

INTRODUCTORY NOTE TO THE COMMITTEE ON ECONOMIC, SOCIAL AND
CULTURAL RIGHTS, GENERAL COMMENT NO. 24 (2017): STATE
OBLIGATIONS IN THE CONTEXT OF BUSINESS ACTIVITIES
BY TARA VAN HO*

Introduction

The United Nations (“U.N.”) Committee on Economic, Social and Cultural Rights (“CESCR”) took an unusual step in issuing its “General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.”¹ Unlike most of CESCR’s other General Comments, General Comment No. 24 does not tackle a specific right. Instead, it consolidates and elaborates the Committee’s jurisprudence on states’ obligations in the area of business and human rights, providing clarity on its approach to some of the most contentious issues within the field of business and human rights. This General Comment has the potential to have profound implications for the ongoing development of legal standards in the area of business and human rights, including implementation of the U.N. Guiding Principles on Business and Human Rights (“UNGP”).²

Background

CESCR has long recognized that businesses can negatively impact human rights.³ In 2011, the Committee issued a brief statement on the responsibility of states parties in the area of business and human rights, calling on states to include information on their regulation and remediation of business impacts on human rights in their periodic reports.⁴ That statement was released shortly after the adoption of the UNGP. Since then, debate has continued to focus on two significant questions: (1) should businesses have direct obligations under international law;⁵ and (2) to what extent do home states have extraterritorial obligations, rather than merely responsibilities, to regulate their corporate nations and provide remedies for the victims of their conduct?⁶ While CESCR hints at the first question – claiming that the General Comment should “assist the corporate sector in discharging their human rights

* Tara Van Ho is a Lecturer in the School of Law and Human Rights Centre, University of Essex, a Core Member of Essex Business and Human Rights Project. Email: tara.vanho@essex.ac.uk.

obligations and assuming their responsibilities” (¶ 5) – it directly answers the second in what is perhaps the document’s most important contribution to current international human rights jurisprudence.

The International Court of Justice has clarified that at least some human rights obligations extend extraterritorially in at least some instances.⁷ The exact extent to which human rights obligations extend extraterritorially, however, remains debated. In the field of business and human rights, there has been debate over whether a business’s “home state” has extraterritorial obligations to regulate and remediate its impacts on human rights abroad.⁸ The call for extraterritorial obligations in the context of business and human rights generally stems from an “accountability gap.”⁹ The state on whose territory a transnational business enterprise operates (the “host state”) may not have the power and/or willingness to hold the business accountable while the business’s use of the corporate veil separates parent and subsidiary companies in a manner that means home states cannot exercise jurisdiction over the activities overseas.¹⁰ There has been limited success in getting home states to act. Notably, France adopted a “duty of vigilance” law, which requires a small number of large corporations to report on their efforts to ensure their operations respect human rights.¹¹ This law has become a model for mandatory “human rights due diligence” efforts.

The Committee’s Approach

As the Committee explains, the current General Comment incorporates and complements other recommendations it has made in the area of business and human rights.¹² While the expectations for host states are in line with those earlier declarations, General Comment No. 24 is both more forceful in its foundational legal claims and more explicit and demanding in the steps states should take to realize extraterritorial obligations.

For its legal foundation, CESCR first points to Article 2(1) of the International Covenant of Economic, Social and Cultural Rights, which contains an explicit reference to international assistance and cooperation. The Committee then references the United Nations Charter, customary international law, a Human Rights Council resolution on extreme poverty, an International Court of Justice advisory opinion to assert that

“[e]xtraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction” (¶ 28). It is on the basis of this claim that the Committee outlines extraterritorial obligations to respect, protect, and fulfil economic, social and cultural rights.

While recognizing that states must respect, protect, and fulfil economic, social and cultural rights obligations domestically and extraterritorially, CESCR does not claim that the home and host states have synonymous obligations. Instead, home states are to ensure they do not create conditions that impinge on a host state’s ability to comply with the Covenant (respect), regulate and respond to threats by their businesses acting abroad (protect), and “contribute to creating an international environment that enables the fulfillment of the Covenant rights” (fulfil) (¶ 37). CESCR offers recommendations for how to implement each of these obligations in practice. Significantly, the Committee implies states may have an obligation to adopt mandatory human rights due diligence laws for businesses. While discussed in the “extraterritorial” section, CESCR claims that such laws would “not imply the exercise of extraterritorial jurisdiction” (¶ 33).

In addition to the claims of extraterritorial obligations, three aspects of General Comment No. 24 deserve recognition. First, CESCR notes the disproportionate impacts women and girls can experience as a result of business activities and calls on states to “incorporate a gender perspective” into their business regulations (¶ 9).¹³ The General Comment’s language suggests that the Committee will be particularly attuned to accusations that states have failed to adopt policies requiring businesses to account for the rights of women and girls.

Second, CESCR raises concerns over the privatization of public goods and services (¶¶ 21-22). CESCR has taken the approach that all rights can be realized in a variety of economic and political systems if the state also ensures protections for those in situations of vulnerability. While acknowledging again that “[p]rivatization is not per se prohibited by the Covenant,” CESCR cautions states against privatization as the enjoyment of human rights should not “be made conditional on the ability to pay, which would create new forms

of socioeconomic segregation” (¶¶ 21-22). While not the first time CESCR has raised this issue, the language employed is seemingly stronger than in past rights-specific general comments.

Third, the General Comment replicates a common mistake within business and human rights by discussing the issue of procedural remedies without also acknowledging the issue of substantive remedies. International human rights law requires effective remedies that include both a process capable of deciding on the victims’ claims and substantive orders aimed at repairing the damages the victim actually experienced (sometimes called reparations).¹⁴ Common substantive reparations include restitution, rehabilitation, satisfaction, guarantees of non-recurrence, and financial compensation.¹⁵ The UNGP and other documents establishing expectations in the area of business and human rights often note the need for procedural remedies capable of holding businesses accountable without engaging with the obligation on those processes to order the full range of substantive remedies a victim may need and be entitled to. This could inadvertently lead tribunals to favor financial compensation over other, often more difficult but quite necessary, forms of substantive reparations. While General Comment No. 24 acknowledges that states must ‘ensure the right to effective remedy and reparation’ (¶ 44), it fails to remind states of the need to ensure not only adequate processes but also appropriate reparations.

Conclusion

General Comment No. 24 is not the first time that CESCR has indicated states should regulate and respond to threats by business, nor is it the first time CESCR has suggested extraterritorial obligations in the area of business and human rights. The implementation of these expectations, however, has been slow. By explicating the responsibilities of corporate home states to respect, protect and fulfill human rights extraterritorially, CESCR renews and strengthens efforts to close the ‘accountability gap’ over businesses.

Currently, a treaty establishing obligations in the area of business and human rights is being developed under the auspices of the U.N. Human Rights Council. The ‘zero draft’ of that treaty also includes extraterritorial obligations, finding that both home and host states have the same obligations to regulate and remediate corporate impacts on human rights, with

specific obligations in the areas of international cooperation and mutual legal assistance.¹⁶ That approach could set up clashes between home and host states' efforts and approaches to business and human rights. Following General Comment No. 24 instead might allow for the creation of an international system with recognized obligations for both home and host states but with the nuance necessary to protect state sovereignty and reduce the likelihood of legislative clashes. In that sense, General Comment No. 24 may set a standard against which the proposed binding treaty on business and human rights can be evaluated.

¹ CESCR, *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, U.N. Doc. E/C.12/GC/24 (10 August 2017).

² Report of the U.N. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Annex, *U.N. Guiding Principles on Business and Human Rights*, U.N. Doc. A/HRC/17/31 (2011), endorsed by U.N. Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/L.17/Rev.1 (2011).

³ See, e.g., CESCR, *Day of General Discussion: Globalization and its Impact on the Enjoyment of Economic, Social and Cultural Rights*, U.N. E/C.12/1998/26 (11 May 1998).

⁴ CESCR, *Statement on the obligations of States parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2011/1 ¶ 7.

⁵ See, e.g., Anita Ramasastry & Doug Cassel, *White Paper: Options for a Treaty on Business and Human Rights*, 6 NOTRE DAME JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 1, 48-49 (2016); Nicolas Carrillo Santarelli, *A Defence of Direct International Human Rights Obligations of (All) Corporations*, in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* 33-62 (Jernej Letnar Cernic & Nicolas Carrillo-Santarelli, eds., 2018); Tara Van Ho, *'Band-Aids Don't Fix Bullet Holes': In Defence of a Traditional State-Centric Approach*, in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty* 111-138 (Jernej Letnar Cernic & Nicolas Carrillo-Santarelli, eds., 2018).

⁶ See, e.g., Claire Methven O'Brien, *The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal*, 3 BUSINESS AND HUMAN RIGHTS JOURNAL 47-73 (2018); Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUSINESS AND HUMAN RIGHTS JOURNAL 41 (2016); Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117(3) JOURNAL OF BUSINESS ETHICS 493-511 (2013);

⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. REPORTS 2004, 136 at ¶¶ 106-113.

⁸ See, *supra* n 6.

⁹ See, NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY – BRIDGING THE ACCOUNTABILITY GAP 263-265 (2017).

¹⁰ *Id.*

¹¹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLi>

[en=id](#) (last accessed 28 June 2019). For an English-language discussion of the law, see, Sandra Cossart, Jérôme Chaplier & Tiphaine Beau de Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUSINESS AND HUMAN RIGHTS JOURNAL 317-323 (2017).

¹² See, e.g., CESCR, *General Comment No. 4 (1991) on the right to adequate housing* ¶ 14; CESCR, *Day of General Discussion: Globalization and its Impact on the Enjoyment of Economic, Social and Cultural Rights*, U.N. E/C.12/1998/26 (1998); CESCR, *General Comment No. 12 (1999) on the right to adequate food*, ¶¶ 19-20; CESCR, *General Comment No. 15 (2002) on the right to water* ¶ 49; CESCR, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Germany*, U.N. Doc. E/C.12/DEU/CO/5 ¶ 10 (2011); CESCR, *Statement on the obligations of States parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/2011/1 (2011); CESCR, *General Comment No. 23 (2016) on the right to just and favourable conditions of work* ¶¶ 74-75; CESCR, *Concluding observations on the sixth periodic report of Canada*, U.N. Doc. E/C.12/CAN/CO/6 ¶¶ 15-16 (2016).

¹³ This recommendation was echoed in a 2019 report from the U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises. U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises, *Gender Dimensions of the Guiding Principles on Business and Human Rights*, U.N. Doc. A/HRC/41/43 ¶¶ 43-45 (23 May 2019).

¹⁴ See, DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 16-17 (3d ed. 2015).

¹⁵ *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*, U.N. Doc. A/RES/60/147, Annex at ¶ 18 (2005).

¹⁶ *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*, Zero Draft (16 July 2018), available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (accessed 28 June 2019).