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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Day of General Discussion on article 6 of the Covenant (the right to work)

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THE RIGHT TO WORK *

Background Paper submitted by Dr. Machteld Inge VAN DOOREN, LL.M., researcher, Human Rights Office, Amersfoort , The Netherlands. **

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* Issued as submitted

** The views expressed in the present document are those of the author and do not necessarily reflect those of the United Nations.

I. THE IMPORTANCE OF THE RIGHT TO WORK

1. The right to work is one of the most fundamental of all human rights. The importance of work not only lies in the fact that it provides people with an income but also in other factors such as selffulfilment, to be of use, to have a place in society, as well as the development of society as such. The International Labour Organisation has always referred to those different ways in which work is important; rightly this matter of principle is also stressed in the document presenting a draft general comment on the right to work (article 6) from the International Covenant on Economic, Social and Cultural Rights.[1]

2. The importance of work also appears from the fact that many international human rights instruments as well as ILO Conventions pay attention to work and related issues. The way the United Nations Charter refers to employment matters deserves attention: the apparent importance of the subject resulted in the formulation of a separate objective of the United Nations. The first of the objectives as enumerated in article 55 of the UN Charter includes the promotion of full employment, whereas the promotion of human rights (including the right to work) is mentioned in a separate, third objective. Work is thus mentioned twice, which shows once more the importance attached to it.

3. Work is to be considered as one of the basic needs of human beings. For being able to live a fully human life work is essential, not only because it gives people the possibility to earn a living but also because of the fundamental values of work apart from that possibility. Those who are unable to work will need compensation at the material as well as the immaterial level.

4. Whatever aspects of the right to work the ILO deals with in its Conventions, nowhere a provision may be found proclaiming a *right* to work as a human right. This is where the usefulness of referring to the activities of the ILO for the benefit of clarifying the background to article 6 of the Covenant ends. The ILO deals with many important aspects of the right to work without mentioning the right to work itself.[2] This may have enabled the ILO to get rather detailed rules accepted by States. The Covenant however places work within the framework of human rights law. The juridical basis is stronger that way. There is a *right* to be realised, not merely a policy. More action may be expected from the States parties now that in the Covenant the instrument of a right was chosen for the fulfilment of the basic need of work.

II. ELEMENTS OF THE RIGHT TO WORK

5. The right to work contains several aspects. As a result, there are several kinds of obligations for States parties as well.
In the first place, the right to work brings with it that States parties should strive for full employment, that is: the availability of work for everyone able and willing to work. “Work for everyone” may be an ideal situation, yet States have to undertake efforts towards full employment “by all reasonable means”.[3] For, as stated by the ILO: “if most countries accept the defeatist attitude that full employment is unattainable, then that by itself is likely to contribute to a worsening of the current situation.[4]

6. The right to work includes the prohibition of arbitrary dismissal. Where those who have a job can easily lose it the right to work is not sufficiently protected. The right not to be arbitrarily dismissed should therefore be regarded as part of the right to work (article 6 of the Covenant) rather than one of the “just

[1] Observation générale sur le droit au travail (article 6) du Pacte international sur les droits économique sociaux et culturels, Document submitted by mr Philippe Texier, member of the Committee on Economic, Social and Cultural Rights, 2 September 2003, E/C.12/2003/7, par.1.
[2] An exception is made in Recommendation no. 169 concerning Employment Policy (adopted 1984), providing details for the application of Convention no. 122 concerning Employment Policy, but this is a (non binding) recommendation not a treaty.
[3] See Ch. Tomuschat, The Right to Work. In: Human Rights in a Changing East-West Perspective. Allan Rosas and Jan Helgesen (eds.), with the collaboration of Donna Gomien, London, Pinter 1990, p. 185.
[4] Promoting Employment. Report of the Director-General. International Labour Office, Geneva 1995, p. 94.

and favourable conditions of work" (article 7). The ILO regards the so-called "security of tenure" as one of the just and favourable conditions of work, but then the ILO system, in contrast with the Covenant, does not include the right to work as such.

7. Free choice of employment is another important element of the right to work. The right to work includes - as explicitly mentioned in article 6 (1) of the Covenant - not only the opportunity to do work but also to do work that is freely chosen or accepted. Although the Covenant rather confusingly speaks of a right to an *opportunity* - so as to indicate that a real guarantee that everybody will have a job cannot be given because of factors outside the control of States - it is clear from article 6 that States parties are not allowed to interfere with the free choice of employment.

8. The counterpart of the free choice of employment is the prohibition of forced labour. Those two aspects of the right to work are linked: nobody may be *forced* to do work that is *not* freely chosen or accepted, but also nobody may be *hindered* to do work that *is* freely chosen or accepted. Even though the prohibition of forced labour is not explicitly included in the Covenant, it may be derived from the right to free choice of employment as laid down in article 6. The General Comment on the right to work might refer to this link between two aspects of the right in question. Reference to article 8 (3) of the Covenant on Civil and Political Rights is relevant in this respect, since the two Covenants are interconnected and interdependent. For the description of the exceptions to the prohibition of forced labour article 8 (3) CCPR is likewise useful.
The General Comment may state that all forms of forced labour are condemned[5], yet the Covenant on Civil and Political Rights itself mentions some exceptions.

9. Just and favourable conditions of work, including fair remuneration, are of high importance for the enjoyment of the right to work. They may be seen as elements of the right to work itself yet they get attention in separate provisions (like article 7 in the case of the Covenant) and may therefore be dealt with as separate rights. The right to security of tenure or the prohibition of unfair dismissal however forms part of the right to work rather than of the right to just and favourable working conditions.

10. The prohibition of discrimination is an inherent part of all human rights including the right to work. This appears from article 2 (2) of the Covenant that requires States parties to guarantee the exercise of the rights laid down in the Covenant without any form of discrimination. It also follows from international instruments concerning the elimination of discrimination, like the Convention on the Elimination of All Forms of Racial Discrimination that clearly States that all human rights should be enjoyed without any form of racial discrimination and pays special attention to "the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration".[6]

11. The different aspects of the right to work are interdependent as all human rights are interdependent. It is true that the right to work partly depends on the realisation of other human rights.[7] Also the exercise of other rights may depend on the fulfilment of the right to work. It would be better however, if only for the sake of clarity, not to consider one right, for instance the right to work, as *part* of another right.[8]

III. NON–DISCRIMINATION

12. Non-discrimination is to be considered as inherent in all human rights and therefore also in the right to work.[9] It is of high importance that human rights should be enjoyed without any form of discrimination whatsoever. All human beings should be able to enjoy all human rights an equal footing: this is one of the

[5] As in par. 10 of E/C.12/2003/7.
[6] Article 5 (e) (i) CERD. See also article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women.
[7] See E/C.12/2003/7, par.4.
[8] E/C.12/2003/7, par.4, considers the examples of aspects of an adequate standard of living as a list of *rights* that includes the right to work.
[9] See above, paragraph 10.

basic principles of human rights law.[10] Rightly the document presenting a draft general comment refers to General Comment no. 3 that stresses that the enjoyment of the rights of the Covenant without discrimination belongs to the essential minimum contents of human rights that is to be ensured by States parties.[11]

13. Where non-discrimination is as fundamental as explained in the preceding paragraph, discrimination on *any* ground is to be prohibited. For this reason article 2 (2) of the Covenant provides an illustrative rather than a limitative enumeration of the prohibited grounds for discrimination. Several grounds are mentioned but the provision of article 2 (2) adds: "or other status". Article 2 (1) CCPR uses the same construction. Also both articles condemn discrimination "of any kind". A comparable conclusion may be drawn from the fact that the rights of the Covenants should be ensured by States parties to every individual "within its territory and subject to its jurisdiction". The Covenant on Civil and Political Rights mentions this in its article 2 (1), the Covenant on Economic, Social and Cultural Rights should be interpreted in the same way.[12]
The document presenting a draft for a General Comment also stresses that *any* form of discrimination brings about a violation of the Covenant.[13] In paragraph 12 of this same document the enumeration of prohibited grounds for discrimination is extended. However this is done without the addition of words like "or any other status". Reference is made to article 1 of Convention no. 111 of the ILO, the Discrimination (Employment and Occupation) Convention that enumerates some grounds for discrimination that are to be prohibited. But this Convention too does not refer to the grounds mentioned as being examples only: the enumeration is exhaustive.[14]
Following the line of reasoning of the Covenant in the General Comment on the right to work means that all enumerations of grounds for discrimination should be illustrative, that is non-exhaustive.

IV. OBLIGATIONS OF IMMEDIATE EFFECT AND SELF-EXECUTIVENESS OF TREATY PROVISIONS

14. In article 6 of the Covenant, the right to work itself is also formulated in a non-exhaustive, general way.[15] Its definition is "incomplete".[16] This gives States some liberty in the choice of instruments for the realisation of the right. Yet at the same time obligations with immediate effect may be derived from article 6[17]: precise legal obligations rather than philosophical principles.[18] States are requested to continue with the progressive realisation of the right to work, and this does not mean that there are no obligations of immediate effect.[19]

15. As a consequence, article 6 of the Covenant is self-executing at least to a certain extent. However, States that are reluctant to recognise the self-executiveness of a provision concerning the right to work will argue that it is not possible to give such an effect to a provision that is formulated in a general, non-exhaustive way, since details are not clear yet and have to be elaborated first through national legislative measures. States will therefore need more clarification on how this general provision can bring with it obligations of immediate effect. This may be done by giving them a clear overview of their obligations under article 6.

V. OBLIGATIONS OF STATES PARTIES

[10] See inter alia Paul Sieghart, The International Law of Human Rights, Clarendon Press, Oxford 1990, esp. p. 17; Paul Sieghart, The Lawful Rights of Mankind, Oxford University Press 1986, p. 75; Michael Akehurst, A Modern Introduction to International Law, Sixth Edition 1987, reprinted 1993 by Routledge, London, p. 76.
[11] E/C.12/2003/7, par.35
[12] See General Comment no. 1, "Reporting by States parties", par.3.
[13] E/C.12/2003/7, par. 40.
[14] Article 1(1) (a) of C. 111 reads: "For the purpose of this Convention the term "discrimination" includes: (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction *or* social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" (emphasis added). No phrase like "or any other status" is included in this article.
[15] E/C.12/2003/7, par. 2.
[16] E/C.12/2003/7, par. 7.
[17] E/C.12/2003/7, par. 21.
[18] E/C.12/2003/7, par. 2.
[19] E/C.12/2003/7, par. 21; General Comment no. 3, par. 1.

16. Obligations of States parties with regard to the application of human rights provisions may be classified in different ways. But before looking at possible classifications it is important to note that the existence of a right to work does not involve in each and every case an obligation for States parties to actually provide persons with a job when they do not have one. For the realisation of human rights, individuals in the first place need to have sufficient opportunity to provide themselves with what they need for having a decent life. States are expected to undertake action no sooner than necessary.

17. It is important for States parties to get a clear overview of their obligations under the Covenant. There are different ways to give such an overview. Often the old division between classical and social rights is still used, resulting in an obligation to refrain from interfering with rights for classical rights and an obligation to take measures for the progressive realisation of rights in the case of social rights (obligations of conduct). A strict division of rights along these lines however leads to the idea that in the case of social rights there are no obligations of immediate effect. In General Comment no. 3 it is clearly stated that there are obligations with immediate effect also with regard to the realisation of social rights as laid down in the Covenant.[20]

18. A more useful approach is a division in three kinds of obligations that are of importance for the realisation of all human rights, whether they are civil rights or social rights. These are the obligation to respect (States parties are requested to refrain from interfering with the right in question and they have to avoid taking measures that might negatively influence the enjoyment of that right); the obligation to protect (States parties are requested to prevent others from interfering with the enjoyment of the right); and the obligation to fulfil (the obligation to actually provide people with the contents of the right in question).

19. It is even better from the point of view of the actual application of human rights, including the right to work, to make a division into four categories of obligations. After the obligations to respect and protect respectively an extra category may be included: the obligation to redress, wich is an obligation for States parties to redistribute opportunities for disadvantaged persons or groups to have access to, in this case, work.[21]
    This obligation enters before the final obligation to fulfil the right to work (to actually provide people with work). The reason for adding an extra category of obligations is that there are several possible forms of State action short of actually providing work. The obligation to fulfil only comes into view where fulfilment of the first three obligations appears to be insufficient for the realisation of the right to work. Therefore it is better not to regard the third obligation as part of the fourth obligation.[22]

20. Concrete obligations for States parties formulated along the lines of a division into four different categories of obligations will include the following.
    First, the obligation to respect the right to work. This is an obligation to refrain from interference and to avoid legislative or other measures that might hinder the effective enjoyment of the right to work. To refrain from interference involves complying with the prohibition of forced labour and leave every individual the free choice of employment. But it also means that State activities resulting in loss of employment are to be avoided or if unavoidable are as far as possible accompanied by measures of compensation towards those who lose their jobs. Further, States parties have to check their legislation on policy measures and amend any regulations that might hinder access to work or the free choice of employment. In particular, legislatory or other provisions that might have discriminatory effects (which may often appear in an indirect way) are to be amended. Also States parties have to see to it that those who want to be self-employed do not find that they are hindered by disproportionate requirements to fulfil.

21. Secondly, the obligation to protect involves that States parties have to ensure that third parties, like employers, do not hinder the access to work, for instance by excluding certain categories of (potential)

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[20] General Comment no. 3, par. 1 and par. 9.

[21] See A. Eide, Human Rights and the Satisfaction of Basic Needs. In: Recueil des Cours, Institut International des Droits de l' Homme, Strasbourg 1986, fifth lecture p. 33, 34. A division into four categories is also made by G.J.H.van Hoof, The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. In: P. Alston and K. Tomasevski (ed.), The Right to Food, The Hague 1984, p. 133 sqq.

[22] As in the document submitted by mr. Textier, E/C.12/2002/7, par. 24, 25, 30 and in A. Eide, Realisation of Social and Economic Rights, The Minimum Threshold Approach, in: ICJ Review no. 43, December 1989, p. 44. See also A. Eide, Right to Adequate Food as a Human Right, United Nations, New York 1989, p. 10 sqq and p. 24.

workers (e.g. those who belong to minority groups) or the free choice of employment (within an undertaking or after dismissal). In particular, States parties should ensure that employers refrain from discriminatory behaviour, directly or indirectly, at all stages of employment (access, working conditions, and dismissal).

22. In the third place, the obligation to redress. This involves that the State creates conditions and opportunities to facilitate access to employment in particular for disadvantaged persons or groups, e.g. women or ethnic minorities. If necessary a redistribution of resources has to be made as well. Concrete measures are required to enhance equal opportunities. Special measures for providing information concerning access to employment or to vocational training are part of these. Some forms of coaching those looking for a job may be tried or even projects involving subsidised jobs might be set up. Special measures for the prevention of discrimination also come into this category, for instance socalled measures of positive action. States have the liberty to choose what measures they think best within the limits of their resources.

23. The actual provision of work comes last, where all other measures fail. As a last resort, measures of positive discrimination might be tried when certain minority groups appear to be at a structural disadvantage in the labour market because of discrimination experienced in the past.

24. From these obligations, at least the obligation to refrain from interfering with the right to work, the prohibition of discrimination in general and the obligation to see to a non-discriminatory application of any measures taken in particular are to be considered obligations of immediate effect, the corresponding parts of the provisions concerning the right to work having self-executing effect.

25. [As the obligations are to be complied with for the benefit of the realisation of the rights of everybody in the territory and/or under the jurisdiction of the State, in principle aliens are also included [, at least those who reside legally in the territory of the State because they have a residence permit or are waiting for the outcome of a procedure concerning their request for a permit to stay]. This also follows from the provision concerning non-discrimination, article 2 (2) of the Covenant, that prohibits discrimination on any ground and therefore also prohibits discrimination on the ground of nationality. Again, this does not mean that the State is obliged to provide everyone, including aliens, with a job. Yet some of the obligations are to be complied with also in the case of aliens. This certainly goes for the obligations of immediate effect. The prohibition of forced labour is clearly included here, whether or not the alien is residing lawfully in the territory. Also the free choice of employment, at any rate as soon as an alien may be employed, should not be interfered with. This inter alia has as a consequence that an alien cannot be requested to obtain a new work permit when changing jobs for a longer period of time than strictly necessary.[23] Also those who have refugee status or are in the possession of a permit to stay on other grounds should benefit from measures taken to help vulnerable groups, since they certainly belong to a group with a disadvantaged position in the labour market. In this respect measures for the prevention of discrimination also deserve attention.]

26. [Article 4 of the Covenant opens a possibility for States to limit the rights laid down in the treaty. However this may only be done subject to strict requirements: apart from the fact that they have to be "determined by law", limitations are to be compatible with the nature of the right at issue and necessary for promoting the general welfare in a democratic society. Measures limiting the right to work will not easily meet these criteria. Measures or activities that disregard any of the obligations of immediate effect will not be compatible with the nature of the right to work. The prohibition of discrimination on any ground, along with the obligation of non-interference, will remain an obligation that States parties cannot avoid. After all the provision of article 4 is necessary mainly because there are no absolute rights: in the enjoyment of any human right, the rights and interests of others have to be taken into account.[24] The possibilities for States

[23] C. 143 of the ILO States that the free choice of employment of migrant workers may not be limited for more than two years; the European Convention on the Legal Status of Migrant Workers allows such restrictions for one year only. Article 14 (a) of the Convention concerning Migrations in Abusive Conditions and the Promoting of Equality of Opportunity and Treatment of Migrant Workers; article 8(2) of the European Convention on the Legal Status of Migrant Workers.

[24] See Paul Sieghart, The International Law of Human Rights, Clarendon Press, Oxford 1983 reprinted 1990, p. 87.

parties to restrict the right to work as laid down in article 6 of the Covenant are therefore limited.]
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