



15 November 2016

Preliminary Comments on 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

The International Organisation of Employers (IOE) attaches great importance to business and human rights. The IOE was actively engaged in the mandate of the UN Secretary-General's Special Representative on business and human rights, endorsed the UN "Protect, Respect, Remedy" framework and the UN Guiding Principles on Business and Human Rights, and has actively contributed to the dissemination and implementation of the framework and the UN Guiding Principles. The IOE argues for preserving the approach agreed by these Principles and provides the following comments on 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.

I. General Remarks

1. The General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities must focus on the implementation of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) so that businesses and other stakeholders have clarity with regard to their roles and responsibilities. To go beyond the UN Guiding Principles carries the risk of breaking the consensus established among the stakeholders by John Ruggie after an extremely lengthy process.
2. The General Comment No. 24 should encourage States to take a "think small first" approach. Small and medium-sized enterprises (SMEs) are the essential backbone of all economies around the world and, moreover, many are active on a global scale. SMEs have different challenges and resources, but also possibilities when it comes to the implementation of the UN Guiding Principles. States must take into account the challenges, limitations and needs of SMEs when developing policies on business and human rights
3. The draft General Comment No. 24 address only very briefly the development of National Action Plans (NAP) and refer mainly to the guidance by the UN Working Group on Business and Human Rights. Although the IOE supports stressing the importance of the work of the UN Working Group, it is nevertheless necessary to elaborate more on the issue of NAPs.
4. The General Comment No. 24 should reflect more that the involvement of business in the development of state policy on business and human rights is key. NAPs, as well as all other policies related to business and human rights, must be developed in close coordination with business as the main target group. The feedback of individual companies is important in gaining direct insight from practitioners. However, only representative business organisations have the mandate to speak on behalf of the business community as a whole and are able to give a comprehensive overview of

the national state of play. Moreover SMEs are given a voice in the process through these representative organisations.

5. A key challenge in many countries with regard to the State's "duty to protect" is not the absence of legislation, but insufficient enforcement of existing legislation. This key challenge should be addressed more clearly in the General Comment. States should identify enforcement gaps and the reason for these gaps (such as insufficient labour inspection, corrupt police forces, etc.) and take action to address and remedy these situations.
6. In many cases, State actors are directly involved, or are even the cause of, human rights challenges which business faces. States must identify the areas where they themselves are involved in human rights violations and remedy them.
7. The draft General Comment focuses too much on extraterritorial jurisdiction instead of supporting States to improve access to remedy at local level. The shortcomings of extraterritorial jurisdiction are thereby ignored, including the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign courts when they must rule according to foreign legal principles; the difficulties in obtaining evidence and testimony abroad; and most importantly, the problem that extraterritorial jurisdiction is mainly open for allegations against multinationals and not purely domestic companies, which leaves victims of domestic companies without access to remedy.

II. Specific comments

- On Para 18 ("States Parties should adopt a legal framework requiring business entities to exercise human rights due diligence"): UN Guiding Principles No 4 clearly states the circumstances under which States might, "where appropriate", require human rights due diligence. It is in cases where enterprises are owned or controlled by the State, or where enterprises receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies. The proposed wording in paragraph 18 on legislation "requiring" human rights due diligence goes far beyond the UN GPs. It is not even limited to high-risk operations. The wording should be altered to promote "encouragement".
- On Para 19 ("establishing minimum wage and fair remuneration practices to ensure adequate working conditions"): There are many ways to ensure adequate working conditions – minimum wages are not necessarily required for that. There are countries, like Switzerland, with very good working conditions and remuneration practices without legal minimum wages.
- On Para 38 ("States Parties may also require such businesses to ensure that other related entities, such as subsidiaries, suppliers, franchisees, or investors, comply with the requirements under the Covenant"): Business can encourage subsidiaries, suppliers, franchisees, or investors, to comply with the requirements under the Covenant, however, they can not "ensure" this. Moreover, the UN Guiding Principles clearly stress in UN Guiding Principles No. 13, that companies should "seek to prevent or mitigate adverse human rights impacts that are directly linked to their

operations, products or services by their business relationships, even if they have not contributed to those impacts.” The term “seek to” indicates the limits on what companies can do. Furthermore, as the Commentary to Article 22 of the UN Guiding Principles explains, in efforts to remediate adverse impacts to which an enterprise is directly linked through its operations, products or services, but which it has not caused or contributed to, the “responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.” Similarly, the OECD Guidelines indicate that when an impact is directly linked to an enterprise’s operations, products or services by a business relationship, that “[t]his is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship” (MNE Guidelines, II.A.12). Thus, General Comment No. 24 must not undermine well-established norms for allocating responsibility to enterprises and should not create new legal liabilities for companies for social standards along the global supply chain.

- On Para 46 (“The Committee notes the particular challenges that victims of transnational corporate abuses face in accessing available and effective remedy. Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil”): This statement as well as the following paragraph do not do justice to the fact that in the vast majority of cases weak and corrupt judicial systems in the host country are the root cause of insufficient access to remedy.

Moreover, the ILO estimates that 20.6 per cent of the global workforce is linked to Global Supply Chains (GSCs). This is an impressive figure. However, at the same time we have to recognise that around 80 per cent of workers are not linked to GSCs. Similarly, Margaret Jungk from the UN Working Group pointed out in a recent article in the Huffington Post that “the vast majority of economic activity is carried out by small-scale companies, ones you’ve never heard of, mostly in the informal sector. Their goods don’t travel across borders, and when they exploit their workers or harm communities, you don’t hear about it”. We have to improve access to remedy for all workers – not only for the 20 per cent of the global workforce that is linked to GSCs. People who work in the informal, purely domestic economy have the same right to access to remedy as the worker in the factory next door working to produce an item that is sold on the global market. Thus, the General Comment should focus much more on strengthen local access to remedy.

Furthermore, the UN Human Rights Council endorsed in June 2016 the recommendations of the United Nations High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse (see A/HRC/32/L.19). These recommendations must be the basis of the General Comment’s approach for improving access to remedy. This is not only a question of policy coherence, but also to make full use of the more than two-years work of OHCHR on the question.

The IOE appreciates the opportunity to provide input to the draft General Comment and looks forward to cooperating closely with the Committee on Economic, Social and Cultural Rights on this matter. It encourages the members of the Committee to additionally consult

closely with the business community at national level with regard to further work on this issue.

The International Organisation of Employers (IOE) is the largest network of the private sector in the world, with more than 150 business and employer organisation members. In social and labour policy debate taking place in the International Labour Organization, across the UN and multilateral system, and in the G20 and other emerging processes, the IOE is the recognised voice of business.

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