



**Submission to the UN Committee on Economic, Social and Cultural Rights
regarding the Draft General Comment on
'State Obligations under the International Covenant on Economic, Social and Cultural Rights
in the Context of Business Activities'**

19 January 2017

1. Introduction

We are grateful for the opportunity to make this submission to the Committee on Economic, Social and Cultural Rights, commenting on its Draft General Comment on 'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities'.¹ The topic of the Draft General Comment is one of the most important issues relating to economic, social and cultural rights currently. As the power of business grows both absolutely and relative to States, and as States look more and more to the private sector to finance and implement their policies, particularly in the area of economic and social rights, the Committee's guidance on the relationship between the International Covenant on Economic, Social and Cultural Rights (*ICESCR*) and business activities is much needed. The General Comment is also timely as the implementation of the Sustainable Development Agenda gets underway. The SDGs will be one of the key mechanisms for the realisation of economic and social rights in many countries and it is clear from the recent Financing for Development discussions that the private sector will play a central role in their implementation. States, business actors and civil society will all benefit from the Committee's detailed consideration of this topic.

2. Context and Scope

2.1. As paragraph 1 of the draft clearly states, the purpose of the General Comment is to 'clarif(y) the duties of the State under the International Covenant on Economic, Social and Cultural Rights'. Whilst the Guiding Principles on Business and Human Rights are relevant to this endeavour, they do not in any way alter the States' obligations under the ICESCR with respect to business activities.

The Guiding Principles do not create new international law² but are a restatement of international human rights law obligations and responsibilities, including State obligations arising under the ICESCR. Importantly, the Guiding Principles do not replace or undermine the source laws: 'Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights'.³

Whilst, this General Comment can assist business actors to better understand their *responsibilities to respect human rights*, as they relate to economic, social and cultural rights and the ICESCR, the purpose of the General Comment is to elaborate State obligations under the ICESCR.

2.2. Paragraph 5 refers to 'business entity', whilst paragraph 6 refers to 'non-State actors in the business sector' and the term 'business actors' is also used throughout. It is unclear whether a distinction is intended between these different terms? For clarity, we recommend defining one term (perhaps 'business actors') in paragraph 5 and then using that term throughout.

2.3. We suggest that paragraph 5 might be strengthened if it sets out broadly the different contexts in which the State has obligations with respect to business activities:

¹ 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, 17 October 2016

² *Op. cit.*, see page 1 'General Principles'.

³ *Op. cit.*, page 1 'General Principles'.



- Putting in place measures, including direct regulation of business entities, to protect people from the acts of any business entity over which it has jurisdiction, in respect of activities and impacts within or outside the State's territory;
 - State-owned or controlled entities;
 - Business entities acting on its behalf, eg: out-sourcing of public services;
 - In its own dealings with business entities, eg: procurement, export credit or insurance services; public private partnerships (PPPs); the State's commercial transactions with business
- 2.4. As a general observation, the human rights principles of transparency, access to information, participation and consultation could be emphasised more throughout the draft General Comment. For example, in relation to non-discrimination, the point could be added that an important way of avoiding discrimination and creating more sustainable policies, is through targeted consultation and participation of key groups, such as women.
- 2.5. These principles are particularly relevant to the obligations to protect and fulfil. For instance, in relation to natural resource extraction projects – participation of affected communities in decision-making is key to the avoidance of conflict and rights violations. Meaningful consultation cannot occur without transparency in the commercial relations between business and the State and access to key commercial documents and information. States can mandate meaningful consultation processes in its commercial agreements with business entities or in legislation regulating extractive sectors. The State should also demonstrate best practice through its own behaviour in State-owned enterprises. Another example is in the development of National Action Plans where consultation with civil society is crucial (see paragraph 10.1 below).
- These issues of consultation and participation link in with paragraph 23 of the draft which discusses human rights defenders, which is addressed in paragraph 4.4 – 4.6 below.

3. Obligation to respect

- 3.1. In our view, the obligation to respect, in the context of business activities also implicates government procurement and commercial transactions with business actors. States must ensure that their business partners are also operating in conformity with the ICESCR by putting in place due diligence mechanisms to detect risks and abuses in supply chains and with business partners.
- 3.2. We found that there is some blurring or lack of clarity between the respect and protect elements. For example, the content of paragraph 16 appears to fit equally in the obligation to protect. This may reflect the reality that there is some overlap between these categories.
- 3.3. The reference to land in paragraph 15 is vital, and we encourage it to be kept. In addition, we would encourage the Committee to also cross-reference CEDAW General Recommendation No. 34 on the Rights of Rural Women, as this is a specific place where a gender perspective would benefit the draft. CEDAW General Recommendation No. 34 on the Rights of Rural Women asks States parties to: ensure that land acquisitions, including land lease contracts, do not violate the rights of rural women or result in forced eviction, and protect rural women from the negative impacts of the acquisition of land by national and transnational companies, development projects, extractive industries and megaprojects; obtain the free and informed consent of rural women before the approval of any acquisitions or project affecting rural lands or territories and resources, including those relating to the lease and sale of land, land expropriation and resettlement; when such land acquisitions do occur, they should be in line with international standards, and rural women should be adequately compensated; and adopt and effectively



implement laws and policies that limit the quantity and quality of rural land offered for sale or lease to third States or companies.⁴

4. **Obligation to protect**

- 4.1. We support the detailed description of the obligation to protect in the context of business activities, including the helpful examples. In particular, we agree it is important to underline the obligation of States to require business actors to undertake due diligence processes to identify, prevent, mitigate and account for how they address, their impacts on human rights. A key component of human rights due diligence is consultation with affected communities, to ensure that potential adverse impacts are identified in advance of projects/operations. Meaningful consultation must take into consideration all barriers to engagement, including marginalized groups and differing abilities and needs. It must also include a commitment to transparency in respect of the transactions and the consultation process and access to key information for affected communities.
- 4.2. Paragraph 21 of the draft General Comment is very important and provides a helpful description of the importance of monitoring and enforcement mechanisms and of their resourcing, authority and independence and the absence of corruption.⁵
- 4.3. Paragraph 22 of the draft which deals with the phenomenon of privatisation is also very important, given the prevalence of privatisation in all spheres of government activity. We recommend that the paragraph emphasise that the State retains its ICESCR obligations in situations where it has privatised a public service. Further, whilst affordability is a key element of the challenges for States dealing with privatisation, other equally important elements are: accessibility; quality; discrimination, both direct and indirect/systemic; transparency and participation in decision-making; and adequacy, particularly in the context of persons with special or different needs such as persons with disabilities.⁶
- 4.4. In our view, paragraph 23 on human rights defenders could be developed further to better reflect the severity of the problem and the role of States in protecting and establishing an enabling environment. Further, in order to reflect the reality of legal harassment experienced by human rights defenders, *civil* offences and penalties should also be referred to. Legal harassment of human rights defenders by business entities is a serious problem whereby business entities initiate legal proceedings against individuals and organisations that publically criticise them or their projects, in order to silence them. They are commonly civil claims such as defamation or libel.
- 4.5. We recommend including a reference to the recent Statement of the Committee on human rights defenders and economic, social and cultural rights.⁷ Further, States can play a crucial role in establishing an environment conducive to the protection of human rights defenders through laws and policies protecting their work and through the State's own behaviour, which signals to business acceptable behaviours with respect to human rights defenders. States should create a culture of respect for the work and role of human rights defenders by, for instance, mandating consultation and meaningful dialogue with affected communities for projects in all relevant sectors.

⁴ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 34 (2016) on Rural Women, CEDAW/C/GC/34, paragraphs 62 c, d and e.

⁵ Eg: The tragic Kentex factory fire in Valezuela City, the Philippines, where 72 workers died due to the inadequacy of the fire safety system. The Philippines had in place fire safety laws, which if enforced, may have saved the lives of the workers. However, due to corruption and lack of resources and authority of the inspection bodies, those laws were not enforced, fire safety permits were granted in breach of the laws and whilst inspections were carried out, they were marred by corruption and under-resourcing of the inspectorate. See <https://www.theguardian.com/global-development-professionals-network/2015/jun/08/philippines-factory-fire-72-workers-unions-human-rights>

⁶ This discussion is also relevant to the obligation to fulfil and is discussed further at paragraphs 5.2 – 5.4 below.

⁷ Committee on Economic, Social and Cultural Rights, Public Statement on 'Human Rights Defenders and Economic, Social and Cultural Rights', E/C.12/2016/2, adopted on 7 October 2016.



4.6. In relation to human rights defenders, we also endorse the submission on this topic made by the International Service for Human Rights.

5. *Obligation to fulfil*

- 5.1. In paragraph 26, another ‘facilitating measure’ might be government procurement policies which could aim to encourage business investment in the fulfilment of ESC rights or could be conditional upon publication of a human rights impact assessment in respect of relevant projects or services.
- 5.2. With respect to the duty to provide (para 28) many States are turning to the private sector for resources and implementation in the fulfilment of ESC rights, often through public-private-partnerships (PPPs). This is particularly relevant in the context of the 2030 Agenda for Sustainable Development, where it is clear that public finances and international aid and development contributions are woefully inadequate and the private sector, and PPPs in particular, have been highlighted as the solution. When fulfilling rights using private sector provision, States of course retain all of their ICESCR obligations, including the human rights principles of non-discrimination, participation and accountability. Relevant ICESCR obligations should be reflected in the commercial documentation between the State and the business entity (such as PPP agreements).
- 5.3. Whilst the regulation of private actors involved in service provision is crucial, it is not sufficient. States have an obligation to ensure that the system itself, for the provision of health, education or water (etc.) is reaching, and indeed prioritizes, the most marginalised⁸ and that reliance on private providers is not creating segregation such that marginalised groups are receiving a sub-standard service. That is, States’ obligations go beyond merely ensuring that private providers of public services do not directly discriminate in the provision of services, and extend to ensuring that a two-tiered health/education system is not created, where there is a poor level of service for poor people and a high level of service for wealthy people. States have an obligation to ensure that this type of systemic discrimination is not the by-product of a system that in part or whole relies on the private sector.⁹ Whilst different considerations may be relevant to different social sectors, affordability, quality and access will be key considerations for all social and economic rights.
- 5.4. This may also mean that a State must maintain a good quality public system which guarantees affordable, quality services to all and requires private providers to undertake measures that reinforce affordability, quality and accessibility across the system. For example, legal requirements that private providers: allocate a specified number of school places for low-income or rural students; must cap fees; have financial hardship policies in relation to fees for water or sanitation services; must build a certain percentage of affordable social housing including housing appropriate for persons with disabilities; or must prioritise establishing rural and outreach health facilities.
- 5.5. Paragraphs 28 and 29 include very important references to taxation of business and measures against tax avoidance relating to the obligation to mobilise the maximum available resources. We encourage the Committee to expand on this topic by referring to the State’s obligation to ensure that its tax and financial services arrangements, both domestically and internationally, ensure that business pays its fair share of taxation and do not encourage a race to the bottom in business tax policies. The Committee has noted its concern that financial secrecy legislation and permissive rules on corporate tax can affect the

⁸ Eg: those in rural areas, those experiencing poverty or living in slums, women and girls, LGBTI persons, ethnic and linguistic minorities etc

⁹ See for instance the CESCR Concluding Observations on Chile, E/C.12/CHL/CO/4, June 2015, at paragraph 30.



ability of States parties to mobilise the maximum available resources.¹⁰ We recommend including in the General Comment a reference to these concerns.

- 5.6. In this respect States should also consider tighter regulation of business lawyers and accountants to ensure their advice to businesses does not encourage aggressive tax avoidance practices which diminish its, or another State's, ability to mobilise the maximum available resources.
- 5.7. Paragraph 29 could be strengthened by more clearly relating this to business activities.

6. Extra-territorial obligations (ETOs)

- 6.1. We welcome the detailed guidance on ETOs, as they are critically relevant to current experiences of rights violations involving business activities, across the world. Cross-boundary harms or situations involving corporate actors domiciled or controlled in one State but harms occurring in another, are common. It will also help to inform debates about the extra-territorial reach of ICESCR.
- 6.2. In paragraph 31, the Committee suggests that the only criteria for States to prevent human rights violations abroad by corporations, is that the State 'may exercise influence' over the corporation. For clarity, it would be useful to elaborate what is meant by 'may exercise influence'. It seems that this would include situations where the corporation is incorporated within the relevant State but is engaged in activities outside the State. Perhaps it would be useful to spell out what other circumstances might be covered.

7. Extra-territorial obligation to respect

- 7.1. The extra-territorial obligation to respect (para 34) also relates to State partnerships with business entities in the implementation of aid and development programs abroad. Where States invest in, or contract to, business actors to provide aid and development assistance in another country, their ICESCR obligations follow them and States must ensure that those projects comply with the Covenant (whether or not the business partners are domiciled in the home State).

8. Extra-territorial obligation to protect

- 8.1. In paragraph 37 it seems that the reference to paragraph 15 may be incorrect, as it is not clear what four elements are referred to?
- 8.2. Paragraph 38 might benefit from expanding on what obligations States have in relation to ESC rights risk and abuses in supply/value chains and due diligence. The Committee should urge States to legally require corporations incorporated in or operating in its jurisdiction, to conduct human rights due diligence throughout their operations and in supply/value chains, involving:
 - Systematic assessment of actual and potential human rights risks and abuses;
 - The taking of measures to mitigate those risks;
 - Action to end and prevent the human rights abuses and ensure access to remedy for victims;
 - A transparent process which includes public reporting on the risks, abuses and actions taken.

9. Remedies

- 9.1. We support paragraph 41 and in particular the reference to 'preferably through courts'. Often discussions about access to remedy for human rights abuses of corporations focuses on non-judicial remedies, due to difficulties with the effectiveness and reliability of the judicial system in the State where the harm occurred and jurisdictional limitations on claims in the State where the corporation (or its parent company) are domiciled. Whilst, non-judicial mechanisms and remedies (whether State-

¹⁰ See Committee on Economic, Social and Cultural Rights, Concluding Observations on the United Kingdom, E/C.12/GBR/CO/6, 16 July 2016, paragraphs 16 & 17.



based, multi-stakeholder initiatives or operational level grievance mechanisms) can sometimes provide swifter access to remedy for victims, all too frequently, they do not deliver access to justice due to their non-binding nature and lack of transparency and independence. Therefore, it is critical that the primary avenue that States should be facilitating, is access to remedy through the Courts.

- 9.2. Paragraphs 50 & 51 set out very helpful guidance on the requisite features of an ICESCR compliant non-judicial remedy mechanism, with the proviso that they should not be seen as a substitute for a judicial mechanism.
- 9.3. Obviously for judicial remedies to be available there needs to be in place a legal framework that enables corporations to be held legally liable for violations of ICESCR rights. Where appropriate, this should include criminal corporate legal liability.
- 9.4. We also strongly support the Committee's recognition of the particular challenges for transnational abuses of ESC rights, discussed in paragraph 45. In paragraph 46, we recommend adding to the discussion of the barriers to access to justice, the importance of access to legal aid. Without access to legal aid, in many cases it is impossible for victims to bring a claim in respect of corporate human rights abuses, due to the cost of legal assistance and the complexity of Courts proceedings.
- 9.5. We support the Committee's reminder to States, in paragraph 48, that in some cases prosecutorial authorities will need to be made aware of their role in upholding rights. We would add to this a need for States to ensure that prosecutorial authorities are adequately mandated, resourced and independent to carry out this function. Further, given the complexity of cross border cases involving corporate abuses of human rights, States may need to seek international co-operation and technical assistance to build the capacity of prosecutorial authorities in these types of cases.

10. National implementation

- 10.1. Where States Parties are developing a National Action Plan on Business and Human Rights, pursuant to the Guiding Principles, obviously they should include their obligations under the ICESCR. We welcome the reference to the importance of NHRIs and civil society organisations in the development of national strategies and plans of actions. In addition, we suggest noting specifically the importance of consultation in the development of such plans and underlying that States should put in place a meaningful consultation process that aims to ensure participation from all relevant sections of society, with particular focus on groups frequently marginalised in the realisation of ESC rights.

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