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January 20th, 2017

**Comments to the “Draft of the General Comment on State Obligations under the International**

**Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” (“Draft General Comment”)**

**Conectas Human Rights, HOMA - Human Rights and Business Centre and the Working Group on Intellectual Property/Brazilian Interdisciplinary Association of AIDS** have the honor to address the Committee to transmit some reflections on selected topics of 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”).

This is a timely initiative that further clarifies States’ duties, under the Covenant, for the protection of human rights from corporate-related abuses. It comes in a crucial moment as States prepare for the third session of the Intergovernmental Working Group for the Negotiation of a Binding Instrument on Business and Human Rights, which will take place in ​October​ ​2017.

Considering the process of negotiation of a binding treaty on the issue of business and human rights, it is crucial that the conceptual and normative elements of the Draft General Comment uphold the foundational principles of international human rights law and the duties of States under the Convention. This contribution aims to complement the analysis and guidelines of the Draft General Comment by calling the Committee’s attention to issues that it might wish to review or consider to address in more depth in the final version of the document.

**Scope**

The General Comment scope is intended to cover virtually all business activities and business entities, irrespective of their domestic or transnational character, of size, location, ownership, and structure. While this broad conception of business activities and enterprises is welcome to ensure that any business-related abuse of rights guaranteed by the Convention is addresses by States, special attention could have been dedicated to State-owned Enterprises (SOEs) and to transnational corporations (TNCs). In the case of SOEs, the close association with the State implies additional obligations for avoiding that they commit human rights abuses, in line with Principle 4 of the UN Guiding Principles on Business and Human Rights (UNGPs). As for TNCs, the Draft General Comment should explicitly recognize that lack of remediation for abuses by these companies is cause by legal and practical obstacles resulting from serious gaps in international law.

**Levels of obligation**

The Draft GC provides meaningful guidance for States on the diversity of situations where business-related abuses can trigger their responsibility for breach of either the right to respect, protect or fulfil the rights established by the Convention. However, business enterprises have human rights obligations of their own to respect the rights enshrined in the Convention, irrespective of the obligations of States, and this means that business enterprises can violate human rights. This logic should be reflected along the entire document and should shape its language. In this sense, the vocabulary of “incidents” (para 1) and the conditioned obligations, such as the wording “if needed” (para 18), are incompatible with the grammar of human rights and should therefore be revised. These are just examples that illustrate the need to ensure the language chosen for this Comment does not result in misinterpretations of the Convention’s provisions and in the weakening of international human rights standards.

Despite business enterprises’ direct obligation to not infringe upon the rights of others, States retain the primary obligation to respect, protect and fulfil human rights. Therefore, the Committee should be extremely cautious when addressing the challenges posed by privatization and the overwhelming presence of market mechanisms in the provision of basic goods and services necessary for the realization of rights, such as in paragraph 22. More than recommending that States regulate the markets and its private participants, the Committee should reinforce that States have the obligation to fulfil human rights by mobilizing the maximum available of its resources, including as a means to prevent that businesses generate or aggravate social inequalities, exclusion and reinforce vulnerabilities amongst marginalized groups.

Regarding direct regulation and intervention of States under the duty to protect (para 19), an additional example could be inserted, drawn from the report of the UN High Level Panel on Access to Medicines. According to the Panel, governments should require manufacturers and distributors of health technologies to disclose to drug regulatory and procurement authorities information pertaining to the costs of R&D, production, marketing and distribution of health technology being procured or given marketing approval with each expense category separated; and any public funding received in the development of the health technology, including tax credits, subsidies and grants. Still under the duty to protect, pharmaceutical companies should not seek to limit, diminish or compromise the ‘flexibilities’ and other features of the intellectual property regime that are designed to protect and promote access to existing medicines.

On the obligation to fulfil human rights, the Committee could insert another example of a violation to this duty, such as the failure to curb high prices of essential medicines while protecting intellectual property rules instead of the right to health. To further clarify the duty to inform we recommend that the Comment includes the need for States to secure compliance of business actors with the Convention by requiring that they refrain from lobbying for more demanding protection of intellectual property interests than those required by TRIPS.[[1]](#footnote-1)

**State-Owned Enterprises**

The document treats State-Owned Enterprises as any private enterprise when setting the duties of State Parties regarding Convention rights. On Para 14, about the responsibility to respect, the Draft General Comment lists a range of situations where States can be held directly responsible for violations committed by business actors, including when a private entity is in fact acting on a State’s instructions, is under its control or direction in carrying out the particular conduct at issue or if a business actor commits an abuse with the facilitation of the State or with corruption of public officials. The Committee should clarify the meaning of “control” in such paragraph, if it refers to the State being the beneficiary owner of the majority of the shares, having the power to appoint the majority of board members, exercising *de facto* control over the activities of the enterprise, or something else, such as “control” over a specific conduct, irrespective of legal, statutory or contractual stipulations.[[2]](#footnote-2)

The lack of distinction between the special level of obligation of States towards private companies and SOEs represents a missed opportunity to clarify that a State failure to take additional measures to protect against violations committed by companies that it owns or controls will most likely be taken as a failure to comply with the “obligation to respect”. In this sense, the Working Group on Business and Human Rights has addressed this issue in a report about the duty to protect rights from violations by SOEs[[3]](#footnote-3), where the Group stated there are compelling reasons for States to adopt further steps to ensure that the activities of these entities do not infringe on the rights of third-parties. The Working Group recognized that a violation by an SOE “significantly increases the likelihood that the State is held liable under the duty to respect”. The lack of a distinction between situations where abuses by SOEs attract the responsibility of the State under the “duty to respect” also marks a departure of previous General Comments adopted by the Committee. It has stated, for instance, that the duty to respect requires the State to refrain from unlawfully polluting air, water and soil, for example through industrial waste from State-owned facilities.[[4]](#footnote-4) The Committee should clarify the special situation of SOEs and the consequences, under the Convention, of the nexus between these companies and the States.

**Human Rights Due Diligence (HRDD)**

In the Draft GC, the Committee states that the obligations of States to ensure that businesses carry on human rights due diligence falls under the “duty to protect”. But the Committee should uphold its previous understanding about the obligation of States Parties to ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights would as a matter of the “duty to respect”[[5]](#footnote-5). To ensure that HRDD is not completely shaped by prevalent market logic of Corporate Social Responsibility (CSR), the Committee should set out minimum substantial and procedural aspects drawing from international standards, including, but not limited to the UNGPs and the body of norms and jurisprudence of international human rights law. The Comment should clearly set the obligation that States define minimum standards for the HRDD through legislation and other policies.

**Supply Chain**

On the duty to respect, (para 18), the Committee should include the obligation of States to legislate and enact policies requiring that businesses adopt policies and take actions to avoid human rights abuses by its subcontractors and in their supply chain.

**Trade and investment promotion and facilitation**

As recognized by the Draft General Comment, policies to facilitate and promote trade and investment by business enterprises can conflict with States’ obligations under the Convention. The proliferation of investment and free-trade agreements containing extensive patent and clinical trials data protections on health technologies which exceed the minimum standards for intellectual property required by the TRIPS Agreement is an example of a practice of “enhancement of the business environment” that impedes the fulfillment to the right to health. While the Draft General Comment restates the obligation of States to align policies and business incentives to their human rights obligations, it fails to require States to ensure that business promotion and facilitation agencies, such as export credit agencies and development finance institutions, adopt human rights policies and carry out HRDD processes as part of their own duties to respect and protect human rights considering their close association with the State, or, as in many cases, the relationship of control between them. We recommend that the Draft General Comment refers to the Guiding principles on human rights impact assessments of trade and investment agreements, elaborated by the Special Rapporteur on the right to food.[[6]](#footnote-6)

**Remediation**

In mass-scale human rights violations committed by corporations, such as the British Petroleum oil spill in the Gulf of Mexico, the Trafigura illegal waste disposal in the Ivory Coast and the Samarco/Vale/BHP Billiton dam collapse in Mariana (Brazil), States and involved companies have entered into settlement agreements for the remediation of the human rights impacts and environmental damages. In the case of the dam collapse in Brazil, victims and affected communities were completely left out of the table of negotiations of the agreement, a violation of the right to an effective remedy according to international law.[[7]](#footnote-7) The Draft GC should explicitly refer to the obligation of States and business enterprises to ensure that affected communities are consulted in all phases of the negotiation and implementation of settlement agreements.

When addressing obstacles for a full and effective remedy and access to justice, the Draft General Comment should make it clear that States must include in their legal framework hypothesis to remove the corporate veil, by disregarding legal personality prerogatives in case of human rights violations. Also, States must also approve nationally binding laws that foresee holding transnational corporations accountable for human rights violation, access to remedy and to justice.

**Sanctions**

The General Comment could have recommended more measures that States Parties should deploy to punish corporations that violate the rights protected by the Convention beyond civil and criminal liability. There is an urgent need for States to make more use of administrative sanctions to deter business from committing human rights abuses. Measures in this sphere include, for instance: (i) the creation of publicly accessible lists of companies with a negative record of human rights abuses, either by focusing on specific sectors or rights (such as the slave-labor list in Brazil) or through general records; (ii) the prohibition to access public credit, obtain tax incentives and to receive fiscal subsidies, as well as other types of financial and economic benefits from official agencies such as development banks, investment insurance funds and export credit agencies.

**National Action Plans**

Paragraph 52 states that National Action Plans (NAPs) “may set specific and concrete targets, define the time frame and necessary means for their adoption. Empirical studies have shown that NAPs on business and human rights suffer from structural problems seriously hinder their capacity to function as tools for advancement of the UNGPs.[[8]](#footnote-8) The requirement that NAPs define targets, roles and responsibilities and mechanisms of review should be treated by the Committee as mandatory. Action plans devoid of such basic elements are incapable of producing concrete changes and changing corporate and State behavior. States should pass NAPs in the form of binding law. As a matter of legitimacy and observance of the principle of primacy of human rights, the Committee should demand that States ensure that asymmetries of economic and political power between victims and corporations are duly mitigated by putting victims in the center of the process and that mechanisms are put in place to avoid corporate capture and undue influence of business actors in the process.

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1. This example is drawn from the Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicine of the Special Rapporteur on the Right to Health. [↑](#footnote-ref-1)
2. See, for instance, the definition of control used by the Working Group on Business and Human RIghts in their report on SOEs, taken from the OECD Guidelines on Corporate Governance of State-Owned Enterprises. This definition of control is not without its limitations, and therefore the Committee should evaluate which definition to use in the Draft General Comment. [↑](#footnote-ref-2)
3. See the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/32/45, Human Rights Council Thirty-second session, May 2016. [↑](#footnote-ref-3)
4. See the Committee’s general comments No.14 (2000) on the right to the highest attainable standard of health, para. 34; No. 15 (2002) on the right to water, para. 21; and No. 23 (2016) on the right to just and favorable conditions of work, para. 58. [↑](#footnote-ref-4)
5. Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights (para 4), E/C.12/60/R.1 Committee on Economic, Social and Cultural Rights, Sixtieth session, February 2017. [↑](#footnote-ref-5)
6. A/HRC/19/59/Add.5, Human Rights Council Nineteenth session, December 2011. [↑](#footnote-ref-6)
7. An urgent appeal was sent by Brazilian civil society organizations to Human Rights Council Special Procedures calling the attention of the mechanisms to the violation of the right to an effective remedy as a result of the lack of consultation with affected communities by States and involved companies before and after the signature of the settlement agreement. Available in: <http://www.conectas.org/arquivos/editor/files/Urgent%20Appeal%20-%20Settlement%20Agreement%20Mariana%20Doce%20River%2005\_13\_2016.pdf>. [↑](#footnote-ref-7)
8. See HOMA’s first of a series of studies about NAPs on Business and Human Rights. Available in: <http://homacdhe.com/index.php/en/2016/01/25/homa-launches-first-of-a-series-of-papers-about-national-action-plans-on-business-and-human-rights/>. [↑](#footnote-ref-8)