

UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS  
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**THE INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION  
TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS  
ON THE DRAFT GENERAL COMMENT ON THE RIGHT TO JUST AND  
FAVOURABLE CONDITIONS OF WORK (ARTICLE 7 OF THE COVENANT)**

Submitted on 4 May 2015

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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE  
COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON THE DRAFT  
GENERAL COMMENT ON THE RIGHT TO JUST AND FAVOURABLE CONDITIONS  
OF WORK (ARTICLE 7 OF THE COVENANT)**

1. During its 55<sup>th</sup> session, on 16 June 2015, the UN Committee on Economic, Social and Cultural Rights (the Committee) will hold a half-day general discussion on the draft general comment ("the draft") on the right to just and favourable conditions of work (article 7 of the Covenant).<sup>1</sup> In this context, the International Commission of Jurists (ICJ) welcomes the opportunity to provide its comments and to set out the requirements for the implementation of article 7 necessary to comply with the Covenant.
2. At the outset, the ICJ stresses that the primary purpose of treaty body general comments is to interpret the relevant treaties and provide guidance on how to implement their provisions and thus comply with their obligations. Such obligations include but, are certainly not limited to, their reporting obligations.<sup>2</sup> The ICJ therefore recommends the modification of paragraph 1 of the draft to reflect this wider purpose or, alternatively, its deletion.
3. In general, the ICJ would like to commend the Rapporteurs for the current draft for it provides important elucidations as to the normative content of article 7 as well as conditions for the effective protection of the rights it guarantees. Indeed, the ICJ concurs with much of the content of the draft. The ICJ is appreciative of the consideration given to standards and recommendations elaborated under the auspices of the International Labour Organization (ILO). These and other international instruments provide standards that are the basic threshold for the normative content and the related State obligations under article 7. The eventual general comment shall build upon, complement and adapt these standards to the specific legal framework in which the Committee's work is entrenched, which is the Covenant, taking into account current international law and practice.
4. In this submission, the ICJ sets out a number of recommendations aimed at assisting the Committee in strengthening certain aspects of the draft.<sup>3</sup>

**Nature of obligations of States parties under the ICESCR**

5. While the distinction between public and private sector may be relevant to determine how to apportion responsibilities as between the State and third parties, the ICJ considers that the eventual general comment will need to make clear and explicit that the degree of enjoyment of the right to just and favourable conditions of work does not depend on whether the worker is employed in the public or in the private sector. The ICJ is concerned that the draft may appear to introduce an unjustified and unwarranted distinction in treatment between workers on the sole basis of whether their employer is a public authority or a private actor, and thus denying the same level of protection to a whole group of workers. In particular, the language in paragraphs 15 and 16 of the draft could be interpreted as making a distinction in relation to the pace for achieving equal remuneration for work of equal value between the public and private sector, with pace in the latter being construed as gradual and progressive. In this regard, the ICJ does not consider it appropriate to apply the principle of "progressive realization" differently to the fulfillment of the State obligation to respect than to the fulfillment of the

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<sup>1</sup> Draft General Comment on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/54/R.2, 20 January 2015.

<sup>2</sup> See for instance the OHCHR glossary that defines general comment as: "A treaty body's interpretation of the content of human rights provisions, on thematic issues or its methods of work...", available at: <http://www2.ohchr.org/english/bodies/treaty/glossary.htm>

<sup>3</sup> Furthermore, with the present submission the ICJ does not intend to provide an exhaustive appraisal of the present draft.

obligation to protect, especially not in the context in which non-discrimination and equality are concerned. The Committee itself in its General Comment 20 has reiterated that discrimination must be eliminated both formally and substantively, and that both direct and indirect forms of differential treatment can amount to discrimination. In addition, General Comment 20 reiterates that non-discrimination is an immediate obligation of States parties.<sup>4</sup> In general, the ICJ urges the Committee to make clear and explicit that discrimination on a whole range of prohibited grounds is the root cause of a great proportion of violations of the rights guaranteed by article 7.

6. A related concern is that such a construction risks undermining existing standards and interpretations that the Committee and other human rights bodies have consistently adopted and applied, in particular in relation to the nature and scope of the obligation of States parties to protect the rights under the Covenant.<sup>5</sup> In this regard, the ICJ is concerned about the use of the term “incentives” in paragraphs 60, 61 and 63 of the draft in the context of elucidating the actions incumbent on States to ensure that private actors respect rights under article 7, including regarding occupational health and the gender pay gap. Indeed, this may give the impression that some important aspects of article 7 may be subject to measures of “good will” and to voluntary commitments on the part of private actors.<sup>6</sup> While providing “incentives” to encourage progress towards the full realization of the rights enshrined in article 7 of the Covenant may be appropriate in certain contexts, the ICJ considers that the State obligation to protect under the Covenant requires States to take all necessary measures to design, adopt and enforce laws upholding workers’ rights, including by ensuring that abuses affecting workers’ rights are effectively sanctioned and remedied. The ICJ would therefore recommend that the revised general comment makes clear and explicit the State obligation to effectively regulate, enforce and sanction non-compliance with the law, regardless of whether the employer is public or private.
7. With respect to the section of the draft regarding Article 7(b) (safe and healthy working conditions, paragraphs 28 to 32) and related core obligations, the ICJ is concerned that the draft seems to restrict the obligations of States parties in the area of occupational health merely to the adoption of a national policy on occupational health and safety. While, indeed, as the draft acknowledges, the adoption of such a policy is prescribed by relevant ILO standards,<sup>7</sup> the ICJ considers that States’ obligations under other provisions of the Covenant, and in particular under article 12,<sup>8</sup> require States to adopt and enforce laws that, at a minimum, prohibit the most dangerous and negligent conduct of any employers as to health and safety at work, and provide for effective remedial mechanisms including reparation for injured workers. In this respect, the ICJ strongly encourages the Committee to go beyond recommending the adoption of a national policy and to reaffirm States’ obligations to protect life and health of all workers.
8. Finally, the ICJ welcomes the introduction in the draft of a section spelling out obligations of States in the context of international cooperation and assistance. The ICJ encourages the Committee to strengthen this section of the draft (in particular paragraphs 68 and 69) by introducing a reference to the Maastricht Principles on extraterritorial obligations of States in the area of economic, social

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<sup>4</sup> CESCR, General Comment No. 20, UN Doc. E/C.12/GC/20, 2 July 2009, paras. 7 -10.

<sup>5</sup> See for instance CESCR, General Comment No. 16, UN Doc. E/C.12/2005/4, 11 August 2005, paras. 19 and 20.

<sup>6</sup> Draft General Comment on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/54/R.2, 20 January 2015, paras. 60, 61 and 63.

<sup>7</sup> International Labour Organization, Convention No. 155, Occupational Safety and Health Convention (1981) and its 2002 Protocol.

<sup>8</sup> And under other human rights obligations, see *inter alia* ICESCR, Article 12 protecting the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; International Covenant on Civil and Political Rights, articles 6 protecting the right to life.

and cultural rights adopted in 2011 by international legal experts that define the international law obligations of States to individually and jointly respect, protect and fulfill the rights within and beyond their borders.<sup>9</sup> In particular, the ICJ wishes to draw the attention of the Committee to the relevance of the Principles 23 to 27 of the Maastricht Principles defining the nature and scope of the obligation of States to protect extraterritorially rights including those under article 7.

9. In addition, in paragraph 69, the draft, states: "States parties can have an important role in helping individuals and enterprises to identify, prevent and mitigate risks to just and favourable conditions of work through their operations." The ICJ suggests that this statement be clarified by including concrete ways in which the State can play such a role in the light of their obligations under the Covenant. While enterprises may have the social responsibility to identify, prevent and mitigate risks, under the instruments cited by the draft, it is not clear how States can have an obligation to help enterprises to do their work, except by regulation, monitoring, and legal enforcement, and ensuring remedy and accountability.

### **Importance of control and remedial mechanisms**

10. As alluded to in paragraph 7 above, the ICJ considers of utmost importance that the future general comment unambiguously underscores States' obligations not only to regulate and take legislative measures but also to enforce laws and take the necessary steps to guarantee the right of access to justice and to an effective remedy to victims of violations of any of the rights protected by article 7. Such obligations in turn require that States create and maintain legal and judicial systems providing effective remedies including reparations through fair and impartial proceedings.<sup>10</sup> In this regard, the ICJ welcomes the references to the role of labour inspections and to access to remedies for victims in cases of violations.<sup>11</sup> However, in this context, the ICJ encourages the Committee to further strengthen the current draft. In particular, the ICJ recommends to explicitly include the relevance of penal law to ensure that the most serious breaches of labour laws be considered as crimes under national law (especially in paragraph 54 of the current draft). Furthermore, based on its experience at national level, the ICJ considers it fundamental that labour inspectors be able to rely on the assistance of law enforcement officers to carry out their control and investigation work when faced by instances of non-cooperation by employers.
11. In addition, a high degree of accessibility of remedial mechanisms plays a vital role in making sure that individuals are able to seek justice and obtain redress in cases of violations of their rights under article 7. This is particularly important due to the nature of the violations concerned, e.g. cases of workers denied their minimum wages or instances of unlawful dismissal are most likely to affect individuals in extremely precarious economic and social circumstances. States shall therefore review and if necessary reform their codes of procedures so as to ensure accessibility of legal and judicial procedures as well as procedural fairness.<sup>12</sup> The question of the accessibility of the law from a procedural standpoint is particularly important for migrant workers (especially if undocumented) as the relevant procedures should allow them to seek justice and

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<sup>9</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted 28 September 2011, available at: [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23)

<sup>10</sup> United Nations 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, UN Doc. A/RES/60/147 (2005), in particular Principle 12.

<sup>11</sup> See Draft General Comment on the right to just and favourable conditions of work, UN Doc. E/C.12/54/R.2, 20 January 2015, paras. 54-56.

<sup>12</sup> As alluded to in paragraph 56 of the Draft General Comment on the right to just and favourable conditions of work, UN Doc. E/C.12/54/R.2, 20 January 2015.

redress for violations of their rights to just and favourable conditions of work without fearing reprisals and deportation. Provisions should be made to attend to their needs and to allow them to complain, ensuring that their migration status does not prejudice them.

12. Finally, the ICJ would like to emphasize that adequate resources, including human resources, must be made available to ensure that labour inspections and justice systems can function effectively. Especially in the area of occupational health and safety at work (article 7.b), the availability of experts, including medical experts in the context of labour inspections, and/or within labour courts, is of great significance. The ICJ thus recommends that the general comment emphasizes the needs of inspectorates and courts to be able to rely on specialists and experts in instances of accidents at work and occupational diseases, so that they can handle the complexity of these cases, including issues of causality that are crucial for decisions on damages.

### **The legal protection gaps and the regulation of employment relationships**

13. The ICJ welcomes the draft's focus on Special Economic Zones or Export Processing Zones.<sup>13</sup> In its experience, these zones and other similar special or exceptional legal regimes to attract investment and promote exports may provide the context for numerous, systematic human rights abuses, especially of the rights guaranteed under article 7 and 8. However, the ICJ does not consider that this is an issue of retrogressive measures, as States usually do not formally exclude these zones from the application of their labour laws. Rather, in these zones, there is a frequent lack of control and enforcement of the laws protecting the rights under article 7. This protection gap emanates from a series of interrelated factors, including, typically, the impossibility to form trade unions, to defend rights through collective bargaining and the absence of labour inspections. These factors contribute to the frequent impunity in cases of abuses affecting the rights in such zones and under assimilated regimes. The ICJ therefore urges the Committee to include clear provisions in the future general comment in relation to the obligations of States parties to ensure the equal protection of the law to all workers,<sup>14</sup> including those who work in such zones.
14. The ICJ considers that the issues of informality and employment relationships could be further elaborated in the eventual draft. With regard to informality, the ICJ recommends that the Committee reviews the current paragraph 48(iv) regarding "*Workers in the informal sector*" of the draft. In particular, the ICJ recommends to use the term "workers in informal employment", rather than referring to the "informal sector" as the future general comment shall address the specific problems and needs of workers as to the realization of their rights. As the ILO clarified, "*employment in the informal sector and informal employment refer to different aspects of informality. Employment in the informal sector is an enterprise-based concept and covers persons working in units that have "informal" characteristics ... Informal employment is a job-based concept and encompasses those persons whose main jobs lack basic social or legal protections or employment benefits and may be found in the formal sector, informal sector or households....*".<sup>15</sup> The general comment should hence focus on the situation of individuals who do not benefit from protections, rather than on the (in)formality of the economic activity per se. The formalization of employment is of utmost importance for the protection of a whole range of workers' rights and entitlements,

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<sup>13</sup> Currently at paragraph 52 of the Draft General Comment on the right to just and favourable conditions of work, UN Doc. E/C.12/54/R.2, 20 January 2015.

<sup>14</sup> This is in compliance with article 7 in conjunction with article 2.2 of the ICESCR.

<sup>15</sup> See International Labour Organization, Department of Statistics, Statistical update on employment in the informal economy, June 2012, p. 2, available at: [http://laborsta.ilo.org/applv8/data/INFORMAL\\_ECONOMY/2012-06-Statistical%20update%20-%20v2.pdf](http://laborsta.ilo.org/applv8/data/INFORMAL_ECONOMY/2012-06-Statistical%20update%20-%20v2.pdf)

including with regard to the right of older persons to receive an adequate pension.<sup>16</sup> It is a major issue to be addressed as a matter of priority by States parties who shall take immediate measures with the view to progressing as quickly as possible towards the eradication of informal employment, paying particular attention to those sectors of the economy in which informal jobs are most numerous.

15. Another major trend that places workers in a situation of high vulnerability to abuses of their rights is the increase in the complexity of employment relationships. The ICJ welcomes the mention of temporary contracts at paragraph 46 of the current draft, but urges the Committee not to limit itself to mentioning this in relation to leave entitlements. The use of temporary and similar contracts may not only deprive workers of their leave entitlements, but also of other rights and protections. The States' obligation to ensure the same protections to all workers independently of the nature of their contract and employment relationships requires them to regulate the conduct of third parties such as temporary work agencies and sub-contractors, and to eliminate legal protection gaps generated by the new forms of employment relationships.

### **Recommendations relating to other aspects of the draft**

16. Based on its experience of documenting threats and abuses against workers' rights, especially women workers' rights, the ICJ is of the view that access to adequate sanitation should be mentioned in the future general comment as a fundamental element of the right to safe and healthy working conditions (current paragraphs 28 to 32), read in conjunction with other human rights including those guaranteed under articles 11 and 12 of the Covenant.
17. Paragraph 41 of the draft states that: "as much as possible, days of rest should correspond with the customs and traditions of the country and workers in question and apply simultaneously to all staff in the enterprises or workplace". In this respect, the ICJ encourages the Committee to ensure that the draft will not be interpreted as undermining the rights of minorities to enjoy their cultural and religious rights. Indeed, while the ICJ is aware of the pertinence of ILO conventions from 1921 and 1957 in this context, it considers that the respect for workers' rights to take part in cultural life and the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion<sup>17</sup> may be undermined by imposing a unified period of weekly rest to the whole staff.
18. In paragraph 48(i) of the draft, under the title "*Special topics of broad application*", concerning women workers, the ICJ acknowledges the provision on arrangements that the draft is proposing in order to take into consideration the role played by women as primary care-givers. However, the ICJ recommends reviewing the current formulation to avoid reinforcing gender stereotypes and undermining the importance of the benefit of such services and arrangements for men who want to reconcile their family and working life.
19. In paragraph 48(ii), the draft states, "[S]pecific health and safety measures in the work place might be necessary and older workers should benefit from pre-retirement programmes". The ICJ recommends clarifying that such programmes would not be mandatory, and that older workers should be able to benefit from them if they so wish.

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<sup>16</sup> See Conclusion I.6 adopted through Resolution I. by the International Labour Conference, at its 102<sup>nd</sup> Session, Geneva, June 2003: "Only about 20 per cent of the world's working-age population is estimated to have effective access to comprehensive social protection. In developing countries, 342 million older people lack adequate income security and, if nothing is done, the number could rise to 1.2 billion by 2050.... Older people often have to maintain their economic activity to survive and earn a living."

<sup>17</sup> As reiterated in CESCR, General Comment No. 21, UN Doc. E/C.12/GC/21, 21 December 2009, paras. 32 and 33.