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Activation Policies for the Unemployed and the International Human Rights Case Law on the Prohibition of Forced Labour

Les politiques d’activation des personnes sans emploi et la jurisprudence internationale relative à l’interdiction du travail forcé

Elise Dermine

Abstract

In Western Welfare States, entitlement to social benefits has always been conditioned by a duty to work. It has been traditionally considered that work-related obligations imposed on social benefits recipients were not likely to contravene the prohibition of forced labour. Since the early 1990s, Western Welfare States have tended to activate the unemployed and are steadily reinforcing their duty to work. In this contribution, we demonstrate that, in this new context, international supervisory bodies of the application of civil and political rights are progressively abandoning the traditional principle of impermeability between work-related obligations in social protection systems and the prohibition of forced labour. They now admit that activation measures for the unemployed might in certain circumstances violate the prohibition of forced labour. Nevertheless, they are still adopting a very formalistic approach to these cases, compared to their general case law concerning the prohibition of forced labour.

Résumé

Dans les États-providence occidentaux, l’octroi de prestations sociales a toujours été conditionné au devoir de travailler. On considère traditionnellement que les obligations liées au travail imposées aux bénéficiaires de prestations sociales ne sont pas susceptibles de porter atteinte à l’interdiction du travail forcé. Depuis le début des années 1990, les États-providence occidentaux activent de plus en plus les personnes sans emploi et renforcent leur devoir de travailler. Dans cette contribution, nous démontrons que, dans ce nouveau contexte, les organes internationaux de contrôle de l’application des droits civils et politiques abandonnent progressivement le principe traditionnel de l’imperméabilité entre les obligations liées au travail inhérentes aux systèmes de protection sociale et l’interdiction du travail forcé. Ils admettent maintenant que les mesures d’activation des personnes sans emploi pourraient, dans certaines circonstances, enfreindre l’interdiction du travail forcé. Ils continuent néanmoins à adopter une approche très formaliste de ces mesures, comparativement à leur jurisprudence générale relative à l’interdiction du travail forcé.
Introduction

Since the early 1990s, Western Welfare States have entered into a spiral of reforms aimed at promoting the return to employment of social benefits recipients. In this perspective, the work-related obligations imposed on the recipients of unemployment and social assistance benefits have been reinforced. The scope of the availability for work condition has been expanded: in some countries, the traditional concept of “suitable” employment has been progressively weakened; in others, the right to refuse non-suitable employment has even been replaced by the obligation to accept any “reasonable” offer of employment or any “generally accepted” employment. In parallel, the granting of benefits is now being linked to increased obligations to actively seek work, or even to mandatory participation in work-related activities.

It is traditionally considered that, when a State sets up a social protection system, the conditions for the granting of social benefits, including the work-related conditions, are not likely to be at odds with the prohibition of forced labour. The prohibition of forced labour would not be a relevant concept under which to assess the relationship between the recipients of social benefits and their public authorities. This idea was precisely expressed in the draft outline of the International Bill on Human Rights, submitted by the United Nations Division on Human Rights to the Drafting Committee: “Slavery and compulsory labour are inconsistent with the dignity of man and therefore prohibited by this Bill of Rights. But a man may be required to perform his just share of any public service that is equally incumbent upon all, and his right to a livelihood is conditioned by his duty to work”.

1 In the 1990s, Norway and Germany suppressed the possibility for unemployment benefits recipients to refuse, during an initial period of unemployment, an offer of employment that does not correspond to their previous profession, or their qualifications. In 2011, Belgium limited the protection period of the professional status and strengthened the requirements concerning the distance between residence and workplace. Since a reform of the employment insurance system carried out in 2012, the definition of suitable employment in Canada has varied, depending on the category of unemployed that the worker belongs to. The regulation distinguishes long-tenured workers who have only rarely recourse to employment insurance benefits, occasional claimants or frequent claimants, such as seasonal workers. In the aftermath of their dismissal, frequent recipients must accept any employment considered as “similar” to the job they normally perform, and after six weeks of unemployment, they must extend their employment search to any work “they are qualified to perform”.

2 In reforming its unemployment insurance system in 2002, Denmark suppressed the distinction between “suitable” employment (corresponding to the abilities, qualification, experience and period in service of the jobseeker in its previous work) and “reasonable” employment (outside the activity sector of the jobseeker). Jobseekers have no longer the right to refuse non-suitable employment during the first three months of unemployment within the last six months. The Danish regulation now requires that jobseekers generally accept any offer of employment. In France, any reference to the notion of suitable employment was removed in 2008 and jobseekers must now accept any reasonable offer of employment. On the French case, see D. Roman, “Activation Policies for the Unemployed in France: ‘Social Debt’ or ‘Poor Laws’?”, in E. Dermine and D. Dumont (eds.), Activation Policies for the Unemployed, Right to Work and Freedom of Work, Brussels, P.I.E.-Peter Lang (Work & Society), 2014, forthcoming.

3 Several schemes condition the granting of unemployment or social assistance benefits to unpaid work performances in the private, public or non-profit sector. For example, one can refer to the Work Experience Program carried out in New York (1996) or the Wisconsin Works (W-2) programme in Wisconsin (1996), two emblematic workfare devices in the United States, to Work for the Dole in Australia (1997), to the Work First programme in the Netherlands (2011) and, finally, to the Mandatory Work Activity Programme (2011) and the Community Action Programmes (2012) for the “very long-term” unemployed in the United Kingdom. On workfare schemes in the United States, see D. Dumont, “Activation Policies for the Unemployed in the United States: Work First”, in E. Dermine and D. Dumont (eds.), op. cit.

Western Welfare States, the entitlement to social benefits has always been conditioned by a duty to work. As expressed by Jon Elster, this duty to work seems necessary “to foreclose the free-rider option” in order to guarantee the model’s sustainability or at least for reasons of fairness.5

In the current context of the activation of social benefits recipients, must this idea be abandoned? Are measures strengthening the duty to work of the unemployed not, in certain circumstances, likely to violate the prohibition of forced labour? Some lawyers have begun to raise this question in front of national courts.6 If some authors are conscious of this issue, the question has thus far been tackled in very few in-depth doctrinal analyses.7 In this context, we propose to undertake a critical review of international case law’s evolution on this issue. More specifically, we will analyse the case law related to Article 8, §3 of the International Covenant on Civil and Political Rights (1966) (ICCPR) and Article 4, §2 and 3 of the European Convention on Human Rights (1950) (ECHR), which enshrine the prohibition of forced labour.8

In the first section, the material scope of application of these provisions will be clarified. The defining criteria of forced labour and possible exceptions to the scope of application of its prohibition will be identified. The drafters and interpreters of these provisions have often referred to Convention No. 29 of the International Labour Organization (1930) (ILO) concerning forced labour. Therefore, we will also pay special attention to its scope of application (I.).

In the second section, we will proceed to a review of the few cases that have given rise to a conformity assessment of the work-related obligations imposed on social

6  Mainly in the Netherlands and in the United Kingdom. See, for example, Rechtbank Arnhem, Uitspraak LJN BF 7284, 8 October 2008 (No. AWB 07/5115), www.jwwb.jure.nl; Centrale Raad van Beroep, 8 February 2010 (No. 08/5996 WWB – 08/5998 WWB, 09/2408 WWB, 09/5858 WWB, 09/5859 WWB, 09/5861 WWB), Nederlands Juristenblad, 2010, lv. 8, p. 507; High Court of Justice, Queen’s Bench Division, Administrative Court, 6 August 2012 (No. CO/260/2012 and CO/1087/2012), www.judiciary.gov.uk; Court of Appeal (Civil Division) on appeal from Queen’s Bench Division Administrative Court, 12 April 2013 (No. B3/2012/2138/2141), www.judiciary.gov.uk.
7  The question has been raised by Pascale Vielle in an international seminar on the trends of labour law reforms in Europe (P. Vielle, “La légitimité des mesures de droit social en temps de crise”, in M.C. Escande Varniol, S. Laïlom, E. Mazuyer and P. Vielle (eds.), Quel droit social dans une Europe en crise ?, Brussels, Larcier (Europe(s)), 2012, p. 373). Earlier, G. J. Vonk argued in a very inspiring article that workfare policies may contravene the prohibition of forced labour (G. J. Vonk, “Hunger as a policy instrument ?”, in O. Hospes and B. van der Meulen (eds.), Fed up with the right to food ? The Netherlands’ policies and practices regarding the human right to adequate food, Wageningen, Wageningen Academic Publishers, 2009, pp. 79-90).
8  The prohibition of forced labour is also considered a component of the right to freely chosen work as proclaimed in the international covenants on economic, social and cultural rights. We analyse the case law of the bodies supervising the application of those texts in a companion paper entitled “Activation Policies for the Unemployed and the International Human Rights Case law on the Right to Freely Chosen Work” (“Activation Policies for the Unemployed and the International Human Rights Case law on the Right to Freely Chosen Work” in E. Dermine and D. Dumont, op. cit.). In so doing, we do not intend to question the relevance of the traditional classification of human rights in successive generations. Rather, splitting our analysis in two separate articles seems appropriate in order to reveal how this issue may be differently addressed by the bodies, depending on whether they apply texts dedicated to civil and political rights or to economic, social and cultural rights. Whether prohibition of forced labour is rooted in one type of legal text or the other may indeed influence its interpretation and its application to activation measures for social benefits recipients. Prima facie, we may expect the bodies controlling the application of texts on civil and political rights to be more reluctant to interfere in States’ social policies and construe the prohibition of forced labour as disconnected from the idea that social protection should support freedom of work.
benefits recipients with regard to the prohibition of forced labour. We will verify whether the case law has considered, in line with the traditional thesis, that such measures cannot as a matter of principle violate the prohibition of forced labour, either because they would not enter into the definition of forced labour or because they would be excluded from the scope of application of the provisions establishing its prohibition (II.). This exercise will lead us to conclude that, even though they have so far never found a breach of the prohibition of forced labour, the international bodies supervising the application of covenants on civil and political rights admit that the work-related obligations imposed on social benefit recipients in the context of activation may, under certain circumstances, infringe the prohibition of forced labour.

I. The material scope of application of the provisions on the prohibition of forced labour

This section aims at clarifying the material scope of application of the different international provisions on prohibition of forced labour. We will successively look at the Forced Labour Convention No. 29 of the ILO (A.), Article 8, §3 of the ICCPR (B.), and Article 4, §3 and 4 of the ECHR (C.).

A. The prohibition of forced labour in Convention No. 29 of the International Labour Organization

The Forced Labour Convention No. 29 of the ILO (1930) commits States’ parties to suppress the use of forced or compulsory labour in all its forms within the shortest possible period. This Convention is part of the eight Fundamental Conventions of the ILO and one of the most ratified (by 177 countries as of 1st of November 2013). Although Convention No. 29 was drafted in the historical context of slavery under colonial administration, it is recognised to be of general applicability, which means that it concerns all new forms of forced labour.\(^9\)

In this part, the defining criteria of forced labour within the meaning of the Convention No. 29 ILO will be explained (1.). A description of the measures excluded from the scope of application of the Convention will follow (2.). We will base our analysis on the text of the Convention and its interpretation by ILO bodies, such as the International Labour Conference (ILC), the Governing Body, tripartite committees set up by the Governing Body, the Committee of Experts on

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\(^9\) Another convention of the ILO also addresses the issue of forced labour: the Abolition of Forced Labour Convention No. 105 (1957). It complements Convention No. 29, by more particularly aiming at abolishing new forms of forced labour imposed for political or ideological reasons during and after World War II.
1. The definition of forced labour

Forced or compulsory labour is defined by Article 2, §1 of the Forced Labour Convention as a work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

The Convention gives a common definition to “forced labour” and “compulsory labour”. Furthermore, the bodies supervising the application of the conventions draw no distinction between the two concepts.

The Convention, by only referring to a work or a service, does not apply to vocational training.\(^1\) Admittedly, the principle of compulsory education, as established by several international instruments, aims at ensuring the full exercise of the right to education.\(^12\) According to the CEACR, “by analogy with and considered as an extension to compulsory general education”,\(^13\) a compulsory scheme of vocational training cannot be considered a mandatory work or service within the meaning of Convention No. 29.\(^14\) Vocational training often implies a certain amount of practical work, and one should assess, on a case-by-case basis, if a training programme solely constitutes vocational training, or if it imposes a work or a service that could be considered forced or mandatory labour.\(^15\)

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\(^1\) As a short reminder, the ILC is the tripartite assembly of the ILO that establishes and adopts international labour standards. Also composed of governments’ members, employers and workers, the Governing Body is the executive body of the ILO. In the framework of its representation procedure, a three-member tripartite committee may be set up to examine the representation presented by an industrial association of employers or workers against a member State and its government’s response. The committee is charged with submitting a report with recommendations to the Governing Body, which is entitled to publish both the representation and the response. Concerning the regular monitoring of ILO Conventions, the CEACR examines each State’s report on their application of the ratified conventions. Composed of jurists appointed by the Governing Body for three-year terms, it is charged with providing an impartial and technical evaluation of a State’s application of international labour standards. Following the examination, it makes observations on and direct requests to each State and publishes an annual report. On this basis, the Conference Committee on the Application of Standards, a tripartite body of the ILC, draws the attention of the ILC, in its general report, to the most serious cases of difficulty encountered with the States as regarding the application of ratified standards.


\(^12\) Universal Declaration of Human Rights, Art. 26; I.C.E.S.C.R., Arts. 13 and 14. See also the ILO standards concerning the prescription of a school-leaving age, such as Art. 15, §2, of the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), and Art. 19, §2, of the Social Policy (Non-Metropolitan Territories) Convention, 1947 (No. 82).


\(^14\) Regarding the distinction between work and vocational training, the CEACR refers in particular to the Special Youth Scheme Recommendation No. 136 (1970), which indicates that schemes of education and training involving obligatory enrolment of unemployed young people are fully complying with the conventions on forced labour, but do require the prior consent for any scheme involving an obligation to serve (art. 7, §1 and 2, a) and b).

Regarding the criterion of the menace of any penalty, it was made clear, while the draft convention was being examined by the ILC, that this penalty was not necessarily meant to take the form of a criminal penalty. It may also consist in a loss of rights, advantages or privileges.\textsuperscript{16} The threat may be physical or psychological; it could also be financial.\textsuperscript{17} It can be the fact of public or private agents. This criterion must be understood in a very broad sense.\textsuperscript{18}

The criterion of the absence of consent must be established in the person of the worker while the criterion of the menace of a penalty is related to the perpetrator of forced labour. The CEACR notes that “where consent to work or service was already given ‘under the menace of a penalty’, the two criteria overlap: there is no ‘voluntary offer’ under threat”.\textsuperscript{19} The CEACR further considers that external constraints or indirect coercion on formal consent may result in an invalidly expressed consent, the interested party having thus not been able to “offer himself voluntarily”. Such constraints or coercion may result from an act of the public authorities. In this respect, the CEACR clarifies that “the State is not accountable for all external constraints or indirect coercion existing in practice: for example, the need to work in order to earn one’s living could become relevant only in conjunction with other factors for which it is answerable.”\textsuperscript{20}

In summary, forced labour implies that the work relationship is characterised by “exercise of coercion” and “denial of freedom”.\textsuperscript{21} The notion of forced labour is thus defined by “the nature of the relationship between a person and an ‘employer’”, and not by the conditions of work.\textsuperscript{22} But admittedly harsh conditions of work may denature a work relationship into forced labour.\textsuperscript{23} Forced labour is the “antithesis of decent work”\textsuperscript{24} and “there is a broad spectrum of working conditions and practices, ranging from extreme exploitation including forced labour at one end, to decent work and the full application of labour standards at the other. Within that part of the spectrum in which forced labour conditions may be found, the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions can at times be very difficult to distinguish”.\textsuperscript{25}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{17} I.L.O., Report of the Director-General of the I.L.O., \textit{A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), I.L.C., 93\textsuperscript{rd} session, 2005, pp. 5-6, §14.}
\item \textsuperscript{18} I.L.O., C.E.A.C.R., \textit{General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, op. cit., p. 111, §270.}
\item \textsuperscript{21} I.L.O., Report of the Director-General of the I.L.O., \textit{Stopping Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I, I.L.C., 89\textsuperscript{th} session, 2001, p. 7, §2.}
\item \textsuperscript{22} I.L.O., Report of the Director-General of the I.L.O., \textit{A Global Alliance Against Forced Labour, op. cit., p. 6, §16.}
\item \textsuperscript{23} I.L.O., Report of the Director-General of the I.L.O., \textit{A Global Alliance Against Forced Labour, op. cit., p. 70, §295.}
\item \textsuperscript{24} I.L.O., C.E.A.C.R., \textit{General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, op. cit., p. 104, §255.}
\item \textsuperscript{25} I.L.O., Report of the Director-General of the I.L.O., \textit{A Global Alliance Against Forced Labour, op. cit., p. 9, §31.}
\end{enumerate}
\end{footnotesize}
One shall finally note that, by opting for a general definition of forced labour in its Convention No. 29, the ILO has demonstrated its willingness to embrace evolutive phenomena. In its general surveys dedicated to forced labour, the CEACR has insisted on the diverse nature that forced labour has been and still is able to display over time and, as a consequence, on the dynamic construction of the phenomenon it has to favour. In its general surveys on forced labour, the CEACR thus reviews the new national legislation and practice likely to be questioned regarding the conventions on forced labour.

2. Exceptions to the scope of application of the Convention

While the draft convention was discussed, a strong majority of countries expressed their opposition to accepting such a wide definition of forced labour without any exceptions to its scope of application. That is why the first paragraph of Article 2, which defines forced labour, is followed by a second paragraph listing measures that should “nevertheless” not be included in the notion of forced labour. The second paragraph therefore aims at excluding from the scope of the Convention certain specific forms of labour that “would otherwise have fallen under the general definition of forced or compulsory labour”.

Article 2, §2 specifies that:

Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include:

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

28 Through this broad definition, ILO supervisory bodies were able to address traditional practices of forced labour, such as vestiges of slavery and slave-like practices, and various forms of debt bondage, as well as new forms of forced labour that have emerged in recent decades, as human trafficking” (I.L.O., C.E.A.C.R., General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, op. cit., p. 112, §272).
Activation Policies for the Unemployed

(d) any work or service exacted in cases of emergency, that is to say, in the event of war [...] 
(e) minor communal services (...).33

We have seen that forced labour may be imposed by the State as well as by private actors.34 However, it is notable that the exceptions to its scope of application exclusively target cases of works or services imposed by the State.

The CEACR points out that “the exceptions are subject to the observance of certain conditions, which define their limits”. States having recourse to these forms of compulsory work need to demonstrate their respect of the conditions set out in the Convention.35 The list of exceptions can thus be qualified as exhaustive.36 To complement this established interpretation, the tripartite Committee set up by the Governing Body ruled however in 2008 that the so-called “duty lawyer roster system” in Chile, although it did not fit within the limits of one of the five exceptions to the scope of application of the Convention, could however equate to one of them, if it was contained within reasonable limits of proportionality.37

Beforehand, the Committee had stated that the system of assignment fell within the general definition of forced labour set out in Article 2, §1 of Convention No. 29. One could not consider that lawyers had voluntarily accepted the system of assignments, although they had chosen, freely and well-informed, the profession of lawyer. In its view, “the lawyers have indeed no choice but to accept the general system governing their profession with all its legal requirements, which include the duty lawyer roster system”.38

The Committee considered afterwards that the obligation imposed on appointed lawyers, by pursuing a general interest objective, i.e. access to justice, could be closely linked to the specific exceptions to forced labour listed in Article 2, §2. Indeed, among the five exceptions to the prohibition of forced labour, four of them are based on general interest considerations. Each one of those exceptions is, however, subject to compliance with precise conditions aimed at guaranteeing that the imposed work or service does not constitute a disproportionate burden

33 We will not elaborate on this last exception since it has been reproduced neither in the ICCPR, nor in the ECHR. The drafters of those texts have indeed considered that the distinction between minor communal services for the territories under colonial administration and the civic obligations applying to the sovereign States was no longer acceptable (U.N., Secretary General, Comments of the Draft Covenants, Art. 4 of the ICCPR, Geneva, 1955 (A/2929), §25; Eur. Com. HR, Preparatory works for Art. 4 of the Convention, Strasbourg, Council of Europe, 15 November 1962 (DH(62)10), p. 15).
34 L. Thomann, op. cit., p. 191.
36 See also L. Thomann, op. cit., p. 192.
38 I.L.O., Report of the Committee set up to examine the representation alleging non-observance by Chile of the Forced Labour Convention, 1930 (No. 29), submitted under article 24 of the ILO Constitution by the Colegio de Abogados de Chile A.G., Geneva, 11 November 2008, §32.
for the interested party regarding the pursued general interest objective. The Committee has taken the view that, as in the case of the exceptions explicitly provided for, the duty lawyer roster system had to comply with the principle of proportionality in order to be excluded from the scope of application of the Convention. It concluded that, in some cases, the load and the frequency of the tasks assigned in the framework of this obligation had a serious impact on the normal exercise of the profession of lawyer, which was in breach with the prohibition of forced labour.39

Nevertheless, how the Committee could equate such a measure with the Convention’s exceptions seems difficult to reconcile with Article 2, §2, considering that the exceptions, precisely defined by the States, are, in essence, of strict interpretation (and considering that the list is supposedly exhaustive). One may, however, understand the Committee’s embarrassment in this matter, as it was facing a case involving work imposed by the State in the name of a general interest objective, even though it was not included in the list of exceptions. It is even more understandable because organised systems of legal aid did not exist when the Convention was adopted, and as we know, the ILO is willing to develop a dynamic and evolutive approach to the forms of forced labour.

Concerning in particular the general exception to normal civic obligations, there is no ample case law. The CEACR has ruled that mandatory membership to a jury or the duty to assist a person in danger constitutes normal civic obligations.40 It considers that the exception should be understood in a very restrictive way.41 Besides, when investigating the complaint concerning the duty lawyer roster system in Chile, the tripartite Committee provided for the fact that the obligation on lawyers to provide legal defence for the most deprived people could not constitute a normal civic obligation, considering that it is only imposed on a certain category of persons and that it did not affect all citizens equally.42 According to this ILO body, normal civic obligations are thus submitted to a condition of generality.

39 In the Van der Mussele case (Bur. Ct HR, Van der Mussele v. Belgium, 23 November 1983 (app. No. 8919/80)), the ECHR was also brought to assess the compliance of a duty lawyer roster system with the prohibition of forced labour. Comparing the respective approaches of the Committee of the ILO Governing Body and of the European Court of Human Rights appears, as will be seen below, enlightening to understand how the notion of forced labour is conceived by those two bodies (see infra, B., 1 and 2).
B. THE PROHIBITION OF FORCED LABOUR IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 8 of the ICCPR establishes the prohibition of slavery, servitude and forced or compulsory labour.\(^{43}\) Slavery and servitude are banned under the first and second paragraphs. The principle of the prohibition of forced or compulsory labour is contained in point a) of the third paragraph (1.). The points b) and c) of the same paragraph state an exception to the scope of application of this prohibition as well as exclusions from the notion of forced labour (2.).

We will essentially base our analysis on the *travaux préparatoires* since the Human Rights Committee of the United Nations (HRC) has not adopted a General Comment on Article 8. Besides, very few cases permit an enlightening of its conception of the prohibition of forced labour.

1. *The definition of forced labour*

Article 8, §3, a) of the ICCPR provides that “no one shall be required to perform forced or compulsory labour”. It does not contain any positive definition of the notion of forced labour. The definition adopted by the ILO has not been integrated into the text, since it did not seem fully satisfying to the drafters of the Covenant, regarding the way it was articulated with its exceptions.\(^{44}\) The drafters of the Covenant were however willing to rely on the ILO definition of forced labour to construe Article 8, §3, a) of the ICCPR.\(^{45}\) As has been seen, forced labour consists in a work or a service performed against the will of a person under the menace of a penalty or any comparable sanction. This definition remains open-ended and must allow for an evolutive approach to the forms of forced labour. In that vein, the United Nations Human Rights Council set up a working group on the contemporary forms of slavery in 2007,\(^{46}\) designed to identify and to combat the new faces of slavery but also of forced or compulsory labour.

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2. The exception to the scope of application of the prohibition of forced labour and the exclusions from this notion

The prohibition of forced labour is accompanied by derogations and limitations established in points b) and c) of Article 8, §3 of the ICCPR:

“(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations”.

The case referred to in point b) is a form of forced labour in the sense of the Covenant, but is nevertheless considered admissible. It is an exception to the scope of application of the prohibition of forced labour. On the contrary, the cases covered by point c) do not constitute forced or compulsory labour within the meaning of the Covenant.47 According to Nowak,48 this formal distinction has no bearing on the application of the law. However, in the absence of any positive definition of forced labour, since the cases referred to in point c) are not to be considered forced or compulsory labour, Article 8, §3, c) could be interpreted as delineating the notion of forced labour by negative construction and could thus provide guidance for the interpretation of the notion of forced labour as stated in Article 8, §3, a). As we will see in the next part, Article 4, §3 of the ECHR, which also states forms of work that cannot be considered forced labour, has in this way been considered by the European Court of Human Rights as an aid to interpret the notion of mandatory work.49 In our view, the distinction between the exception to the scope of application of the prohibition of forced labour and the exclusions from the notion of forced labour could thus be fundamental for the application of the Covenant. This question has not so far been addressed by the HRC.

47 S. Joseph, J. Schultz and M. Castan, op. cit., p. 295; E. Martin, op. cit., p. 229; M. Nowak, op. cit., p. 203, §21. See also Ludovic Hennebel who does not make this distinction and considers that points b) and c) of Article 8, §3 both establish exceptions to the prohibition of forced labour (L. Hennebel, La jurisprudence du Comité des droits de l’homme des Nations-Unies. Le Pacte international relatif aux droits civils et politiques et son mécanisme de protection individuelle, Brussels, Bruylant (Droit et Justice), 2007, p. 146, §166).
48 M. Nowak, op. cit., p. 203, §21. The other authors mentioned in the previous note do not discuss this question.
49 See infra, C.
Finally, the reference to normal civic obligations directly derives from Convention No. 29 and can thus be given the same definition.

C. THE PROHIBITION OF FORCED LABOUR IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 4 of the ECHR establishes the prohibition of slavery, servitude and forced labour. Slavery and servitude are banned under the first paragraph. Forced or compulsory labour is prohibited under the second (1.). Then, in the third paragraph, the forms of work or service that cannot be considered to be forced or compulsory labour are laid out (2.).

1. The ILO definition of forced labour as a starting point for the interpretation of Article 4 of the ECHR

As Article 8 of the ICCPR, Article 4 of the ECHR does not contain any positive definition of forced or compulsory labour. In the Van der Mussele v. Belgium case, the European Court of Human Rights (hereafter the Court) referred to the definition given by the ILO. In this case, it was asked to assess the conformity of the obligation imposed on pupil avocats, in casu Mr Van der Mussele, to defend indigent persons, with regard to the prohibition of forced labour. Having noted that no guidance could be found in the various documents of the Council of Europe, the Court held that the drafters of the ECHR had clearly drawn on Convention No. 29 of the ILO on forced labour. The Court observed “the striking similarity, which is not accidental, between paragraph 3 of Article 4 of the European Convention and paragraph 2 of Article 2 of Convention No. 29”. After observing that Convention No. 29 binds nearly all member States of the Council of Europe, it ruled that the definition of forced labour enshrined in the first paragraph of Article 2 of Convention No. 29 provides a “starting-point for the interpretation of Article 4 of the European Convention”. Subscribing to a dynamic approach to human rights,
the Court then recalled that the Convention is a living document that must be read “in the light of the notions currently prevailing in democratic States.”

In its ruling on *Siliadin v. France* in 2005, the Court also referred to the ILO definition of forced labour. Likewise, it made clear that the Convention is “a living instrument that must be interpreted in the light of present-day conditions, and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.”

Unlike the bodies of the ILO, the Court distinguishes between forced and compulsory labour. In its view, forced labour implies physical or mental constraint, while compulsory labour refers to a work “exact[ed] [...] under the menace of a penalty” and “for which one has not offered himself voluntarily.” This definition corresponds to that of Convention No. 29 of the ILO.

In the *Van der Mussele* case, the Court had recourse to the criterion of the menace of a penalty to define forced labour. By contrast, the European Commission of Human Rights generally established forced or compulsory labour to be on the basis of the satisfaction of two conditions – the lack of willingness and the “unjust” or “oppressive” character of the obligation to carry out the work – without referring to the ILO criterion of the menace of a penalty. We will nevertheless see in the second section that, without referring to the ILO definition of forced labour, the European Commission of HR as an exception has used the criterion of the menace of a penalty from 1976 in cases of work-related obligations imposed on unemployment benefits recipients.

Following the case law of the ILO, the Court considered, in the *Van der Mussele* case, that the menace did not necessarily have to take the form of a criminal sanction, but could also consist in a loss of status. According to the Court, the risk of having the *Council of the Order* strike his name off the roll of pupils or reject his application for entry on the register of lawyers could constitute a menace of a penalty.

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The existence of a menace having been established, the Court then turned to the second element contained in the definition of compulsory labour: that the interested person must perform it against his will. The Court found that Mr Van der Mussele “had consented in advance to the situation he complained of”. He had indeed chosen to enter the profession of lawyer, well aware of the fact that his status would require him to sometimes defend clients free of charge and without reimbursement of his expenses. Nevertheless, the Court considered that the fact that he had to comply with that requirement in order to enter the bar needed to be taken into account. The Court therefore considered that his prior consent, formally expressed, was not sufficient to conclude that he had offered himself voluntarily. Obviously, the Court followed the ILO supervisory bodies, which had already emphasised that the expression of a formal consent did not permit to necessarily conclude that its author had offered himself voluntarily.

Having established “the relative weight to be attached to the argument regarding the applicant’s prior consent”, the Court did however not conclude that Mr. Van der Mussele had taken part in the duty lawyer roster system against his will. It decided that, in order to assess his lack of will, elements other than his formal consent needed to be taken into account. These elements were identified by the Court from a review of the concerns underpinning Article 4 of the ECHR, and more particularly its third paragraph enunciating exclusions from the notion of forced labour. We will detail those factual elements in the next paragraph.

2. Exclusions from the notion of forced labour providing guidance for the construction of Article 4 of the ECHR

The third paragraph of Article 4 of the ECHR provides that:

> “3. For the purpose of this Article the term “forced or compulsory labour” shall not include:
> (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
> (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
> (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
> (d) any work or service which forms part of normal civil obligations”.

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63 See supra, A. 1.
64 Eur. Ct HR, Van der Mussele v. Belgium, §37.
65 One will remember that regarding the system of assignments in Chile, the tripartite Committee of the Governing Body of the ILO had on the contrary decided in 2008 that lawyers could not be considered as having voluntarily offered themselves since they had no choice but to accept this system in order to enter the profession (I.L.O., Report of the Committee set up to examine the representation alleging non-observance by Chile of the Forced Labour Convention, 1930 (No. 29), submitted under article 24 of the ILO Constitution by the Colegio de Abogados de Chile A.G., Geneva, 11 November 2008, §32. See supra, A. 2.).
In its Van der Mussele ruling, the Court made it clear that the third paragraph of Article 4 was not intended to “limit” the scope of the prohibition of forced labour, but to “delimit” the notion of forced labour. By listing measures that do not constitute forced labour, paragraph 3 contributes to shedding light on the construction of the concept of forced labour, as enunciated in the second paragraph. Paragraph 2 and 3 thus forms a whole, allowing the contours of the notion of forced labour to be marked out. The Court’s interpretation relied on the text of the third paragraph, which lists the works and services that “the term ‘forced or compulsory labour’ shall not include”.

In the Court’s view, from the different forms of labour listed in the third paragraph, the common ideas of general interest, social solidarity and normality emerge. From these common features, the Court specified the factual elements other than formal consent that would allow it to determine if the burden imposed on the trainee attorneys was disproportionate and implied that no one could have imagined that it was accepted voluntarily. In this perspective, the Court stressed the following points:

- the services to be rendered are of a similar nature as the usual and normal tasks of a lawyer and do not imply a restriction of his freedom in the conduct of the case;
- the lawyers can find compensation through the advantages attaching to the profession, such as the exclusive right of audience and of representation;
- the concerned lawyer will personally benefit from his work, in terms of experience or notoriety;
- the obligation is based on an idea of general interest and social solidarity, since it aims at guaranteeing the right of access to justice for all;
- the system leaves the lawyer enough time to perform his paid work.

Concerning the absence of remuneration for the services provided, the Court recalled that remunerated work may also qualify as forced or compulsory labour. It also added that the lack of remuneration and of reimbursement of expenses did constitute an element to be taken into account in the assessment of the proportionate character of the measure.

In this case, the Court found that the prejudice was not excessive, considering, in particular, the advantages granted and the time dedicated to those cases compared to the paying ones. The Court concluded that, in the presence of a priorly expressed consent, “only a considerable and unreasonable imbalance between the aim pursued – to qualify as a lawyer – and the obligations undertaken in order to

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66 This case law has been confirmed since then. See in particular, Eur. Ct HR, Kartheina Schmidt v. Germany, 18 July 1994 (app. No. 13580/88), §22; Eur. Ct HR, Spottl v. Austria, 15 May 1996, Decision on the admissibility (app. No. 22956/93), §2; Eur. Ct HR, Kovalova v. Czech Republic, 30 November 2004, Decision on the admissibility (app. No. 57319/00), §1.3.
Activation Policies for the Unemployed

achieve that aim would alone be capable of warranting the conclusion that the services exacted by Mr. Van der Mussele in relation to legal aid were compulsory despite his consent”.69

This conclusion having been reached, the Court did not have to judge if the obligation imposed on pupil avocats to provide legal aid could qualify as a “normal civic obligation” while only affecting a specific category of citizens. On this matter, the European Commission of HR ruled that the requirement for holders of shooting rights to participate in the gassing of fox-holes as part of a campaign against an epidemic amounted to a normal civic obligation,70 as well as the obligation for employers to withhold tax on wages and other contributions from their employees.71 Unlike the ILO tripartite Committee in the Chilean case, the European Commission thus considered that normal civic obligations could apply to specific categories of persons.

It must be noted that the test of proportionality applied by the Court in the Van der Mussele case did not formally act as an autonomous criterion for the definition of compulsory labour, which would eventually override the criteria of the lack of will. The Court considered it as a complementing criterion permitting them to determine, through a balancing test between the general interest and the burden carried by the individual, if prior consent had been validly expressed. The Court in this way stated that the service required of Mr. Van der Mussele could fall within the prohibition of compulsory labour “if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession, that the service could not be treated as having been voluntarily accepted beforehand”. In its discourse, the Court thus applied the two defining criteria of forced labour enounced in the Forced Labour Convention No. 29 of the ILO – i.e. the menace of a penalty and the lack of will.

Nevertheless, we may observe that all the factual elements identified by the Court to deduce the lack of will were largely disconnected from this criterion, which tends to indicate that the proportionate character of the imposed work de facto supplanted the criteria of the lack of will. The factual elements taken into consideration for the test of proportionality were in reality largely borrowed from the European Commission of HR case law concerning the “unjust” or “oppressive” character of the obligation to carry out work.72 As a matter of fact, in the Reitmayr v. Austria case, subsequent to the Van der Mussele case, the European Commission merged both criteria and had recourse to the test of proportionality to assess if the obligation for the public medical service to carry out examinations on some patients without payment was unjust or oppressive.73

72 See for example the X. v. The Federal Republic of Germany case also concerning the obligation for attorneys to provide legal aid (1 April 1974 (app. No. 4655/70)).
In our view, it would be more satisfying to explicitly construe the proportionality criterion as an autonomous criterion overriding the lack of will criterion, in situations where the work is allegedly imposed in the name of a general interest objective. Our point of view relies on the fact that the proportionality criterion has arisen from a combined reading of the measures excluded from the notion of forced work in §3, which all embrace situations where work is imposed by the State in the name of a general interest objective.

Moreover, construing the test of proportionality as a complementing criterion to assess the validity of the consent, leads, in our view, to questionable outcomes. By definition, the test of proportionality only applies when the work is requested by a State pursuing a general interest objective, since it consists in balancing the burden imposed on the individual with the general interest. This criterion is thus not relevant in situations where the work is imposed by a private agent pursuing a personal goal, e.g. in the cases of trafficking in persons for the purpose of labour exploitation. Besides, we have showed that construing the test of proportionality as a complementing criterion does not tighten the definition of forced labour. On the contrary, it broadens it by allowing a more flexible construction of the lack of will criterion, the application of the test of proportionality permitting a possible invalidation of the expressed consent. As a result, establishing a violation of the prohibition of forced labour would be easier in the case of work imposed by the State pursuing a general interest objective, than in that of an individual acting for private purposes. Logically, the definition of forced labour should on the contrary be narrowed when the imposed work serves a general interest objective. It is in fact in this perspective that the drafters of the Convention have drawn up the list of exclusions of the notion of forced labour. In these cases, a certain level of coercion is admitted, since work is imposed on the basis of general interest considerations.

The interpretation of Article 2, §2 of Convention No. 29 of the ILO differs from that of Article 4, §3 of the ECHR. According to ILO case law, the measures listed in Article 2, §2 fall within the definition of forced labour set out in the first paragraph but are nevertheless specifically excluded from its scope. This list of exceptions is exhaustive and of strict interpretation. Unlike Article 4, §3 of the ECHR, Article 2, §2 takes no conceptual part in defining forced labour. It seemed therefore unlikely that ILO case law would discover in the measures listed in Article 2, §2 a complementing or autonomous criterion for the definition of forced labour, which would be applicable to all hypotheses of work imposed by a State pursuing a general interest objective. Facing such a case, we have seen hereinabove that a tripartite Committee of the ILO Governing Body did however consider – exactly like the European Court – that a common requirement of proportionality could emerge from those measures. It therefore had recourse to the test of proportionality in order to assess if the duty lawyer roster system could be related to the exceptions to forced labour listed in Article 2, §2 of Convention No. 29. On the basis of criteria largely similar to those selected by the Court in the Van der Mussele
case, it found that, in the case it was dealing with, the load and the frequency of the tasks assigned in the framework of the obligation could affect the normal exercise of the profession of lawyer and did thus constitute forced labour.\textsuperscript{74}  

At the end of this section, some relevant elements regarding activation measures for the unemployed may be pointed of the general international case law on the prohibition of forced labour.

Throughout international case law, the menace of a penalty and the lack of will are the general defining criteria of forced labour. Through these large criteria, international bodies are willing to develop an evolutive approach of the notion of forced labour and to apprehend all new phenomenons that could amount to it. Concerning the criterion of the menace of a penalty, we will particularly underline that international bodies consider that the penalty can consist in the loss of a right or an advantage. As for the lack of will criterion, its evaluation goes beyond formally expressed consent. Indirect coercion may for example invalidate the expressed consent.

Beyond these general criteria, we have noticed that the question of proportionality emerges whether in the case law on ILO Forced Labour Convention or in the case law of the ECHR, when the work is imposed by a State on individuals under general interest considerations. This criterion is in fact rooted in a separate paragraph following the general prohibition of forced labour, listing in both instruments very similar forms of work imposed on individuals by States in the name of a general interest objective, such as compulsory military service, work in detention or normal civic obligations. Theses paragraphs have nevertheless a different status in each instrument, which leads to different difficulties and ways of handling the question of proportionality.

In the ILO Forced Labour Convention, the forms of work listed in Article 2, §2 fall under the general definition of forced labour but are exempted from Convention No. 29. As an exception to the scope of the general definition of forced labour, this paragraph should be of strict interpretation. We have, though, observed that ILO tripartite Committee has had recourse to interpretations by analogy and have subsequently judged that forms of work imposed under general interest considerations may equate with the Convention’s exceptions if the charge imposed on the individual is proportionate.

The European Court faces different problems. According to her, Article 4, §3 participates in delineating the notion of forced labour. It has thus considered the proportionate character of the work as a defining criterion of forced labour,

\textsuperscript{74} I.L.O., Report of the committee set up to examine the representation alleging non-observance by Chile of the Forced Labour Convention, 1930 (No. 29), submitted under article 24 of the ILO Constitution by the Colegio de Abogados de Chile A.G., Geneva, 11 November 2008, §38.
arising from paragraph 3. Probably willing to develop an interpretation that is consistent with the ILO definition of forced labour, the Court has formally considered the test of proportionality as a secondary test to assess the reality of the expressed consent. Admitting that the test of proportionality has a prevailing role in defining forced labour when work is imposed under general interest considerations, may however, be justified on the fact that Article 4, §3 contributes to defining the notion of forced labour, unlike Article 2, §2 of the ILO Convention.

To conclude this first section, we will finally observe that normal civic obligations may be a very interesting concept in terms of the work-related obligations imposed on social benefits recipients. On this matter, the general international case law seems open as to whether normal civic obligations have to affect all citizens or if they may target specific categories of persons. Besides, few case law developments have been devoted to the abstract criterion of normality.

II. Activation policies for the unemployed in the international case law on prohibition of forced labour

In this second section, an analysis will be delivered of all the cases in which the organs controlling the application of the ICCPR (A.) and the ECHR (B.) have had to look into the work-related obligations imposed on social benefits recipients from the angle of the prohibition of forced labour. We will determine if jurisprudence considers this type of obligation as not meeting the definition of forced labour or as excluded from the scope of application of its prohibition. These particular cases will also be compared to the general case law on the material scope of application of the prohibition of forced labour, as analysed in the first section.

If the case law on the prohibition of forced labour is generally not abundant, this is equally the case for the particular question of the work-related obligations imposed on social benefits recipients. According to Bouziri and Martin, this is probably due to the precarious situation of its potential victims. This tends to be confirmed by the fact that absolutely no cases concerning social assistance recipients have been brought before international bodies. These people generally face an even more precarious situation than unemployment benefits recipients.

75 The ILO case law related to the conformity of activation measures regarding the prohibition of forced labour is not analysed here. This paper aims at emphasising the specific approach to the prohibition of forced labour in the case law applying texts dedicated to civil and political rights (ICCPR and ECHR). Yet, the ILO bodies have also, if not mainly, analysed activation measures through the prism of social rights, such as the right to freely chosen work or the right to social security. For that matter, ILO bodies consider that the prohibition of forced labour supports the right to freely chosen work. The ILO case law is therefore examined in a companion paper dedicated to the right to freely chosen work (E. Derminb, “Activation Policies for the Unemployed and the International Human Rights Case Law on the Right to Freely Chosen Work”, op. cit.).

A. THE FAURE V. AUSTRALIA CASE AND ARTICLE 8, §3
OF THE ICCPR

The Human Rights Committee (HRC) of the United Nations has only once been called upon to decide on the conformity of an activation measure regarding the prohibition of forced labour. This was in 2005, in the Faure v. Australia case.\(^{77}\)

We propose a critical analysis of this case, which has thus far at most only been mentioned in some general commentaries on Article 8, §3.\(^{78}\)

In order to combat long-term unemployment amongst its youth, the Australian government set up the Work for the Dole scheme in the late 1990s, according to which the long-term jobless had to accept work of 12 to 15 hours a week, or face a penalty of having their unemployment benefits reduced or suspended for two months. This programme was part of the unemployment assistance system, for which no prior contribution was required, and the benefits of which were unlimited in time. This type of work programme has since spread to some European countries, such as the United Kingdom and the Netherlands, mainly in universal unemployment benefits systems and in social assistance systems.

Mrs Faure, a young unemployed woman who had never worked, had her unemployment benefits suspended for two months, because of unexplained absences from the work she had been assigned in the framework of the Work for the Dole scheme. Mrs Faure lodged a complaint in the HRC, arguing that she had been compelled to perform forced or compulsory labour, in breach of Article 8, §3, a) of the Covenant. Moreover, she claimed to not have any legal remedy to pursue her grievances, thus violating paragraph 2 and 3, a), b) and c) of Article 2 of the Covenant.

Concerning admissibility, the HRC found that the complainant’s allegations based on Article 8, §3, a) did fall within the scope of the Covenant and were sufficiently supported to be deemed admissible.\(^{79}\) The HRC thus accepted the idea that an obligation to work imposed on unemployed persons as a condition for the granting of their benefits could, under certain circumstances, appear to be contrary to the prohibition of forced labour, enshrined in Article 8, §3, a) of the Covenant.

In her separate opinion\(^ {80}\), Mrs Ruth Wedgwood, an American Committee member, considered, by contrast, that the complaint of forced labour should have been dismissed as inadmissible, through lack of substantiation. She argued that the work-related obligations imposed on unemployment benefits recipients could clearly not equate to forced labour. She claimed that the analysed facts could absolutely not be compared with “horrible instances such as the forced labour required

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\(^{79}\) H.R. Committee, Faure v. Australia, §6.3.

\(^{80}\) H.R. Committee, Faure v. Australia, Appendix, Individual opinion by Committee member Ms Ruth Wedgwood.
Elise Dermine

by colonial powers to build canals and roads”. Her argument was based on an approach to the forms of forced labour that might be considered quite static. So far, we have indeed shown the shared will of international supervisory bodies to follow an evolutive interpretation of the phenomenon of forced labour.

Mrs Wegwood then referred to Nowak, according to which “the mere lapse of unemployment assistance when a person refuses to accept work not corresponding to his or her qualifications does not [...] represent a violation [of Article 8]; in this case, neither the intensity of the involuntariness nor that of the sanction reaches the degree required for forced or compulsory labour”. 81 Nowak based his argument on the X v. The Netherlands case of the European Commission of Human Rights, delivered in 1976. In our view, such a statement cannot however be inferred from this case. As will be explained in our next point, in X v. The Netherlands the European Commission of Human Rights did come to a decision on the conformity of the availability for work condition, imposing on unemployment benefits recipients to accept any suitable job that would match their professional skills. Nothing relevant for the Faure case can emerge from the X. v. The Netherlands case, since the Faure case is about absences from a compulsory work programme imposed on unemployment benefits recipients, without any consideration of their professional skills.

Concerning a potential violation of Article 2 of the Covenant, the HRC recalled that States must provide legal remedies for any violation of the rights enshrined in the Covenant. This guarantee would be void if it was not available where a violation had not yet been established. Article 2 ensures the alleged victims with a legal protection if their complaints are sufficiently well founded as to be arguable under the Covenant. In this case, the Committee concluded that Article 2, read together with Article 8, had been breached, since the complainant did not benefit from an effective national remedy that would have allowed her to have her obligation to work controlled regarding the prohibition of forced labour. 82

The HRC then investigated the alleged breach of the third paragraph of Article 8. The Committee had already recognised that the definition of forced or compulsory labour in the relevant ILO instruments may contribute to the construction of Article 8, §3, a). It however made clear that it falls ultimately under its own responsibility to identify the prohibited practises. So, in its view:

“The term ‘forced or compulsory labour’ covers a range of conduct extending from, on the one hand, labour imposed on an individual by way of criminal sanction, notably in particularly coercive, exploitative or otherwise egregious conditions, through, on the other hand, to lesser forms of labour in circumstances where

82 H.R. Committee, Faure v. Australia, §7.2.-7.4.
punishment as a comparable sanction is threatened if the labour directed is not performed”.83

In this paragraph, reference is indirectly made to the ILO criterion of the menace of a penalty that does not need to take the form of a criminal sanction.

Surprisingly, without even analysing if the obligation to work fell into the definition of forced labour, the HRC then immediately specified the general requirements that needed to be met for a work or service to be considered as a normal civic obligation. In its view, “to so qualify as a normal civic obligation, the labour in question must, at a minimum, not be an exceptional measure; it must not possess a punitive purpose or effect; and it must be provided for by law in order to serve a legitimate purpose under the Covenant”.84 The HRC does thus not seem to require the obligation to affect all citizens on an equal footing, as will be later required by the Committee of the ILO Governing Body in the Chilean case.85

At this stage, one would have expected the HRC to individually apply to the case each one of the criteria it had identified, in order to determine if the obligation to work in the framework of the Work for the Dole scheme did, or not, constitute a normal civic obligation, compatible with the prohibition of forced labour. This was, however, not the case. Instead, the HRC concluded its review in one sentence:

“In the light of these considerations, the Committee is of the view that the material before it, including the absence of a degrading or dehumanizing aspect of the specific labour performed, does not show that the labour in question comes within the scope of the proscriptions set out in article 8. It follows that no independent violation of article 8 of the Covenant has been made out”.86

Given the brevity of the reasoning, it is hard to understand if the HRC based its conclusions on Article 8, §3, a) or on the point c). In the beginning, the HRC seemed to want to determine if the obligation to work imposed on Mrs Faure could be qualified as a normal civic obligation, within the meaning of Article 8, §3, c). Its conclusion is nonetheless very general, with the HRC having confined itself to merely finding that the work imposed on Mrs Faure did not constitute forced labour, as prohibited by Article 8, §3, a).

In particular, the finding of the HRC is based on the fact that the required work could not be considered as degrading or dehumanising. This criterion appears far

83 H.R. Committee, Faure v. Australia, §7.5.
84 H.R. Committee, Faure v. Australia, §7.5.
85 It must be noted that in 2005, the tripartite Committee of the Governing Body of the ILO had not yet made clear that a condition of generality was required regarding the civic nature of the obligation (I.L.O., Report of the committee set up to examine the representation alleging non-observance by Chile of the Forced Labour Convention, 1930 (No. 29), submitted under article 24 of the ILO Constitution by the Colegio de Abogados de Chile A.G., Geneva, 11 November 2008).
86 H.R. Committee, Faure v. Australia, §7.5.
more restrictive than the normality criterion, generally required for the exception of normal civic obligations. It recalls the former case law of the European Commission of Human Rights, which had proposed the unfair or oppressive nature of the work as a defining criterion of forced labour. The criterion favoured by the HRC implies, however, a much graver threshold. It echoes the threshold required to trigger the applicability of Article 3, which prohibits torture and inhuman or degrading punishment or other treatments. It is astonishing that the HRC did not apply the ILO defining criteria of forced labour, i.e. the menace of any penalty and the lack of will, used by the ECHR in the Van der Mussele case, to which the Australian government itself had even referred in its answer to the complaint’s author.

B. The X, Talmon and Schuitemaker v. The Netherlands cases and Article 4, §3 of the ECHR

The European Court and Commission of Human Rights have so far only had three opportunities to address the issue of work-related obligations imposed on unemployment benefits recipients, from the angle of the prohibition of forced labour: the X v. The Netherlands (1976), the Talmon v. The Netherlands (1997) and the Schuitemaker v. The Netherlands (2010) cases. These three disputes concerned the suspension or the reduction of unemployment benefits, justified on the grounds of the complainants’ refusal to take up employment on the labour market. Thus far, the Convention bodies had never had to assess the conformity of compulsory work schemes with Article 4, §3 of the ECHR.

None of the abovementioned cases passed the admissibility test. The Convention bodies did not identify any problem regarding their material competence in deciding the cases submitted to them. In the three cases, the applications were declared inadmissible for being manifestly ill-founded. As a reminder, the Convention bodies consider that “any application will be considered ‘manifestly ill-founded’ if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits.” This implies that, even if the Court case law on the issue is not abundant, the organs of the Convention have considered the situation as sufficiently simple to conclude, regarding the existing jurisprudential elements, that there was no indication of violation of the Convention.

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The factual background of the X. v. The Netherlands case is as follows. The applicant, a specialised construction worker, had refused an employment offer made by the municipal plantations service, for the reasons that it did not match his professional skills and that it was socially disreputable, those kinds of jobs being, in his view, mainly for disabled persons. Following this refusal, he was excluded from unemployment benefits for 25 weeks. Before the European Commission of HR, he argued that he had been summoned to perform forced or compulsory labour, banned by Article 4, §2 of the Convention.

The Commission declared the application manifestly ill-founded after a very concise – and quite formalistic – reasoning:

“In pursuance of Dutch legislation relating to unemployment benefits, no one is forced, by whatever penalty, to accept a job offer made by competent public authorities. A refusal does not constitute an infringement of the law. The acceptance of a convenient employment is only a condition for granting unemployment benefits. The refusal is penalised by the temporary loss of these benefits, excluding any other measure. There can therefore be no question of forced or compulsory labour within the meaning of Article 4, §2 of the Convention.”

It would indeed be inconsistent to consider that the loss of unemployment benefits for refusing suitable work constitutes forced labour, while, according to international standards, unemployment benefits can be refused, suppressed, suspended or reduced if the interested party fails to accept a suitable employment. As a reminder, the notion of suitable employment essentially protects the professional status of the unemployed person who must have the right, during a first reasonable period of unemployment, to refuse an employment that does not correspond to her professional qualifications.

Nevertheless, the unemployed individual in this case complained about having been excluded from unemployment benefits for refusing work that did not match his professional skills. One can thus deplore that the European Commission of HR confined its control to such a formal regulation, without making sure that, concretely, the unemployed individual had not been compelled to accept a non-suitable employment.

Moreover, the Commission also applied the criterion of the menace of a penalty. As we can recall, the European Court of Human Rights had recourse for the first time to this criterion years later in the Van der Mussele case. Besides, it is excep-
tional that the Commission referred to this criterion, since following its consolidated case law forced labour was solely conditioned by the absence of will and its unjust or oppressive character. The Commission considered that this criterion was clearly not met. It seemed to base this finding on the fact that in this case, refusal of the suitable employment was not punished by a criminal penalty. In its view, it was normal that the refusal would be punished by the temporary loss of benefits, since this was one of the conditions for their granting. This reasoning seems now outdated, considering the subsequent case law of the Court on the notion of forced labour. The Court currently refers to the case law of the ILO bodies and thus now considers that the penalty should not necessarily take the form of criminal sanction, but may also consist in the loss of a right, advantage, privilege or status.  

The second case, *Talmon v. The Netherlands* was submitted to the European Commission of HR in 1997 and relates to a beneficiary of unemployment assistance, who considered that the only suitable employment for him was that of an independent scientific expert or a social critic. In his view, he had serious and insurmountable conscientious objections to taking up any other employment. The Dutch administration decided to reduce his unemployment benefits, since other employments than those of independent scientific expert and social critic did match his professional skillset.

Again on the basis of a very concise reasoning, quite similar to the one made in the previous case, the Commission concluded that there could be no question of forced or compulsory labour, within the meaning of Article 4, §2 of the ECHR. In its view, the applicant did not seem to have been compelled to perform any kind of labour, and the refusal to seek any other form of employment than those of independent scientific expert did not appear to have made him liable to any other kind of measures than the reduction of his unemployment benefits. The Commission therefore considered that his application was manifestly ill-founded.

The Commission seems to have made a distinction between the constraint and the menace of a penalty. This distinction probably echoes that made by the Convention bodies between forced labour implying constraint and compulsory labour implying the menace of a penalty.  

Just as in the first case, the Commission did not consider that the reduction of unemployment benefits may constitute, in itself, the menace of a penalty. In between these two cases, the Court had however delivered its judgement in the *Van der Mussele case*, where it ruled, in accordance with the case law of the ILO bodies, that the menace of a penalty could consist in the loss of a right. In

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99 See supra, I., C. and, in particular, the *Van der Mussele case* commentary.
our view, compliance with this criterion should thus have been more carefully assessed, or at the very least, the Commission’s reasoning should have been more widely developed. The Commission would have then eventually examined the second criterion of the lack of will, which it has not yet applied to work-related obligations imposed on social benefits recipients.

As the work-related requirement is a condition for the granting of unemployment benefits and is only sanctioned by the loss of those benefits, it could not, in the European Commission of HR’s view, be a question of forced labour. States would thus be completely free to choose the granting conditions to impose on the recipients of the benefits systems they set up. One shall however note that, at that time, the Commission could probably not imagine the multiple forms that work-related obligations imposed on unemployed persons would take a decade later.

In 2010, in the Schuitemaker v. The Netherlands case, the Convention bodies investigated for the first time a case where the availability for work condition had been expanded to all “generally accepted” employment. In the surrounding context of activation, the Netherlands had indeed reformed their regulation on unemployment assistance, in order to force the unemployed to take up any generally accepted employment, and not only suitable employment. This new obligation had a much wider scope, since it included employments the unemployed had no experience or qualifications for and even no affinity with and only excluded employments that were generally not socially accepted. According to this reform, the unemployed could also refuse employments for which they had conscientious objections. Before the Court, the applicant argued that this new requirement to accept any generally accepted employment, and not solely suitable employments, may compel her to perform forced or compulsory labour.

The applicant had not concretely had her benefits reduced following a refusal to take up employment. Following the case law of the Court, in the absence of an individual measure of implementation, individuals can only contend that a law violates their rights within the meaning of Article 34 of the Convention if they run the risk of being directly affected by this law. On the basis of this case law, the applicant argued that this law applies to all recipients of benefits. The Court however ruled that it did not have to assess the applicant’s status of victim, since its application was in any case manifestly ill-founded for other reasons.

The Court stated that, “it must in general be accepted that where a State has introduced a system of social security, it is fully entitled to lay down conditions that

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100 In certain circumstances, ILO bodies have considered that the reduction or suspension of unemployment benefits for non-compliance with a work-related obligation constituted a menace of losing a right. On this case law, see E. Dermine, “Activation Policies for the Unemployed and the International Human Rights Case law on the Right to Freely Chosen Work”, op. cit.
have to be met for a person to be eligible for benefits pursuant to that system”.\textsuperscript{103} Reading this assertion, the Court seems to be confirming the traditional position according to which work-related obligations imposed on unemployed persons in the framework of a social security system could in principle never violate the prohibition of forced labour, whatever the nature of the work relationship and the working conditions.

However, the Court further nuances this affirmation, in the next paragraph:

“In particular a condition to the effect that a person must make demonstrable efforts in order to obtain and take up generally accepted employment cannot be considered unreasonable in this respect. This is the more so given that Dutch legislation provides that recipients of benefits pursuant to the Work and Social Assistance Act are not required to seek and take up employment which is not generally socially accepted or in respect of which they have conscientious objections. Therefore, the condition at issue cannot be equated with compelling a person to perform forced or compulsory labour within the meaning of Article 4, §2 of the Convention”\textsuperscript{104}

Moreover, the Court could only rule on the abstract content of the law. If the applicant had had her unemployment benefits reduced following a refusal to take up employment, the Court may have reviewed the concrete elements of the case and determine if what was required from the applicant did reach the threshold of forced or compulsory labour, within the meaning of Article 4, §2 of the Convention.\textsuperscript{105}

In terms of principles, this was an important ruling, since it was the first time that the Court indirectly recognised that the measures aimed at activating unemployment benefits recipients could, under certain circumstances, constitute forced labour prohibited by the Convention.

Otherwise, the decision can be deemed somewhat disappointing. The Court did not refer to the defining criteria of forced labour that it had itself identified in the \textit{Van der Mussele case} (menace of a penalty and offer against one’s will). Knowing that the Court considers non-contributory social benefits to constitute “possessions” in the sense of Article 1 of the First Additional Protocol, the same as contributory benefits,\textsuperscript{106} one may have expected the Court to rule, within this new jurisprudential framework, that the threat to suspend unemployment assistance benefits constituted a menace of depriving of a right, as the loss of unemployment insurance benefits.

\textsuperscript{103} Eur. Ct HR, \textit{Schuitemaker v. The Netherlands}, §5.


The Court confines itself to applying a test of proportionality, considering that the obligation to seek and to take a generally accepted employment imposed by the law is not unreasonable, especially as the unemployed person has the opportunity to refuse any employment for which she may have a conscientious objection. Since the Court does not refer to the absence of will criterion, we do not know if the test of proportionality is used as an autonomous defining criterion of forced labour or if its use aims at implicitly assessing the existence of a real consent on the part of the applicant. Since the Court further states that it does not possess the concrete elements to conclude that the threshold of forced or compulsory labour has been reached, one may be tempted to think that the Court uses the unreasonable nature of the imposed work as an autonomous defining criteria of forced labour.

Conclusions

A certain duty to work has always been inherent to the social protection systems of the Western Welfare States. Traditionally, it was considered that this duty could not enter into conflict with the prohibition of forced labour.

Since the 1990s, the duty to work of unemployment benefits and social assistance recipients has been steadily reinforced: classical availability for work conditions have been deepened and new work-related obligations have been introduced in legislations. In this context, one can ask if the classical thesis of complete impermeability between work-related obligations in social protection systems and the prohibition of forced labour is still topical. To shed an original light on this question, we have turned to the relevant international case law on this issue.

The first section of our study was dedicated to an overview of the general case law on the prohibition of forced labour. In view of this general case law, we could assume that the work-related obligations imposed on social benefits recipients should not be excluded by principle from the notion of forced labour or from the scope of application of the prohibition of forced labour and that they should, on the contrary, be assessed on a case-by-case basis. This assumption relies on three observations.

Firstly, the defining criteria of forced labour are large and open. The menace of a penalty can consist in the loss of rights or advantages. If the unemployed persons, as former workers, have contributed in order to later be eligible for unemployment insurance benefits, one could thus argue that the loss of unemployment benefits in cases of refusals to take up employment or training consist in a loss of a right. And given that the European Court of Human Rights considers non-contributory social benefits as constituting “possessions” in the sense of article 1 of the First Additional Protocol, one could think that the threat to suspend unemployment assistance or social assistance benefits also constitutes a menace of a loss
of a right. As for the criterion of the absence of consent, international bodies do not limit it to formally expressed consent. They take into consideration external elements of coercion that could invalidate expressed consent. This criterion thus offers a margin of discussion to potential claimants. In the first section, we also have put into perspective the emergence of an ultimate defining criterion: the proportionate character of the burden imposed on the individual balanced with general interest considerations. This criterion requires as a matter of course a case-by-case analysis in order to determine if the activation measure has exceeded in practise the reasonable charge that may be imposed on social benefits recipients.

Secondly, work-related obligations imposed on social benefits recipients are not the subject of a specific exclusion from the scope of application of the prohibition of forced labour nor of an exclusion from the notion of forced labour itself. One may though wonder if they could be qualified as a normal civic obligation. The international case law has still not definitively judged if a normal civic obligation can affect a specific category of persons or if it must concern all citizens equally. The normality criterion should moreover give rise to a case-by-case analysis.

Finally, the will of international bodies to adopt an evolutive approach of the prohibition of forced labour in order to apprehend new forms of forced labour has appeared throughout the international case law overview.

Following the general overview of this promising case law, we examined in the second section a few cases in which the international case law assessed the conformity of work-related obligations imposed on social benefits recipients with regard to the prohibition of forced labour.

We have identified two cases brought before the European Commission of Human Rights in 1976 (*X. v. the Netherlands*) and 1997 (*Talmon v. the Netherlands*) concerning the classical availability for work condition in unemployment benefits systems and two other cases concerning the activation measures of unemployment benefits recipients, the first one brought before the HRC in 2005 (*Faure v. Australia*) and the second brought before the European Court of Human Rights in 2010 (*Schuitemaker v. the Netherlands*).

In the two first cases, the European Commission of Human Rights considered, in line with the traditional thesis, that work-related obligations imposed on social benefits recipients cannot conflict with the prohibition of forced labour. In short and authoritative reasonings, it asserted, without explaining its position regarding the defining criteria of forced labour, that States, as soon as they set up a social protection system, are free to choose the work-related obligations to be imposed on benefits recipients.

In the *Schuitemaker* case, the European Court of Human Rights moved away from the traditional principle of a complete impermeability between work-related
obligations in social protection systems and the prohibition of forced labour. It assessed if the activation measure was *in casu* contrary to the prohibition of forced labour. By undertaking this examination, it implicitly admitted that some activation measures could raise concerns regarding the prohibition of forced labour. In the *Faure* case, the HRC also accepted to assess if the activation measures complied with the prohibition of forced labour. Given the state of the case law, we can thus affirm that supervisory organs of the international texts dedicated to civil and political rights today admit that work-related obligations imposed on unemployment benefits and social assistance recipients might, in certain circumstances, come to violate the prohibition of forced labour.

Notwithstanding, the case law opening remains very formal. In the *Schuitemaker* case as well as in the *Faure* case, the international bodies did not refer to the classic defining criteria of forced labour, i.e. menace of a penalty and absence of will, as these have been progressively defined by the general international case law on forced labour. The HRC required, in its *Faure* decision, that work should be inhuman and degrading in nature in order to be qualified as forced labour. This criterion involves such a high threshold that the possibility to interfere with the choices made by States remains minimal. In the *Schuitemaker* case, the European Court limited itself to declaring that it did not possess the concrete elements to consider that the work imposed on the unemployed was unreasonable. This criterion clearly echoes the test of proportionality, applied in the *Van der Mussele* case. Nonetheless, in its *Schuitemaker* ruling, the Court seems to have disconnected this criterion from any verification of the absence of will criterion.

On this particular question, we will recall that it is in our view fully legitimate to institute the test of proportionality as an autonomous criterion in cases where the work is imposed in the name of a general interest objective, since Article 4, §3 of the ECHR, from which the idea of proportionality emerged, participates in defining the notion of forced labour. Within the framework of work-related obligations imposed on the unemployed, the burden imposed on the unemployed should thus be balanced with the collective objective of a labour market including the highest number of working people.

In conclusion, supervisory bodies of international covenants on civil and political rights have taken the first step by admitting that the activation measures of unemployment benefits recipients might contravene the prohibition of forced labour. We now hope that, departing from a formalistic approach, they will observe from case to case in what really consists the activation measure that is contested (content of the measure, its objective, its concrete effects, the accompanying sanctions) and confront it with the defining criteria of forced labour identified in their general case law. In order to give international case law the opportunity to develop in this way, pleaders would be advised to invoke the prohibition of forced labour in front of national courts, in support of claims against activation measures, and bring these cases up to international jurisdictional bodies.
International supervisory bodies and national courts may feel uncomfortable in concretising the abstract defining criteria of the prohibition of forced labour. On this matter, one must know that international bodies supervising the application of economic, social and cultural rights do protect the prohibition of forced labour under the right to freely chosen work. These bodies have already identified concrete elements to assess the existence of a menace of a penalty and the proportionate character of the work imposed on the benefits recipients. They have essentially derived these elements from the case law concerning the right to social security and international minimum standards on social protection.\(^{107}\) We hope that the international supervisory bodies and national rights courts will rely on this substantial case law and benefit from the expertise of the international bodies supervising the application of social rights. The adoption of an “integrated approach to human rights”\(^{108}\) is in this case all the more desirable since the prohibition of forced labour is both a civil right – protecting the individual freedom and the physical integrity – and a social right – supporting the freedom of work.

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\(^{107}\) On international case law concerning the right to freely chosen work and activation policies, see again E. Dermine, “Activation Policies for the Unemployed and the International Human Rights Case Law on the Right to Freely Chosen Work”, op. cit.