras.178-180. [↑](#footnote-ref-4)
5. E.g. *Lopez Burgos v Uruguay* (1981) 68 ILR 29, Communication No. R12/52, UN Doc. Supp. No. 40 (A/36/40) at 176); *Celiberti de Casariego v Uruguay*, Communication No. R 13/57, UN Doc. Supp No. 40 (A/37/40) at 157 (1981); *Öcalan v Turkey,* App. No. 46221/99, Judgment, 12 Mar 2003, para.93, *Öcalan v Turkey* [GC] App. No. 46221/99, Judgment, 12 May 2005; *Al-Skeini and others v UK* [GC]*,* App. No.55721/07 7, Judgment, 7 July 2011. [↑](#footnote-ref-5)
6. See further, C Methven O’Brien, ”The Home State Duty to Regulate TNCs Abroad”, DIHR Matters of Concern Research Paper Series 2016/04, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854275>; L Bartels, ‘‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2014) 25 *European Journal of International Law* 1071-91. [↑](#footnote-ref-6)
7. International Law Commission (ILC) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, extract from the Report of the ILC on the work of its fifty-third session, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>  (accessed 19 January 2017), *Chapter I, General Principles* Article 2. [↑](#footnote-ref-7)
8. Article 8, *Conduct directed or controlled by a State*, provides that: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”. [↑](#footnote-ref-8)
9. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Judgment 26 February 2007,para.406, emphasis added. [↑](#footnote-ref-9)
10. E.g. Human Rights Committee, ‘General Comment No. 3**: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’** (2004), CCPR/C/21/Rev.1/Add. 1326, para.8; *Velasquez Rodriquez**Case,* Judgment 29 July 1988, Inter-Am.Ct.H.R. (Ser.c), No.4 (1988); *X and Y v Netherlands*,App. No. 8978/80, Judgment, 26 March 1985, para.23; *Osman v. UK* [GC], App. No.23452/94, Judgment, 28 October 1998. [↑](#footnote-ref-10)
11. E.g. *Ireland v. UK,* App. No.5310/71, Judgment, 18 January 1978, para.159 [↑](#footnote-ref-11)
12. *Fadeyeva v. the Russian Federation*, App. No. 55273/00, Judgment, 30 November 2005, para.92. [↑](#footnote-ref-12)
13. *Moldovan and Others v Romania*, App. Nos.41138/98 and 64320/01, Judgment, 30 November 2005, para.95, citing *llaşcu and others v Moldova and Russia* [GC] App.No. 48787/99, Judgment, 8 July 2004. [↑](#footnote-ref-13)
14. B. Simma (ed.), *The Charter of the United Nations – A Commentary* (Oxford University Press, Oxford, 1994), 794, cited and discussed in S. Skogly and M. Gibney, ‘Economic Rights and Extraterritorial Obligations’ in S. Hertl and L.Minkler, *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, Cambridge, 2007), 271. [↑](#footnote-ref-14)
15. Under the heading, “Extraterritorial obligation to protect”, the draft GC asserts that States Parties have the “obligation to prevent and redress” impacts “outside their territories of the activities and operations of business entities that are domiciled under their jurisdiction” (para.35), an obligation that “extends to any business entities over which States Parties may exercise influence by regulatory means or by the use of incentives…in accordance with the Charter of the UN and applicable international law”(para. 36). [↑](#footnote-ref-15)
16. G. Nolte, ‘Third Report for the ILC Study Group on Treaties over Time’, in G. Nolte (ed.), *Treaties and Subsequent Practice* (2013), at 384. [↑](#footnote-ref-16)
17. M. Craven, ‘The Violence of Dispossession: Extra-Territoriality and Economic, Social, and Cultural Rights’, in M. Baderin and R. McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (2007), at 77. [↑](#footnote-ref-17)
18. Commission on Human Rights, Fifty-Ninth Session, Summary Record of the 56th Meeting, E/CN.4/2003/SR.56, at para. 49 (Canada, denying a ‘right’ to water in response to General Comment No 15); Commission on Human Rights, Sixtieth Session, Summary Record of the 51st Meeting, E/CN.4/2004/SR.51, at para. 84 (USA, denying that there is any international obligation in relation to a right to food), the latter referred to in Craven, *supra* note 17. [↑](#footnote-ref-18)
19. L. Bartels, ‘The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects’ (2014) 25:4 *European Journal of International Law* 1071, 1091-2. [↑](#footnote-ref-19)
20. Specifically Art. 23, comment 2: “To have been unforeseen the event must have been neither foreseen nor of an easily foreseeable kind”. [↑](#footnote-ref-20)