



# The UN Committee on Economic, Social and Cultural Rights' proposed draft General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities

## Amnesty International's Observations and Suggestions

Amnesty International welcomes the opportunity to provide its observations and suggestions on the draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (hereafter the "draft General Comment").

### II. Context and Scope

**Paragraph 6:** As well as highlighting the way in which Covenant provisions might apply directly to companies within domestic legal systems, it is important to highlight in this paragraph the many other domestic laws designed to protect and ensure respect for certain economic, social and cultural rights (though not necessarily framed in human rights terms) that are relevant to businesses and legally binding on them. At the same time, it is also important to reiterate in this paragraph the principle articulated in the *UN Guiding Principles on Business and Human Rights* (UNGPs) that companies should respect human rights "*independently of States' abilities and/or willingness to fulfil their own human rights obligations...*"<sup>1</sup> We therefore suggest the following additions and modifications to draft paragraph 6:

[...] In certain jurisdictions individuals are allowed direct recourse against business entities for violation of their economic, social and cultural rights as guaranteed under the Covenant. There are also a large number of domestic laws designed to protect specific economic, social and cultural rights that apply directly to business entities such as in the areas of non-discrimination, health care provision, education, the environment, labor and consumer safety. an increasing number of jurisdictions that require business entities to report on their human rights due diligence process. In addition, under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or, if they exist, states enforce them in practice. The present General Comment seeks to assist the corporate sector in appreciating their human rights obligations **and responsibilities** and ensuring their compliance.

### III. Obligations of States Parties under the Covenant

**Paragraph 7:** The phrase "*of all persons under their jurisdiction*" at the end of the first line of draft paragraph 7 can lead to confusion as to the scope of States Parties' obligations under the Covenant. These obligations are articulated in section III.C concerning extraterritorial obligations. We suggest deleting this phrase to avert any confusion and bring the paragraph in line with section III.C.

#### B. Specific Obligations linked to Business Activities

<sup>1</sup> UN Guiding Principles on Business and Human Rights, Commentary to Principle 11.

## Obligation to protect

**Paragraph 18:** Risks to human rights must be prevented or mitigated. Abuses to human rights, on the other hand, must be prevented. It is important that the General Comment make this distinction very clear to avoid suggesting that a level of abuse to human rights may be acceptable. The text in the second line of draft paragraph 18 should therefore be reformulated in the following way:

[...] To this end, States Parties should adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent **and mitigate risks to Covenant rights and prevent abuses to these rights**, as well as to account for the negative impacts caused...

Draft paragraph 18 should also make clear that, as well as a business's own activities, due diligence should cover risks to, and abuses of, Covenant rights in a business's supply chain and in relation to the activities of subcontractors and other business relationships (see similar suggestions below regarding draft paragraph 38).

Draft paragraph 18 correctly points out that States Parties should seek to enforce Covenant rights by sanctioning corporate abuse of these rights. As well as remedying abuses, States Parties must take measures to prevent them. To this end, we suggest that this draft paragraph also emphasises the need for measures to monitor and sanction due diligence failures, regardless of whether abuses have been committed. It should also recommend that States Parties revise the various ways in which they engage or support corporate activity to align these with their duty to protect. Access to public procurement contracts or export credits, for example, should be made conditional upon companies' respect for human rights. As well as revising tax codes as suggested in draft paragraph 18, procurement contracts, export credits and other forms of State support or benefit should be amended, suspended or terminated when beneficiary companies are found to be abusing human rights or failing in their due diligence responsibilities.

This draft paragraph also correctly refers to the need for monitoring of impacts and identifying compliance and information gaps. Transparency and access to information of corporate human rights policies and due diligence practices (particularly, how risks and abuses are identified, prevented and managed) are critical in this regard. In practice, while companies are willing to disclose general policies and procedures publicly, they are reluctant to be forthcoming about actual risks and abuses. This undermines a critical aspect of human rights due diligence. Paragraph 18 should therefore more strongly emphasise the need for States Parties to impose high levels of business transparency and disclosure (see suggestions below regarding reporting requirements and right to information).

**Paragraph 19:** Draft paragraph 19 correctly points out that the obligation to protect at times necessitates direct regulation and intervention. This paragraph should also indicate that existing regulations necessary for the protection of Covenant rights in the context of business activity should not be repealed or amended in a way that weakens that protection. It would be useful to reiterate in this regard long-standing principles laid down by the Committee in relation to retrogressive measures. According to these, if any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources.<sup>2</sup>

### C. Extraterritorial Obligations

**Paragraph 33:** Extraterritorial obligations arise when a State Party is able to exercise control, power or authority over business entities or situations when these business entities' activities or these situations can have a foreseeable detrimental effect on the enjoyment of human rights outside the State's territory.

---

<sup>2</sup> General Comment No 3: The nature of States parties obligations, para 9.

This is the case regardless of where these business entities or situations are located. For this reason, the phrase “located outside its territory” in draft paragraph 33 appears inconsistent with draft paragraphs 31, 35 and 36. We suggest a reformulation of this paragraph to make clear that extraterritorial obligations arise when a State Party may exercise control, power or authority over business entities located within the State’s territory as well as when located outside the State’s territory.

### **Extraterritorial obligation to protect**

**Paragraphs 38:** Given the centrality of due diligence as a means of ensuring corporate respect for human rights, provisions in relation to due diligence in draft paragraph 38 should be strengthened. Draft paragraph 38 should articulate more clearly the need for States Parties to require businesses over which they exercise control, power or authority to exercise human rights due diligence throughout their global operations. It should also make clear that due diligence should extend to the activities of subsidiaries, suppliers, subcontractors, franchisees, and other business relations wherever these may be located.

Given its relevance as a means of ensuring adequate due diligence, external scrutiny and accountability, reporting should be mandated as part of due diligence. Draft paragraph 38 briefly mentions reporting requirements but is insufficient. It should recommend companies are required to report regularly on their human rights risk and impacts and that States sanction and/or order corrective action for lack of, incomplete or misleading reporting.

## **IV. Remedies**

### **A. General principles**

**Paragraph 45:** We welcome the inclusion in draft paragraph 45 of a number of critical barriers to justice in cases of business-related human rights abuse. In addition to these, we would like to suggest the inclusion of a few other barriers that, because of their significant and detrimental effect on the ability of individuals to access justice in cases of corporate abuse, should be explicitly mentioned. These include: the granting of exemptions from the applicability of certain laws or regimes designed to protect economic, social and cultural rights to particular commercial projects; the difficulty in accessing information and evidence to substantiate claims (much of which is often in the hands of the corporate defendant); and, the use of the *forum non convenience* doctrine in certain jurisdictions such as the USA and Canada. Under the *forum non convenience* doctrine, decisions to stay claims in favour of other jurisdictions are often taken without considering whether access to remedy is possible or realistic in the other jurisdiction. This often amounts to a barrier to justice as claimants are unable in practice to pursue their claim there.<sup>3</sup>

**Paragraph 46:** We also welcome the inclusion in draft paragraph 46 of concrete recommendations for addressing some of the barriers highlighted in the previous paragraph. We would like to suggest the inclusion of additional recommendations on measures to address barriers to remedy either highlighted in draft paragraph 45 or in our suggestions above. In particular, this paragraph should recommend States Parties to:

- establish parent company or group liability regimes to address the challenges associated with the “corporate veil” highlighted in draft paragraph 45;

---

<sup>3</sup> For an analysis of some of these barriers and means of addressing them, see Amnesty International, “Injustice Incorporated: Corporate Abuses and the Human Right to Remedy” (March 2014), accessible at: <http://www.amnesty.org/en/library/asset/POL30/001/2014/en/33454c09-79af-4643-9e8e-1ee8c972e360/pol300012014en.pdf>

- facilitate access to relevant information through the use of mandatory disclosure laws, procedural rules that allow for ample disclosure of evidence or by reversing the burden of proof in certain cases;<sup>4</sup>
- provide legal aid and/or other funding schemes to ensure people who would otherwise not be able to afford the cost can make a claim against a company for alleged human rights abuses;
- Explore means of eliminating the use of *forum non conveniens* in serious cases of alleged corporate abuse and/or establish a presumption of applicable forum with the burden on the corporate defendant to prove that the chosen forum is “clearly inappropriate”.

## B. Types of remedies

**Paragraph 48:** We welcome the reference in draft paragraph 48 to the critical role prosecuting authorities play in upholding Covenant rights. Often criminal laws that could be used to hold companies accountable for the most serious abuses to economic, social and cultural rights exist but are not enforced in practice. To address this serious gap, we recommend that this paragraph highlight the need for States Parties to review their criminal legislation as well as enforcement policies and practice to identify and address any legal or enforcement gaps, including in cross border cases. States Parties should also ensure that law enforcement are well equipped and prepared to take on these cases.<sup>5</sup> In addition, the paragraph should recommend that States Parties adopt new laws where these do not exist so that corporate actors can be held criminally liable for serious abuses to Covenant rights.

Draft paragraph 48 should also articulate more clearly long-standing principles of the Committee in relation to the importance and centrality of judicial remedies to redress violations of Covenant rights<sup>6</sup> and the States Parties’ duty to make these effective, available and accessible.<sup>7</sup> These principles are of particular importance in the field of business and human rights where a significant power imbalance exists between individuals and companies that may be parties to a dispute. This often results in a lack of effective remedy.

---

<sup>4</sup> The Committee has made this recommendation in General Comment No 20: Non-discrimination in economic, social and cultural rights, para. 40: “Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively.”

<sup>5</sup> This includes having appropriate expertise, access to networks, as well as adequate resources. See: Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases, accessible at: <http://www.commercecrimehumanrights.org/>

<sup>6</sup> General Comment No 3: The nature of States parties obligations, para 5 and General Comment No 9: The domestic application of the Covenant, paras. 3 and 9.

<sup>7</sup> See principles articulated in the Committee’s General Comment No 9: The domestic application of the Covenant, para. 9; General Comment No 14: The right to the highest attainable standard of health, para. 59; General Comment No 15: The right to water, para. 55 and General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, para. 18.

## Non-judicial remedies

**Paragraph 50:** Amnesty International agrees that non-judicial mechanisms can be an effective means of providing alternative avenues for remedy and welcomes the clarification that these should not substitute for, but work alongside and in complementarity to, the courts. We would like to recommend that the General Comment pay particular attention to the role of State-based non-judicial mechanisms. State-based bodies such as labour inspectorates and tribunals, consumer and environmental protection agencies and financial authorities, to name a few, already regulate and adjudicate aspects of corporate activity. Some do this very effectively. Despite their potential, these mechanisms remains largely unexplored in the area of business and human rights.<sup>8</sup> We would welcome greater emphasis in the General Comment on the need for States Parties to consider and make greater use of the wide range of existing administrative and quasi-judicial mechanisms to strengthen corporate accountability and access to remedy.

The General Comment should also make clear that State-based non-judicial mechanisms must be independent, impartial and, where they offer dispute resolution services, guarantee equality of arms between the parties. States Parties should also ensure the enforceability of their decisions. At the same time, the General Comment should reiterate the Committee's long standing position that, to be effective, administrative remedies will often need to be reinforced or complemented by judicial remedies and that an ultimate right of judicial appeal will be necessary in many cases.<sup>9</sup>

Finally, Amnesty International would like to recommend eliminating from draft paragraph 50 the list of features that non-judicial mechanisms should have. This list replicates the "effectiveness criteria" of Principle 31 of the UNGPs and as such appears unnecessary. This space could be used instead to elaborate further on some of the critical aspects suggested above, such as measures to ensure effective access to remedy and the legal accountability of companies that abuse Covenant rights.

### Additional text:

To conclude, we would like to suggest the addition of text addressing the right to information (as such, and as an essential means of protecting other economic, social and cultural rights) and participation in decision-making processes relevant in the context of business activity, such as those concerning economic projects or activities likely to impact peoples' economic, social and cultural rights.<sup>10</sup>

---

<sup>8</sup> Recognising this gap, the Human Rights Council mandated the Office of the High Commissioner for Human Rights in its resolution of 29 June 2016 to: "... identify and analyse lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context..."

<sup>9</sup> General Comment No 9: The domestic application of the Covenant, paras. 3 and 9.

<sup>10</sup> The Committee has addressed these rights in previous General Comments. For example, General Comment No 14: The right to the highest attainable standard of health, para 11; General Comment No 15: The right to water, para 48; General Comment No 21: Right of everyone to take part in cultural life, para 49.