

## **Submission of the Norwegian Government**

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

The Norwegian Government refers to the invitation of the Committee on Economic, Social and Cultural Rights to submit written contributions to the General Discussion on the *Draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, to be held on 21 February 2017.

Norway has been a party to the International Covenant on Economic, Social and Cultural Rights since 1972 and would like to confirm its commitment to comply fully with its treaty obligations. According to the Norwegian Human Rights Act of 1999, the provisions of the Covenant have the force of Norwegian law with precedence over any other legislative provisions that conflict with them.

The Norwegian Government attaches great importance to its obligation to provide protection against human rights abuse by business enterprises operating within its jurisdiction, and also makes it clear that it expects business enterprises domiciled in its territory to develop and carry out their international operations in accordance with international human rights law. In 2015, the Government adopted a [national action plan](#) for the implementation of the UN Guiding Principles on Business and Human Rights as part of its efforts to intensify Norway's promotion of human rights in the business context.

The Norwegian Government welcomes this opportunity to submit its observations on the Committee's draft General Comment on State obligations under the Covenant in the context of business activities. Norway has limited its observations to the Committee's comments concerning direct responsibility of State Parties for the action or inaction of business actors and to the extraterritorial scope of States' obligations under the Covenant. Where Norway has not provided specific comments on issues raised in the draft General Comment, this should not be interpreted as either agreement or disagreement with its substance.

In general, the Norwegian Government considers the Committee's views as expressed in the draft General Comment to be recommendations to States, and not in all respects to be expressions of the Committee's view on States Parties' legal obligations.

#### **Direct State responsibility**

In paragraph 14 of the draft General Comment, the Committee addresses the question of the circumstances under which a State Party may be held directly responsible for the action or inaction of business actors. The Committee states the following, which reflects the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, Articles 8, 5, 9 and 11:

*“An act or omission of a non-State entity, for instance, is directly attributable to a State Party if the private entity is in fact acting on that State Party’s instructions or is under its control or direction in carrying out the particular conduct at issue. In addition, a non-State entity’s activity related to the exercise of government authority may be directly attributed to a State Party if its law empowers the private entity to do so or if the circumstances call for such exercise of government functions in the absence or default of the official authorities. Furthermore, an act that is otherwise not attributable to a State Party is nevertheless deemed as such if and to the extent that State Party acknowledges and adopts the conduct as its own.”*

The Norwegian Government agrees with the Committee that the International Law Commission’s Draft Articles on State Responsibility are relevant here. It is also Norway’s opinion that, in general, the Draft Articles reflect the present state of customary international law on State responsibility.

At the same time, the Norwegian Government would like to draw attention to how the Draft Articles should be understood as regards the conduct of companies and enterprises. In its commentaries to Article 8 on conduct directed or controlled by a State, the Commission states the following:

*«Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the “corporate veil” is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its ownership interest as a vehicle for directing the company to seize the property. On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.”*

Thus, in the International Law Commission’s view, States can only exceptionally be held directly responsible for the action or inaction of state-owned or state-controlled companies. Responsibility requires that the corporate entity is exercising elements of governmental authority or that the State is using its ownership interest in or control of the corporate entity specifically to achieve a particular result. The Norwegian Government agrees with the Commission on this point.

## Extraterritorial scope of the Covenant

In section III, subsection C, the Committee addresses the “extraterritorial obligations” of States under the Covenant. The Norwegian Government is firmly of the view that in this subsection, the Committee goes too far in defining extraterritorial legal obligations for State Parties to protect against human rights abuse by business entities abroad.

Norway refers particularly to paragraphs 31 and 32 under the heading “Extraterritorial Obligations” and paragraphs 35 to 37 under the sub-heading “Extraterritorial obligations to protect”.

In the Norwegian Government’s view, States are generally not required under international law to regulate the extraterritorial activities of businesses domiciled in their territory. This is recognised in the commentaries to the UN Guiding Principles on Business and Human Rights, which state as follows : “At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.”

The Norwegian Government agrees with the Committee that under certain exceptional circumstances, human rights conventions, including the Covenant on Economic, Social and Cultural Rights, may have an extraterritorial scope. However, in Norway’s view, the Covenant is primarily territorial in nature.

The Norwegian Government refers in this context to the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, also referred to by the Committee in paragraph 32.<sup>1</sup> In its Advisory Opinion, the Court observes that jurisdiction of States “may sometimes be exercised outside of the national territory”, but holds at the same time that “jurisdiction of States is primarily territorial” (para. 109). The Court points out that the Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. However, the Court comments that “[t]his may be explicable by the fact that this Covenant guarantees rights which are essentially territorial” (para 112). The Court continues by stating that “it is not to be excluded that [the Covenant] applies both to territories over which a State Party has sovereignty and to those over which that State exercises territorial jurisdiction”. In the case before the Court, the question was whether the Covenant applied to occupied territories. The Court observed that the occupied territories in question had been subject to the territorial jurisdiction of the State concerned as the occupying Power for more than 37 years. In the exercise of the powers available to the State on this basis, the Court found that the State was bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. The Advisory Opinion of the International Court of Justice in the case *Legal Consequences of the Construction of a Wall in the Occupied*

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<sup>1</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (9 July), paras. 109-112.

*Palestinian Territory* therefore does not address the question of whether States are legally obliged to protect against human rights abuse by enterprises domiciled in their territory when operating outside the territorial jurisdiction of the State.

In the opinion of the Norwegian Government, the question of extraterritorial application of the Covenant can only arise where a State exercises effective control over the territory where the business operation is carried out, or where a State exercises a high degree of authority or control over the activity in question affecting human rights abroad.

Norway is therefore of the view that the Committee's draft General Comment section III subsection C needs to be reconsidered.