

19 January 2017

**Initial Observations on the Draft General Comment
on State Obligations under the International Covenant on Economic, Social
and Cultural Rights in the Context of Business Activities**

1. Minority Rights Group International (MRG), an international non-governmental organization working to secure the rights of minorities and indigenous peoples, and Lex Justi, a law practice with a business and human rights specialty, would like to submit comments on the draft General Comment of the Committee on Economic, Social and Cultural Rights (hereafter ‘the Committee’) in the Context of Business Activities.
2. First of all, we express our appreciation for the Draft as well as this opportunity to comment on it. The Draft is a strong contribution to the development of understanding of States’ obligations to ensure that businesses respect economic, social and cultural rights. It is well-structured, nicely combining general principles with specific guidance based on the Committee’s prior General Comments and decisions. For instance, the Draft usefully builds on the “respect, protect and fulfil” framework of the Committee’s own 2011 Statement on the topic (E/C.12/2011/1). In addition, we commend the drafters for their development of the area of States’ extra-territorial obligations with regard to businesses’ respect for economic, social and cultural rights.

Marginalised Groups

3. We find that the Draft is quite weak with regard to the obligations to protect the economic, social and cultural rights of marginalized groups. Indigenous peoples are mentioned cursorily, with no mention at all of their right to free, prior and informed consent. Similarly, minorities are only mentioned briefly with no specific mention of their right to effective and meaningful participation. We can also wonder why the mention of minorities in para. 9 is limited to “ethnic or religious” and “where they are politically

disempowered.” Surely, national and linguistic minorities should also be mentioned to bring the General Comment in line with other UN texts and indeed Article 2.2 of the Covenant on Economic, Social and Cultural Rights (hereafter ‘the Covenant’). Additionally, we would suggest that “where they are politically disempowered” is an unnecessary and hard-to-interpret limitation.

- We recommend specific mention of indigenous peoples’ right to free, prior and informed consent.
 - We also recommend changing the reference to minorities to read “national or ethnic, religious and linguistic”. We recommend deleting “where they are politically disempowered”.
 - We suggest inclusion of the right of all affected marginalized groups, including especially minorities, to effective and meaningful participation. These rights should be mentioned at least in paras. 9, 15 (with regard to forced evictions) and paras. 17-18 (with regard to due diligence obligations on the part of businesses).
 - Moreover, language should be inserted elaborating on how consultation should be conducted in order to ensure meaningful participation – for instance, that information should be provided in local languages and in ways that are relevant to the affected community. There are useful details (specifically to do with indigenous peoples, but equally relevant to other marginalized groups) available here: https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf
 - A reference to the UN Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 in the text, or at least in a footnote, would be useful. A reference to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities would also be helpful.
4. Para. 9 does not reflect the full scope of disproportionate and adverse impact. For instance, persons can also be disproportionately and adversely affected by business activities on account of their age, disability, health status, sexual orientation, gender identity and descent.
- We recommend that the list of marginalized groups be expanded in para. 9 to reflect the extensive range and contemporary recognition of such marginalized groups.
5. We would *inter alia* add discrimination by businesses with regard to the right to health (e.g. access to medical facilities, goods and services as well as programmes) to the examples mentioned in para. 10 consistent with the Committee’s General Comment no. 14. We note that access to “essential medicines” is mentioned in para. 20, and para. 24 deals very specifically with private health providers and women’s sexual and reproductive rights, but we

think the right to health should be brought up in the broader discrimination context of para. 10.

- We recommend that the wording: “in the health sector” be added to the first sentence para. 10.
6. More generally concerning this section and given Article 3 of the Covenant as well as the Committee’s General Comment no. 20:
 - We recommend that the heading of the section be adjusted to read “Equality and non-discrimination” and that “the right to equality and non-discrimination” be inserted wherever relevant.
 7. While mention of intersectional and multiple discrimination in para. 11 is very welcome, in fact the rest of the paragraph does not actually illustrate this type of discrimination. The paragraph speaks only of women and girls – all of which is very valuable – but intersectional and multiple discrimination occurs when persons are discriminated against due to overlapping social identities (as explained in General Comment no. 20, para. 17), e.g. when women and girls belonging to ethnic minorities are discriminated against because of their gender and because of their ethnicity.
 - We recommend that the section of para. 11 starting with the second sentence be retained but moved to a new paragraph illustrating discrimination on the basis of gender, and that several specific examples of intersectional discrimination be added in para. 11.

Recognition of the Scope of Businesses’ Responsibility to Respect Human Rights

8. While the General Comment primarily addresses States Parties, it, as the Draft states, “is also relevant to non-State actors in the business sector” (para. 5). However, the Draft could more explicitly reference the responsibility of non-State actors to respect human rights in a manner similar to prior references made in other General Comments. For example General Comment no. 23, states that “non-State actors, such as employer and worker organizations, also have a responsibility to secure just and favourable conditions of work” (para. 51).
 - We suggest that a specific reference to businesses’ responsibility to respect human rights be included in the section from para. 13 onwards, and several specific examples be referenced, based on prior General Comment no. 23 and others.

9. Para. 19 could also usefully mention environmental concerns, given the growing awareness of the interconnections between the environment and human rights, e.g. the rights to health, food and water.
- We suggest that States adoption of appropriate regulations and policies to protect the environment (e.g. management of natural resources and preventing pollution) should be added to the list of State Party interventions in para. 19 and a reference to governmental environmental protection bodies should be added to the list of “enabling infrastructure” in para. 21.

Due Diligence

10. The references to “due diligence” in the draft (paras. 6 and 17) are commendable, but could be strengthened through a reference to human rights impact assessments. Such assessments are a key means to ensure that businesses assess and evaluate the actual and potential impacts of their projects and operations on the economic, social and cultural rights of persons. Moreover, human rights impact assessments are key to the consultation with and meaningful participation of persons whose rights may be impacted.
- Specific mention of human rights impact assessments should be included as part of due diligence obligations from para. 17 onwards.
 - In addition, in para. 6, it might be useful to footnote some selected examples of due diligence processes that have been adopted by States.

Obligation to fulfil

11. In para. 26, a link is made between States’ provision of “measures ... such as export credit, investment-related insurance and guarantee, tax exemptions and deductions” and the creation of “an enabling environment for business actors to respect the economic, social and cultural rights enshrined in the Covenant”. While we very much like the idea of having these measures lead to greater respect for human rights, at the moment, they are generally intended to make businesses’ operations abroad more financially feasible and secure in the face of political and financial risks, and in practice, have not necessarily led to greater respect for economic, social and cultural rights by businesses. Moreover, as stated in UN Guiding Principle 4, where States provide these forms of substantial support and services, they should require human rights due diligence by the receiving business to ensure protection against human rights abuses.

- We would suggest incorporating the reference to “export credit, investment-related insurance and guarantee, and tax exemptions and deductions” into para. 36 related to extraterritorial obligations to protect, and mention, consistent with UN Guiding Principle 4, the need for due diligence where States provide such support and services. In light of this suggested modification, we believe that the reference to infrastructure in the last sentence of para. 26 could be supplemented by a mention of fostering long-term quality investment consistent with para. 36 of the Addis Ababa Action Agenda of 2015.

Unnecessary Qualifications in the Text

12. In para. 12, the articulation of the scope of States’ obligations for overseas activities of business entities suggests two conditions: i) a nexus of the business entities to the jurisdiction of a State and ii) business activities over which a State “may exercise influence”. However, the second condition appears to be unnecessary and risks providing a State with an excuse not to try to influence the actions of businesses with a nexus to the State. We also note that para. 35 mentions domiciliation of a business but does not mention any need for “influence”.

- We suggest deletion of this second condition in para. 12 in order to ensure that States take the broadest view of their potential to influence and regulate businesses.

13. Given the many on-going violations of economic, social and cultural rights involving businesses around the world, there are unwelcome qualifications in para. 18 as well.

- We suggest in para. 18 that “if needed” in the 7th line and “if and to the extent necessary” in the 10th line should be deleted. In the first citation, the wording “should” already provides a qualification in this sentence and in the second, the wording might be better replaced by “where appropriate”.

Extraterritorial Obligations

14. We agree that the area of extra-territorial jurisdiction has a “complex and evolving nature” (para. 12), and therefore find sub-section C, which specifically addresses “Extraterritorial Obligations”, to be quite useful. We also recognize that there is overlap between States’ general obligations, on the one hand, and their extraterritorial obligations, on the other, that present challenges in drafting sub-sections B and C.

- Specifically, we would suggest that the reference to States' failure to take reasonable measures to prevent businesses' violation of human rights (para. 37) and the reference to related entities (para. 38), contained in sub-section C, also be included in sub-section B since they are important general concepts applicable to the State obligation to protect.
 - We would suggest revisiting para. 34 on the "Extraterritorial obligation to respect" in light of the extensive provisions in paras. 13-16 concerning the "Obligation to respect". The detailed provisions mentioned in paras. 13-16, namely, the direct responsibility of States Parties for the actions or inactions of business, States' facilitation of human rights violations by businesses and States' failure to adopt and implement effective measures, could be further elaborated with respect to extraterritorial obligations.
15. The articulation that a State Party may regulate business entities that are not only domiciled in the State but also have a seat of business or generate substantial revenues in the State, among others detailed in para. 36, is a welcome elaboration of the connection between a State and a business.
- We would like to suggest that the reference in para. 35 to "business entities that are domiciled under their jurisdiction" be similarly nuanced, particularly given the differing interpretations of "domicile" in different countries.
 - The reference in para. 37 to para. 15 should likely be to para. 14.

Remedies

16. We believe that particular attention to marginalized groups should be made with regard to access to remedies.
- A reference in para. 46 could usefully be made to the particular challenges faced by disadvantaged groups such as women, indigenous peoples and minorities, among others, in obtaining remedies.
 - Also, we would suggest that para. 46 recommend that States review their substantive, procedural and practical barriers to remedies.
17. We are concerned that the statement in the last line of para. 48: "Judicial remedies must be available and accessible if non-judicial mechanisms fail to bring effective redress and satisfaction to the victims" unintentionally establishes a hierarchy of redress. As UN Guiding Principle 27 states: "States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms". Victims of human rights infringements by businesses may choose judicial mechanisms over both state-based non-

judicial and non-State-based grievance mechanisms for reasons of the severity of the violations, perceptions of inadequacy of these mechanisms or other reasons.

- We suggest that the text should not concretise a certain approach that must be followed by persons whose rights are infringed. The better approach is reflected in the first sentence of para. 50.

18. We believe that it is extremely important for the victims of human rights infringements perpetrated by businesses to be thoroughly consulted and involved in devising appropriate remedies. This is particularly true from our experience with respect to indigenous peoples and is expressed as their right in para. 11(2) of the UN Declaration on the Rights of Indigenous Peoples, which provides as follows:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

- We suggest that a reference to the need to engage and consult persons whose rights have been infringed by businesses in determining an appropriate remedy to such infringements be included in this “Remedies” section.

19. Currently, “engagement and dialogue” is mentioned in para. 50 (g) but only with regard to non-judicial remedies. Moreover, it is couched too loosely in terms of “consulting... and focusing on dialogue...” without emphasizing that the consultation must be meaningful. In para. 50, we are uncertain why para. (g) of UN Guiding Principle 31 has not been included in the list.

- We recommend that para. 50 be redrafted to omit the unnecessary hierarchy suggested in the current wording for different remedies. In addition, we suggest that there is specific mention of the need for meaningful consultation with affected communities regarding all remedies (and not just non-judicial ones) and that para. (g) of UN Guiding Principle 31 be inserted.

National Implementation

20. We wonder whether the important principles mentioned in para. 53: effective and meaningful participation, non-discrimination and gender equality, etc. as well as the existence of monitoring mechanisms should not be expressed in the General Comment as applicable to all actions taken by

States in carrying out their obligations to respect, protect and fulfil relevant to businesses' respect for human rights. As the General Comment is currently drafted, the application of the principles is limited to national strategies and plans of action, indicators and benchmarks.

- We recommend that these rights are introduced at the beginning of the General Comment and apply to the whole of the text.

Broadening the Scope and Effect of the General Comment

21. Lex Justi and MRG have now had the privilege to comment on numerous drafts emanating out of the UN and other international agencies on business and human rights, and we can feel that some resulting texts do not receive the proper application, extensive readership and interest they deserve.

- In order to further the reach and effect of the General Comment, the Committee may wish to consider the following:
 - mentioning interlinkages between impacts on civil and political rights and economic, social and cultural rights and vice-versa (e.g. businesses' negative impacts on water, food and livelihoods can affect the right to life);
 - in para. 39 in connection with the mention of "international assistance and co-operation" and the reference to Article 2.1 of the Covenant, mentioning States' obligations to promote the protection of these rights through cooperation/collaboration in international organizations; this would also be consistent with UN Guiding Principle 10; and
 - including a general reference to the UN Sustainable Development Goals in the Introduction.
- In addition, in order to give concrete effect to the General Comment, it would be useful to have the Committee issue a document updating its guidelines on the form and content of reports to be submitted by States Parties to the Covenant in order to ensure that States include information that reflects the principles and suggestions contained in the General Comment.