20 January 2016

Submission to the Committee on Economic, Social and Cultural Rights on the Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities in Advance of the Sixteenth Session of the Committee.

The Initiative for Social and Economic Rights (ISER) is a Ugandan non-profit organization that was founded in February 2012 to address the gaps that exist in respecting, protecting and fulfilling economic and social rights in Uganda and to improve government accountability for this category of rights. The strategic approach for the organization is based on the core principles of equality and non-discrimination in access to social and economic services, accountability, citizen/community participation, and adequacy and quality of services. ISER has four programs currently running: (1) The Right to Education; (2) The Right to Health; (3) Business and Human Rights; and (4) Social Accountability and Citizen Participation. ISER also hosts the Uganda Consortium on Corporate Accountability.

ISER welcomes the Committee’s development of a General Comment on Business and Human Rights and appreciates the opportunity to provide input into the draft General Comment. It applauds the Committee’s strong draft which clearly sets out enforceable domestic and extra territorial obligations States and businesses have to ensure human rights are respected in the context of business and human rights. As businesses play an increasing role as a result of foreign direct investment and increasing privatisation, this General Comment will further strengthen the international standards that regulate the human rights impacts of businesses. ISER welcomes the emphasis on the State’s obligation to ensure that there are adequate remedies for victims of human rights abuse in the context of business activities.

We, however, believe certain issues can be more thoroughly addressed and recommend the General Comment explicitly addresses the following:

1. **Participation: States Must Take All Necessary measures to Ensure the Transparent, Maximum and Effective Participation of Local Communities, Particularly Vulnerable Groups, in Decision Making Concerning their Resources or Anything Else that May Affect Them and Ensure their Free Prior and Informed Consent is Sought.**
2. It is well established that the right to participation is inextricably linked to other human rights. Yet communities continue to face barriers impeding them from adequately participating during policy formulation and decision making regarding key sectors where human rights violations by businesses occur, for example the extractive sector. Groups that face intersectional and multiple forms of discrimination like women and indigenous groups are often less empowered to participate, particularly in Africa, yet they disproportionately face the impact of human rights abuses by businesses. They are unable to meaningfully participate for a number of reasons. First, there is little awareness among indigenous groups and rural communities on their rights. Second, there are often insufficient spaces for them to participate. If any consultation happens, it is often with the political elite. Their free prior and informed consent is often not sought. For example in Uganda, indigenous groups lack legal recognition and there is no specific legislation that requires entities to obtain their free, prior and informed consent on matters relating to the exploitation of their resources. In Karamoja, a region in Uganda, residents noted that companies like East Africa Mining obtained exploration licences and started exploration activities on their land without consulting them or seeking their consent.[[1]](#footnote-1) Women are often not included in decision making concerning land and resources, especially with respect to communal lands largely owned by men due to discriminatory laws and cultural attitudes and practices.[[2]](#footnote-2) While the proposed General Comment recognises multiple and intersectional forms of discrimination faced by certain groups and recommends State Parties “incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights”[[3]](#footnote-3), this does not adequately address the inability of certain vulnerable groups to adequately participate. The General Comment should include an explicit requirement for states to especially consult these groups and to ensure that businesses seek the free prior and informed consent of these groups before initiating investment or extractive projects that affect them including before exploratory work in the case of the extractive industry. States should be required to include within existing legislation or come up with national legislation enforcing the obligation to seek free prior and informed consent before any project affecting the communities is initiated. Consent should only be obtained with the full and meaningful participation of the affected community, particularly women and indigenous groups and after genuine consultation in the language spoken by the community.
3. In line with the right to participate, we welcome the General Comment’s requirement that State Parties “educate the public on their rights and access to remedies pertaining to the Covenant rights in the context of business activities.”[[4]](#footnote-4) However, to ensure that communities can meaningfully participate, states should be urged to translate relevant materials like human rights impact assessments into local languages and in easily accessible formats given the low literacy levels among these groups, particularly in developing countries,. Companies and State agencies should be obligated to share these assessments with communities beyond merely publishing them. For example, in Uganda, the general public can make written comments when an environmental impact assessment is complete but illiterate people are excluded from participating by virtue of the requirement for comments to be written.[[5]](#footnote-5)
4. Participation is further endangered by the shrinking space for civil society and human rights defenders holding businesses accountable for rights violations. The draft General Comment urges States Parties to protect human rights defenders and refrain from imposing penalties on them[[6]](#footnote-6) but it should go a step further and require States Parties to urge companies to include the perspectives of human rights defenders in their consultative efforts.
5. Access to information is also integral to adequate meaningful participation. Yet the right to access information in some states only pertains to information held by the State.[[7]](#footnote-7) Transparency should be more strongly emphasised. This is particularly important for extra territorial conduct or in investment agreements— the Special Representative of the UN Secretary General found a lack of transparency and public participation in the negotiations of these agreements and in the mechanisms used to enforce them.[[8]](#footnote-8) The right to access public information in the context of negotiations between states and foreign investors has already been recognised by regional human rights bodies like the Inter American Court of Human Rights. [[9]](#footnote-9) States should be urged to consider making mandatory the publishing of contracts and benefit-sharing agreements and to sign on to initiatives like the Extractive Industry Transparency Initiative.

**II. More Strongly Address Tax Evasion**

1. The draft General Comment in paragraph 28 requires State parties to raise resources to provide for the realisation of the rights under the Covenant and refers to “direct taxation of business income”.[[10]](#footnote-10) It rightfully notes that violation of the obligation to fulfil includes failure to take measures against tax evasion.[[11]](#footnote-11) Large corporate tax exemptions, particularly unjustified tax exemptions, and illicit financial flows affect the realisation of economic social and cultural rights by depriving states of necessary resources that could be used to realise those rights. In African countries, in particular, governments allocate few resources to realising rights like health, in part due to the lack of funds. This has been the case in Uganda.[[12]](#footnote-12) Yet mobilising the tax base, particularly by taxing corporations could address this. A paragraph or stronger statement addressing tax exemptions for corporations is needed. The report of the Special Rapporteur on Extreme Poverty and Human Rights is a useful starting point. [[13]](#footnote-13) States that fail to mobilize resources to progressively realise economic, social and cultural rights yet grant tax exemptions to corporations should be required to demonstrate that the exemptions/tax incentives are justified and their implementation will ensure deliberate, concrete and targeted steps to ensure human rights. These exemptions should be monitored and their social benefits and the human rights compliance of those companies should be periodically assessed. These assessments should be informed by broad public participation, especially by individuals that are directly affected.[[14]](#footnote-14) States should refrain from granting fixed tax holidays or tax stability agreements.[[15]](#footnote-15) States should require companies to disclose information on contracts, concessions, licensing agreements in the extractive sector and other related information, for example, expected tax revenues and export royalty rates.[[16]](#footnote-16) States should enact legislation to ensure companies domiciled in their territory follow taxation regimes in the countries in which they operate and enforce disclosure standards such as the Dodd-Frank Wall Street Reform and Consumer Protection Act and similar European legislation. [[17]](#footnote-17)

**III. Mandate *On-going Independent* Social and Human Rights Impact Assessments**

1. Paragraph 18 of the draft General Comment notes that “States Parties should adopt a legal framework requiring business entities to exercise human rights due diligence” and to require businesses to impose criminal and administrative sanctions and penalties for violations by businesses of the Covenant rights. We urge the Committee to go a step further and require on-going human rights impact assessments not only before starting activities. As the UN Guiding Principles astutely note: “risks may change over time as the business enterprise’s operations and operating context evolve.” Human rights impact assessments should be publicly available and independent— they lose their usefulness if conducted by companies’ or companies’ consultants who are merely trying to meet pre-determined outcomes.

**IV. Acknowledge the Unique Constraints Developing Countries Face.[[18]](#footnote-18)**

1. Due to limited capacity or the lack of political will, implementation of legislation and policy is often lacking. Developing countries, particularly African nations, face unique resource challenges that make implementation difficult. For example inspection bureaus are established but often not adequately resourced. Governments in developing countries are constrained from taking measures against powerful companies which might put their international standing or national economies at a disadvantage. States should be encouraged to identify enforcement gaps and take measures to rectify them. Paragraph 21 of the draft General Comment calls on States to put in place enforcement mechanisms and enabling infrastructure like National Human Rights institutions and “competent inspectorates in the areas of food safety and working conditions”[[19]](#footnote-19) However, this is insufficient to ensure implementation. The enforcement mechanisms put in place have to be adequately financed and free from political interference. States should be encouraged to seek international assistance if the lack of funds impedes their ability to put in place these measures and to cooperate internationally to ensure corporate accountability for human rights abuses.

**IX. More Robust Discussion on Effective Remedy**

1. We welcome the General Comment’s reinforcement of the right to effective remedy and reparation including judicial and non-judicial remedies, its multi-pronged approach to remedy domestically and extra territorially and its acknowledgement of the challenges victims face accessing remedies, particularly for violations committed by transnational actors.[[20]](#footnote-20) We believe that this section would be further strengthened by emphasising access to a prompt remedy and provision of legal aid where needed. Paragraph 44 briefly alludes to this by noting that available and effective remedy requires victims seeking remedy to “have prompt access to an independent authority.”[[21]](#footnote-21) Judicial case backlog often frustrates victims seeking remedy for human rights abuses with victims dying before they receive access to justice. In Uganda, the Industrial Court, which is a referral court has a five year case backlog and is inadequately staffed and financed.[[22]](#footnote-22) Moreover, poverty, lack of legal assistance and unfamiliarity with the legal process continues to impede victims’ access to remedy. In conflict areas in particular, corruption, intimidation of witnesses are prevalent in the judicial process, denying victims access to justice.[[23]](#footnote-23) State parties should be required to take measures to address these barriers to effective remedies.
2. Access to Information is inextricably linked to access to remedy since victims may fail to pursue remedies because of lack of information. The General Comment should emphacise that states ensure that business information is readily available especially to affected communities.
3. **ISER reiterates support for the section of the General Comment that addresses Privatisation and the Regulatory Role of State Entities**
4. We applaud the focus on privatisation and States’ regulatory role. As the private sector plays an increasingly prominent role in developing countries’ development, particularly in public private partnerships in education and health, it has often grown faster than countries’ efforts to regulate it. In Uganda, less than half of private schools are regularly inspected to ensure compliance with the government’s Basic Requirements and Minimum Standards, for example. [[24]](#footnote-24) The lack of accountability resulting from the weak supervision of the private sector is resulting in the failure to ensure quality, affordable services and discrimination against children from poor backgrounds[[25]](#footnote-25). This is also increasingly becoming an issue in other areas like health. In line with their obligations to protect, States should be required to put in place regulatory frameworks, for example adopting principles and guidelines for the involvement of private actors in service delivery, passing legislation regulating Public Private Partnerships and requiring human rights impact assessments for PPPs, setting up monitoring units to ensure privatisation does not detrimentally affect the rights enshrined under the Covenant on Economic Social and Cultural Rights and does not result in discrimination against the poor.

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1. Human Rights Watch, *“How Can We Survive Here?” The Impact of Mining on Human Rights in Karamoja, Uganda* (February 2, 2014). [↑](#footnote-ref-1)
2. Committee on the Elimination of Discrimination Against Women, General Recommendation No. 34 of the Rights of Rural Women, CEDAW/C/GC/34 at para G. [↑](#footnote-ref-2)
3. Para 11 of Draft General Comment. [↑](#footnote-ref-3)
4. Para 27 of the Draft General Comment. [↑](#footnote-ref-4)
5. Environmental Impact Assessment Regulation 19(1) S.I. No. 13/1998. [↑](#footnote-ref-5)
6. Para 23 of the Draft General Comment. [↑](#footnote-ref-6)
7. *See, e.g.,* Article 41 of the Constitution of Uganda. [↑](#footnote-ref-7)
8. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights* , A/HRC/8/5 ( 7 April 2008) (by John Ruggie) at para 37. [↑](#footnote-ref-8)
9. Claude Reyes et al. v. Chile, Inter-American Court of Human Rights judgment, September 19, 2006, para. 77 (holding that article 13 of the American Convention on Human Rights, which enshrines the right to freedom of thought and expression, “protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case”). *See also* Olivier De Schutter et al., Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, para 4 http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\_drblob\_pi1%5BdownloadUid%5D=63 [↑](#footnote-ref-9)
10. Para 28 of the draft General Comment [↑](#footnote-ref-10)
11. Para 29 of the draft General Comment [↑](#footnote-ref-11)
12. For example in Uganda, the health sector received 8.9% of the National Budget in 2016/17, an amount that is likely to decrease in 2017/18. Ministry of Finance, Planning and Economic Development (MFPED), National budget Framework Paper 2016/17. *See also* Ministry of Finance, Planning and Economic Development (MFPED), National budget Framework Paper FY 2017/18-FY 2021/22 (December 2016). Yet the tax to GDP ratio is anticipated to be 13.4% in 2016/17, far below the East Africa Macroeconomic convergence criterion of 25% with large statutory tax exemptions including Value Added Tax (VAT) exemption to oil companies in 2015 estimated to be worth USD 2.7 billion. *See* Government of Uganda, *Approved Estimates of Revenue and Expenditure 2016/17*; Development Initiatives, *Pro-poor orientation of budgets: The case of Uganda* (2016); Tax Justice Network-Africa and ActionAid, *Still racing toward the bottom? Corporate tax incentives in East Africa* (2016). Other discretionary tax exemptions were leaked by the Panama Papers. [↑](#footnote-ref-12)
13. Report of the Special Rapporteur on Extreme Poverty and Human Rights, A/HRC/26/28 (Magdalena Sepúlveda Carmona) (22 May 2014) [↑](#footnote-ref-13)
14. A/HRC/26/28 at para 79(j). [↑](#footnote-ref-14)
15. A/HRC/26/28 at para 79(j). [↑](#footnote-ref-15)
16. A/HRC/26/28 at para 79(m). [↑](#footnote-ref-16)
17. A/HRC/26/28 at para 79(f). [↑](#footnote-ref-17)
18. Para 17 of the UN Guiding Principles on Business and Human Rights. [↑](#footnote-ref-18)
19. Para 21 of the draft General Comment [↑](#footnote-ref-19)
20. Paras 48-50 of the draft General Comment. [↑](#footnote-ref-20)
21. Para 44 of the draft General Comment. [↑](#footnote-ref-21)
22. Danish Institute for Human Rights (DIHR) and Uganda Human Rights Commission 2016. Business and Human Rights Country Guide. [↑](#footnote-ref-22)
23. Office of the UN High Commissioner for Human Rights, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, page 83, http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf [↑](#footnote-ref-23)
24. Initiative for Social and Economic Rights (ISER), *Privatization, Discrimination and the Right to Education in Uganda* (2015). [↑](#footnote-ref-24)
25. *Id.* [↑](#footnote-ref-25)