

Submission by Asylum Access and the Refugee Work Rights Coalition to the Committee on Economic, Social and Cultural Rights on Draft General Comment to Article 7: The Right to Just and Favourable Conditions of Work

I. Introduction

1. On average, each of the world's 16 million refugees will spend 20 years in exile.¹ The lack of integration among refugees in the labor market force many to seek work in unregulated, dangerous, and degrading conditions, exposing them to the threat of gender-based violence, human trafficking, and other human rights violations. This is costly for individuals, the host government and international agencies that have to provide benefits and support.² While humanitarian aid has an essential role to play in protecting the physical security of refugees, it alone is not enough. Indeed, a comprehensive response must ensure both access to safe and lawful employment for refugees as well as protections guarding against their exploitation, harassment and discrimination in the workplace.

2. The following submission is made on behalf of Asylum Access and the Global Refugee Work Rights Coalition, in response to the Committee's Draft General Comment to Article 7 – The Right to Just and Favorable Conditions of Work. The submission looks to inform the Committee on the particular vulnerability of refugees in the workplace and the need to assist States Parties in understanding their obligations with respect to this group. Information here builds on the *Global Refugee Work Rights Report*, which examines the laws, policies and practices pertaining to refugee work rights in 15 countries around the globe, affecting a total of 30% of the world's refugee population.³ Refugees in nine of the countries analyzed in the report endure discrimination and harassment at the labor market and enjoy no legal access to justice.⁴

II. Right to Just and Favorable Conditions of Work for Refugees

3. The 1951 Convention Relating to the Status of Refugees (the Refugee Convention) and the 1967 Protocol set the standard for international refugee rights. Under the Refugee Convention, refugee labor rights expand incrementally, depending on the nature and duration of a refugee's stay in a country. The treaty affords those refugees *lawfully staying* in a host country the right to wage-earning employment as well as labor protections equal to that of citizens.⁵ *Lawfully staying* refugees includes, among others, those recognized as refugees through individual or *prima facie* refugee status determination (RSD).⁶ However, refugees *lawfully in*, such as those with pending asylum claims, can only engage in self-employment and without such safeguards.⁷

¹ UNHCR Statistical Yearbook 2012.

² Council of Europe Parliamentary Assembly, Refugees and the right to work, March 2014, para.2. Available at: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20569&Language=EN>.

³ Asylum Access, Global Refugee Work Rights Report, September 2014; Available at: http://asylumaccess.org/AsylumAccess/wp-content/uploads/2012/09/FINAL_Global-Refugee-Work-Rights-Report-2014_Interactive.pdf. [hereinafter Global Refugee Work Rights Report].

⁴ *Ibid.* pg. 23.

⁵ Hathaway, J., *The Rights of Refugees Under International Law*, Cambridge University Press, (2005), pg. 154; [Hereinafter Hathaway (2005)].

⁶ 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, 22, Article 24(1), April 1954 [hereinafter 1951 Refugee Convention].

⁷ *Ibid.* Article 18.

4. While refugee work rights are clearly defined under the Refugee Convention, 80% of the world's refugees seek asylum in non-democratic states, or in states that have not signed the treaty or its Protocol, do not have implementing legislation or, offer rights that fall below the Convention's standards.⁸ More analysis is needed to clarify labor protections of refugees under international human rights law as well as the added protections refugees can enjoy in states that are party to both the Refugee Convention and conventional human rights instruments.

(a) Equal enjoyment of the right to just and favorable conditions of work

5. The International Covenant on Economic, Social, and Cultural Rights (the Covenant) offers refugees an important source of additional rights. Article 2(2) of the Covenant protects against direct and indirect discrimination, conveying labor rights to, *inter alia*, non-nationals, including refugees, regardless of their stage in the asylum process.⁹ Since virtually all rights in the Covenant, including those found under Article 7, must be implemented without discrimination, refugees with pending asylum claims who invoke the Covenant's protection can effectively avoid the lower standard of treatment prescribed by the Refugee Convention.¹⁰

(b) Defining lawful limitations to the right to just and favorable conditions of work for refugees

6. Despite the protection the Covenant appears to offer, its application for refugees is often limited under Article 2(1), which maintains that States are required simply to "take steps" to progressively realize the rights of the Covenant to the extent possible within the limits of their resources.¹¹ Additionally, less developed states may normally elect not to extend labor protections set out by the Covenant to refugees by reliance on Article 2(3), which allows governments to determine the extent they guarantee economic rights to non-nationals.¹²

7. The requirement to "take steps," under Article 2(1) imposes a continuing obligation to work towards the realization of the rights under the Covenant over time, taking into account the State's available resources.¹³ In light of the fact that governments must expel resources in order to implement some of these obligations, States are often reluctant to allocate their finite capital toward non-nationals. This is particularly apparent in developing countries where the government's available resources are insufficient to fulfill the rights of its own citizens. Nonetheless, States are required to provide special attention to the most disadvantaged groups, such as refugees, and immediately implement certain obligations that are less contingent on the availability of their resources.¹⁴ These obligations include:

(a) *Non-discrimination*. Discrimination on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status must be immediately prohibited (see above). With regard to refugees and other categories of non-citizens, the Committee on the Elimination of Racial Discrimination (CERD) recommends State Parties take measures to eliminate both *de jure* and *de facto* discrimination in work conditions against such groups.¹⁵ Similar language should be reflected in the Committee's General Comment to Article 7.

⁸ Center for Forced Migration Studies at Northwestern University, Refugee Protection Outside the International Legal Framework. Available at: <https://nucfms.wordpress.com>.

⁹ UN Committee on Economic, Social, and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (2009), para. 30. [Hereinafter CESCR General Comment No. 20 (2009)]

¹⁰ Any exceptional distinctions—for example between citizens and non-citizens or wage-earning and self-employed refugees—must serve a legitimate State objective and be proportional to the achievement of that objective. See UN Committee on the Elimination of Racial Discrimination, General Comment No. 30, Discrimination against Non-citizens, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004), para. 30. [Hereinafter CERD General Comment No. 30 (2004)].

¹¹ UN Committee on Economic, Social, and Cultural Rights, General Comment No. 3, The nature of States parties' obligations, U.N. Doc. HRI/GEN/1/Rev.6 (2003), para. 9. [Hereinafter CESCR General Comment No. 3 (2003)]

¹² International Covenant on Economic, Social, and Cultural Rights, 993 U.N.T.S. 3, Article 2(3), January 1976 [hereinafter ICESCR].

¹³ CESCR General Comment No. 3 (2003)

¹⁴ *Ibid* at para. 12.

¹⁵ CERD General Comment No. 30 (2004) para. 33.

(b) *Non-retrogressive measures.* States should not allow the existing protection of economic, social, and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure. To justify it, a State would have to demonstrate that it adopted the measure only after carefully considering all the options, assessing the impact and exhausting its available resources.¹⁶ In light of such obligation, any future restrictions placed on refugees from enjoying the right to just and favorable conditions of work under Article 7 should be deemed *prima facie* unlawful.

(c) *Minimum Core Obligations.* The Committee on Economic, Social, and Cultural Rights interprets the obligations of State Parties under the Covenant as imposing minimum core obligations to provide, “at the least, minimum essential levels of certain rights.”¹⁷ If resources are highly constrained, this should include the use of targeted programs aimed at the most vulnerable individuals or groups, such as refugees.¹⁸

8. The scope of ICESCR’s labor protections is also limited by reliance on Article 2(3), which permits developing countries to determine the extent to which they will guarantee the Covenant’s economic rights to non-nationals.¹⁹ Article 2(3) should be applied narrowly, as an exception to the general rule that rights under the ICESCR must be granted without discrimination.²⁰

9. More than eighty-percent of the world’s refugees are currently being hosted by developing countries.²¹ As such, Article 2(3) has a significant impact on this particularly vulnerable subset of non-nationals from accessing critical rights and enjoying economic self-reliance throughout their two decades of displacement. While there’s no authoritative definition of which countries qualify as “developing” under the Covenant, the designation should only be applied to those that meet a set of objective and relevant criteria.²² Furthermore, Article 2(3) allows for “limitations” on economic rights, not elimination. Even if a State falls within the parameters of Article 2(3), permissible limitations must be implemented pursuant to enacted legislation and should not infringe on the State’s minimum core obligations.²³

III. Recommended Language

10. Asylum Access and the Refugee Work Rights Coalition recommends that the Committee considers including the following language, referenced in bold, in its General Comment to Article 7. The language aims to highlight the particular vulnerability of refugees in the workplace and reiterates the legal standards that apply to them under the Covenant:

(a) “6. [...] The reference to ‘everyone’ highlights the fact that the right applies to all workers, female and male, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, domestic workers, self-employed workers, **refugees, regardless of legal status and documentation**, and unpaid workers as well as all workers in all settings, including free trade and export processing zones.”²⁴

¹⁶ CESCR General Comment No. 3 (2003) para. 9.

¹⁷ *Ibid.* at para. 10.

¹⁸ *Ibid.* at para. 9.

¹⁹ ICESCR

²⁰ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights Limburg Principles, para. 43. [Hereinafter Limburg Principles].

²¹ UNHCR, “New UNHCR report says global forced displacement at 18-year high,” 19 June 2013; Available at: <http://www.unhcr.org/51c071816.html>.

²² The Limburg Principles state that Article 2(3) should apply strictly to those formerly colonized states that fall within the appropriate UN classification of developing countries. *See* Limburg Principles para. 44.

²³ ICESCR Article 4.

²⁴ Refugee status is considered legally constitutive, meaning that refugees are refugees so long as they qualify, regardless of whether they are declared to be so by the country of asylum. For such reasons, the division between “refugees” and “asylum-seekers” as found in the Committees earlier General Comments is legally suspect and plays erroneously into the view that refugee status recognition is other than a declaratory process. *See* Global Refugee Work Rights Report pg. 1.

(b) “26. In keeping with the broad scope of Article 7, the minimum wage should apply systematically, protecting as much as possible the fullest range of workers, including workers in vulnerable situations such as workers with disabilities, domestic workers, migrant workers, agricultural workers, **refugees, regardless of their legal status and documentation**, as well as workers in the informal sector.”

(c) “48. (ix) **Refugees.** Refugees, by virtue of their forced displacement and status as non-nationals, are particularly vulnerable to exploitation, harassment, and discrimination in the workplace. In many countries, especially in those where the government does not fully recognize refugee status, such groups are often unable to enjoy access to justice for violations of labor rights. Impediments to accessing justice are frequently compounded by language barriers, documentation requirements, or fears of reprisals from employers against whom refugees complain. Legal impediments toward accessing safe and lawful employment cause refugees to over-represent workers in the informal sector where they are particularly susceptible to gender-based violence, human trafficking, and other human rights violations. State Parties must take measures to eliminate both *de jure* and *de facto* discrimination against refugees in the workplace. When laws, policies, and regulations treat either categories of refugees differently or distinguish between nationals and non-nationals, State Parties must demonstrate that the differing treatment is legitimate and proportional. Additionally, limitations to the enjoyment of economic rights under Article 2(3) should be applied narrowly, only within those States recognized as developing based on a set of relevant and objective criteria. Such limitations must be made pursuant to enacted legislation and should never infringe on the State Party’s minimum core obligations.

(d) “64. State Parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favorable conditions of work. Specifically, this requires States parties to: [...] (f) Define and prohibit harassment, including sexual harassment at work through law, ensure appropriate complaints procedures and mechanisms and establish criminal sanctions for sexual harassment. **Ensure disadvantaged and marginalized individuals and groups enjoy equal access to such complaints procedures and mechanisms;** (g) Introduce and enforce minimum standards in relation to rest, leisure, reasonable limitation of working hours, paid leaves and public holidays. **Ensure disadvantaged and marginalized individuals and groups enjoy equal protection of such standards.**”²⁵



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²⁵ The language recommended for addition in this paragraph was borrowed from both General Comment 18 and General Comment 19 of the UN Committee on Economic, Social and Cultural Rights; see CESCR General Comment No. 18 para. 12 and UN Committee on Economic, Social, and Cultural Rights, General Comment No. 19, The Right to Social Security, U.N. Doc. E/C.12/GC/19 (2008), para. 38.