Republic of the Philippines

**COMMISSION ON HUMAN RIGHTS**

Quezon City

**IN RE: Position paper on the 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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**POSITION PAPER**

 WHEREAS, the Commission on Human Rights of the Philippines submits this position paper that provides its views and inputs to the draft General Comment on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. Likewise, this is being submitted as contribution to the efforts of the Global Alliance of National Human Rights Institutions (GANHRI) that is currently preparing its consolidated position on the same General Comment.

 WHEREAS, the draft General Comment puts emphasis on clarifying the duties of the State Party under the International Covenant on Economic, Social and Cultural Rights (ICESCR) to ensure that the activities of businesses contribute to and do not impede the realization of economic, social and cultural rights.[[1]](#endnote-1) More so, the draft General Comment is said to assist the business sector in appreciating their human rights obligations and ensuring their compliance.[[2]](#endnote-2) Certainly, the draft General Comment has categorically recognized that the business sector, though may be comprised of non-state actors, have obligations under the ICESCR. However, it is evident that the General Comment still applied the respect-protect-fulfill typology of human rights obligations to the State Party only.[[3]](#endnote-3) The draft General Comment cites specific examples of such obligations, and corresponding violations thereof, in such a way that it appears it is still the State Party who is the primary duty-bearer that influences and regulates the business sector.

 WHEREAS, the draft General Comment summarized and distilled some of the literatures on the complex and evolving issue of the extraterritorial components of the obligations under ICESCR. Simply stated, the State Party's obligations under the ICESCR do not stop at their territorial borders.[[4]](#endnote-4) The point of view therefore is taken from the duty bearer who knows it is expected not to limit itself within its territories, but rather is obliged to look beyond and ensure that businesses overseas, if with links to it, respect human rights. The draft General Comment further provides 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.”[[5]](#endnote-5) (Emphasis ours)*

 *“Extraterritorial 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.”[[6]](#endnote-6) (Emphasis ours)*

 WHEREAS, the draft General Comment cites numerous references that point to the soundness and legality of the concept of extraterritorial obligations under ICESCR.[[7]](#endnote-7) For example, the previous General Comments of the Committee on ESCR about the Right to Water (GC 15), Right to Work (GC 18), and the Right to Social Security (GC 19) are reiterated wherein the Committee has addressed specific extraterritorial obligations of States Parties concerning business activities. However, we note that the general comment on the right to work (GC 18), in its paragraph 52, provides that:

 *“While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, local communities, trade unions, civil society and private sector organizations - have responsibilities regarding the realization of the right to work. States parties should provide an environment facilitating the discharge of these obligations.* ***Private enterprises - national and multinational - while not bound by the Covenant,*** *have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work.” (Emphasis ours)*

In contrast, the draft General Comment under review would assert that the business sector have human rights obligations under the Covenant as shown in the following excerpts:

 *“****This General Comment aims to provide guidance on the international law obligations under the Covenant in the context of business activities.*** *As such, it seeks to assist States parties, including parliaments, domestic courts and national human rights institutions, in fulfilling their Covenant duties.* ***It is also the Committee’s intention that the present General Comment will support business entities and civil society on taking into account Covenant obligations in their activities.****”[[8]](#endnote-8) (Emphasis ours)*

 *“This General Comment is also relevant to non-State actors in the business sector. In a number of States Parties, international law provisions, including the Covenant, are incorporated into domestic law. In certain jurisdictions individuals are allowed direct recourse against business entities for violation of their economic, social and cultural rights as guaranteed under the Covenant. There are also an increasing number of jurisdictions that require business entities to report on their human rights due diligence process.* ***The present General Comment seeks to assist the business sector in appreciating their human rights obligations and ensuring their compliance****.”[[9]](#endnote-9) (Emphasis ours)*

 WHEREAS, it observed that corporations in the Philippines come into being not merely by contractual relations among individuals. The theory of concession[[10]](#endnote-10) in corporate law, as may be adopted in other jurisdictions, provides that a corporation cannot become as such by mere consent of the parties. There must be a law granting it an existence, and once granted, forms the primary franchise of the corporation. We now refer to the two types of franchise in Philippine corporate law: the *primary or corporate* franchise, and the *secondary or special* franchise.[[11]](#endnote-11) Primary franchise is the right granted to individuals by the State to be and act as a corporation after its incorporation. On the other hand, secondary franchise is conferred by the State upon the corporation after its incorporation and not upon the individuals who compose it. This system of franchises shows that the State Party is ultimately responsible to ensure that corporations respect human rights, because corporations are creatures of the State. As such, the United Nations Guiding Principles (UNGP) on Business and Human Rights provide that in meeting their duty to protect, states should ensure that laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights, such as economic, social and cultural rights.[[12]](#endnote-12) Certainly, The State Party has the obligation to define, by law, rule or regulation, the human rights obligations of the business sector under the ICESCR, taking into account the draft General Comment.

 WHEREAS, Article XIII, Section 18 (3)[[13]](#endnote-13) of the 1987 Constitution grants the Commission on Human Rights of the Philippines extraterritorial jurisdiction to protect and promote the human rights of Filipinos residing abroad. This is an example when the State Party may have conceived a national human rights institution that monitors the human rights situation of its nationals residing outside its borders.

 IN VIEW OF FOREGOING PREMISES, the consideration of the following recommendations in finalizing the draft General Comment is being sought, to wit:

1.) To include in the General Comment that States Parties have the obligation to provide, by way of the appropriate legislation or regulation, extraterritorial jurisdiction for concerned national human rights institutions to serve as non-judicial redress mechanisms that victims of human rights violations can access –

 This recommendation is consistent with the statement in paragraph 51 of the draft General Comment which provides that non-judicial remedies should be available in both national and transnational settings.

2.) To include in the General Comment that States Parties, being host states of business activities, have the responsibility to recognize the extraterritorial jurisdiction of the concerned national human rights institutions of the other States Parties in serving as non-judicial redress mechanisms in so far as the latter's nationals are concerned, consistent with Article 2.1[[14]](#endnote-14) of the ICESCR and Article 28[[15]](#endnote-15) of the Universal Declaration of Human Rights –

3.) To amend Paragraph 32 of the draft General Comment and insert the highlighted sentence below, as follows:

 “In Article 56 of the Charter of the United Nations, 'All Members pledge themselves to take joint and separate action in cooperation with the Organization...' to achieve purposes set out in Article 55 of the Charter, including: '... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' This duty is expressed without any territorial limitation, and should be taken into account when addressing the scope of States' obligations under human rights treaties. Also in line with the Charter, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, legislative history and the lack of territorial limitation provisions in the text. Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law. **More so, legal regimes concerning climate change mitigation and adaptation, as demonstrated in the Paris Agreement that entered into force on 04 November 2016, are recognized to have extraterritorial dimensions.**” (Emphasis ours; Citations omitted)

4 .) To include in the subject General Comment that States Parties could be held into account if they do not categorically legislate and define the human rights obligations of the business sector, with the ultimate objective of making economic, social and cultural rights binding on the latter –

5 .) To amend Paragraph Nos. 9 and 23 of the General Comment, respectively, through the insertions highlighted as follows:

 “Under articles 2 and 3 of the Covenant, States Parties have the obligation to guarantee the enjoyment of Covenant rights to all without discrimination. States Parties are required to eliminate formal as well as substantive forms of discrimination. Accordingly, States Parties must not only regularly review that domestic laws and policies do not discriminate on prohibited grounds, but also adopt specific measures, including legislation, aimed at prohibiting discrimination by non-State entities in the exercise of economic, social and cultural rights. Among the categories who are often disproportionately affected by the adverse impact of business activities are women and girls, indigenous peoples, **persons with disabilities (PWDs), LGBTIs, peasants, fisherfolks, and other people working in rural areas** particularly in relation to extractive **and agribusiness** projects, and ethnic or religious minorities where they are politically disempowered.”

 “The Committee also draws the attention of the States parties to the challenges facing human rights defenders. During the review of States Parties’ periodic reports, the Committee has regularly come across accounts of threats and attacks aimed at those seeking to protect their own or others’ Covenant rights, particularly in the context of **agribusiness,** extractive and development projects. In addition, trade union leaders, indigenous leaders, and anti-corruption activists are often subject to the risk of harassment. The Committee recommends States Parties to take all necessary measures to protect human rights advocates and their work and to refrain from imposing criminal penalties on them or enacting new criminal offences with a purpose of hindering their work.”

 It is observed that the draft General Comment seems to highlight the extractive industry, whereas the agribusiness sector has equally significant impacts to economic, social and cultural rights particularly in the Philippines. The complaints of communities against agribusiness firms are land grabbing and encroachment on ancestral domains and lands; environmental degradation; breach of contract; unconscionable terms and conditions in agribusiness venture agreements; corruption of government officials; threats to one's personal security and freedom of movement; circumvention of government processes, particularly those on obtaining free, prior and informed consent of indigenous peoples; and labor and social legislation issues, such as on child labor, nonpayment of minimum wage. More so, the sector comprising peasants, fisherfolks and other people working in rural areas must likewise be specifically mentioned in order to recall the on going efforts to draft the Universal Declaration on the Rights of Peasants and other People Working in Rural Areas. Businesses have impact on the realization of the rights of PWDs and LGBTIs, particularly in the work setting.

6 .) To include specific discussion on the Covenant obligations of the State Parties and the business sector in situations of armed conflict –

 This recommendation is being made with due consideration to Principle No. 7 of the UNGP, which provides:

 *“Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:*

 *(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;*

 *(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;*

 *(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;*

 *(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.”*

Respectfully submitted.

18 January 2017, Quezon City, Philippines.

1. Paragraph No. 1 of the draft General Comment [↑](#endnote-ref-1)
2. Parag. No. 6, ibid. [↑](#endnote-ref-2)
3. Parag. No. 12, ibid. [↑](#endnote-ref-3)
4. Parag. No. 31, ibid. [↑](#endnote-ref-4)
5. Parag.No. 31, ibid. [↑](#endnote-ref-5)
6. Parag. No. 33, ibid. [↑](#endnote-ref-6)
7. Refer to Parag. Nos. 30-40, ibid. and the corresponding footnotes cited [↑](#endnote-ref-7)
8. Parag. No. 4, ibid. [↑](#endnote-ref-8)
9. Op cit., ii [↑](#endnote-ref-9)
10. Villanueva, C.L. (2010). Philippine Corporate Law. Quezon City: Rex Printing Company, Inc. [↑](#endnote-ref-10)
11. De Leon, H.S. & De Leon, Jr. H.S. (2006). The Corporation Code of the Philippines Annotated. Quezon City: Rex Printing Company, Inc. [↑](#endnote-ref-11)
12. Principle 3 (b) of the UNGP [↑](#endnote-ref-12)
13. (3) Provide appropriate legal measures for the protection of human rights of all persons within the Philippines, **as well as Filipinos residing abroad**, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection; [↑](#endnote-ref-13)
14. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. [↑](#endnote-ref-14)
15. Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. [↑](#endnote-ref-15)