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BUSINESS' RESPONSIBILITIES
UNDER THE ICESCR - CONSULTATION
MEETING WITH THE COMMITTEE ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS

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The meeting on Business' Responsibilities under the International Covenant on Economic, Social and Cultural Rights (hereafter Covenant) was organized by the Geneva office of the Friedrich-Ebert-Stiftung to allow for a dialogue between and among the 20 participants, members of the Committee on Economic, Social and Cultural Rights (hereafter Committee) and other experts on the topic. The meeting was guided by three questions:

1. How to deal with state responsibility where a violation of the rights defined by the Covenant occurs in relation to business activities?
2. How can extra-territorial application of the Covenant be interpreted in case transnational corporations are involved and how can a state party be addressed regarding violations abroad?
3. How and when can the Covenant apply directly to non-state actors, keeping in mind that the Covenant is part of international law which transnational corporations have to oblige to?

The Covenant can only address state parties as they are its legal members. Businesses are not parties to the Covenant and hence their accountability under the human rights framework of the Covenant is difficult to assess. It is obvious though that individuals and corporate stakeholders can violate human rights. Such violations might also happen across state borders, which cause difficulties for the Committee to hold actors responsible according to the Covenant. Because of this, there are plans to adopt a statement on the subject of extraterritorial business responsibility during the Committee's current session in order to solve this misery. During two panel sessions and a subsequent open dialogue the participants of the meeting had a chance to exchange ideas on the topic.

The first panel discussed the United Nations Guiding Principles which are built on the "Protect, Respect and Remedy"-Framework, developed by the UN Secretary-General's Special Representative on business and human rights, Prof. John Ruggie.

These principles intend to complement existing obligations for states under the Covenant (and the other core treaties) and not to undermine them, despite their nature of being a voluntary framework in contrast to the legally binding Covenant. The Guiding Principles could be an instrument to invite states, which are not members to the Covenant, to consider economic, social and cultural rights as well. The possible endorsement of the document in the upcoming Human Rights Council session in June by a cross-regional group of states would be remarkable. While a legally binding document of some sort would have been preferred by many participants of the meeting, this has for now been declared as utopia under political reality.

A difficulty in terms of the different ratifications of various human rights treaties lead to an incoherence of obligations for states in terms of human rights, especially in terms of business' obligations. It has been stressed by various attendees of the meeting that this fact must not be an excuse for states to ignore their obligation to protect against human rights violations in a business context.

In general, tools to deal with extraterritorial business activities in the human rights context should be implemented. This had been recommended by many Treaty Bodies in the past. There are extraterritorial obligations in place already, as for example in the case of fighting child pornography.

Coherence in the language among Treaty Bodies would be important. This coherence should also apply to the Guiding Principles

which seemingly was not the case in some paragraphs. Apart from the positive content Ruggie's Principles have been described by many participants as a weak instrument due to its nature of not being legally binding. There was nevertheless hope for an inter-governmental process to follow, in order to expand on obligations as formulated in the Guiding Principles and transform them into legally enforceable standards.

The participants welcomed the mainstreaming of business responsibility in terms of human rights and the tendency of human rights issues increasingly becoming part of Corporate Social Responsibility measures.

The topic of the second panel was an instrument to report and assess effective state reporting on business' responsibility. Such a tool, the Human Rights Compliance Assessment, is currently under development by the Danish Institute for Human Rights. It is meant to support National Human Right Institutions in helping companies to understand contents of human rights agreements and to implement these into their business policies. Further, this tool can contribute to reporting on violations of human rights to relevant Treaty Bodies so as to make the private sector more accountable. The Human Rights Compliance Assessment is based on pillars one and three of the "Protect, Respect and Remedy"-Framework and will offer indicators for businesses to assess their compliance with the principles of the Framework. At the moment the question of business and human rights could not be addressed sufficiently during state reporting procedures, where this tool could close a gap, since it would be applicable to every single right as defined by the Covenant. The regulatory function of states towards corporations would be assessed, independent of the question where the company operates; hence the tool is independent of questions of extraterritoriality.

States might act as entrepreneurs as well through state-owned enterprises, public banks, pension funds, and so on. Economic, social and cultural rights could be interpreted in a broader scope. This reinterpretation is a necessary adaptation to the existence of tax heavens, the impact of private financiers on the public debt crisis and the flight of capital which all have impacts on human rights. It could for example be recommended to states to make compliance with human rights a precondition for obtaining state-funding.

The duty to remedy was identified as an insufficiently covered obligation with a current lack of implementation in many cases. Even the focus of the Committee would lie rather on the duty to protect than the duty to remedy. There are still legally-binding obligations for states which are members to the Covenant, but many issues would go beyond the core obligations. States should actively participate in the process of attributing responsibilities to businesses and being held accountable e.g. during the State Reporting Process with respect to the question of business' responsibilities in general and remedy mechanisms in particular.

Another difficulty identified for the Committee lies in the field of extra-territorial obligations. During the State Reporting under the Covenant it is rather unlikely that by coincidence mutually affected countries are under review at the same time. To solve this problem, issues of cross-border business activities could be noted and brought up in upcoming sessions covering the country of interest.

As stated through General Comments by the Committee, there is no horizontal effect of human rights in domestic law, which means that the Committee's mandate is limited to monitor state parties. Addressing

businesses and individuals directly in the Committee is out of order. Nevertheless, Treaty Bodies encounter the business sector directly when discussing the issues of labor, or indirectly when discussing private provision of health insurance, to give examples. So, the Committee touches the business sector with respect to some selected rights, but does not directly encounter it. This way, the business sector is not subject to revision under the entire scope of human rights as defined in the Covenant's mandate.

During the discussion and in some closing remarks it was concluded that the Committee has the possibility to further develop its reflection on the interpretation of the Covenant and fit it to arising demands. This way, the Committee can play an important role as a legally binding Treaty Body which can be complemented by the voluntary "Protect, Respect and Remedy"-Framework in order to address human rights issues arising from business' activity.

There are many issues left to be clarified as the Committee further pursues the topic:

Are the definitions of human rights obligations relating to business conduct consistent among Treaty Bodies? Who is the subject of law in this context – the states or the companies or natural persons (e.g. managers)? Should Treaty Bodies further broaden their scope and make individuals responsible under the Covenant? Should there be a coherent approach of all Treaty Bodies addressing the state duty to respect, protect and fulfill? How can Treaty Bodies deal with extraterritorial obligations? How do business' responsibilities spell out in the concept of due diligence? How to deal with problems arising from privatization of state-owned enterprises? Are there effective remedy and compensation mechanisms in place? Should there be, and if so, what kind of reporting guidelines on business and human rights issues should be in place?

While this meeting shed some light on those issues, it mostly served to start the discussion among Committee members and experts from non-governmental organizations in order to further develop the elaboration of the Covenant's obligations in this area.

On the author:

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