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COMMENTS BY THE CETIM ON THE DRAFT GENERAL COMMENT OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON STATE OBLIGATIONS REGARDING THE ACTIVITIES OF BUSINESS ENTERPRISES[1]

The Committee on Economic, Social and Cultural Rights' draft *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (E/C.12/60/R.1, 17 October 2016) aims to facilitate the implementation of the *International Covenant on Economic, Social and Cultural Rights* by its states parties. It also aims to reinforce the legal actions of victims before states' judicial instances and before the Committee itself following the 2013 entry into force of the *Covenant*'s *Optional Protocol*, establishing complaint and mediation mechanisms. It is worth recalling that the *Covenant* defines as an integral and indissociable part of human rights the right to a sufficient standard of life (food, adequate housing, clothing etc.), the right to education, the right to work under fair and favorable conditions, trade union rights including the right to strike, the right to health, the right to social security and social insurance, the right to participate in cultural life and to benefit from scientific progress.

This draft general comment is thus very important in the current Silent Revolution of an ever greater application of international law, especially in the area of human rights as affected by the practices of business enterprises. Moreover, this draft is concurs with certain essential points of the draft binding international treaty on transnational corporations (TNCs).[2] Together, they lay out the broad outlines of an international law scheme liable to ending transnational corporations' impunity:[3] the obligation of states wherein are located the head offices TNCs to ensure that these corporations respect their obligations (direct vertical effect) regardless of the place/state where they are active (extraterritoriality of obligations regarding human rights) and assume responsibility for acts committed by themselves or by the contractors of their value chain (sphere of influence); but also the organization of effective remedy for victims of the perpetrators of these violations (direct horizontal effect). It is these major principles, affirmed in the draft, that must absolutely be maintained, indeed clarified.

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[1] These comments were drafted in collaboration with Professor Gilles Lhuilier.

[2] See the written statement, with eight proposals, endorsed by more than one hundred organizations and social movements and submitted by the CETIM and the IPS to the first session of the Intergovernmental Working Group on TNCs (A/HRC/WG.16/1/NGO/12/F, 24 June 2015): http://www.cetim.ch/8-propositions-pour-le-nouvel-instrument-international-contraignant-sur-les-soci%C3%A9t%C3%A9s-transnationales-stn-et-les-droits-humains/ and the one to the second session (2016), as well as the CETIM's six written statements on elements the future treaty should comprise: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/WrittenContributions.aspx

[3] Melik Özden, *Transnational Corporations' Impunity*, Geneva: CETIM Publications, 2016.

A. Regarding the Scope of the Draft

The draft is very significant. It aims to provide interpretive directives to the *Covenant* and clarifies previous texts,[4] among which the most important are *General Comment N° 3 on The Nature of States Parties' Obligations (Art. 2.1, of the Covenant)* and the Committee's 2011 *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights.*[5]

In this spirit, the draft draws on *General Comment N° 3*, which clarified states' obligations in order that the Committee could have a direct effect, something denied it most of the time by states. *General Comment N° 3* clearly affirmed that in the *Covenant* there is a certain number of provisions such as Articles 2.2; 3.7 (§ *a*, i); 8; 10.3; 13.2 (al. a, et par. 3 and 4); and 15.3 "which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain" (§ 5). *General Comment N° 3* thus countered the traditional silence of international law on the means of its implementation in the national context. The draft comment, more precise, goes further. Its style is very much to the point, and it gives many new examples of implementation of the rights enshrined in the *Covenant*. This style is very important for, in the majority of legal systems, the direct effect of a rule of international law is subordinated to two cumulative criteria: on the one hand, a subjective criterion – the willingness of the norm's authors – and, on the other hand, an objective criterion – the degree of precision sufficient to the norm in order that, by itself and without the support of a national norm, it can be effective regarding individuals. An international law norm thus must be clear and specific! [6]

First example: the scope of states' obligations concerning the activities of business enterprises is defined, and very broadly, for it concerns all economic activities regardless of the legal nature of the entity, its public or private character, its national or transnational activity (§ 5). Second example: the draft recalls the obligation established by Article 2 to combat discrimination but adds indigenous peoples as well as ethnic and religious minorities to the categories that are disproportionately affected by TNC activities, especially extractive activities. The risque of multiple discrimination is also cited, as in investment projects triggering displacements or evictions affecting women and young girls in particular. Specific steps are recommended for states to fight discrimination, such as systematically taking gender into account in the regulation of economic activities.[7] This draft, however, goes further than *General Comment N° 3* and adopts an analysis of the specific obligations of business enterprises similar to the Committee's 2011 declaration.

B. Regarding Obligations Specifically Linked to the Activities of Business Enterprises

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[4] *General Comment N° 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4 (2000), paras 26, 35; *General Comment N° 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, E/1992/23 (1991), para. 14; *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, E/C.12/2002/11 (2002), para. 49; *General Comment N° 19: The Right to Social Security (Art. 9)*, E/C.X/GC/19 (2008), paras 45-46, 71; *General Comment N° 18: The Right to Work (Art. 6 of the Covenant)*, E/C.12/GC/18 (2005), para. 52; *General Comment N° 23: The right to Just and Favorable Conditions of Work (Art. 7)*, E/C.12/GC/23 (2016), paras 74-75.

[5] E/C.12/2011/1 ("2011 Statement").

[6] Gilles Lhuilier, *Le droit transnational*, Paris: Dalloz, 2016, especially p. 257 ff.

[7] See in this regard Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (1 December 2014).

The draft adopts an analysis of Article 2 of the *Covenant* as establishing states' obligation "*to respect, to protect and to fulfill*", distinct from "*protect, respect and remedy*" of the *Framework for Business and Human Rights*[8]. In fact, the draft strengthens the 2011 declaration, which had already included such an analysis of Article 2.1, by drawing clearly on the 2013 text of doctrinal scope, *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*.[9]

First, the obligation to *respect* is defined identically to the 2011 declaration: the states parties' rules must conform to the *Covenant*. Once again, it is confirmed that non-respect can result as much from a state action as from a non-action (thus a preventive action is required); that this non-respect can also result from the acts of a private business enterprises under its control (in the broad meaning of the term), which is important in a context of privatization of public services and the development of public-private partnerships (PPPs).[10]

The examples given are new, such as failing to respect in the case of forced evictions within the framework of investment projects when the state fails in its obligation of intervention or compensation, or such as the failure to prevent violations of the rights of local communities or persons during the awarding of extraction rights.

Second, the obligation to *protect* is defined more simply than in the 2011 declaration, as in the obligation to prevent violations of economic, social and cultural rights by business enterprises.[11] The text would gain in clearness, however, by better distinguishing the two means of action that are provided for. First, states must act themselves, through legislation or regulation, indeed by information policies aiming for example to combat stereotyping in discrimination. Then, **states must oblige business enterprises to act themselves to enforce economic, social and cultural rights**, among which a fair wage allowing a decent standard of living, **and undertake to enforce this in what one could perhaps call – to simplify – their "sphere of influence".**[12] Examples are given, old ones, such as business enterprises' obligation to adopt codes of conduct, and others, new – and interesting – such the obligation of due diligence, which one might interpret to mean monitoring by corporations of the activities of subsidiaries and sub-contractors. This mention of due diligence / duty of care / obligation of vigilance is perhaps one of the most interesting new elements of the draft, for this can be rapidly developed in national legislation and regulation, such as the regulation of war-related industry. In our opinion, **a more explicit mention of the necessity of states' establishing responsibility – civil and/or criminal – of business enterprises in the event of failure of due diligence/duty of care/*obligation de vigilance*,** is necessary.

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[8] *Protect, Respect and Remedy: a Framework for Business and Human Rights. 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/Res/8/7, 7April 2009; *Protect, respect, and remedy: a framework for business and human rights*, A/HRC/8/5, 7April 2008.

[9] *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, ETO Consortium for Human Rights Beyond Borders, 2013

[10] The draft cites *Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries adopted by the International Law Commission, *Report of the International Law Commission, Fifty-Third Session (23 April to 1 June and 2 July to 10 August 2001)*, Supplement N° 10, A/56/10, Chapter IV, "State Responsibility", Art. 8. "Conduct directed or controlled by a State". See also A/RES/56/83, 28 January 2002; A/RES/59/35, 2 December 2004; A/RES/62/61, 6 December 2007; A/RES/65/19, 6 December 2010.

[11] "*effectively prevent the infringements of economic, social and cultural rights in the context of business activities"* (§ 17).

[12] "*those who depend on their business activities or who may be negatively affected by them*" (§ 17).

This mention – as well as the definition of extraterritorial obligations (ETO) proposed *infra* – would clarify both paragraph 35 and the second sentence of the draft general comment (“*States Parties have the obligation to prevent and redress such impacts on the enjoyment of Covenant rights, regardless of where the harm occurs*.”), by clarifying the nature of the states’ “obligation”.

The draft also recalls the obvious obligation to provide for “remedy” to victims, but innovates by recalling the importance of the inspection body and the protection of human rights defenders, trade unionists, indigenous community representatives and anti-corruption militants. To this list must be added **peasants** and **the affected communities** that are greatly affected by TNC activities.

The question of the relations between investment treaties and economic, social and cultural rights is broached, inviting states to accord rights, for example, to business enterprises that respect human rights, so that intellectual property rights do not deprive populations of access to medicines. **The draft could go much further, requiring, for example, a generalization of the practice of certain investment treaties that refer to the priority of human rights, which, in an interpretative process, could re-establish in arbitration or in state litigation a balance between the protection of investors’ interests and the protection of states’ and persons’ interests.** The *Vienna Convention on the Law of Treaties* requires that the provisions of a treaty be interpreted in their context and in the light of the purpose of the treaty. Thus, there would no longer be a dissociation between international human rights law and international investment law, and more generally, private commercial interests,[13] the former taking precedence over the latter.

Third, the obligation to *“implement”* is too complex. Whereas the 2011 declaration defined this obligation as obtaining from business enterprises a commitment to support the fulfillment of economic, social and cultural rights, the draft affirms that states must take the necessary steps,[14] at the maximum of their resources, to facilitate and promote economic, social and cultural rights, and in some cases, to directly supply essential goods and services. That this positive obligation is explicitly affirmed is without a doubt important, but this obligation is already implicit in the obligation to “respect”. This obligation to “implement” is divided into three elements, the duty to “*facilitate, to promote, to supply*”,[15] is without a doubt too complex and redundant, only the duty to “supply” represents newness relative to the obligations to “respect” and “protect” as declared. Specific applications, however, can reveal violations of this obligation to supply, such as the failure to repair road or other infrastructure for the distribution of goods of first necessity like of food, water and electricity. Finally, making the obligation to cooperate stipulated by Article 2.1 a simple duty to “implement” extraterritorially is not enough given its importance.

C. Regarding Extraterritorial Obligations

The draft is the most innovative on extraterritorial obligations (ETOs) regarding both the protocol’s signatory states and TNCs. The articulation of the obligations – states/TNCs – is very important to understanding the scope. Regarding the principle itself, there is nothing

[13] Thomas W. Wälde, *Nouveaux horizons pour le droit international des investissements dans le contexte de la mondialisation de l’économie*, Paris: Pedone, 2004.

[14] “*The obligation to fulfil requires States Parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and in certain cases, to directly provide goods and services essential to such enjoyment*” (§ 25).

[15] “*the duty to facilitate, the duty to promote, and the duty to provide*” (§ 26).

new, for ETOs were already recalled in the 2011 declaration. However, the importance accorded the principle justifies, in the draft general comment, an analysis of its basis in Article 56 of the *Charter of the United Nations*, in the jurisprudence of the Internationale Court of Justice and in international common law.

The definition of this obligation is clear: a state, when it can, must exercise control over a local business enterprise's activities beyond its territory in such a way as to prevent violations of the economic, social and cultural rights of persons affected by this enterprise or situation.[16] Consequently, the state's responsibility could be engaged for companies' acts that would be avoided through state measures implementing this extraterritorial obligation (§ 37).

But this definition is insufficient. The draft insists on the obligation of states to ensure that business enterprises on its territory refrain from causing economic, social and cultural rights violations beyond their territory through their activities, or to ensure that their affiliates, subcontractors, franchises and investors do not violate these rights. The definition of ETOs given in the draft could also be completed by the following more explicit affirmation: **States shall ensure that their legislation assigns responsibility to transnational corporations for economic, social and cultural rights violations by their affiliates and subcontractors arising from those corporations' failure to prevent such violations through the implementation of appropriate measures. This responsibility shall be construed as allowing extraterritorial victims legal action against a TNC in the jurisdiction of the state where it is located and shall remove the "corporate veil".**

Such a formulation clarifies states' responsibility, which is an obligation to ensure that TNCs observe a duty of vigilance as opposed to states' obligation to ensure by themselves that the affiliates or subcontractors enforce human rights beyond their territory. The proof of failure by the state or by a TNC in the event of a violation beyond the state's territory of a right enshrined in the *Covenant* would thus be simple: the lack of state legislation imposing this duty of vigilance or the lack of observance of this legal duty of vigilance by the TNC.

D. Regarding Remedy

Such a redefinition of ETOs would be in conformity with the obligation of states recalled by the draft general comment to guarantee victims access to compensation and reparations in its jurisdictions, whether the injury occurs on or beyond its territory.[17] The affirmation of the importance of the responsibility of business enterprises through legal or quasi-legal actions has already been affirmed,[18] but the draft accords it a specific dimension by insisting on the effectiveness of the avenue of redress as well as of the compensations granted: restitution, compensation etc. (§ 44). **While criminal responsibility is to remain the determining principle, civil suits seeking compensation for the victims must be facilitated.**

The essential contribution of the draft general comment undoubtedly lies in the affirmation that states must implement procedural measures to alleviate the denial of justice resulting from the transnational character of the action: the foreign incorporation of affiliates is a very

[16] "*Extraterritorial obligations arise when a State Party may exercise control, power or authority over business entities or situations located outside its territory, in a way that could have an impact on the enjoyment of human rights by people affected by such entities' activities or by such situations"* (§ 33).

[17] A/RES/60/147 (2005) (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law), Art. 3 (a)-(d).

[18] General Observation N° 9, para. 2.

simple way for TNCs to escape both criminal responsibility for acts committed by their affiliates and civil compensation for the victims; the transnational character of the compensation, for example in environmental cases, makes both jurisdiction and legal action uncertain; the imbalance between the means available to victims and those of the perpetrators of the harm makes legal action difficult etc. **Procedural measures are essential to obtaining effective compensation: the simplification of transnational legal actions, the creation of class-action suits, the adaptation of rules of evidence, the limitation of abusive actions by transnationals aiming to discredit the plaintiffs, the limitation of the scope of discovery[19] when used only to benefit the imbalance of financial means between the parties, the activation of international judicial cooperation in human rights cases etc.**

E. Implementation by States

States' practical implementation of *Covenant*'s obligations – in application of Article 2.1 – is the object, *in fine*, of a monitoring mechanism inspired by business administration: a national plan can be set up defining the precise objectives, the various deadlines and the means of legal action, as well as the actors such as human rights defenders and civil society. It is, however, unfortunate that civil society is not systematically associated with the implementation of states' obligations under the *Covenant*.

In brief, the draft text could be clarified on four points.

Regarding the obligation to *protect* (§§ 17-19), the text could better distinguish between the two proposed means of action. First, states must act themselves, through legislation or regulation, indeed through education policies aiming to combat stereotypes in discrimination. Then, **states must compel business enterprises to act themselves to respect economic and social rights –** e.g. a fair wage allowing a decent standard of living –**and compel them especially to enforce due diligence/duty of care/*obligation de vigilance* in their "sphere of influence".**

Regarding the relation between international human rights law and international investment law (§ 20), **the draft could request a generalization of the practice enshrined in certain investment treaties that refer to the priority of human rights, which, in an interpretive undertaking, could re-establish in an arbitration or state context a balance between investors' protection and states' and persons' interests.**

Regarding territorial obligations (§§ 30-40), the definition given in the draft could be completed by the following more explicit affirmation: **States shall ensure that their legislation provides that transnational corporations incur civil and/or criminal responsibility in the event of economic, social and cultural rights violations by their affiliates and subcontractors if these corporations have not implemented due diligence/duty of care/*obligation de vigilance* measures to prevent these violations. This responsibility shall enable extraterritorial victims to undertake legal action against TNCs in the jurisdiction of the state where the TNC is located thus removing the "corporate veil of the legal person". A more explicit mention of the necessity for states to establish responsibility – civil and/or criminal – of these business enterprises in the event of a lack of due diligence is necessary.**

[19] The *Discovery* procedure is almost systematically used in United States civil and trade cases but contested in many countries whose legal tradition does not recognize it.

Regarding remedy (§ 48), **procedural measures are essential to obtaining effective compensation: the simplification of transnational legal actions; the establishment of class-action suits; the adaptation of rules of evidence; the limitation of transnationals' abusive actions aiming to discredit the plaintiffs and the limitation of discovery when it is used only to benefit the imbalance of financial means between the parties; the activation of international judicial cooperation in the area of human rights etc. While criminal responsibility is to remain the basic principle, civil actions seeking compensation for the victims must be facilitated, even before the establishment of non-judicial mechanisms. The sentence, "*Judicial remedies must be available and accessible if non-judicial mechanisms fail to bring effective redress and satisfaction to the victims"* could be deleted.**