Submission to the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises for its upcoming report to the Human Rights Council at its 53rd session in June 2023 on "Development Finance Institutions and Human Rights".

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The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) and Support for Advocacy and Training to Health Initiatives (SATHI) welcome the call for inputs of the United Nations Working Group on Business and Human Rights for its upcoming report concerning development finance institutions.

This submission seeks to answer some of the questions under sections A, B and C of the Questionnaire. The answers focus on the right to health and healthcare services. The input shows the challenges associated with private investments in healthcare in low- and middle-income countries (LMICs) and includes a series of recommendations.

A. State duty to protect human rights.

1. What should be the role of States in ensuring international Development Finance Institutions (DFIs) respect human rights and the environment? What challenges have you observed in this regard?

States must ensure that DFI-backed investments align with their obligations under Article 12 of the International Covenant on Economic, Social and Cultural Rights.[1] States should thus take measures *to protect* the right to health when a third party is involved in healthcare financing and provision, including by drafting and implementing a clear monitoring and regulation plan.[2] In particular, when private actors provide services in areas where the public sector has been strong, they should be "subject to strict regulations that impose on them so-called 'public services obligations': (…) private healthcare providers should be prohibited from denying access to affordable and

[1] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 3 (ICESCR) Article 12.
[2] UN Human Rights Council, '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' (7 April 2008) A/HRC/8/5.

adequate services, treatments or information."[3] Furthermore, states should ensure that any private involvement in healthcare does not undermine the accessibility, availability, acceptability, and quality of healthcare.[4]

When protecting the right to health, states should also ensure that DFI-backed private investment in healthcare does not reduce the level of enjoyment of the previously recognised right.[5] Such backslidings can happen *de jure,* at the normative level and de facto, meaning that this retrogression can be noted empirically.[6]

Finally, states should ensure that any DFI-backed investments contribute to the overall realisation of the right to health in line with a responsible and efficient use of their maximum available resources.

3. How can States harness the potential of DFIs to accomplish important policy objectives such as achieving gender equality, protecting human rights and the environment, mitigating climate change, and realising the Sustainable Development Goals? Please provide examples if possible.

All health sector interventions financed by DFIs should adopt adequate human rights and environmental safeguards to prevent potential adverse impacts on people and ecosystems. This includes adopting measures to ensure health interventions are aligned with the Paris Agreement, as well as with international human rights treaties to contribute to a just transition to a sustainable and climate resilient future. Priority should be given to investments in health project interventions that while strengthening the quality and accessibility of national public health systems, they also ensure the participation of rights-holders in decision-making and contribute to combat the climate emergency. This tripe-dividend action, for instance, can be achieved through investment in decentralised renewable energy (DRE) for health care facilities in low-income areas that often struggle

[3] CESCR, General Comment 24: State obligations under the ICESCR in the context of business activities, 10 August 2017, E/C.12/GC/24.
[4] General Comment 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, see, for example, paras 11, 43 (f) and 54.
[5] The obligation of non-retrogression has been underlined here: Chairperson of the CESCR, 'Letter Dated 16 May 2012 Addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States Parties to the International Covenant on Economic, Social and Cultural Rights' (2012) UN Doc HRC/NONE/2012/76, UN reference CESCR/48th/SP/MAB/SW. For the debate on non-retrogression, see: Warwick, Ben TC. 2016. 'Socio-Economic Rights During Economic Crises: A Changed Approach to Non-Retrogression'. The International and Comparative Law Quarterly 65 (1): 249–65.
[6] Nolan, Aoife, Nicholas Lusiani, e Christian Courtis. 2014. 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights'. Economic and Social Rights after the Global Financial Crisis 121: 128–29.

to have access to safe reliable energy infrastructure.[7] DRE allows for greater control and access to energy resources by communities at the local level; can significantly improve the quality of the health care provided through electrification of health services; and by being free from fossil fuel value chain, contribute to arrest greenhouse gas emissions, reduce air pollution and increase the climate-resilience of health care facilities.[8]

We recommend the following three best practices to improve the human rights impacts of DFIs activities:

- **Guiding principles and context-specific mapping of priority areas for seeking DFI support:** The state should develop the guiding principles and context-specific mapping of priority areas for seeking support which is important for achieving SDGs. Such mapping should be done involving experts from diverse backgrounds. It could be desirable to form a multistakeholder committee to oversee the flow of DFIs in the country in different sectors.[9]
- **Mutual transparency**: DFI, as well as recipients, must publish information on projects with details of the source of financial support, the scale of finances, nature/ type of financial support, tenure, details of the project, and partner agencies. This information is critical for victims to bring complaints and seek justice.

4. How can/should States engage with DFIs, private businesses, investors, civil society, rights-holders, and trade unions to prevent and address adverse human rights impacts caused by irresponsible development financing practices?

States can ensure that a range of stakeholders prevent and address human rights impacts of development finance by requesting human rights impact assessments targeted to health and specific marginalised populations to be undertaken before and after the development projects in partnership with DFIs.[10] Alternatively, states can also push for developmental impact assessment as well as social and environmental risk

[7] World Health Organization (WHO), "Energizing health: accelerating electricity access in health-care facilities", Executive Summary, pag. 13, last accessed 6 March 2023, available at: https://www.who.int/publications/i/item/9789240066984

[8] Ibid.

[9] SATHI, Analysis of landscape and impact of German development investments in India's healthcare sector (forthcoming June 2023).

[10] Bakker, S., M. Van Den Berg, D. Duzenli, e M. Radstaake. 2009. «Human Rights Impact Assessment in Practice: The Case of the Health Rights of Women Assessment Instrument (HeRWAI)». Journal of Human Rights Practice 1 (3): 436–58. https://doi.org/10.1093/jhuman/hup017.

assessments to take into consideration human rights norms and standards at domestic, regional and international level.[11]

For states to engage with DFI recipients, clients or projects, setting up a mechanism for reporting such adverse impacts is essential. For example, in the case of India, it could be the National Human Rights Commission, whose role could be expanded to look into safeguarding human rights in DFI support.[12] It is less likely that private entities or investors will report on their own about any adverse impacts on human rights caused by DFI in their business interest. Hence it would be prudent to set up a mechanism such as 'audit' to assess abidance to human rights.

5. **What are the specific human rights risks posed by DFIs to groups in the most vulnerable situations, such as women and girls, indigenous communities, human rights defenders, persons with disabilities, persons with different sexual orientation or gender identity, older persons, persons living in poverty or migrant workers?**

DFIs are unique investors: while being commercial enterprises, they also play the developmental role of supporting private investments in low- and middle-income countries for the realisation of Sustainable Development Goals (SDGs).[13] They play an ever-prominent role in official development assistance (ODA) and they are increasingly the main actor leveraging for development of private businesses in LMICs, including in healthcare.[14] In recent years, scholars[15] as well as civil society[16] have been noting the potential negative effects of involving private actors in healthcare, including during the COVID-19 pandemic.[17] States should pay attention especially when DFI-backed

[11] Danish Institute for Human Rights. 2021. Human Rights at Development Finance Institutions. https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Human_rights_at_development_finance_institutions_accessible.pdf.

[12] The National Human Rights Commission (NHRC-https://nhrc.nic.in/) of India was established on 12 October, 1993. The statute under which it is established is the Protection of Human Rights Act (PHRA), 1993 as amended by the Protection of Human Rights (Amendment) Act, 2006. NHRC adopted the patients' rights charter in 2019 (National Human Rights Commission. PRC. (accessed 30 March 2022). Available at: https://nhrc.nic.in/document/charter-patient-rights).

[13] Danish Institute for Human Rights (2021) *Human Rights at Development Finance Institutions*, available at: https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Human_rights_at_development_finance_institutions_accessible.pdf.

[14] Hunter, Benjamin M., Anna Marriott, e G. B. Oxfam. 2018. 'Development Finance Institutions: The (in) coherence of their investments in private healthcare companies'. *The Changing Faces of Development Aid and Cooperation: Encouraging Global Justice or Buttressing Inequalities?* - 33.

[15] Audrey Chapman, 'The Impact of Reliance on Private Sector Health Services on the Right to Health' (2014) 16 Health Hum Rights 122.

[16] GI-ESCR, 'Italy's experience during COVID-19 and the limits of privatisation in healthcare' (2 June 2021) accessed 16 March 2022.

[17] David Williams O, Yung KC and Grépin KA, 'The Failure of Private Health Services: COVID-19 Induced Crises in Low- and Middle-Income Country (LMIC) Health Systems' (2021) 16 Global Public Health 1320.

investment results in intended or unintended privatisation of one or more healthcare services and functions. In fact, UN Treaty Bodies have underlined that privatisation in healthcare poses serious risks for the enjoyment of human rights.[18]

Looking at specific country case studies, civil society reports have been exposing that DFI-backed investment in private healthcare undermine the right to health in several LMICs. In Lesotho, an Oxfam report shows that the Queen Mamohato Memorial Hospital, built under a public–private partnership (PPP) under the advice of the International Financial Corporation (IFC), while costing half of the domestic budget of the country, was not contributing to the realisation of the goal of universal access to healthcare.[19]

In Kenya, development actors have been central in promoting private healthcare, with international financial institutions and affluent countries directing substantial resources towards market-oriented reforms and to private actors directly.[20] In fact, as of 2010, the Word Bank Group called for several pro-private sector measures and it has provided $90 million in loans to: 'kick-start Kenya's public-private partnership (PPP) programs'.[21] Likewise, the United States Agency for International Development (USAID), adopted a Private Sector Engagement Policy in 2018 that is a 'call to action' to 'embrace market-based approaches,' and which explicitly aims to benefit US companies and promote US economic growth.[22] Civil society is underlying the negative consequences of this model promoted by development institutions on the right to health.[23] A report conducted by GI-ESCR during the COVID-19 pandemic in urban informal settlements shows that the commercialised healthcare systems causes inequality and discrimination in accessing healthcare services.[24] Findings from the report show that unregulated for-profit private

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[18] GI-ESCR, 'Compendium on United Nations Human Rights Treaty Bodies' Statements on Private Actors in Healthcare', June 2021.

[19] Anna Marriott, 'A Dangerous Diversion: Will the IFC's Flagship Health PPP Bankrupt Lesotho's Ministry of Health?', *Oxfam Policy & Practice*. Available at : https://policy-practice.oxfam.org/resources/a-dangerous-diversion-will-the-ifcs-flagship-health-ppp-bankrupt-lesothos-minis-315183/.

[20] Economic and Social Rights Centre – Hakijami and the Centre for Human Rights and Global Justice, 'Wrong Prescriptions: the Impact of Privatising Healthcare in Kenya' (17 November 2021) https://chrgj.org/wp-content/uploads/2021/11/Report_Wrong-Prescription_Eng_.pdf accessed 13 January 2022.

[21] World Bank, Financing Agreement Between Republic of Kenya and the International Development Association, August 2017, 14-15, documents1.worldbank.org/curated/en/153191504040149253/pdf/Financing-Agreement-forCredit-6121-KE-Closing-Package.pdf.

[22] USAID, Private-Sector Engagement Policy, 2018, 3-4, https://www.usaid.gov/sites/default/files/documents/1865/usaid_psepolicy_final.pdf.

[23] Joint submission to United Nations Special Procedures regarding human rights harms associated with the privatization and commercialization of healthcare in Kenya (22 October 2022) available at: https://www.gi-escr.org/latest-news/gi-escr-joins-civil-society-organisations-to-urge-un-intervention-on-health-privatization-and-commercialisation-harms-taking-place-in-kenya

[24] Global Initiative for Economic, Social and Cultural Rights, 'Patients or Customers? The impact of Commercialised Healthcare on the Right to Health in Kenya during the COVID-19 pandemic (2021) DOI: 10.53110/RPCN4627.

businesses are widespread, leading to unnecessary treatments, unsafe medical care, lack of referral to the appropriate level of care and use of expired drugs and reagents.[25]

In India, there have been media reports from India that patients entitled to state health insurance schemes faced denial from such hospital.[26] So, the absence of an accountability framework for DFI recipients puts human rights at stake regarding potential denial of healthcare to patients or not utilising the DFI support to provide subsidised healthcare. Therefore, it is necessary to put in place a mechanism at DFI to oversee the recipients/projects from the human rights lens.

B. DFIs' responsibility to respect human rights.

3. **In your view, what are the main challenges and opportunities for DFIs to ensure the inclusion of human rights requirements in projects and to enforce the responsibility to respect human rights among clients?**

Currently, the transactional arrangements between DFI and the recipient entity are largely business centred.[27] Also, the documentation of several DFIs commitments focuses on the 'numerical reach' and the scale of investments.[28] There is no accountability mechanism at either end the investor and the recipient (country or the individual organisation), to investigate and ensure the inclusion of human rights requirements in projects. Hence a mechanism for accountability at donor and a recipient end needs to be developed.

C. Access to remedies.

2. What is your experience engaging with avenues available to victims to bring complaints, including through grievance mechanisms, to hold DFIs accountable for human rights abuses linked to investment-related projects?

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[25] Ibid; see also a similar situation in Nigeria: Global Initiative for Economic, Social and Cultural Rights and Justice & Empowerment Initiative (2022) 'The failure of commercialised healthcare in Nigeria during the COVID-19 pandemic. Discrimination and inequality in the enjoyment of the right to health. DOI: 10.53110/ZYQT7031.

[26] Millennium Post, Pvt hosp fined Rs 25,000 for denying treatment to Covid patient, (3 December 2020), available at: https://www.millenniumpost.in/kolkata/pvt-hosp-fined-rs-25000-for-denying-treatment-to-covid-patient-425527?infinitescroll=1.

[27] Benjamin (2018) - see note 10.

[28] Quadria Capital, 'Building Business for Long-term Success. Resilience Consistency Transformation Impact' *Annual Review 2019 – 2020*, Vol. VI. Available at: https://quadriacapital.com/annual_review/quadria-annual-review-2019-20/; KfW Development Bank, *Perspectives on Development Financing. Achieving Universal Health Coverage: Contributions by German Financial Cooperation*, (July 2017) Available at: Wordvorlage (kfw-entwicklungsbank.de).

It should be noted that lay victims (for example, patients) are generally unaware of such DFI funding being received by the recipient entity (such as private hospital). Such details are rarely put out in the public domain or displayed on the websites of the recipients. In the empirical study from India (forthcoming), even senior staff members from the recipient hospital were unaware that DFI funding is being received by the hospital collaborate with.[29] Therefore, lack of transparency and information in the public domain about receiving DFI support has been a major issue in holding the DFIs accountable.

For more information, please consult the following publications:

- The Future is Public: Global Manifesto for Public Services (2021)
- Santiago Declaration (2022)
- Global Initiative for Economic, Social and Cultural Rights, 'Compendium of United Nations Human Rights Treaty Bodies' Statements on Private Actors in Healthcare' (June 2021).
- Global Initiative for Economic, Social and Cultural Rights, 'States' Human Rights Obligations regarding public services essential for the enjoyment of Economic, Social and Cultural Rights – The regional perspective' (September 2022).
- Global Initiative for Economic, Social and Cultural Rights, 'Ensuring public services for indigenous peoples: human rights standards' (December 2022).
- Global Initiative for Economic, Social and Cultural Rights and Justice & Empowerment Initiative (2022) 'The failure of commercialised healthcare in Nigeria during the COVID-19 pandemic. Discrimination and inequality in the enjoyment of the right to health'.
- Global Initiative for Economic, Social and Cultural Rights, 'Patients or Customers? The impact of Commercialised Healthcare on the Right to Health in Kenya during the COVID-19 pandemic' (2022)
- Principles for Human Rights in Fiscal Policy (2022).
- Global Initiative for Economic, Social and Cultural Rights, 'Italy's Experience during COVID-19: the Limits of Privatisation in Healthcare' (2 June 2021).

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[29] SATHI, 2023 (See note 7).