Global Alliance of National Institutions for the Promotion and Protection of Human Rights

Working Group on Business and Human Rights

Observations on the CESCR
Draft General Comment (31.01.2017)

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National human rights institutions (NHRIs) are independent public bodies established at national level according to the United Nations (UN) Paris Principles\(^1\) with responsibility for promoting and protecting human rights. Since 2009, the Global Alliance of National Human Rights Institutions (GANHRI) has constituted a Working Group (WG) on Business and Human Rights with the objective of enhancing the capacity of NHRIs to fulfil their mandate in the context of business activities and of increasing collaboration amongst NHRIs.

The WG welcomes the opportunity to comment on the draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities and congratulates the Committee on Economic, Social and Cultural Rights (CESCR) for its continued attention to the issue of human rights and business. Business can and is contributing to the realisation of economic, social and cultural rights, through the jobs, products and services it provides. However, the WG shares the view of the Committee that there is an urgent need to prevent and redress adverse impacts of business activities on human rights.

The Draft General Comment (GC) can be a useful complement to the UN Guiding Principles on Business and Human Rights (UNGPs) adopted by the UN Human Rights Council in 2011 in relation to the specific obligations of states stemming from the International Covenant on Economic, Social and Cultural Rights in relation to business.

**Role of NHRIs in the area of business and human rights**

The WG welcomes the recognition of the role of NHRIs in the draft General Comment and would like to further underline the key role of NHRIs in supporting the full realisation of economic, social and cultural rights in relation to business activities.

In 2010, NHRIs adopted the Edinburgh Declaration\(^2\) in which they emphasized the important role NHRIs can play in addressing corporate-related human rights challenges individually at the national level and collectively at the regional and international levels. Since then, a growing number of NHRIs across the world have been using their promotion and protection mandate to inter alia ad-

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\(^2\) International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), The Edinburgh Declaration, 10 October 2010.
vise governments on aligning national law and regulations on business with human rights, facilitate multi-stakeholder dialogue, conduct inquiries and facilitate mediation or conciliation of complaints about human rights and business issues.3

As recalled by the UN Human Rights Council4, the establishment of effective, independent and pluralistic NHRIs in accordance with the Paris Principles, or the strengthening of already existing institutions, is critical to the realisation of human rights. NHRIs should also enjoy a broad mandate to enable them to address business-related human rights issues in an effective manner. In particular, many NHRIs play an important role in monitoring the implementation of the existing laws and policies with regard to business and human rights. This requires the authority and resources for effective monitoring, investigation and accountability mechanisms.

It is proposed to add the following paragraph to §27: “The Committee recognizes that NHRIs can play a key role in promoting the rights enshrined in the Covenant in the context of business activities and can also contribute to the promotion of the UN Guiding Principles on Business and Human Rights. The Committee refers in this regard to the definition of the main promotional functions provided by the Subcommittee on Accreditation in its General Observation No. 1.2 entitled “Human rights mandate”5.”

State-business nexus

The WG welcomes the attention in the General Comment to cases where a state may be held directly responsible or facilitates an abuse of Covenant rights by third parties, including business actors. The WG would like to underline in that regard that states have a “duty to protect” against adverse impacts by business entities. Additional steps need to be taken to ensure respect for human rights by business entities that are owned or controlled by the state, as recalled by UN Guiding Principle (Guiding Principle 4). State-owned enterprises (SOEs) play a crucial role in sectors where human rights violations in the context of business activities are reported such as the oil sector, i.e. only 1 of the 6 largest oil companies headquartered in Africa are private enterprises.6

Where there is a nexus between States and business enterprises, States possess special leverage to ensure that no adverse effects for human rights occur. The closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights. Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the

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5 The Sub-Committee understands ‘promotion’ to include those functions which seek to create a society where human rights are more broadly understood and respected. Such functions may include education, training, advising, public outreach and advocacy.
6 Top oil companies in Africa: http://www.blog.kpmgafrica.com/top-oil-companies-in-africa/
State, an abuse of human rights by the business enter prise may amount to a violation of the State’s obligation to respect human rights (§ 13-15, 34) in certain circumstances. Against this background, the WG encourages the CESCR to further elaborate on the State-business nexus by addressing export credit agencies, official investment insurance or guarantee agencies, development agencies, development finance institutions and on public procurement.

While the state has a general duty under human rights treaties to protect against human rights abuses by non-state actors the WG underscores that a key element of that duty is that public authorities must ensure human rights are respected when they enter commercial transactions with businesses, which includes public procurement and “contracting out” of public services. However, government action to prevent human rights abuses in public procurement, are lacking in most countries. The WG thus encourages the CESCR to further elaborate on this aspect of the ‘state duty to protect’ (now only mentioned in § 36).

Privatisation

The WG encourages the CESCR to pay greater attention to the human rights implications which the privatization of state functions may have. Privatization does not allow the state to abdicate its responsibility to respect, protect, and fulfil human rights:

- obligation to respect: If a state privatizes a particular service relevant for the enjoyment of human rights the agreement with the private service providers must be consistent with relevant human rights norms.

- obligation to protect: If a public service is privatised non-discrimination and equality norms in relation to vulnerable groups as well as other human rights must be respected. States must ensure that privatisation does not result in denial of access to vulnerable and poor people to socio-economic services. For instance, in the case of water supply, the State has an obligation to prevent third parties from potentially “compromising equal, affordable, and physical access to sufficient, safe and acceptable water”.

- obligation to fulfil: The state has the duty to ensure that accessibility, availability, quality and acceptability of basic services are not compromised through privatisation measures. States should adopt measures that enable and assist individuals and communities to enjoy their rights. For instance, payment for water services has to be based on the principle of equity, ensuring that these services are affordable for all, including socially disadvantaged groups.

Extraterritorial Obligation to respect

The WG takes the view that, as a matter of policy coherence, States should refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. In addition, the GC should outline more state provisions and situations that may lead to such

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8 General Comment No. 15.
9 General Comment No. 15.
interference in the context of the state-businesses nexus, e.g. when enterprises are state-owned, in situation of public procurement from private enterprises and any kind of state support to companies, including export promotion. In some cases, domestic measures, such as national resource strategies, may have extraterritorial impacts and should therefore be subject to a human rights impact assessment.

**Extraterritorial Obligation to protect – role of NHRI**s

As mentioned in the draft General Comment, states should pay attention to negative human rights impacts in host countries of businesses domiciled in their jurisdiction. NHRI have the mandate to monitor effective implementation of international human rights standards, they are embedded in the national human rights protection systems and at the same time they are globally linked with each other through the Global Alliance of National Human Rights Institutions.\(^{10}\)

It is proposed to add the following paragraph to §37: “NHRI, particularly through their global, regional or sub-regional networks, can serve as important information exchange platforms regarding joint complaint management and handling concerning violations of the rights provided for in the Covenant in the context of the extra-territorial business activities. The Committee further encourages NHRI to standardize as much as possible the complaints handling procedures within this framework to ensure the effectiveness of these platforms”.

**Access to Remedies and the role of NHRI**s

As recalled in the draft General Comment, the right to a remedy is a fundamental principle of international human rights law, which has also been recognized under Pillar III of the UNGPs. The WG remains concerned however that victims of business-related human rights abuses too often do not have access to an effective remedy. Practical and legal barriers to judicial remedies in both domestic and cross-border cases have been widely documented across different jurisdictions, but little action has been taken so far by States to address those challenges in a systematic manner.

The WG recalls the UN Human Rights Council recently adopted guidance developed by the OHCHR for states on how to address these legal and practical barriers to remedies for business-related human rights abuses.\(^{11}\) It welcomes the recognition in the draft General Comment (§ 46 et seq) of the concrete forms that these barriers take across legal systems, and encourages the Committee to further strengthen the General Comment’s language calling for the implementation of OHCHR’s recommendations and the removal of these barriers.

While the role of non-judicial remedies is acknowledged in the draft General Comment, the WG would like to highlight the particular role of state-based non-judicial remedies as an essential element of a well-functioning remedy architecture, in complementarity to judicial remedy. Many NHRI have a complaints-handling function and have been increasingly dealing with business-related

\(^{10}\) [http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx](http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx)

complaints\textsuperscript{12}. While NHRIs experience some challenges in dealing with an increasing amount of cases, not least linked to their scarce resources, in a number of instances, they have the potential to effectively address individual or collective cases of business-related human rights abuses\textsuperscript{13}. There is also an emerging practice of NHRIs collaborating to deal with cross-border cases of human rights abuses linked to business activities\textsuperscript{14}.

In addition to individual complaint-handling, NHRIs do also contribute to remedy through the exercise of other complementary mandate areas: NHRIs can and are using their investigative, advisory, legal and educational prerogatives to contribute to remedy. It is proposed to add the following paragraph to §21: “The Committee recommends that NHRIs regularly inform the competent executive, legislative and/or judicial authorities of the violations of the rights under the Covenant and promote that these violations are redressed, including within the framework of the international judicial cooperation”.

It is proposed to add the following paragraph to §11: “The Committee recommends States Parties to ensure that NHRIs are legally empowered to provide prevention and protection against all forms of violations in the context of business activities. The mandate of NHRIs in this area must be defined in complementarity with that of the various relevant judicial and administrative mechanisms (e.g. labor courts, labor inspectorates...). The Committee refers to the General Observation No. 1.5 of the Sub-Committee on Accreditation of the Global Alliance of National Human Rights Institutions (GANHRI) entitled “Cooperation with other human rights bodies”).

National implementation – role of NHRIs

The WG welcomes the support of the Committee to the development of national action plans (NAPs) on business and human rights and the recognition of the fundamental role that NHRIs play in that regard. In many countries across the world, NHRIs have already taken an active role in NAPs processes by contributing to baseline assessments or other preparatory analyses for NAPs or convening stakeholders.

The WG welcomes the attention of the Committee to the need to adopt a Human Rights-based approach when developing such national action plans and insists on the importance of participation, non-discrimination, accountability and transparency. We would also emphasise the value of national baseline assessments, especially in countries, where government, business or other stakeholders may be relatively new to business and human rights analysis and information on governance “gaps” may be lacking. NHRIs can be involved in monitoring the implementation of action plans, particularly paying attention that implementation is human rights-based.

\textsuperscript{13} For an overview of NHRIs’ role in supporting access to remedy in business-related cases, see Claire Methven O’Brien and Thomas Pegram, Access to remedy for business-related human rights abuses: Understanding and strengthening the role of NHRIs, Background paper, Workshop, 2-3 March 2016, Rabat, Morocco.
It is proposed to add the following paragraph to §21: “The Committee encourages NHRIs to establish appropriate structures in their institutions for monitoring state obligations under the Covenant in the context of business activities and the implementation of the UNGPs, and encourages States to adequately resource NHRIs to allow them to effectively carry out this mandate. The Committee refers to the General Observation No. 2.10 of the Subcommittee on Accreditation of GANHRI entitled “Quasi-judicial competency of national human rights institutions (complaint handling)” as well as the relevant work of the GANHRI Working Group on Business and Human Rights”.

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