



**Submission to the UN Committee on Economic, Social and Cultural Rights
Day of General Discussion, 21 February 2017**

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

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The following organisations have endorsed this submission:

The Business and Human Rights Resource Centre
The Global Initiative on Economic, Social and Cultural Rights
Global Witness
Green Advocates (Liberia)
Justiça Global (Brazil)
OT Watch (Mongolia)
Project on Organizing, Development, Education and Research – PODER (Mexico)
Terra Mater (Ecuador)

Introduction and Executive Summary

The ISHR welcomes the initiative of the Committee on Economic, Social and Cultural Rights ('the Committee') to address the role of States, as well as business enterprises, in the context of business impacts on the enjoyment of economic, social and cultural (ESC) rights.

Human rights defenders play a critical role in supporting accountability for human rights violations involving businesses. They organise communities and workers, and assist victims to secure an effective remedy. They also have an important role to play in preventing human rights violations, whether through engaging in consultations with States and businesses or calling for the adoption and implementation of effective laws and policies to protect human rights in the context of business operations, such as through National Action Plans and other domestic mechanisms.

Yet, in doing so, human rights defenders face serious restrictions and risks. In his report to the UN General Assembly in October 2016¹, Special Rapporteur on Human Rights Defenders Michel Forst identified defenders working on issues of land and environmental rights as being at particular risk. Tactics to intimidate these defenders – employed by both State and non-State actors – include surveillance and stigmatisation, judicial harassment, threats, attacks, arbitrary detention, enforced disappearance and killings. In many countries, these tactics combine with an environment of impunity to create significant barriers to access to justice for ESC rights violations.

The draft General Comment provides a unique opportunity to build on the Committee's past calls on States Parties to recognise and protect human rights defenders, and should reflect fully the statement released by the Committee on 7 October 2016 on human rights defenders of ESC rights. In this important statement, the experts clearly and unequivocally state that they 'consider any threat or violence against human rights defenders to constitute violations of States' obligations towards the realisation of Covenant right'. The same document then reiterates the State obligation to ensure that defenders are 'effectively protected against any and all forms of abuse, violence and reprisal.'

The following pages comprise recommendations made by ISHR with the support of eight other global human rights organisations that would contribute to increased protection and recognition of defenders of ESC rights. In short, we recommend that the General Comment seek to:

- **Ensure that national law and relevant policies recognise and protect the work of human rights defenders, including ESC rights defenders, and ensure accountability for attacks and reprisals against them.**
- **Emphasise the important role of defenders, whistleblowers, advocates, and others in ensuring access to remedy for violations of ESC rights.**
- **Establish clear expectations for human rights due diligence required by States, and conducted by companies, to take into account the situation of human rights defenders.**
- **Recognise that businesses should refrain from seeking to limit activities in defence of ESC rights, and indeed should take proactive steps to support human rights defenders.**

Analysis of the Draft General Comment on State Obligations under the ICESCR in the Context of Business Activities

A. Context and Scope

The effective protection and realisation of ESC rights relies upon the contribution of civil society, who play a vital role by monitoring and evaluating State compliance with the ICESCR; providing inputs into policy formulation and implementation; identifying violations of human rights when

¹ A/71/281

they occur; and holding authorities accountable. In these ways, human rights defenders are key allies in the promotion and protection of ESC rights.

ISHR welcomes the Committee's broad scope, including business activities 'regardless of size, sector, location, ownership and structure' (para 5), which is in line with the UN Guiding Principles². Human rights defenders find themselves victims of both large multinationals and local enterprises, and often the smaller and less well-known companies have less incentive to improve their human rights record – or face less risk in continuing behaviour which undermines human rights, including ESC rights.

Similarly, the broad scope accommodates the important concerns raised in the report of the Working Group on Business and Human Rights in regard to the particular obligations of States in the context of state-owned enterprises.³ The Working Group concludes that there exist 'compelling normative and policy arguments for States to take additional steps to ensure that state-owned enterprises respect human rights' and that States should 'lead by example', including by using 'all the means at the disposal of States to ensure that the enterprises under their ownership or control fully respect human rights throughout their operations. The report recommends that all parts of the UN human rights system 'examine the human rights impacts... and clarify the State's duty with respect to [state-owned] enterprises, taking into account principle 4 of the Guiding Principles'.

- **The Committee should underline the increased duty of States to prevent against and meaningfully address violations of ESC rights, and attacks on ESC rights defenders, committed in relation to state-owned enterprises (para 5).**

ISHR notes that the General Comment intends to 'assist the business sector in appreciating their human rights obligations and ensuring their compliance' (para 6). Despite the efforts of the UN Working Group, the Human Rights Council, the ILO, the OECD, and other international and regional bodies and mechanisms, human rights due diligence at the company level remains a challenge. Although the Corporate Human Rights Benchmark⁴, released in 2016, does include a commitment to respect the rights of human rights defenders based in UN Guiding Principle 12, this is the exception and not the rule⁵.

- **We urge the Committee to consider that any elaboration of human rights due diligence norms or standards by States Parties, including as related to trade and investment legislation and non-financial disclosure, should include explicit reference to the situation of human rights defenders and to the need to ensure fundamental freedoms and civic space.**

B. Obligations of States: respect, protect, fulfil

ISHR appreciates the attention paid to non-discrimination, and the recommendation to adopt specific measures to combat it; these are particularly important for individuals impacted by multiple and intersecting forms of discrimination, such as indigenous and other minorities.

- **The Committee should recognise the adverse impact of business activities on 'women and girls, indigenous peoples... and ethnic, linguistic or religious minorities' (para 9).**

Women human rights defenders (WHRDs) regularly face specific, gendered forms of harassment and threats because of their status as women *and* as human rights defenders. These attacks

² http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³ A/HRC/32/45

⁴ See Section A.1.6, p. 56 of the Corporate Human Rights Benchmark Pilot Methodology 2016. https://business-humanrights.org/sites/default/files/CHRB_report_06_singles.pdf. The results of the first year are expected to be released on 13 March 2017.

⁵ Adidas is the first, and so far only, company with [an explicit human rights defender policy](#).

often go unseen and undocumented, even within the broader rights community. Perhaps the most visible of such attacks was the tragic killing of indigenous WHRD Berta Caceres in March 2016; after her death, Honduran *campesina* activists have said that some authorities sought to link her death to her private life, effectively delegitimising her rights defence work and undermining efforts to hold public authorities to account.

- **The Committee should ensure that States prevent and address threats and attacks against WHRDs, including those working in the area of economic, social and cultural rights.⁶**

When States parties violate ESC rights in the context of business activities, or allow or facilitate violations by third party actors (including businesses), this constitutes a failure to meet Covenant obligations (para 14-15). Legislation and relevant policies should require inclusive, transparent consultation and that can be actively tracked and monitored by human rights defenders, civil society organisations and affected communities.

- **HRDs should be fully able to participate in policymaking aimed at the adoption and implementation of legislative and other measures, including ‘human rights standards for business actors’ (para 16), to prevent business violations.**
- The ‘design and implementation of relevant policies’ aimed at protecting human rights ‘should be accompanied by assessment of their impacts on the enjoyment of Covenant rights, **and should include meaningful consultation and input from defenders and affected communities’ (para 20).**
- **In addition, we urge the Committee to emphasise obligations related to consultation should include the free, prior and informed consent of indigenous communities, in line with the UN Declaration on the Rights of Indigenous Peoples, including Art. 19, 26 and 29.**

Where there are challenges to the outcomes of consultations or where challenges arise in the good faith observance of agreements with communities, States parties should ensure access to remedy – this includes an impartial and independent judiciary, and an environment where advocates and legal aid organisations can operate freely. As the Access to Remedy report by the UN Working Group on Business and Human Rights (A/HRC/32/19) highlighted, ‘victims, witnesses, human rights defenders, whistle-blowers and their legal representatives’ must be protected.

The draft Comment focuses especially on the need for protection of HRDs (para 23), and calls for ‘States Parties to take all necessary measures to protect human rights advocates and their work and to refrain from imposing criminal penalties on them or enacting new criminal offences with a purpose of hindering their work’. In ISHR’s view, the foundation of such ‘necessary measures’ is a clear recognition of the positive and legitimate role of human rights defenders in the fulfillments of human rights, including ESC rights, for all.

- **The Committee should urge States Parties, in this regard, to develop and implement national laws for the protection of human rights defenders - with specific attention to ESC defenders – and establish, mandate and resource a mechanism for their protection.⁷**
- **We urge the Committee to recommend States Parties to ‘refrain from imposing criminal or administrative penalties’ on human rights defenders (para 23)**
- **The Committee should further note the obligations of States Parties to take steps to prevent reprisals against ESC rights defenders for engaging or seeking to engage with the UN,**

⁶ This also follows from CEDAW General Recommendation No. 34 on the Rights of Rural Women, which notes that ‘[rural] women human rights defenders are often at risk of violence when working, for example, to protect victims... or secure natural resource rights.’ The violations they face often occur as a result of the activities of business enterprises, in particular in the extractives and agricultural sectors.

⁷ See A/HRC/RES/31/32, OP8 of March 2016 for more details.

including the Committee. Where such acts do occur, States Parties should conduct prompt, transparent and independent investigations and ensure accountability for perpetrators and redress to victims.⁸

The Committee rightly notes that States Parties should facilitate, promote and provide for the realisation of ESC rights, including the ability of business enterprises to contribute to the enjoyment of these rights. The draft Comment clarifies that facilitation of such contributions occurs through the creation of an enabling environment for business actors (para 26); however, it is essential for the fulfilment of ESC rights that a broadly enabling environment be created, one that not only facilitates the respect by business actors of the rights enshrined in the Covenant, but that facilitates the creation and sustainability of a vibrant civil society.

- **The Committee should consider the adoption of legislation that seeks to overly regulate funding to non-governmental organisations as a violation of the obligation to protect (para 24), in that such laws and policies create barriers to civil society contributions to the protection and promotion of ESC rights.**
- **Paragraph 26 should be amended to reference ‘an enabling environment for all actors’.**

C. Extraterritorial Obligations

The draft Comment states clearly that States Parties have ‘the obligation to prevent and redress [adverse] impacts on the enjoyment of Covenant rights, regardless of where the harm occurs’ (para 35). Given the critical role of defenders in monitoring the impacts of business activities on ESC rights, States Parties should take steps to ensure that businesses domiciled in their jurisdictions do not engage in actions which would violate ESC rights, or the rights of those who defend ESC rights. In addition to those actions enumerated in the draft Comment (para 36):

- **States Parties should ensure policy coherence between their efforts to ensure their companies engage in responsible business conduct and their efforts to support human rights defenders, including of ESC rights.** For example, some States⁹ have adopted human rights defender guidelines that recognise specific responsibilities when challenges confronting human rights defenders arise from a company domiciled within their jurisdiction.
- **States Parties should further take measures to ensure that business enterprises do not interfere with or impair in any way the exercise by HRDs of rights to freedom of expression, assembly and association in the jurisdictions where they operate, whether or not the exercise of such rights is directly related to the company’s activities (para 37).**
- **States Parties should train their foreign diplomatic mission representatives the importance of companies domiciled in their territory to respect Covenant rights when operating abroad.** This includes training on respect and protection of human rights defenders working on economic, social and cultural rights as well as remedy for potential abuse.

The use by home States of leverage over business actors to encourage positive engagement in host States is a potentially powerful tool for change; public procurement regulations are one such example. However, the Committee should also recognise that many businesses have leverage over host States that can contribute to fulfilment of Covenant rights.

- **The Committee should also address the responsibility of business actors to speak out against host State efforts to violate or undermine Covenant rights, and indeed all universal human rights (para 38).**

⁸ Among other references, please see OP5 of A/HRC/RES/31/32.

⁹ See discussion of Canadian human rights defender policy, for example, at <https://www.ishr.ch/news/canada-new-guidelines-put-human-rights-defenders-front-and-centre>

D. Remedies

In addition to the barriers to access to remedy outlined in the draft Comment, and keeping in mind in particular the challenges associated with victims of transnational abuses, one can also speak of an ‘enabling environment’ for access to remedy which recognises the important role that independent professional associations and civil society organisations (e.g., legal aid clinics) can play. The High Commissioner’s report on ‘Creating and Maintaining a Safe and Enabling Environment for Civil Society’¹⁰ provides significant guidance in this regard.

- **ISHR emphasises the need to address corporate action to discourage individuals or groups from exercising remedies or to intimidate corporate accountability defenders (para 46).**
- **States Parties should create a ‘supportive legal framework’** through steps to:
 - Protect, by law and in practice, those rights that are necessary for civil society actors to operate, including the rights to freedom of opinion and expression and peaceful assembly and association and the right to participate in public affairs, including online;¹¹
 - **Review and repeal or amend all legal provisions that impede the free and independent work of civil society actors; ensure that all legislation affecting their ability to work complies with relevant international human rights laws and standards and with the Declaration on Human Rights Defenders;**
 - Ensure access to justice through an independent and effective judiciary, as well as access to national human rights institutions that conform to the Paris Principles and to regional and international human rights mechanisms.¹²

E. National implementation

National implementation is essential to foster the implementation of General Comment provisions where they are most needed, i.e. within States Parties. ISHR welcomes the reference to national action plans in the draft General Comment, in particular as regards the potential for National Action Plans on Business and Human Rights (NAPs) to be informed by the obligations outlined within.

- **The Committee should encourage States Parties to use the General Comment as a tool in the elaboration of NAPs on Business and Human Rights (para 52). These should be inclusive, transparent, concrete and legally enforceable, and incorporate inclusive monitoring and grievance mechanisms.**
- **The Committee should encourage States to ensure full participation by human rights defenders in NAPs processes.**

Additionally, as recently highlighted by the Study¹³ published by OHCHR, National Mechanisms for Reporting and Follow-up (NMRFs) can play a fundamental role in promoting national implementation of international human rights recommendations, including CESC recommendations on business and human rights. When properly resourced and supported, NMRFs can also contribute to more participatory, inclusive and accountable governance.

- **We further encourage the Committee to acknowledge the valuable role of NMRFs for national implementation of Covenant provisions and Committee recommendations, including with regards to business and human rights (para 53).**

¹⁰ A/HRC/32/20

¹¹ A/HRC/32/20, para 84a

¹² Ibid, para 84c

¹³ http://www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_Study.pdf