Written contribution to the draft General Comment on "State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities"

International Commission of Jurists
20 January 2017

1. The International Commission of Jurists (ICJ) welcomes the opportunity given by the Committee on Economic, Social and Cultural Rights (the Committee) to submit written contributions to its work on a 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). The subject matter of the draft General Comment is critical in relation to the realization of economic, social and cultural rights. The work of the Committee in clarifying this important aspect of States' obligations under the Covenant will assist States parties to discharge their Covenant obligations. It will similarly provide guidance to business enterprises in respect of their responsibilities to respect Covenant rights and civil society in working to promote and protect these rights.

2. At this stage of the process the ICJ will limit its comments to section "IV Remedies" of the draft General Comment, without prejudice to other aspects we may seek to address at a later stage and as the draft contents evolve during and after the Day of General Discussion.

General Principles

3. The ICJ welcomes the outline of basic principles on the right to a remedy as applicable to abuses by business enterprises and of existing barriers to remedy and the state obligations to overcome those barriers (paras. 42- 47). In this context, the Committee may consider making reference to some additional elements in defining the contours of required remedies. One of them relates to the participation of and the consideration of the specific needs and circumstances of marginalized and disadvantaged people, and persons belonging to certain groups, such as minorities, indigenous peoples, women, LGBTI persons, children and disabled people at the moment of determining the level and form of reparation.[1]

[1] Committee on the Rights of the Child, General Comment 16 on States obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, para. 31

4. The principles of non-discrimination, equality and equal protection are fundamental to the protection of all rights, including ESCR, and is rightly emphasized in the draft general comment. Non-discrimination and equality, as well as the equal protection of the law are recognized as rights in and of themselves in international law and most domestic normative frameworks. In addition, the particular obligation to guarantee the enjoyment of all other rights without discrimination is a cross-cutting and immediate obligation of States under the international law pertaining to ESC rights. Successful cases concerning discrimination against persons with disabilities; gender discrimination; substantive equality; discrimination on the ground of sexual orientation and gender identity, and discrimination against non-nationals/migrants show that these principles cannot be overlooked in the design of a remedy framework.[2]

5. In addition, international law and standards concerning the rights of the child cover a range of ESC rights. In this respect, the Committee may want to highlight the principle of the best interests of the child, a fundamental overarching principle governing all rights of the child in the determination of the kind and level of remedies required in each case.

6. One aspect of the remedy framework focuses on avoiding irreparable harm. This includes the ability to petition a judicial or quasi-judicial body, sometimes on an urgent basis, to order measures, which may be temporary in character, aimed at avoiding irreparable harm. The Committee may recognize the importance of provisional measures and the need for states to contemplate them as part of their remedial frameworks.

7. Irrespective of the nature of the remedies ordered, judicial and quasi-judicial bodies often face difficulties in the enforcement of their decisions. The respect and enforcement in good faith of final judicial decisions by other branches of government is a key element of the rule of law. Yet, the enforcement of decisions, especially in cases with a high degree of political sensitivity and/or with significant economic interests at play, is a real and recurrent challenge to the legal and judicial protection of ESC rights. In the face of these difficulties, some judicial and quasi-judicial bodies have been proactive in fashioning creative approaches to follow up and oversee the implementation of their decisions. The Committee may wish to draw inspiration from these methods and recommend States party to develop similar practices.[3]

8. The draft General Comment recognizes that under certain circumstances States parties may be responsible for the wrongful conduct of business actors that is attributable to the State. It should be noted however that States may be responsible for conduct of private actors not only in relation to its own obligations to respect, but also in relation to the State obligations to protect and fulfill economic, social and cultural rights.

---

[2] For full details on these types of cases see: International Commission of Jurists, Adjudicating Economic, Social and Cultural Rights at the National Level: A Practitioner's Guide (Geneva, 2014) pp. 173-190.
[3] Ibid., pp. 224-321.

The draft General Comment currently locates this issue only in the section corresponding to the state obligation to respect ESCR (para. 14). This should be corrected.

9. In relation to the obligation to provide effective remedies, the draft General Comment should explicitly recommend that legal remedies are available against the State for conduct of a business enterprise that is attributable to it. This will add an element of coherence between the different sections of the draft. Currently, the availability of remedies in this context is generally implied (para. 43), but should be made explicit.

Types of remedies

10. The draft General Comment appropriately quotes the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation to restate States' obligation to provide victims with effective access to justice "irrespective of who may ultimately be the bearer of responsibility for the violation". It is well known that business enterprises may engage in human rights abuses that give rise to responsibility under domestic law and in that sense may be considered as the ultimate bearer of responsibility.

11. The Committee should consider setting out the kinds of remedies specific to business related abuses that may be made available by States and how such remedies may be tailored to respond to the challenges and obstacles outlined, for instance, in paragraph 46 of the draft GC.

12. State practice shows that domestic law remedies generally take the form of civil (including constitutional remedies), criminal or administrative action.[4]

13. While corporate criminal liability is a legal avenue that is increasingly accepted in national legal systems, there are States that do not recognize such liability in law. Criminal accountability of businesses that are the authors of rights abuses is an important element in the State duty to protect, at least for those arising from conduct that is criminal in nature. The deterrent effect of criminal justice may help to prevent future abuses and may contribute to the fulfillment of States' duty to guarantee non-repetition.

14. Corporate criminal liability alone may not be sufficient to ensure accountability for those bearing responsibility in the abuse of rights. In addition to corporate criminal liability, individual criminal liability should be developed to account for the potential responsibility of the individual company officers and administrators. At the same time, corporate liability

[4] Improving accountability and access to remedy for victims of business-related human rights abuse, report of the United Nations High Commissioner for Human Rights, A/HRC/32/19, 10 May 2016; and also the addendum to this report A/HRC/32/19/Add.1, para. 6 onwards

should be seen as complementary of individual liability: even if corporate criminal liability is established, this does not preclude individual criminal liability for company officers.

15. Civil remedies are important to address violations and abuses by states and non-state actors. Civil courts may deal with a wide range of situations that generate or constitute violations of ESC rights. The relevance of civil law for ESC rights is manifold, reaching family law matters, labour and social security matters, conflicts between landlords and tenants, and the recovery of damages for victims of torts in cases of civil liabilities. Private law is increasingly relevant in response to a global trend towards privatization of basic services that used to be, generally, in the hands of public authorities. These typically include health care, water, electricity and other public utility procurement services, education and cultural institutions. Recourse to effective civil remedy faces serious obstacles in most parts of the world. The Committee would do well to issue some recommendations to States to facilitate access to civil remedies in terms of broader jurisdiction for their own courts, the possibility of collective complaints and the elimination of procedural, substantive and financial obstacles to access civil justice.

16. The Committee should also recognize the role that remedies for breach of consumer protection frameworks can play in the protection of ESCR. In some countries, consumer protection law offers an institutional and procedural framework that can be of great help in realizing ESC rights, preventing violations through the development of new protective standards and facilitating access to justice and remedies for victims of violations of these rights. In certain countries, the official institutional infrastructure for the protection of consumers offers flexible, accessible and swift responses to situations that constitute or can escalate to abuses of ESC rights.

17. Land, water and forest rights may be subject to licensing for exploration or exploitation by private business without adequate consultation or consent by the occupying communities or groups. The Committee invokes these abuses in relation to violations of the State duty to protect (paras 15-16 of the draft). Depending on the country and system under consideration, the review of administrative law and acts may, at first instance be undertaken by administrative commissions, courts, or other bodies. In other systems, an independent and specialized institutional branch of the judiciary with their own procedural arrangements undertakes the function. These bodies can thus play an important role for ESC rights adjudication.

18. The Committee should further clarify the responsibility to adopt administrative remedies and to ensure adequate regulatory oversight of land acquisition that protects human rights and prevents forced evictions.

19. Similarly, labour rights may be subject to inspection by ministry of labour officials who may also have the power to impose penalties or warnings. Financial and other form of support from States to development or business operations may have been made available on condition to full

respect of certain requirements, including social, human rights and environmental standards, the lack of respect to which could entail the triggering of compliance or sanctions mechanism. These kinds of avenues are increasingly important for individuals and communities affected by economic negative impacts.

20. The Committee should further consider the use of environmental law for remedy to ESCR abuses. The protection of the environment, through environmental law and standards, has long played an important role for the protection of ESC rights. In fact, the right to a safe and healthy environment is included in various conventions and constitutional enumeration of rights. Principles, such as the precautionary or prevention principles, which have their genesis in environmental law have been generally invoked outside of the environmental law context. At the domestic level, a variety of cases demonstrate the relevance of environmental issues and law to the protection of ESC rights.

21. The draft General Comment seems to dedicate greater attention to non -judicial remedies than to judicial ones, which risks having the unintended consequence of sending the wrong signal to States parties as to the relative importance of those kinds of remedies. While the section dedicated to judicial remedies may be further developed (see recommendations above), the section on non-judicial remedies may also benefit from additional clarity. While important, non-judicial remedies are not always as effective as judicial mechanisms or administrative mechanisms whose decisions have the force of domestic law, as some States will consider their authority to be consist of soft guidance of a non-legal character.

22. In particular, a distinction should be made between State-based non-judicial remedies and those other mechanisms established by industry associations and businesses themselves (grievance mechanisms). Although the Guiding Principles on Business and Human Rights (reproduced at length in para. 50 of the draft General Comment) applies to all non-judicial mechanisms, those remedies provided by the State are subject to other, fundamental, principles that should be respected as a matter of international law. Paragraph 44 of the draft states that remedies (not only judicial ones) should be available and effective and that they entail access to an independent authority with the competency to determine whether a violation has occurred and to order enforceable remedial measures. The section on non-judicial remedies should keep coherent with this and other paragraphs in the current draft General Comment.