

Written Contribution by FIAN International to the draft General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

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FIAN International welcomes the opportunity to submit this written contribution with regard to the Committee on Economic, Social and Cultural Rights' (CESCR) draft General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities. In its work supporting the struggles of grassroots communities and social movements in countries around the world for the full realization of the right to adequate food and nutrition, FIAN has encountered cases of severe harm by business enterprises impairing the enjoyment of human rights in total impunity. We saw States ignoring their respect, protect and fulfil obligations territorially or extraterritorially. It is this experience which feeds our comments on this very timely General Comment from the Committee. In the following you will find some specific comments on the draft General Comment. In addition, we will be sending our specific proposals for text change to the Committee Members coordinating this work.

1. The relevance of States' Extraterritorial Obligations

The draft General Comment clarifies fundamental State obligations under the Covenant. States' extraterritorial obligations to respect, protect and fulfill are vital in order for States to individually and jointly regulate complex structures and webs of business enterprises of transnational character. In this sense, part C. addressing States' extraterritorial obligations is particularly welcomed and represents an opportunity for the Committee to clearly spell out and specify these obligations, and broaden its work in this regards when monitoring States' compliance.

In presenting the significance of States' extraterritorial obligations, it would be useful to include reference in the General Comment to additional jurisprudence of the Committee as well as of other Treaty Bodies. Missing from para. 31 are for instance CESCR General Comment No. 23 on the right to sexual and reproductive health, CESCR General Comment No. 12 on the Right to Adequate Food, CRC General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights and CEDAW General Recommendation no. 34 on the rights of rural women.

Despite clarifying States' extraterritorial obligations, the draft General Comment comes short when emphasizing the obligation for States to take joint action through international cooperation – in addition to individual action – for the realization of the Covenant rights. Although clearly stipulated under Article 2.1 of the Covenant and mentioned in para. 39 of the draft General Comment, this element of States' obligations is missing in many other of the paragraphs of the draft General Comment which clarify States' obligations (e.g. para. 8, 17, 25, 29, 40, 42, 46, 52). This omission is furthermore concerning as international cooperation and assistance are particularly relevant when regulating, monitoring, investigating, adjudicating and enforcing judicial decisions relative to transnational corporations impairing the enjoyment of human rights. The initiative taken by the Human Rights Council in its Resolution 26/9 addresses these shortcomings by setting up an international instrument to operationalize international cooperation, mutual legal support

and possibly establish joint facilitating mechanisms to address this regulatory gap. This could be an important step to address the impunity that we are often faced with.

Taking into account the relevance of international cooperation in the implementation of the present General Comment, we furthermore recommend the elimination the word “National” from Section V. on implementation.

2. Relevance of the Human Rights Council process towards a Binding Instrument on TNCs and other Business Enterprises with respect to Human Rights

The current process towards an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights established by resolution 26/9 of the Human Rights Council is extremely pertinent to the aim of this draft General Comment, in the aim of further building international human rights law. We consider that adequate reference to this process is missing in the draft. We propose to mention it under para. 2 (on the different mechanisms adopted by the international community) under para. 45 (on the challenges relating to transnational abuses), and under paras. 52-53 which discuss national action plans and strategies.

National action alone, without international cooperation between States or intergovernmental binding regulatory initiatives such as the one established by resolution 26/9, will inevitably prolong protection gaps and fail to thoroughly protect the Covenant rights from adverse business activities, especially those of transnational character.

3. Undue corporate influence and corporate capture

Undue corporate influence in policy spaces at different levels or even the corporate capture of public decision making, especially in the area of regulating business activities, poses a real threat to the protection and realization of the Covenant’s rights. Decisions of public interest, such as those related to human rights, have to remain exclusively in the domain of States acting jointly and separately. No interference must be allowed by business interests. The General Comment should therefore refrain from encouraging so-called “*multistakeholder*” initiatives and more generally the participation of business in the implementation of the Covenant’s rights and the present General Comment. We believe that the formulation under para. 22 on “privatization of economic, social and cultural life” is beside the point: what is privatized is not life but some functions that States formally performed. Whether these transfers have led in general to an improvement of services and a lowering of cost is questionable and needs further research. In any event, the General Comment should affirm in a stronger manner that States Parties to the Covenant have to retain their policy spaces for the implementation of economic, social and cultural rights and the common good and scrutinize the effects of privatization instead of taking this as a given.

4. Language related concerns – States violate, companies commit crimes, abuse or offend human rights.

In the same manner, the General Comment should avoid language that seems to indicate that business entities hold obligations under the Covenant. States are the duty-bearers under the Covenant for a number of reasons. One of them is that States, separately and jointly, are the only legitimate entities to administrate law, and the purpose of human

rights is (and has always been) for the people to establish, obligate and control States. While this State of affairs has obvious implications for business enterprises, this does not mean that they hold human rights obligations under the Covenant, but rather that States have to impose obligations under civil, criminal, labor and other branches of law to the business sector, in order to comply with their obligation to protect. In this sense, the General Comment should refrain from suggesting this under paras. 1, 4 and 6 at the risk of transforming the purpose of human rights and watering them down to mere moral standards, similar to corporate social responsibility, which have no legal value. Similarly, the General Comment should reserve the term “violation” for breaches of States obligations under the Covenant rights. There are specific language conventions about business impairing/infringing/harming the enjoyment of rights, or abusing human rights that the General Comment should use *inter alia* for businesses in paras. 7, 15, 16, 17, 18, 21, 31, 43, 45, 48, 49, 50.

Requiring “businesses to adopt human rights based codes of conduct for their management and employees” in para. 18 undermines human rights as rights. Human rights are not for moral orientation but for legal enforcement. This passage should therefore be removed. Businesses have to be legally regulated by States separately and jointly and recommendations are expected from the Committee to this effect. Businesses have to be held accountable by States under their administrative, civil and criminal laws. In para. 1, the draft General Comment begins by hailing the business sector’s “long contribution to the fulfilment of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights, including by generating employment opportunities and investing in economic development”. We recommend the Committee to remove or modify this statement. It suggests that businesses “fulfill human rights” by creating employment opportunities or investing. Everyday activities (as almost everything in society) has to do with human rights content in one way or the other - both positively and negatively. This, however, is not the point here. It should remain clear that human rights are a legal relationship between States (separately and jointly) as duty-bearers and people as rights holders. So it is States that carry legal obligations to respect, protect and fulfil, and they have to operationalize them in a way that eventually makes these obligations justiciable for the rights-holders.

5. Obligation to Respect

The draft General Comment’s section on States’ obligation to respect (paras. 13-16) confuses at times States’ respect-obligations with their protect-obligations (paras. 17-24). States’ failure to adopt and implement effective measures to prevent businesses from abusing Covenant rights, as stipulated under para. 16, is better understood as a failure by States’ to comply with their protect-obligations as it relates to the obligation for States to prevent third parties from infringing human rights and not as States’ obligation to refrain from interfering with the enjoyment of the right. It is recommended to include under para. 13 the issue of collusion by States with business conduct which impairs the enjoyment of human rights.

Under States’ obligation to respect human rights, including extraterritorially, the General Comment should make specific reference to the due diligence requirements of State-

owned or controlled business enterprises as well of State export credit agencies. States must ensure that the businesses they are supporting or providing services to via State agencies, such as export credit agencies, do not impair the enjoyment of human rights. State export credit agencies should be required to undertake mandatory human rights due diligence prior to providing financial and other forms of support, whether directly or through an intermediary.

6. IGOs and IFIs activities with respect to business

States' obligations as members of international organizations, including International Financial Institutions (IFIs), in the context of business activities are absent from the draft General Comment. It should reaffirm that member States of international organizations hold human rights obligations when acting jointly with other States inside international organizations¹. Member States of international organizations must respect economic, social and cultural rights, including extraterritorially, when participating in decision-making inside such organizations related to business activities. As members of international organizations, States must furthermore take all reasonable steps to ensure that the international organizations act consistently with the particular States' economic, social and cultural human rights obligations. This requires for instance opposing policies or programmes which can potentially impair the realization of human rights or developing and proposing new policies and programmes to ensure that international organizations comply with international human rights law. Reaffirming these States' obligations is crucial in a time where policies by international organizations, in particular IFIs, have fueled land grabs and other large-scale projects by corporations which have severely harmed the enjoyment of individuals' and communities' economic, social and cultural rights. This also follows the jurisprudence set in other General Comments from the Committee as General Comment No. 12 on the Right to Adequate Food, General Comment No. 13 on the Right to Education, General Comment No. 14 on the Right to the highest attainable standard of health and General Comment No. 15 on the Right to Water *inter alia*.

7. Obligation to fulfil

The framing of States' obligation to fulfill – especially regarding the duty to facilitate under para. 26 of the draft General Comment – as the requirement for States “to create an enabling environment for business actors to respect the economic, social and cultural rights enshrined in the Covenant as well as to contribute towards the full realization of these rights” through measures such as “...export credits, investment related insurance and guarantee, tax exemptions...” needs to be considerably amended. The duty to facilitate in the context of business activities should not be understood as the duty to create an enabling environment *for businesses*, but rather the duty to adopt all needed measures, including direct provision, to ensure effective access to the goods and services underlying Covenant Rights. The main focus of States' action is to ensure the access, availability, adequacy, affordability of such goods and services especially for the most marginalized and disadvantaged, the human rights holders, and not to facilitate “windows of opportunities” for businesses. Examples of such facilitating measures and policy tools

¹ See Principle 15, Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

which could be included under para. 26 of the draft General Comment are full employment policies, agrarian reform, the shortening of working hours, measures to support affected people cover costs to access remedy mechanisms and lawyers, equality of salary for women and men, policies to impede tax evasion which allow the State to allocate more resources for social protection, reversing privatization processes which impede the access to basic services for the most deprived, adopting measures to guarantee tenure of land for peasants and indigenous communities, regulations on parental leave under work contracts which are needed to fulfill children rights inter alia.

A similar framing is encountered under para. 27 on States' duty to promote. States' obligation to provide information and guidance *to human rights holders* on their rights and mechanisms for remedy is inadequately addressed. Instead, the emphasis in the draft General Comment is on promotion activities *towards businesses, government agencies and institutions* through educational campaigns, the dissemination of best practices and trainings. A human rights approach to the obligation to promote is not to give capacity building to companies, but, to make rights holders aware of their rights, of the complaint mechanisms available to them when States breach their obligation to protect vis-a-vis businesses, of the possibility to use civil, administrative, labor, environmental law and other branches of law to hold businesses to account for human rights abuses amongst other things.

8. Remedy mechanisms

We would like to make here several remarks regarding Section IV on remedies. The General Comment should further highlight States' obligation to also provide remedy for beaches of extraterritorial human rights obligations as well as for cases where it holds a bases for protection as defined under para. 35-36 of the draft General Comment or principle 25 of the Maastricht Principles. On the challenges to remedy regarding transnational abuses, para. 45 should make reference to other important barriers impeding affected people and communities to access justice such as *forum non conveniens*, statute limitations and insufficient or inadequate legal aid schemes.

On the types of remedies, it is not enough for the General Comment under para. 48 to refer to criminal liability of corporations as a possibility only for those legal systems that recognize the criminal liability of legal persons. The General Comment should underline that all States, as part of their obligation to protect and to provide for remedy for human rights abuses or violations, should amend their criminal law accordingly as to ensure the criminal liability of corporations as well as of the individuals acting on behalf of the corporation.

Although the draft General Comment states that non-judicial mechanisms "should not be seen as a substitute for judicial mechanisms" (para. 50), it does not spell out the concerns and potential dangers of such types of remedy mechanisms such as grievance mechanisms. Many cases² have proven the ineffectiveness of moral-duty-based and non-judicial grievance mechanisms in addressing human rights abuses. In addition to the power

² See e.g Acacia mining case in Tanzania: <http://miningwatch.ca/news/2015/11/17/broken-bones-andbroken-promises-barrick-gold-fails-address-ongoing-violence>

asymmetries which such mechanisms create, businesses furthermore sometimes use them strategically to avoid affected people from taking legal action, for example, by including legal waivers in which victims accepting private non-judicial remedies cannot initiate legal proceedings.³ The General Comment should therefore call on States to take all the necessary measures to avoid that these remedy mechanisms hinder affected individual's and communities' access to justice. As opposed to company-based "remedy mechanisms", a reference to State-based non-judicial mechanisms could be developed in the General Comment, including administrative complaints, measures by controlling administrative bodies and national human rights institutions.

³ Feeney, P., 'Principles without Justice: The corporate takeover of human rights, Rights and Accountability in Development,' 2016. Accessed at: http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf.