

Comments on the draft general comment on state obligations under the ICESCR in the context of business activities

Submission from IT for Change

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Introduction

The need to clarify state obligations under the ICESCR in the context of business activities stem of course from “*increased globalization of economic activities and a growing trend of privatization*” as observed in Para 1 of the draft general comment, but equally from the new issues/concerns to the substantive enjoyment of such rights posed by digitalisation:

(a) The excesses of online platforms and violations of the right to just and favourable conditions of work, safe and healthy working conditions, trade unions and minimum standards of industrial hygiene:

The imbrication of the Internet in all sectors of the economy has enabled the rise of a new business model – the ‘platform’ model where a few large companies make profit by managing interconnections between producers/suppliers of goods and service and buyers. As some would put it, these are times where there are aspiring ‘Ubers’ everywhere; from retail commerce, rental accommodation, and financial services to health, education, media and even urban governance. By asserting monopoly control over who participates in the digital marketplace, such platforms are able to earn brokerage/commission without adding any value on their own. In other words, they have emerged as the new middlemen of Internet-mediated business activities. Further, platforms oftentimes indulge in excesses and abuses of their monopoly positions, violating ESC rights of citizens. For instance: the Taskrabbit errand out-sourcing service masks the precarisation of work it facilitates and its failure to pay minimum wages, by re-labelling workers as ‘contractors’.¹ Amazon, one of the oldest platforms, has attained notoriety for its shabby treatment of its workforce, especially its draconian treatment of trade unions.²The taxi service Uber has had frequent

1 Hill, S. (2016). The California Challenge: How (not) to regulate disruptive business models, https://www4.fh-swf.de/media/downloads/meschedestandort/fachtagung_industrie_4_0/2016_6/downloads_unterlagen/03_Steven_Hill_FINAL_ENGL_print.pdf

2 <http://fortune.com/2014/04/01/in-battling-german-unions-will-amazon-emulate-wal-mart/>

run-ins with city governments with its refusal to follow transport insurance norms.³ The Airbnb rental service has oftentimes tried to evade responsibility for its inability to ensure that all the properties it lists follow health and safety regulations for hotels. Platform companies who have become the key actors of every sector avoid regulatory responsibility by claiming that they are not actual providers of services but only mediators, and thus not covered by regulation. This situation calls for new laws, rules and regulatory approaches that cover intermediaries/ platforms (and regulate their immense power). Most importantly, this entire edifice of the platform economy rests on an extremely environmentally destructive base of material activities – the exploitation of mineral and natural resources of the poorest countries for the production of the physical infrastructure of computer-networks.

(b) Datafication of business sectors and the violation of the right to economic self-determination of people in the global South:

In the digitalised economic order we inhabit, the mining of personal data and commodification of everyday social interactions has become the order of the day. Online platforms are engaged in the unbridled collection of personal data of users, and monitoring the digital footprints of their transactions, to enhance their personalised targeting. Further, they are also engaged in trading this data to market research agencies, oftentimes in trans-border transactions. Most often, it is data from markets of the global South that is mined by Internet platforms headquartered in the global North, and sold to Northern companies, inter alia looking to capture new bottom-of-the-pyramid markets. Older companies that have traditionally dominated specific sectors are also in the process of reinventing their business strategies, to ensure that they stay relevant and retain their market leadership in the current context when data is changing the nature of the game. For instance, Monsanto is attempting to retain its market share by entering into a series of mergers that can help it gain monopolistic control over crop-input and weather-related data sets, in emerging markets.⁴ Similarly, new predatory fin-tech models are emerging that

3 <http://www.sfgate.com/business/article/Leaked-transcript-shows-Geico-s-stance-against-5910113.php>;
https://www.buzzfeed.com/kenbensinger/ubers-yawning-insurance-gap?utm_term=.po5wArXn1#.pyl9dGW31

4 <http://www.etcgroup.org/content/monsanto-bayer-tie-just-one-seven-mega-mergers-and-big-data-domination-threaten-seeds-food>

seek to profit by building and selling the creditworthiness profiles of marginalised women in the global South who are just entering the world of connectivity, by mapping their digital transactions. In this data-based economy, it is not just privacy and data protection rights, but also the right to economic self-determination of the peoples of the global South that is at stake. However, these new business models that involve intimate details of people's social behaviour have not been covered by current laws and regulation in any meaningful way. Prior to developing such new legal and regulatory frameworks, the nature of such emerging ESC rights violations, in addition to violations of civil and political rights, should be properly analysed, and understood, and key principles framed.

Another threat is posed by emerging pluri-lateral and multilateral frameworks on global trade that push for seamless, unrestricted cross-border data flows without permitting any accompanying safeguards for legal protections for data. In fact, these agreements completely do away with any host country safeguards that could mandate citizen data, at least of the more sensitive kind, collected by trans-national corporations to be stored in the country of its origin on local data servers so that it could be subject to necessary legal safeguards.

We feel that in the text of this general comment, there is scope to pay special attention to the new risks/ threats to ESC rights posed by the digitalisation of business activities, in the following matters:

Para 10. Discrimination in the labour market.

There must be an explicit reference in this paragraph about the obligation of state parties to regulate aggregator platforms so that they do not engage in discriminatory practices that result in the erasure of hard-won worker-rights. This is becoming a major bone of contention in many countries. For example: Uber has time and again positioned itself as a mere aggregator platform that helps connect drivers and passengers, and not an employer of the thousands of drivers⁵ that it engages, in order to escape obligations under prevailing labour laws. Judicial rulings in California and UK, on separate occasions⁶, have refused to

5 <http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/briansolomon/2015/05/01/the-numbers-behind-ubers-exploding-driver-force/>

6 <https://www.theguardian.com/technology/2016/oct/28/uber-uk-tribunal-self-employed-status>,
<http://www.legallyindia.com/views/entry/a-judicial-caution-for-aggregator-based-e-commerce-business-like-uber>

accept Uber's argument that it is merely a 'technology company', and not a 'transportation company', and rapped the company for its unfair and discriminatory treatment of its taxi-driver work-force.

Para 28. Obligation of states to raise revenues by direct taxation, to fulfill the Covenant rights and comply with human rights standards and principles.

Article 2 of the ICESCR requires state parties to progressively realize the rights listed under the covenant through the maximum possible utilization of its resources. Taxes are an important way for states to generate necessary resources to fulfill covenant obligations. Para 28 of the present General Comment reaffirms this obligation by emphasising state responsibility to directly tax corporations to generate resources.

In this para, there should be a reference to how states must put in place robust regulatory frameworks that will ensure that Internet platforms whose business spans multiple jurisdictions are not allowed to escape their tax liability. This is a dangerous trend that is on the rise, and needs to be urgently reined in. For example, the home rental platform Airbnb has abrogated itself from any responsibility of paying hotel tax by using the defence that it is merely a platform that connects a guest to a host, and not a hotel company. The company has even gone to the extent of proclaiming that even though it was not legally required to pay taxes, it would 'voluntarily' do so in some jurisdictions!⁷ Similarly, Google has strategically exploited tax loopholes in the different countries that it operates, to minimise tax liability.⁸

Para 35. State obligation to pay close attention to the adverse impacts outside their territories of the activities and operations of business entities that are domiciled under their jurisdiction

⁷ Hill, S. (2016). *op.cit.*

⁸ <http://www.dailymail.co.uk/news/article-2185427/How-Google-avoided-paying-218m-tax-Internet-giants-cash-saving-deal-2-6bn-UK-earnings.html>, <http://www.bbc.com/news/business-20580545>

In the new digital spaces opened up by the de-territorialised, trans-border Internet, traditional rules of jurisdiction no longer apply. Therefore, Para 35's reference to the obligation of a state party to redress adverse impact on covenant rights stemming from business entities domiciled under their jurisdiction, in territories of other states, acquires fresh significance. But so far, such an approach has not been adopted by the state in which most Internet companies are domiciled, the United States. Researcher Betsy Rosenblatt, when discussing the new principles of jurisdiction applying to the Internet, has observed that *"U.S. courts have, basically, shoehorned Internet cases into the same jurisdictional rules that they use for non-Internet cases, with the result that U.S. courts lean toward limiting jurisdiction, regulating only (web)sites that intentionally direct themselves into the U.S. in some way."*⁹

Such jurisdiction issues become even more urgent to address when the Internet is increasingly being used for illegal trafficking, child pornography and drugs trade¹⁰ across the globe. While of course it is true that in the long run, such issues can be addressed only through a global intergovernmental treaty on human rights issues on the Internet, ETOs of states in which major Internet companies are domiciled become pertinent in the short to medium term.

9 Rosenblatt, B. Principles of Jurisdiction. <https://cyber.harvard.edu/property99/domain/Betsy.html>

10 <http://www.hindustantimes.com/india-news/in-a-first-narcotics-trade-detected-via-darknet-bitcoin-in-india/story-5n5MDRe9gqhPAnRMQ9oouJ.html>