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

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TOWARDS A GENERAL COMMENT ON THE RIGHT TO WORK: CORE ELEMENTS*

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* Issued as submitted.

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1. This paper is written in response to the request by representatives of the Committee on Economic, Social and Cultural Rights (hereafter CESCR or the Committee) for the present author to comment on core elements of the right to work. This contribution emphasizes points not stressed in the author's chapter entitled "The Right to Work: Core Minimum Obligations", in Audrey Chapman and Sage Russell, eds., *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*.[1] That chapter focuses on the core elements of the right to work, how core labour rights are related to that right, the impacts of globalization on such a right, core minimum obligations of States to respect, protect and fulfil work-related rights, and the violations of and remedies for the several dimensions of this right as emphasized by international supervisory bodies. That chapter also elaborated on obligations, violations and remedies regarding full employment, equal treatment and non-discrimination, and work not freely chosen (i.e. slavery, forced labour, and exploitative child labour). It considered the contributions to the elaboration of obligations, violations and remedies by various international covenants, conventions, recommendations and supervisory bodies, particularly the International Covenant on Economic, Social and Cultural Rights (henceforth referred to as the ICESCR) and its supervisory committee.

2. One purpose of the present paper is to isolate some of the most relevant findings and recommendations of my earlier writings. But it will focus primarily on questions and subjects suggested by representatives of the Committee. Its reiteration of points from the Chapman-Russell book will be offered, as appropriate, in the context of responding to the follow-up questions posed by the Committee. The subjects for the present inquiry are as follows:

1. Define the Concept of Work;

2. Define the Concept of "Decent Work";

3. Discuss the Structural Obstacles to the Right to Work;

4. What are the Core Elements of the Right to Work and the Major Violations of those Elements?;

5. What is the Relationship between Articles 6 and 7 of the ICESCR?;

6. What are the Obligations of State Parties of International Organizations, particularly International Financial Institutions, Regarding the Right to Work?

An effort has been made to subsume other issues of interest to the Committee in the context of these six topics. As such, I begin this analysis with:

Defining work

3. The first question addressed here is the meaning or definition of the term work. Although the prolonged debates in the United Nations Commission on Human Rights over the right to work did not centre on the definition of work itself, the meaning of this term is disputed. The term is defined variously in such disciplines as sociology, law, social administration, social work, anthropology and industrial relations. The concept of work has evolved creatively in contemporary cultural studies and in relation to particular historical eras, subcultures, and

geographic regions. As noted by Keith Thomas in his authoritative *The Oxford Book of Work*, "The term's different meanings embody different phases of historical development and different political viewpoints."[2] Although Thomas cannot identify any "single, universally acceptable definition of work", he offers as an authoritative definition of work "those kinds of sustained physical or mental effort that have about them some form of necessity or constraint".[3] Although that necessity or constraint may be self-imposed, and work can be both voluntary and pleasurable, the term is generally identified in English with the concepts of labour, toil and employment.

4. The political nature of the definition of work is clearly reflected in article 6 of the ICESCR, this in relation to its insistence that work be freely chosen and that it be achieved "under conditions safeguarding fundamental political and economic freedoms to the individual"[4] (art. 6, sect. 2). Presumably, work that does not meet such conditions, including work that is forced, compulsory, exploitative, hazardous or otherwise inhumane, is still work but does not meet international or national criteria for decent or legal work.[5] Given this distinction, we will proceed to discuss "decent work".

The concept of "decent work"

5. The Committee has requested a discussion of the term "decent work". This request presumably results from the fact that the right to work is not intended to ensure or promote just any kind of work, certainly not work that is exploitative, forced or unacceptably hazardous. To refer to "decent work" is to link this right to remunerated labour that is free of such negative characteristics and is positively shaped by social protection, opportunity for personal fulfilment (through leisure if not at work itself), a context of overall economic development, efforts to overcome poverty, and particular policies aimed at enhancing local, national and international labour markets. Advocates of social democratic, social market and neoclassical liberal approaches to labour economics and public policy generally can agree on the objective of such decent work for all even if they disagree on the respective roles of the State and the market in its pursuit.

6. Whether or not work is legal does not in itself determine whether that work is decent. Illegal work may exist openly or be hidden underground, be formal or informal; it is found in the "black economy" because of its objectively illegal nature or largely to avoid taxes and regulations. Also, work that is formal or legal in a given State may well be indecent and violative of international labour standards. And international labour standards do not completely proscribe work that is indecent. After all, such standards are themselves products of political compromise as well as the application of subjective criteria. In the English language one commonly uses the word decent to refer to something that is minimally acceptable, whether in terms of conditions or exchange value. Much of the language in major regional and global international instruments concerning work implicitly or explicitly relates to minimal standards of decency in terms of conditions and remuneration, but efforts to make illegal the work that is indecent will continue for many decades.

7. In my view the Committee has two basic choices as it seeks to define the term "decent work". The first is to focus on the term "exploitative" as the key dimension of work that is not decent. The term exploitative is implicit in many of the instruments defining international labour standards and human rights instruments relating to work. It is given a very specific meaning in

the 1999 ILO Convention No. 182 (and accompanying Recommendation) concerning "the prohibition and immediate elimination of the worst forms of child labour".[6] Relatedly, the Convention on the Rights of the Child, adopted in 1989, recognizes "the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development".[7] Exploitation is also explicit as a theme of international instruments pertaining to women, migrants and other groups deemed to require special protection. But exploitation is a reasonable standard for defining "work that is not decent" for any worker. Unfortunately, the term exploitative has no self-evident or fully agreed meaning. The emphasis in ILO Convention No. 182 concerning child labour is on issues of morality, drugs, sexual exploitation and hazardous work. In relation to decent work for adults, the Committee should emphasize its rejection of forced labour, discrimination at all stages of training and employment, and work that is not healthy, safe or fairly compensated - all of these core elements of the right to work.

8. But the Committee, in addition to its focus on exploitation, should also review the various labour conventions and human rights treaties that do not explicitly focus on the term "exploitative." The terms decent work and exploitative work are commonly used in international labour conventions and domestic law, but less commonly in human rights instruments. The Universal Declaration addresses "just and favourable conditions of work" and "just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity … supplemented, if necessary, by other means of social protection" (art. 23, sects. 1, 3). Also relevant is the language in article 24 of the Universal Declaration of Human Rights concerning "the right to rest and leisure, including reasonable limitations on working hours and periodic holidays with pay" and article 25 calling for "a standard of living adequate for the health and well-being of himself and his family".

9. The ICESCR has the following concepts that are related to the "decency" of work:

Article 6: "work which he freely chooses or accepts";

Article 7: "just and favourable conditions of work which ensure, in particular":

- "remuneration which provides all workers, at a minimum, with:
  - "fair wages and equal remuneration for work of equal value …"
  - "a decent living for themselves and their families".

Article 7 identifies just and favourable conditions of work with:

- "safe and healthy working conditions"
- "equal opportunity in promotion at work"
- "rest, leisure and reasonable limitation of working hours and periodic holidays with pay …";

Article 8 incorporates rights of freedom of association and collective bargaining and article 9 addresses "the right of everyone to social security, including social insurance".

10. The Universal Declaration and the ICESCR are characterized by (1) a lack of specificity in its prescriptions concerning minimally acceptable conditions of work; and (2) compromises among the drafters of the two documents that reflect both the liberal concept of work freely chosen and the European and Roman Catholic emphasis on social protection in such areas as safety, health, and social security as well as planning for full employment.

11. As such, standards for decent work remain highly subjective, evolving, and closely connected with the level of economic development in a particular State or region. But neither the history of the ICESCR nor the conventions and recommendations of the ILO suggest that the member States and States parties envisioned a standard of decent work that reflects the lowest common denominator or the results of a race to the bottom. All interpretations of socio-economic rights in general comments adopted heretofore by the CESCR, or by the other global treaty bodies, reflect higher standards.

12. The high standard of decent work to be adopted by the CESCR should be influenced by such diverse sources as the relevant ILO conventions and the interpretations of that organization's supervising bodies, by OECD resolutions and recommendations on manpower policy, by recent Council of Europe, European Union and inter-American human rights system interpretations, and by the thinking reflected in post-1966 United Nations-sponsored international covenants, conventions, and other instruments concerning all relevant issues and the rights of such protected groups as children, women, migrants, the disabled and older persons. Each of these documentary sources and the opinions and judgements of treaty bodies speak to both decent work and the core minimum obligations of States parties and others to respect, protect and fulfil the right to work.

13. If the CESCR seeks to establish a comprehensive conception of decent work fully responsive to contemporary conceptions of core labour standards it should consider modifying and adapting to global applicability the elements of decent work set out in articles 1 through 10 of the 1996 revised version of the European Social Charter, sponsored by the Council of Europe. By eliminating some elements of that instrument, these including article 2, section 3, "to provide for a minimum of four weeks' annual holiday with pay" and article 8, section 1, mandating 14 weeks of maternity leave, the Committee can ensure that it is not imposing inappropriate standards on developing countries. The greater part of articles 1 through 10 articulates standards that can be approached immediately or progressively by almost all States parties to the ICESCR. Most of the elements of articles 1-10 of that Charter are also expanded upon in various ILO conventions. However, the European Social Charter presents those standards in a reasonably concise and complete manner, and is thus an excellent source for referencing the requirements of decent work.

Structural obstacles to the right to work

14. In its general comment No. 1 (1989) the CESCR invites States to report on the "factors and difficulties" inhibiting the progressive and immediate realization of economic, social and cultural rights.[8] It suggested then that identification and recognition of such factors provides the framework within which the most appropriate policies can be devised. The nature of State

obligations in the face of such constraints is a major focus of the CESCR's discussion of States parties' obligations in general comment No. 3 (1990).[9] The subject of structural obstacles to the right to work involves both defining the nature of these barriers and elaborating on State obligations in the context of such obstacles.

Defining structural obstacles: These obstacles were not set out very thoroughly or clearly in the CESCR's prior general comments.[10] Yet an excellent starting point for the statement on structural obstacles in the proposed general comment on work is the May 1998 "Statement by the Committee on Economic, Social and Cultural Rights". The Committee's general comment on the right to work should refer States parties to that statement, which includes the assertion that "respect for the right to work and the right to just and favourable conditions of work is threatened where there is an excessive emphasis upon competitiveness to the detriment of respect for the labour rights contained in the Covenant".[11] Section 2 of that document offers a useful 11-line critical summary of globalization that is appropriate to a discussion of structural obstacles. However, it is also important to consider that neoclassical and neoliberal doctrines justify globalization and structural adjustment programmes as necessary means to remove structural obstacles at the global and national levels. As such, I recommend that the conflicting perspectives on globalization and structural obstacles be resolved by recognizing various policy documents sponsored by the World Bank, ILO, UNDP, independent commissions and other organizations that point both to some positive contributions of globalization together with the need to retain and enhance strong State powers to tax and regulate firms as well as maintain and enhance anti-poverty measures and other social protections, particularly for the most vulnerable.[12]

15. The Committee need recognize explicitly that the major problems concerning globalization are manifested only in part by such passing phenomena as the 1997-1998 financial crises or various global economic recessions.[13] Without taking a radical political posture the Committee can take notice of the weaknesses of the global regimes for finance, investment, development and trade, and recognize the grave inequalities, instability and imbalances inherent in the world's divisions of labour, income, wealth and power even as recent economic progress in India and China has improved the extent of global income inequality according to some measures.[14]

16. But structural obstacles are rooted in more than globalization and its diverse manifestations. They are also based in national and regional conditions that include endemic disease, civil and international war, "failed States", corruption, and pervasive organized and violent crime. Natural disasters interact with and compound such realities. There is no doubt that the labour market and rights concerning work are major casualties of these domestic and regional structural obstacles.

17. A large proportion of developing and transitional States, as well as various developed States parties, invoke structural obstacles in their reports. They seek to excuse, at least partially, their poor records of conduct and results regarding work and other areas of economic and social policy and rights. Structural obstacles are emphasized in order to bolster their case for more time and indulgence regarding their efforts to progressively realize the right to work. The Committee is often sympathetic to this line of argument even as it seeks to move toward the elaboration of certain core minimum obligations that it views as immediately binding on States parties regardless of structural obstacles and/or extreme poverty.

18. The immediately applicable obligations of States parties regarding the right to work involve duties of conduct and result regarding non-discrimination, equal protection and the avoidance of policy and legal measures that are steps backward from the policies and laws required to meet core minimum obligations of States. They also involve duties to provide special protection to the most vulnerable sectors of the population in the face of structural obstacles and structural adjustment policies. But the right to work stands out from other socio-economic rights regarding State responsibilities to legislate and enforce certain criminal and civil laws affecting work and liberty, these applicable to both governments and private organizations. Neither the rules of progressive realization nor structural obstacles excuse failures of States parties to act immediately and effectively in relation to all forms of proscribed forced labour, including slavery, bonded labour, and exploitative child labour. Sweatshops and grossly hazardous work also represent the kinds of violations that must trigger criminal as well as civil sanctions, and must be targeted by the CESCR for requirements of conduct and result.

19. The reach of such immediate obligations concerning work and liberty to States that have not ratified relevant covenants and conventions is rooted in part in customary international law and also in the statutes of international criminal courts and actions by the ILO and other international organizations and courts. Such elements of international law are intended to ensure that all States are bound by certain obligations. These universal obligations include the need for immediately applicable binding duties to prevent and punish forced labour, grave violations of the freedom of association, exploitative child labour and the kinds of mandatory labour segregation found in systems of racial apartheid.[15]

Core elements of the right to work and their violation

20. The core elements of the ICESCR respecting the right to work are stated somewhat incompletely in my chapter in the Chapman-Russell book because I decided to limit that writing to article 6, the equal opportunity clauses of article 7, and the child labour section in article 10. As such, core minimum obligations were identified and discussed there in terms of obligations to respect, protect and fulfil, but only in regards to full employment, equal treatment and non-discrimination, and work not freely chosen - particularly slavery, forced labour and exploitative child labour.

21. The January 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights offer the most comprehensive framework for analysing the matter of violations.[16] It discusses violations through acts of omission and commission and violations committed by the State itself as well as by non-State actors. My chapter in the Chapman-Russell book identifies violations that involve immediate obligations of conduct and result, as in the condoning of discrimination in training and employment and retrogression in legislation, as well as obligations subject to progressive realization.[17]

22. I regard as the most important points of that chapter that (1) State party obligations regarding work not freely chosen are not matters of labour law alone but are also fundamental obligations of civil-political rights[18], civil liberties and criminal law, and (2) State party obligations concerning full employment must be reinforced in the current ideological, economic and political climate. Key aspects of the right to work and core labour standards intersect with international and national criminal law, civil-political rights as promulgated in the International Covenant on Civil and Political Rights (ICCPR), and grave violations of human rights as stated

in the Rome Statute of the International Criminal Court. It is not that such violations of the right to work as the condoning of slavery, apartheid in employment, forced labour, or violence against trade union activists are necessarily more important or serious than grave violations of the right to food, education or health. Rather, it is that such violations relating to the right to work have been given special status in the reporting system of the ILO and in the jurisprudence of the new International Criminal Court, and that still other major international conventions on these subjects place special responsibilities on States to act immediately and effectively to prevent and eliminate the given abuses.[19]

23. The elaboration of a general comment on the right to work offers an excellent opportunity for the CESCR to underscore state obligations to make such violations justiciable and subject to effective criminal law and meaningful remedies for individual victims. This should be advocated together with the promotion of such other approaches to prevention as education and the implementation of programmes that advance cultural, social and economic alternatives to such exploitation. Such exceptional obligations of States parties and other States with respect to work and labour must be mandated by the Committee regardless of the vulnerability of States to the threats of removal of firms and plants to other States or claims by Governments concerning sovereignty or interference with domestic jurisdiction, or their arguments concerning interference in the terms of trade and investment. The Committee should also reflect in its general comment the fact that the national Governments that are home to most multinational firms have broad powers to regulate such enterprises and to sanction them in relation to their involvement with the most serious violations of core elements of the right to work and core labour standards at home and abroad. The legitimacy of such action was evident when the United States and many other countries implemented sanctions legislation in the 1980s directed against South African Apartheid.

24. State obligations concerning full employment and forced labour were the most controversial aspects of the debates over the right to work in the United Nations during the drafting and adoption of the ICESCR. It was widely agreed between 1948 and 1966 that such a right would not involve entitlements of individuals to guaranteed employment. Rather, a majority within the United Nations organs agreed that each State party (and all States insofar as the UDHR would come to be viewed as customary international law) has obligations shaped and delimited by such documents as the ILO 1944 Declaration of Philadelphia and ILO Convention No. 122 (1964), Concerning Employment Policy.[20]

25. The precise nature of State party obligations regarding full employment inevitably remains fluid. The ILO itself attempted to update such obligations with its exploration of a new convention on employment in 1983-1984, but had to settle on a recommendation at that time.[21]

26. The essence of State party obligations concerning full employment involve following the best international practices relating to active labour market or employment policies while maintaining a strong emphasis on employment promotion and security in the full range of domestic and foreign economic and social policies. All States should be held to core minimal obligations to avoid actions that intentionally deepen unemployment. They must also integrate planning for full employment in their macro- and microeconomic policies. States should reflect this priority in their trade, monetary, fiscal, industrial, agricultural, education and training policies and programmes. While there is no fixed maximum rate of acceptable unemployment,

any State that ignores its responsibilities concerning high and persistent rates of unemployment and underemployment as compared to its regional and socio-economic peers should be held in violation of Article 6 in regard to conduct and results.

27. It is also evident that positive long-term trends regarding full employment may require monetary, fiscal, and other policies that negatively affect employment in the short or even intermediate terms. The primary obligations of States parties involve the development and implementation of sound plans for achieving full employment over time. The needed programmes and policies must be multifaceted and include updated versions of active labour market policies as articulated by the ILO, OECD, EU and other organizations. These programmes must be developed in cooperation with both workers' and employers' organizations. Although structural obstacles to economic growth and labour market flexibility should be ameliorated through such planning, there should not be capitulation to thoughtless austerity demands on the part of ruling elites, international organizations, or leading economic power.

28. States parties condoning of or collusion in such grave violations of the right to work as bonded and exploitative child labour and their failure to protect against disasters from hazardous work are no less serious than the issues discussed above. However, their prevention and eradication may require greater understanding by the CESCR of structural and other obstacles. Nonetheless, exploitative child labour and hazardous work involve violations that must be met with immediate and sustained action by States parties on a wide array of policy and legal fronts and with the necessary international assistance. There must be the strongest possible insistence by the CESCR that these elements of the right to work and core labour standards must be addressed in ways that achieve meaningful results in the shortest possible time frame.

29. It is also essential that the Committee recognize that additional core elements, core minimal obligations and violations relating to the right to work are explicit or implicit in articles 8, 9 and 10 as well as in articles 6 and 7 of the ICESCR. Obligations noted in each of the articles have been recognized as core labour rights or standards by the ILO, the United Nations, the OECD, other international organizations, and leading experts. These core labour rights or standards certainly include free association, elaborated in article 8 of the ICESCR, equal protection as stated in article 7, and the exploitative child labour protection of article 10.

30. It is also reasonable to add, taking a broader perspective on the right to work, core elements and core minimal obligations related to safe and healthy working conditions (art. 7, sec. (b)), special protection for working women (art. 10, sec. 2), and "… the right of everyone to social security, including social insurance" (art. 9). As such, the Committee must not limit its consideration of the right to work to obligations found in articles 6 and 7. It is necessary to expand its purview to also include articles 8, 9 and 10. The Committee may also seek to recognize in this general comment the relationships of article 11 (food and standard of living), article 12 (health), and article 13 (education) to the right to work, though no core minimal obligations deriving directly from these articles are recommended by this writer for the present general comment. But the Committee should note the interdependence of the right to work and the rights to health, education, income security and a decent standard of living. Certain other connections between articles 6 and 7 and the three articles that follow them in the ICESCR are discussed further in the next section of this paper.

What is the relationship between articles 6 and 7?

31. As indicated in the previous section, not only Articles 6 and 7 of the ICESCR but also articles 8, 9 and 10 are interconnected and interdependent to various degrees. Article 6, that is most often identified with the right to work, principally articulates the full employment and "work freely chosen" concept. In article 7, which also serves as a central source for the right to work, we find the concepts of "just and favourable conditions of work", "fair wages", "equal remuneration for work of equal value", "equal conditions of work for women", "safe and healthy working conditions", and "rest, leisure and reasonable limitation of working hours". As such, article 7 offers the most important language in the ICESCR specific to work regarding non-discrimination, equal protection and opportunity, and the assurance that the conditions of work need be "decent".

32. The Committee should regard all of the key concepts noted in the above paragraph as central to both decent work and the core minimal obligations of States. Indeed, equal protection and the need to continually advance the "safe and healthy" concept almost certainly enjoy greater international agreement today, in principle, than the full employment concept central to article 6.

33. The Committee should interpret the key concepts of article 7 and the child labour concept in article 10 as indisputably integral to the core minimal obligations pertaining to the right to work. This perspective on interdependence is implicit in the conventions and other work of the International Labour Organization on issues of occupational health and safety, non-discrimination, and the need for special protection for women, children and such other designated groups as older workers, migrants and the disabled.

34. It is difficult to state the precise line to be drawn concerning the level or degree of unsafe or unhealthy work that is unacceptable to particular nations and to the international community. Child labour was dealt with by the ILO by focusing on the concept of exploitative work, this involving political, moral and economic compromises in the development of the 1999 Convention. Unhealthy and unsafe work are viewed by the international community as largely a matter of progressive realization and evolving international minimal standards. The States parties of the World Trade Organization are reluctant to enforce any core labour standards through that organization, preferring to refer them to the ILO. The CESCR must translate the concept of work that is healthy and safe into a few core minimal obligations, but how can it do this in a way that is specific and meaningful?

35. British law Professor Geraldine Van Beuren notes that international law does not define the term "hazardous" in relation to work. This expert on child labour contends that, in establishing obligations of States and others, "The duty is placed on States parties to determine after consultation with organizations of employers and workers, the types of work that fall within that definition."[22] Van Beuren further states that in making this determination, "States should take full account of any relevant treaties to which they are party, including those concerning dangerous substances, the lifting of heavy weights, and underground work."[23] She adds that States and the international community must periodically revise their definitions of hazardous work to take account of advancing knowledge and epidemiological research.

36. Van Beuren's advice appears to suggest that core minimal obligations in regard to healthy and safe work should be based on process and good faith on the part of States parties.

I am rather dubious about this emphasis to the extent that it plays down substantive criteria. Such requirements as consultation and good faith need be supplemented by effective core minimal standards, enforced by international authorities, that at minimum exclude gross neglect of the State party's obligations to respect, protect and fulfil standards. These minimal obligations must be based on international scientific input and should be updated periodically. They must apply to all workers but also offer additional protections to children, pregnant women and other especially vulnerable groups. They must be promulgated in statutes and regulations, and such rules must be enforced effectively in relation to obligations of result, including criminal and civil sanctions for gross violations.

37. Jan Hodges of the International Labour Office offered in 1998 a summary of the core content of CESCR in relation to safety and health in the work environment.[24] She noted that work hazards were explored thoroughly in the 1977 edition of the *ILO Encyclopaedia of Occupational Health and Safety*. She suggested in a concise statement that:

> Regarding safety and health in the working environment there should be a coherent national policy for all workers to prevent accidents and injury and to minimize as far as possible the causes of hazards inherent in the working environment. A key element is the adoption of laws or other methods, like training, for the operation of a system of inspection of workplaces. Employers shall provide protective clothing and equipment. There shall be no dismissal of workers who remove themselves from a dangerous situation. The use of certain dangerous substances is prohibited (e.g. white lead and lead sulphates; benzene) as is exposure to asbestos and chemicals. No worker shall be required to use any power-driven machinery without guarding material. No worker shall be required to transport annually a load which by means of its weight is likely to jeopardize his or her health and safety. Weights of over 1,000 kg shall be so marked for transport by inland waterways. Work premises and equipment shall be properly maintained and kept clean, and shall have adequate ventilation, lighting (preferably natural), temperature, noise, washing and other sanitary conveniences, first aid and so on. Special modalities apply to work in mines and in construction.

38. Article 3 of the 1996 Revised European Social Charter offers the following summary of core obligations concerning the right to safe and healthy working conditions that focuses on process and includes only broadly stated substantive elements:

> **The right to safe and healthy working conditions**
>
> With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the parties undertake, in consultation with employers' and workers' organizations:
>
> – To formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent

accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimizing the causes of hazards inherent in the working environment;

- To issue safety and health regulations;

- To provide for the enforcement of such regulations by measures of supervision;

- To promote the progressive development of occupational health services for all workers with essentially preventive advisory functions.

Obligations of State party and other members of international financial institutions regarding the right to work[25]

39. In this section I discuss whether the CESCR need modify its approach to the obligations of international financial institutions and other international organizations, as well as those of the member States of those agencies, concerning the right to work. The Committee will want to consider the obligations of its States parties within a wide array of regional and global organizations. The ILO is the principal organization specializing in this area of rights and policy, though such other IGOs as the European Union, the Council of Europe, the OECD, UNCTAD, UNDP, the IMF and the World Bank have also focused on labour and work. Generally, the IMF, WTO and World Bank have sought to distance themselves from obligations deemed non-economic or derived from particular human rights instruments. Yet it is clear that workers' or labour rights are economic as well as social in character.

40. Such organizations as the EU, the Council of Europe and the OECD have contributed significantly to such dimensions of the right to work as national planning for employment and the analysis of equal protection issues. The Inter-American human rights system has also focused some attention on these subjects, and the ILO has made substantial contributions to the advancement of all core elements of the right to work in the course of its nearly 85 years. The United Nations itself has been particularly important in relation to such issues as forced labour, slavery, apartheid, equal treatment for women and migrants, and the obligations of multinational enterprises, and several of these violations were included as major crimes against humanity in the Rome Statute of the new International Criminal Court. It may not be necessary to call on these organizations to add greatly to their prescriptions concerning right to work issues, but it is appropriate to ask each of them to continue to improve the supervision and implementation of their human rights and policy instruments relating to work and to further assist developing and transitional countries in preparing effective national and local programmes as well as enforcement of rules and policies concerning such issues as equal protection, child labour, forced labour and slavery.[26] At this juncture the involvement of all of the above-mentioned organizations with such issues is severely limited by constraints on resources and the lack of sufficient political will. It is crucial that the CESCR influence all organizations involved with labour and work to maximize in particular the effective enforcement of rules and standards given special status by their member States.[27] It may also be useful to encourage the WTO and its States parties to support core labour standards and the right to work explicitly, and to not be content to refer such issues to the ILO.[28] Although it is a widespread view among WTO member States that the invocation of core labour standards in relation to trade arrangements reinforces

protectionism, it can be hoped that the WTO itself will soon promote policies and standards that discourage States from condoning or encouraging gross violations of core labour standards and the right to work.

41. All IGOs had to respond in the 1980s and 1990s to increasingly dominant neoliberal approaches to rights and policy. These doctrines, heavily influenced by changes in the domestic politics of leading member States, created competing and sometimes superseding free market priorities for such organizations as the EU and even affected the ILO's more social-democratic ethos.[29] A profound impact was the increasing tolerance by most IGOs that had long supported key aspects of the right to work of changes in law and practice that effectively weakened the goal of full employment. They increasingly condoned or encouraged less secure and less protected forms of employment in the name of restructuring. Previous IGO prescriptions concerning policy and rights in the sphere of work were not so much repealed as given a lower priority. This change was intensified after the demise of Marxist-Leninist regimes that were at least formally committed to full employment at home and abroad.

42. The CESCR addressed in general comment No. 3 the need for "States parties to the Covenant, as well as the relevant United Nations agencies" involved with adjustment policies, international debt, technical assistance and development cooperation generally to protect "the most basic economic, social and cultural rights" that are especially urgent in the context of austerity (section 9). The Committee has expressed particular interest in the role of its States parties as member States of the principal international financial institutions. This involvement took on increased importance in recent decades as conditionality through structural adjustment programmes and agreements became a normal aspect of those organizations' lending processes.[30] These arrangements have negatively impacted such aspects of the right to work as employment opportunity, labour conditions and employment security in the State and private sectors. And the resulting austerity policies have had quite disparate impacts on various sectors of society, usually hurting the poor and marginal most severely. Deregulation has destabilized labour markets in both developed and developing States, even as significant new flows of foreign direct and portfolio investment money created new job opportunities in the short or long term in several States receiving such inflows.

43. Important human rights issues have also been raised in connection with World Bank project loans and the approaches taken by both international financial institutions regarding loans to chronic grave violators of human rights. These international institutions often argue that such controversial loans are made in part to advance employment opportunities and antipoverty goals. But even when a positive employment outcome may occur in a particular case, the IGO may be bolstering a regime responsible for serious violations in diverse areas of human rights that involve the right to work and core labour standards.[31]

44. Although the offices of the General Counsel and of other officials of the IMF and World Bank have generally rejected claims that their agencies have legal obligations to respect particular human rights instruments, Bank officials have occasionally conceded ground on these matters. They have based their case on rather inconsistent arguments concerning their need to ground policies in economic considerations. The Bank concedes the inevitability of taking political factors into account, and articulates what it claims to be a narrow approach to political considerations designed to legitimate Bank actions challenging political corruption and promoting citizen participation, governmental stability and predictability, and sufficient

government capacities in policy-making and implementation. Indeed, references in World Bank discussions to the need to consider the rule of law and the right to development in its relations with recipient member States leave almost no distinction between its list of acceptable political considerations and broader conceptions of human rights.[32] Indeed if the Bank and the IMF claim to have operated with a policy of rejecting such human rights considerations as the civil-political human rights record of potential recipients, these agencies have clearly violated their own policies by taking actions based on Western States' controlling votes, these based in numerous instances on articulated human rights criteria.[33]

45. The CESCR has not been persuaded that the specialized agencies or other international organizations are absolved of responsibilities under the covenants. In 1998 it addressed the incorporation of ESC rights in the United Nations development assistance framework (UNDAF) process,[34] and it also argued in its May 1998 Statement on Globalization and Economic, Social and Cultural Rights for broad human rights obligations of "international organizations, as well as the Governments that have created and manage them" to assist member States "and seek to devise policies and programmes which promote respect for those rights".[35] The Committee drew special attention to the spheres of trade, finance and investment, noting that these "are in no way exempt from these general principles" and that IGOs involved in these areas "should play a positive and constructive role in relation to human rights".[36]

46. Beyond these assertions connecting international organizations to human rights, there are important linkages of the international financial institutions to the right to work and core labour standards in their internal Articles of Agreement. The World Bank has affirmative obligations under its Articles to be responsive to the need for "raising the conditions of labour" [Art. 1 (iii)], and the "maintenance of high levels of employment and income" is part of the IMF's obligations under its Articles of Agreement [Art. 1 (ii)].[37] These clauses were adopted at a time when the promotion of full employment was rather high on the agenda of the United States, Britain and the international community generally.[38] As such, the Articles support an argument that right to work considerations should rank above many other human rights, both socio-economic and civil-political, in the consideration and obligations of the IMF and World Bank.

47. The primary importance of clearly establishing the human rights obligations of particular IGOs is that this determination underscores the responsibilities of their member States. However, the obligations of States parties do not depend primarily on the human rights obligations of the IGOs to which they belong. Rather, State obligations are based on their own treaty commitments, together with customary and other sources of international law. But it is important that this general comment assert that the international financial institutions bear responsibilities for conditions of labour and levels of employment, among other core elements of the right to work.

48. The obligations of States parties in relation to the right to work are rooted in such particular sources as the Universal Declaration, the United Nations Charter and diverse global and regional human rights instruments (including those concerning the rights of women, children and both civil-political rights and ESC rights). These sources also include the Rome Statute and ILO and United Nations conventions concerning slavery, apartheid, traffic in women and children, child labour and other integral elements of core labour standards and the right to work.

49. The Committee summarized its view on the obligations of States parties in IGOs in sections 13 and 14 of its general comment No. 3 (1990). It noted that such obligations pertain to all States, but are "particularly incumbent upon those States which are in a position to assist others in this regard" (section 14). It referred all States to obligations stated in articles 11, 15, 22 and 23 of the ICESCR. Yet, it is notable that the "international action" cited in Article 23 is of only limited relevance to the fulfilment of their obligations. In that article States parties are charged with involvement in international instruments, technical assistance and relevant meetings. But the central issue is how they wield their varying degrees of influence and withstand the power of agency officials and leading member States in relation to the establishment and implementation of policies that intrude deeply into the prerogatives and preferences of dependent States. Although agency policies may be constructive means to provide political cover for difficult decisions preferred by the ruling elites of recipient States, there is also a likelihood of coerced agreements that undercut core elements of the right to work and other ESC rights.

50. Certain obligations of States parties relating to the right to work are, as compared to most other core rights in the ICESCR, more likely to be judiciable in national and international courts or the genesis of international economic sanctions. This should influence State members of various intergovernmental organizations to strongly oppose practices that violate international criminal law. In the current era of globalization, structural adjustment, financial crises, and conditionality, States parties should be held highly accountable in regard to full employment, working conditions and poverty in their roles as member States in intergovernmental organizations, as bilateral actors, and as recipients of international assistance. This accountability should extend to the effects of their roles in IGOs on employment security and opportunity, discrimination, disparate impacts on particular vulnerable groups, and standards of health and safety.

51. The obligations of States parties are just as fundamental in the context of regional organizations as global ones, and in the operations of the World Trade Organization as much as in the IMF and World Bank. Employment is affected as much by terms of trade and economic integration as by conditions and regulations imposed by the global financial institutions. It is notable that labour issues helped generate, shortly after World War I, agreement on the need to create the ILO as one of the world's first global international organizations. The results of a century of international involvement with a wide range of labour and poverty issues have not been altogether satisfactory, to say the least. As a result, the CESCR must now take a position on State and agency responsibility that goes well beyond acquiescence in ideological fashions, bureaucratic inertia and weak arguments to the effect that decent conditions of labour will inevitably emerge out of free markets, globalization or the current policies and limited concern on the parts of States and the international community. The UNDP, the CESCR and the International Labour Office recognize the need for a more affirmative position on State responsibility, as does a growing number of academic and practitioner critics of current trends in globalization. As such, the CESCR should act to stimulate approaches to conditionality, structural adjustment and transitions from authoritarian regimes that deal with employment in ways that treat the right to work as core elements of human rights.

Notes

[1] Antwerp and Oxford: Intersentia Publishers, 2002, pp. 21-52. This book was co-sponsored by the Science and Human Rights Program of the American Association for the Advancement of Science (AAAS) and Human Rights Information and Documentation Systems International (HURODOCS).

[2] Keith Thomas, ed., *The Oxford Book of Work*. Oxford: Oxford University Press, 1999, p. XV.

[3] Ibid. p. XVI. Thomas notes that the *Oxford English Dictionary* offers 34 separate meanings for the noun work and 39 more for the verb form.

[4] These concepts were victories for Western individualism and liberalism. See Richard Siegel, *Employment and Human Rights: The International Dimension*, Philadelphia, PA: University of Pennsylvania Press, 1994, pp. 58-71.

[5] However, even "decent work" should not be considered limited to that which is remunerated or compensated. There is no agreed line between work as conventionally understood and such human undertakings as the expression of artistic or other creativity or the unpaid work of an intern or apprentice.

[6] ILO, *Child Labour*, Report IV (2B), International Labour Conference, 87th Session, 1999. Geneva: International Labour Office, at 7.

[7] Article 32, section 1, of the Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 20 November 1989; entered into force 2 September 1990. United Nations Treaty Series No. 27531.

[8] General comment No. 1 (1989), "Reporting by States Parties", adopted by the CESCR at its third session, 24 February 1989.

[9] Adopted 14 December 1990 at fifth session.

[10] Such obstacles relate both to globalization and the world order and to barriers and impediments that are largely domestic in their roots. General comment No. 3 of the ICESCR emphasizes both the nature of structural obstacles and the obligations that still must be met by States parties together with the international community. The structural factors are identified in that general comment with "times of severe resources constraints whether caused by a process of adjustment, or economic recession; or by other factors …" (ibid., sect. 12). In its general comment No. 11 (1999) on primary education, the CESCR suggests as examples of such obstacles, "for example, the structural adjustment programmes that began in the 1970s, the debt crises that followed in the 1980s and the financial crises of the later 1990s …" (general comment No. 11, "Substantive issues arising in the implementation of the ICESCR: Plans of actions for primary education", adopted by the CESCR, twentieth session, 10 May 1999, section 3). In regard to the right to food, the CESCR has identified structural barriers with "severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic

conditions or other factors …" (general comment No. 12, "Substantive issues arising in the implementation of the ICESCR: The right to adequate food", adopted by the CESCR, twentieth session, 12 May 1999, section 28).

[11] "Globalization and Economic, Social and Cultural Rights", statement by the Committee on Economic, Social and Cultural Rights, May 1998, paragraph 3, adopted by the CESCR at its eighteenth session.

[12] See, for example, Independent Commission of the South on Development Issues, *The Challenge to the South*: *A Report of the South Commission*. New York: Oxford University Press, 1990; OECD, *Trade, Employment and Labour Standards*. Paris: OECD, 1996; and World Bank, *World Development Report 1997: The State in a Changing World*. New York: Oxford University Press of the IBRD/World Bank, 1997.

[13] The literature on globalization is exploding. Members of the ICESCR Committee may be particularly interested in such recent books as Alison Brysk, ed., *Globalization and Human Rights*. Berkeley: University of California Press, 2002; William Grieder, *One World, Ready or Not: The Manic Logic of Global Capitalism*. New York: Simon & Schuster Publishers, 1997; Michael Hardt and Antonio Negri, *Empire*. Cambridge, MA: Harvard University Press, 2000; Joseph E. Stiglitz, *Globalization and Its Discontents*. New York: W.W. Norton Co., 2002; and Hubert Vedrine with Dominique Moisi, *France in an Age of Globalization*. Washington, D.C.: Brookings Institution Press, 2001. The impacts of globalization on work are the focus of Robert B. Reich, *The Work of Nations: Preparing Ourselves for 21st Century Capitalism*. New York: Knopf Publishers, 1991; Robert W. Cox, *Production, Power and World Order: Social Forces in the Making of History*. New York: Columbia University Press, 1987; and World Bank, *World Development Report 1995: Workers in an Integrated World*. New York: Oxford University Press for the International Bank for Reconstruction and Development/World Bank, 1995; and Ethan Kapstein, *Sharing the Wealth: Workers and the World Economy*. New York: W.W. Norton, 1999.

[14] See Jeromin Zettelmeyer, "Bhalla Versus the World Bank: An Outsider's Perspective", *Finance and Development*, June 2003, pp. 50-53.

[15] See references to such universal and/or criminally-sanctioned obligations and violations in Siegel, "The Right to Work: Core Minimum Obligations", op. cit., pp. 28-32, 40-46.

[16] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, The Netherlands, 22-26 January 1997, reprinted in Bekker, op. cit., pp. 151-160.

[17] Siegel, "The Right to Work: Core Minimum Obligations" in A. Chapman and S. Russell, op. cit.

[18] International Covenant on Civil and Political Rights, adopted 16 December 1966 by the General Assembly, Article 8.

[19] These include the 1956 United Nations Supplementary Convention on the Abolition of Slavery (in U.N.T.S., 1957, vol. CCLXVI, No. 3822) and the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly on 30 November 1973, A/RES/3068 (XXVIII).

[20] See Siegel, *Employment and Human Rights, op. cit.*, pp. 193-196 and ILO, *Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966*. Geneva: International Labour Office, 1966, pp. 1097-1099.

[21] See ILO Recommendation 169, Concerning Employment Policy, adopted 26 June 1984, in Siegel, *Ibid.*, pp. 208-218 and in International Labour Conference, No. 70th Sess., *Record of the Proceedings*. Geneva: International Labour Office, 1984, pp. XVIII-XXXV.

[22] Geraldine Van Beuren, "The Minimal Core Obligations of States Under Article 10 (3) of the International Covenant on Economic, Social and Cultural Rights", in Audrey Chapman and Sage Russell, eds., *op. cit.*, p. 154.

[23] *Ibid*.

[24] See Hodges, "Core Minimal Content of the Right to Work", unpublished manuscript, 1998.

[25] The author notes the benefit he received regarding this subject from his participation in Professor Philip Alston's Seminar on the Implementation of International Human Rights while in residence at the New York University School of Law as a Global Law Visiting Scholar in 2002. Professor Alston provided numerous documents to the seminar members.

[26] European and other regional organizations have exceptional opportunities to influence the policy of prospective members, associated non-member States, and States involved with them through trade, foreign aid and foreign direct investment.

[27] I refer here especially to the core labour standards and conventions identified by the International Labour Conference of the ILO as binding on all of its member States and requiring reports and compliance from all of its members.

[28] For a recent discussion of these issues see Kimberly Ann Elliot and Richard B. Freeman, *Can Labor Standards Improve Under Globalization?* Washington: Institute for International Economics, 2003.

[29] CESCR acquiescence in such doctrines is reflected in section 9 of its general comment No. 2 (1990), in which "The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity."

[30] The World Bank provides structural adjustment and project loans, the former more heavily involving conditionality. For a penetrating and controversial discussion of the roles of the

international financial institutions in relation to financial stability and poverty see Joseph E. Stiglitz, *Globalization and Its Discontents*. New York and London: W.W. Norton & Co., 2003. He focuses attention on IMF prescriptions for restructuring in banks and industrial firms in Asia, privatization in Russia, and policies reducing food and fuel subsidies.

[31] These issues apply to multinational corporations as investors as well as to IGOs. See Genoveva Hernandez Uriz, "To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions", *Harvard Human Rights Journal*, vol. 14 (2001): 197-231.

[32] For a discussion of this point see Uriz, *ibid*., pp. 204-210. For an official Bank view see Ibrahim Shihata *The World Bank Legal Papers* (2000), pp. 219-244. For the position stated by the IMF General Counsel see Francois Gianviti, "Economic, Social and Cultural Rights and the International Monetary Fund", n.d.

[33] Ibrahim Shihata, The World Bank's General Counsel, noted in 2000 that, "As explained in my 1990 Legal Memorandum on 'Governance Issues', the Bank may even take political human rights violations into account if they are so pervasive and repugnant to the point of clearly affecting the country's investment climate and its economic performance". Shihata, *op. cit*., p. 234.

[34] Comments adopted by the CESCR, 15 May 1998, at its nineteenth session.

[35] Statement at nineteenth session developed after consultation with specialized agencies and other international organizations and experts, para. 5.

[36] *Ibid*., para. 5.

[37] Uriz, *op. cit*., pp. 210-211.

[38] See Siegel, *Employment and Human Rights*, pp. 58-65.
