

Submission of Comments and Suggestions to the Draft of General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

Paragraph 1

1. As this paragraph is setting the context for the need for a General Comment on State Obligations under the ICESCR in the context of business activities, a stronger elaboration of the context is needed. The manifestation of the contemporary economic climate, such as the dominance of the neo-liberal economic model should be elaborated in order to make the links between the prevalence of such an economic ideology and how it has challenged governments' ability to guarantee human rights in general and the Covenant rights in particular.
2. The General Comment is also an opportunity to highlight the role of the state in delivering public goods and services in the current context which the market cannot adequately supply and has no incentive to supply¹.
3. When acknowledging generating employment opportunities and investing in economic development, it is also important to highlight other factors that exacerbate income inequalities and discrimination. Workers employed in the jobs created through new economic development are often subject to discrimination and exploitative working conditions and consequently denied access to the welfare and labour rights outlined in the ICESCR. The gender division of labour means that women are more likely to be located in these precarious forms of employment than men.² ("The garment sector is great at employing women. At the bottom. While approximately 80% of the world's garment workers are women, the number of women heading the 15 largest mass-market apparel companies on the Fortune 500 list is zero."³)

Paragraph 4

4. An additional paragraph should be included to state the purpose of this General Comment to address new and emerging forms of human rights violations and increasing number of jurisdictions that require business entities to report on their human rights obligations. Naming specific forms of violations (with clarification that the articulation of violations is not exhaustive, but merely illustrative) where possible negates the argument that a particular form of violation does not fall within the ambit of state obligations under ICESCR for business activities. This is essential to ensure legal recognition of such violations by States parties, and for States to address these violations through review and revision of their laws.

Paragraph 5

5. Business actors and activities should be defined with more precision. Although the process for a new legally binding treaty on business activities is underway, defining business actors in relation to state obligation in this General Comment would enable a stronger articulation in establishing Covenant obligations in their activities. The present broad definition covers a range of business actors, but care should be given to make sure that non-conventional business actors and state associated private actors (that may not necessarily be classified as business actors, such as private military/security contractors, export credit agencies and export processing zones, pension funds etc) are not excluded from the definition. The definition should include global inter-governmental organizations and institutions related to finance and trade such as the World Bank, Asian Development Bank, World Trade Organization and the International Monetary Fund, in order to ensure that the policies and decisions of those organizations conform to state obligations under the Covenant.
6. We suggest a separate paragraph with strong articulation on international organization or any other form of international cooperation in which States act collectively, including of a regional scope. The Committee may

¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5

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<https://brownschool.wustl.edu/sites/devpractice/human%20rights%20reports/gender%20and%20access%20to%20human%20rights%20in%20chile.pdf>

³ <https://www.theguardian.com/sustainable-business/2016/mar/08/fashion-industry-protect-women-unsafe-low-wages-harassment>

wish to draw upon the articulation of the CRC General Comment 16 on State obligations regarding the business sector on children's rights (paragraph 47-48).

Suggested paragraph: *In the context of business activities, these international organizations include international development, finance and trade institutions, including, but not limited to, the World Bank, the International Monetary Fund, and the World Trade Organization, and similar regional organizations such as the Asian Development Bank a, in which States act collectively. States must comply with their obligations under the Covenant and its Optional Protocols thereto when acting as members of such organizations and they should not accept loans from or agree to conditions set forth by such international organizations if they are likely to result in the States violating Covenant rights. States also retain their obligations in the field of development cooperation and should ensure that cooperation policies and programmes are designed and implemented in compliance with the Covenant.*⁴

Paragraph 6

7. We suggest a separate paragraph expressly recognizing the significant similarities and distinctions between non-state actors and business actors. In addition, the term "non-state actors" should be defined with more precision. Although international law has yet to provide a clear definition, referencing existing definitions of non-state actors as articulated by other treaty bodies⁵ and expressly defining the term in this General Comment would enable a stronger articulation of the obligations of state and non-state actors.
8. The use of the term "appreciating" implies that the responsibility of the business sector stops short of full understanding. Merriam Webster provides the following "legal" definition of appreciate: "to judge or understand the significance of".⁶ The General Comment should seek to do more than simply help businesses appreciate the significance of their human rights obligations. Therefore, we recommend that the last sentence be revised to read- *The present General Comment seeks to assist the business sector in understanding their human rights obligations and ensuring their compliance.*

Paragraph 7

9. Add ICESCR General Comment No 3 on the Nature of States Parties' Obligation to footnote 13 in the list of General Comments in understanding the precise nature of State parties' obligations.

Paragraph 9

10. Among the categories who are often disproportionately affected by the adverse impact of business activities- add *rural women* particularly in relation to forced evictions and land grabbing by extractive projects, *migrant workers, domestic workers and home based workers* particularly in relation to their over representation in the informal economy, concentration in lower end of the global value chains, lack of access to social protection and decent living wage and *communities in conflict affected areas/contexts* where often times non-state actors or state associated private actors have been influential in negating human rights obligations.

Paragraph 11

11. In order to more precisely define the scope of state obligation with respect to women facing intersecting and multiple forms of discrimination, the paragraph should provide a non-exhaustive list of additional examples of the factors compounding rights' violations for these women. This can be done by making an explicit reference to other international human rights instruments, such as: (1) CEDAW Article 2 and General Recommendation 28 on state obligation (specifically paragraphs 18 & 26); (2) CEDAW Article 4 (1) on temporary special measures that ensure equal representation in economic policy related decision making and access to the formal labour market by women belonging to linguistic and ethnic minorities and women

⁴ Also see CRC General Comment 16 on State Obligations regarding the impact of the business sector on children's rights

⁵ CEDAW General Recommendation 30 on women in conflict prevention, conflict and post conflict situations (paragraph 13), CAT General Comment 2 on implementation of article 2 by States Parties (paragraph 18)

⁶ <https://www.merriam-webster.com/dictionary/appreciate#legalDictionary>

with disabilities⁷; (3) CEDAW Article 5 on stereotypes, which is particularly relevant to (a) media businesses, which play a significant role in reinforcing stereotypes, and (b) gender discrimination in the labour market, such as gender division of labour, and the gender wage gap; (4) CEDAW Article 14 on rural women and General Recommendation No. 34 on the rights of rural women (specifically, paragraphs 14, 15, 20 and 94); (5) the Committee on the Rights of the Child's General Comment No 16 on State obligations, which interprets and articulates state obligation to address the impact of business activities and operations on children's rights, including the specific violations affecting girls (paragraph 19) and the rights minority and indigenous children and children with disabilities (paragraph 21).; (6) CEDAW General Recommendation No 30 on women in conflict prevention, conflict and post-conflict situations which specifically directs states to provide assistance to business enterprises (paragraph 17) and addresses intersectionality at paragraphs 7, 57(b) and 58-61 which explains how statelessness and gender can intersect to affect women's access to employment, among other social rights (paragraphs 7, 17, 57(b) and 58-61).

12. We suggest to either expand the existing paragraph or insert an additional paragraph to articulate "Apply the Covenant and other international human rights instruments and humanitarian law comprehensively in the exercise of state obligation to regulate the business activities".
13. Revise the fifth sentence to read - *The Committee therefore recommends States Parties to address this issue of specific impacts of business activities on women and girls and to adopt measures to regulate business activities that may adversely affect their economic, social and cultural rights. In adopting these measures, States Parties must address the impacts of business activities on women's rights consistent with their obligations under the Convention on the Elimination of Discrimination Against Women.*⁸ *States Parties should also consult the Guidance on National Actions Plans on Business and Human Rights.*

Paragraph 18

14. We suggest removing 'if needed' from the third sentence of the paragraph. We request the Committee to specifically clarify the due diligence obligation to address sexual harassment and obligations of state and business actors to protect and prevent (per CESCR General Comment 23 on right to just and favorable conditions of work, Para 6 and 48) and CESCR General Comment 16 on equal right of men and women to the enjoyment of all economic, social and cultural rights.
15. In the third sentence "...and revise relevant tax codes to deny business exemptions in case of human rights violations and to align business incentives with human rights responsibilities." We suggest replacing responsibilities with obligations and adding "*economic concessions, export credit policies*" after "tax codes".
16. In the last sentence add - "*...to the effect of ensuring that the monitoring is carried out as much as possible by independent bodies with no conflicts of interests, such as the National Human Rights Institutions.*"

Paragraph 19

17. We suggest revising "...establishing minimum wage and fair remuneration practices.." to read "*formulate equal pay legislation and make necessary administrative provisions to establish minimum wage based on independent assessment of the living wage and guarantee equal pay for work of equal value for men and women*⁹ *to ensure adequate working conditions*".

Paragraph 20

18. In the third sentence, "Investment and trade agreements and national measures defining the investment and trade regimes at domestic level must be designed in a way that..." we suggest replacing 'in a way' with '*to ensure*'.

⁷ See also CEDAW General Comment 25 on temporary special measures, specifically, paragraph 12, which addresses the need for temporary special measures for women facing multiple forms of discrimination.

⁸ To the extent a state party to ICESCR is not also a party to CEDAW, the Committee notes that it interprets the rights of women under ICESCR consistent with CEDAW and the interpretations of the CEDAW Committee.

⁹ ILO Convention 100

Explanation: The paragraph limits itself to asking States to refrain from entering into agreements when they do not respect human rights. However, States as part of the international community and members of multilateral obligations also have a positive duty to push for a new generation of trade and investment agreements that include, for instance, human rights clauses (that must be considered in dispute settlement processes) and do not include harmful stabilization clauses. Part of their duty to protect is to positively work for a change of paradigm in trade and investment law.

19. In the fifth sentence “an intellectual property framework...” we suggest to add ‘*awareness raising*’ activities’ as well.
20. In the seventh sentence, it may be instructive to expand the paragraph to capture the severity of the problem and obligation of the state to protect the sovereignty and economic, social and cultural interests, including food sovereignty of the people, especially small farmers and producers, rural women, indigenous and ethnic minorities.

Explanation: The corporate encroachment and monopoly in the agriculture sector is contributing to the loss of livelihoods and of indigenous knowledge and practices. The shift from farm saved seed to corporate monopolies of the seed supply is also a shift from biodiversity to monoculture in agriculture. And the crisis of farmer suicides (cases from India) shows how the survival of small farmers is incompatible with the seed monopolies of global corporations¹⁰.

21. The Committee may wish to draw upon the articulation of the UN Declaration on the Rights of Indigenous Persons, which refers repeatedly to the free, prior and informed consent principle and includes several references to indigenous women, including in Article 21.2. Also add footnotes to this- see *also* CEDAW General Recommendation 34 on rights of rural women [para 54(e)]; see *also* CEDAW Recommendations to Myanmar (2016) CEDAW/C/MMR/CO/4-5 [para 43];

Additional Paragraph:

22. *Ensure effective consultation with affected communities before design and implementation of relevant financial, economic and trade policies and programmes and to secure the free, prior and informed consent of communities (such as, but not limited to, small farmers, fisher communities, labour unions, public interest groups, consumer associations, indigenous groups, etc) who are or will be impacted by such policies, programmes and projects. Ensure participatory, inclusive and democratic economic decision making, monitoring and evaluation, particularly for trade, investment, finance and infrastructure policies. Ensure human rights and environmental impact assessment of the development processes in order to uphold the economic, social and cultural rights of people.*

Paragraph 22

23. Rephrase the first sentence to read “This General Comment is adopted at a time when privatization and ‘*outsourcing of State functions*’ is a growing trend in many parts of economic, social and cultural life worldwide.

Paragraph 23

24. Stronger articulation is needed in the third sentence to highlight the security concerns of women/human rights defenders and protection of their rights. We suggest rephrasing the third sentence to read “*In addition, trade union leaders, indigenous leaders, anti-corruption activists, women’s rights activists, land rights activists and environment protection groups are often subject to the risk of harassment, ill-treatment and arbitrary detention*” (cases of Cambodia¹¹).
25. Substitute the last sentence with:

¹⁰ <https://www.countercurrents.org/glo-shiva050404.htm>

¹¹ <http://www.rfa.org/english/news/cambodia/cambodia-jails-fines-two-08222016141825.html>

The Committee recommends that States Parties investigate allegations of harassment, arbitrary detention of human rights defenders and activists, prosecute those responsible and provide remedies to the victims, take specific steps to protect human rights advocates and their work and refrain from imposing criminal penalties on them or enacting new criminal offences with a purpose of hindering their work.

Paragraph 25

26. Remove 'and in certain cases'

Sub paragraph a)

27. This section should more strongly and clearly define the obligation to fulfill, particularly the 'facilitate' dimension of the obligation. Facilitating measures should ensure the enabling environment for full realization of Covenant rights. It should include comprehensive articulation and should not only focus on providing incentives and subsidies to the businesses. Further in defining the remit of facilitating measures, the focus should be on creating environments which enable business actors 'to respect' the economic, social and cultural rights as enshrined in the Covenant and its Optional Protocol. As such, the state obligation to facilitate includes adoption and enforcement of clear laws and standards on labour, employment, health and safety, environment, anti-corruption, land use and taxation that comply with the Covenant and laws and policies designed to create equality of opportunity and treatment in employment, measures to promote vocational training and decent work, and to raise living standards, and policies conducive to the promotion of small and medium enterprises¹². The Committee may wish to draw upon the articulation of the CRC General Comment 16 on State obligations regarding the business sector on children's rights (paragraph 29).

Paragraph 27

28. Substitute the second sentence with- *This obligation also entails informing government agencies and institutions directly involved with business policies and practices and the agencies responsible for shaping macroeconomic and financial policies, as well as parliamentarians that shape business law and practices are aware of the State's obligations with regard to the Covenant rights. To fulfill this obligation, the State party may need to provide relevant information, training and support so that government representatives are equipped to ensure full compliance with the Covenant when developing law and policy and entering into economic, trade and investment agreements.*

Paragraph 28

29. In the last sentence- The issue of business actors failing to comply with their duties to deliver goods and services is crucial to the enjoyment of Covenant rights, and is a very significant issue. States should not 'step out' or delegate power and autonomy to business actors to deliver goods and services that are crucial to the enjoyment of Covenant rights. Hence, we suggest additional sentences-

The obligation to provide also requires States Parties to adopt appropriate monitoring and accountability procedures to ensure effective regulation of the activities of business actors. Such procedures should include a duty imposed on such businesses to report on how they take into account human rights (including Covenant rights) in their operations, or if they do not, to explain why they do not and investigate and appropriately sanction if they fail to deliver and provide access to accountability and assistance to victims. State parties must take account the prior record of business enterprises in respecting or failing to respect Covenant rights before deciding whether to partner with or provide public finance to the enterprises.

Paragraph 29

30. Add the following to footnote 50

Tax exemptions and deductibles offered as incentives to attract businesses and a failure to take action against tax evaders, has disproportionately negative consequences for women. Both reduce the State

¹² Convention on the rights of Child, General Comment 16 on State obligations regarding the business sector on children's rights (2013)

party's ability to mobilize the resources necessary to fulfill Covenant rights. As recently documented by UN Women, the ability of women to enjoy their economic, social and cultural rights contracts when government revenues decline: "[M]acroeconomic policies influence the resources available to governments to finance social policies and social protection programmes that can be used to reduce women's socio-economic disadvantage". UN Women, Progress of the World's Women 2015-2016 at p. 195 (2015). "Faced with reductions in government revenues, efforts to control budget deficits have emphasized reductions in spending, with cuts often disproportionately affecting women." Id. at 204. Many factors contribute to reduced government revenues, including tax evasion. "Countries that act as tax havens, maintaining low tax rates, facilitate tax avoidance and evasion. Multinational corporations, for example, use a variety of accounting techniques to lower their tax obligations, thereby diminishing their overall contribution to the economies where they operate." Id. at 16. Thus, the failure to take action against tax evasion further diminishes the State party's ability to respect, protect and promote women's economic, social and cultural rights.

Paragraph 32

31. Add- i) CEDAW General Recommendation 30 on women in conflict prevention, conflict and post conflict situations (2013) [paragraph 8-12];; iii) Convention on the Rights of Persons with Disability (CRPD) Article 32 that reads, "States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard".
32. Also add footnotes- see also CEDAW Recommendations to India (2014) CEDAW/C/IND/CO/4-5 [para 14-15]; see also CEDAW Recommendations to France (2016) CEDAW/C/FRA/CO/7-8 [para 21-22]

Paragraph 35

33. Add additional paragraph- *Ensure that State agencies, such as, but not limited to, export credit agencies, take steps to identify, prevent and mitigate any adverse impacts the projects they support might have on the Covenant rights before offering support to businesses operating abroad and stipulate that such agencies will not support activities that are likely to cause or contribute to human rights violations.*

Paragraph 37

34. In the first sentence add *contractors* and *joint ventures* in the list of other related entities.

Paragraph 39

35. Add at the end of the last sentence- *by using its leverage to ensure that the Covenant rights are respected in regional and international trade agreements* and add footnote- see also CRC Recommendations to Italy (2011), CRC/C/ITA/CO/3-4 [para 21]
36. Additional Recommendation- *States parties should engage in national and international consultations with a variety of stakeholders including civil society organizations to discuss the legally binding treaty to regulate business activities.*

Submitted on behalf of following individuals and organizations:

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