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Non-Discrimination and Economic, Social and Cultural rights (art. 2, para. 2)

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I. INTRODUCTION AND BASIC PREMISES

1. Non-discrimination and equality are fundamental components of international human rights law and relevant to the enjoyment and exercise of economic, social and cultural rights. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights obliges each State Party “to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

2. The principles of non-discrimination and equality are recognised throughout the Covenant. The Preamble stresses the “equal and inalienable rights of all” and recognizes that each Covenant right pertains to “everyone”. Furthermore, in Article 3, States undertake to ensure the equal right of men and women to enjoy the Covenant rights and Article 7 includes the “right to equal remuneration for work of equal value” and “equal opportunity for everyone to be promoted” in employment. Article 10 stipulates that mothers should be accorded special protection and that special measures should be taken on behalf of all children and young persons without

discrimination. Article 13 recognizes that “everyone” shall have access to education and provides that “higher education shall be made equally accessible to all”.

3. Beyond the Covenant, Article 2(1) of the Universal Declaration of Human Rights and Article 3(1) of the UN Charter prohibit discrimination in the field of economic, social and cultural rights. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD) respectively require the elimination of discrimination on the grounds of race, sex and disability for a wide range of economic, social and cultural rights. International conventions on the rights of refugees, stateless persons, children, migrant workers and members of their families and persons with disabilities oblige respective State parties not to discriminate against these groups.¹ Article 26 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the autonomous rights to equality before the law and equal protection of the law, which shall prohibit discrimination on any ground and guarantee to all persons equal and effective protection against discrimination.²

4. In previous General Comments, the Committee has considered the application of the principle of non-discrimination to Covenant rights relating to housing, food, education, health, water, work and social security.³ Moreover, General Comment No. 16 focuses on State parties’ obligations under article 3 of the Covenant to ensure gender equality, while General Comments Nos. 5 and 6 concern the rights of persons with disabilities and older persons respectively.⁴ The present General Comment seeks to clarify the Committee’s understanding of article 2(2), including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

¹ See Article 3, Convention relating to the Status of Refugees; Article 3, Convention relating to the Status of Stateless Persons; Article 2, Convention on the Rights of the Child; Articles 1 and 7, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Articles 2, 3 and 4, Convention on the Rights of Persons with Disabilities.

² See General Comment 18 of the Human Rights Committee.

³ See General Comments Nos. 4, 7, 12, 13, 14, 15, 18 and 19.

⁴ See General comments nos. 5 and 6.

II. SCOPE OF STATE OBLIGATIONS

5. The obligation to guarantee non-discrimination in Article 2(2) is applicable to all rights listed in the Covenant. The definition of discrimination can be drawn from recent international human rights treaties.⁵ Accordingly, discrimination under the Covenant constitutes any distinction, exclusion, restriction or preference based on prohibited grounds of discrimination which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.⁶

6. De jure and de facto discrimination. This definition makes it clear that discrimination must be eliminated both formally and substantively, making non-discrimination the corollary of the principle of equality.⁷ Accordingly, States parties must eliminate *de jure* or *formal* discrimination, which includes ensuring that their constitution, laws and policies do not discriminate. Equally, States parties must take steps to eliminate *de facto* discrimination. **In order to eliminate *de facto* discrimination, it is necessary to combat systemic discrimination, which impedes the elimination of all forms of discrimination and the realization of substantive equality.** This obligation of substantive equality means ensuring that laws, policies and practices seek to address the unequal enjoyment of economic, social and cultural rights which individuals face due to discrimination.

7. Direct and indirect discrimination. **Direct discrimination** occurs when a difference in treatment relies directly on distinctions based on prohibited grounds. Such differential treatment is contrary to the **Convention Covenant** if it has the *purpose of nullifying or* impairing the **recognition, enjoyment or** exercise of particular Covenant rights. *Indirect discrimination* occurs when a law, policy, programme or procedure

⁵ See Article 1, ICERD, Article 1, CEDAW and Article 2, Convention on the Rights of Persons with Disabilities. The Human Rights Committee comes to a similar conclusion in General Comment No. 18 and the Committee has consistently taken this position in its General Comments.

⁶ The Committee takes note of Article 5 of the Covenant and that nothing in this General Comment should be understood to limit the guarantee of non-discrimination at the domestic level if greater rights in national constitutions or legislation *provide greater protection*.

⁷ See General Comment No. 16.

does not appear to be discriminatory, but has a discriminatory effect when implemented, thus leaving the existing inequality in place, or even exacerbating it. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

8. Permissible scope of differential treatment. The exercise of Covenant rights without discrimination does not mean identical treatment in every instance. A number of Covenant provisions explicitly permit differential treatment although the *implementation* of such restrictions will be closely examined as to whether there are objective and reasonable criteria allowing preferential treatment, **and** whether there is a legitimate aim for them **and whether the limitation is proportionate to that aim**. In this respect, Article 8(2) permits States parties to impose lawful restrictions on the right of members of the armed forces, police or members of the State administration to join and form trade unions and to strike. In the case of child labour, the State is *required* to impose differential treatment, namely age limits below which the paid employment of child labour should be prohibited (Article 10(3)).

9. Temporary special measures ~~which explicitly differentiate on the basis of prohibited grounds may sometimes be needed in order to bring~~ are measures that States parties are obliged to implement to enable disadvantaged or marginalized persons or groups of persons to **exercise and enjoy human rights and fundamental freedoms to** the same substantive level as others. **Temporary special measures are part of a necessary strategy to effect the structural, social and cultural changes needed to correct discrimination against those disadvantaged or marginalized persons. For example, temporary special measures might include the setting of targets for the number of women or persons of minority racial descent to be included on elected councils.** As long as these measures are necessary to redress *de facto* discrimination and are terminated when *de facto* equality is achieved **and sustained for a period of time**, such differentiation is legitimate.

10. Otherwise, distinctions, exclusions, restrictions or preferences based on prohibited grounds will be viewed as discriminatory unless the criteria for such differentiation are reasonable and objective, **and** the aim is to achieve a purpose which is legitimate under the Covenant **and the means employed are proportionate to the aim sought to be realized**. Article 4 also provides that limitations to the Covenant rights must be determined by law as far as they are compatible with the rights and solely for the purpose of promoting the general welfare in a democratic society. **In accordance with Article 5, nothing in the Covenant can be used to justify the destruction of the right to non-discrimination or to unreasonably limit that right. Where the human rights of individuals are in conflict and one person's right or freedom must be limited in order to protect the right or freedom of another person, such limitation should only occur if it is objective, reasonable, in pursuance of a legitimate aim and proportionate to that aim.**

11. Specific legal obligations. The obligation in article 2(2) is an immediate obligation that can be divided into three categories. The obligation to *respect* requires States parties to ensure that all public authorities and public institutions shall refrain from discriminatory acts, for example, denying health care to persons of particular race, colour or descent. States must also take into account that discrimination, especially *de facto* discrimination, may take place in the private sphere and must address it accordingly. The obligation to *protect* therefore requires States parties to take steps to ensure that individuals and entities in their private capacity do not discriminate on prohibited grounds; for example, imposing penalties on employers who discriminate on the basis of sex, pregnancy, marital status or sexual orientation. In accordance with the obligation to *fulfil*, States parties must take steps to eliminate *de jure* and *de facto* inequality, as well as implement obligations related to non-discrimination (see further Part IV.) **Article 2(2) thus requires States parties to do more than merely refrain from interfering with Covenant rights; States parties must also adopt positive measures to ensure that those rights are realized in practice.**

12. Under international law, a failure to act in good faith to comply with the obligation in Article 2(2) to guarantee that the rights enunciated in the present

Covenant will be exercised without discrimination amounts to a violation of the Covenant. Violations of the Covenant rights can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels.

III. PROHIBITED GROUNDS FOR DISCRIMINATION

13. Article 2 lists the prohibited grounds of discrimination as “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The inclusion of “other status” indicates this list is not exhaustive and the Committee has considered that other grounds may be incorporated in this category. The most significant prohibited criteria of non-discrimination to date are outlined below. Such a flexible approach to the ground of “other status” is essential since the nature of differential treatment in the exercise of Covenant rights varies according to context and evolves over time. The question of whether a ground is incorporated under “other status” is to be determined on a case by case basis with consideration given to the extent to which the discrimination in question causes or perpetuates systemic disadvantage or undermines or adversely affects a person or group’s rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.

14. Membership of a group. In determining whether a person falls within a group distinguished by one or more prohibited grounds, a flexible and contextual approach should be taken in accordance with the underlying principles of the Covenant. While objective criteria may be useful, weight should also be given to subjective criteria such as self-identification or an assumption by others that an individual is part of such a group.

15. Multiple discrimination. Some individuals face discrimination on more than one of the prohibited grounds and such *cumulative discrimination*, which impacts heavily on individuals, should be addressed in law, policy and programmes (for example women belonging to an ethnic or religious minority) may experience discrimination

in a different way than either men belonging to an ethnic or religious minority, or women as a gender).

A. Express grounds

16. Race and colour. Racial discrimination constitutes differential treatment based on *race, colour, descent, national or ethnic origin*.⁸ The Committee rejects theories and practices which determine the existence of separate human races, and prefers the use of the term “racial discrimination” as opposed to defining “race” in order to underline that it does not accept such theories.⁹ The Committee has consistently raised concern over unequal realisation of Covenant rights for ethnic minorities, indigenous peoples, Roma and Travellers, amongst others. The Committee calls upon States parties to remove direct and indirect discriminatory obstacles and to take urgent steps to ensure the realisation of the Covenant rights of persons belonging to these groups.

17. Sex. The Covenant places strong emphasis on the equal rights of men and women.¹⁰ Discrimination may be based on the differential treatment of women because of their physiological differences, such as refusal to hire them because they might become pregnant; or stereotypical ideas concerning *gender*, such as tracking women into low-level or part-time jobs on the assumption that they are unwilling to commit as much time to their work as men. The Committee notes that physiological differences and gender as determinants of “sex” are not simple or fixed categories, and States parties should take a flexible approach when individuals claim they are of a particular sex.

18. Language. Discrimination on the basis of language is often closely linked to unequal treatment on the basis of race or national or ethnic origin. Arbitrary language barriers can hinder access to many economic, social and cultural rights. For instance,

⁸ See Article 1, ICERD

⁹ See General Comment 29, CERD

¹⁰ See particularly, General Comment No. 16

information about public service should be available, as far as possible, in minority languages. States parties should particularly ensure that language requirements for employment or other positions are reasonable and objective and that funding for educational institutions is not unreasonably based on the choice of language of the institution. ~~Equally~~, access to basic health services, goods and facilities should not be ~~prohibited restricted~~ due to lack of understanding of the official language(s) of States parties.¹

19. Religion. The term religion is to be broadly construed in accordance with international law and the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. This prohibited ground of discrimination thus covers the religion or belief of one's choice (including the non-profession of any religion or belief), either individually or in community that may be publicly or privately manifested in worship, observance, practice and teaching. For instance, religious discrimination may arise when certain religious groups are denied access to universities or when there is excessive religious segregation in public schooling institutions.

20. Political or other opinion. Opinions in general, and political opinions in particular, shall not be grounds for discriminatory treatment. For example, employment in the civil service or educational or cultural institutions should not be based on the political opinions of applicants or employees. Access to food, housing and other Covenant rights should not be made conditional on an allegiance to a particular political party.

21. National or social origin. National origin, which also falls under race, refers to a person's belonging to a nation, regardless of whether the nation in question is or was a State, and may define membership of a national minority within a State. The Committee has frequently expressed concern that such minorities often face systemic discrimination in the exercise of their Covenant rights. Social origin refers to a person's inherited social status as discussed more fully in the context of *descent-based*

discrimination,¹¹ or to a person's previous social or other status as will be discussed in paragraphs 22 and 31.

22. Property. Property is a broad concept and includes real property (for example, land ownership or tenure) and personal property (for example, intellectual property, goods and chattels, and income). As regards the former, the Committee has previously commented that access to secure housing tenure and water shall not be conditional on a person's land tenure status, such as informal tenure in a settlement.¹² A person's source of property (for example income from social assistance) should not constitute grounds for denial of Covenant rights

23. Birth. Differential treatment based on birth is in principle prohibited. Article 10 of the Covenant explicitly states that the "reasons of parentage" must not be used to discriminate against children and young persons. Distinctions must, therefore, not be made against those who are born out of wedlock, born of stateless parents or who are adopted. This protection also extends to parents of such children. The prohibited ground of birth also includes *descent*, especially on the basis of caste and analogous systems of inherited status. For a comprehensive overview of State obligations in this regard, the Committee refers States parties to General Recommendation 29 of the Committee on the Elimination of All Forms of Racial Discrimination.

B. Other status

24. Disability. In General Comment No. 5, the Committee indicated that disability was a prohibited ground of discrimination and provided comprehensive guidance on the subject. Persons with disabilities include those who have "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".¹³ States parties should eliminate direct discrimination (for example,

¹¹ in paras. 16 above and 23 below

¹² See General Comments Nos. 4 and 15.

¹³ Article 1, Convention on the Rights of Persons with Disabilities.

unreasonable prohibitions on rights to marry and have children) and indirect discrimination (for example, inappropriate requirements or obstacles in the workplace or in schools). The Committee stresses the need to eliminate *de facto* discrimination, which includes ensuring that all public authorities and institutions and private actors provide “reasonable accommodation” to persons with disabilities.¹⁴

25. Age. Age is a prohibited ground of discrimination¹⁵ and in relation to older persons, the Committee has highlighted the need to address discrimination against older unemployed workers in finding work, set flexible retirement ages and ensure adequate pensions and social and health-care services.¹⁶ States parties should ensure that children and younger persons do not face unreasonable differential treatment on the basis of age (for example, the level of the minimum wage for younger workers or age requirements for accessing social security). Article 10(3) also specifically states that special measures of protection and assistance are required for children and younger persons.

26. Nationality. The Covenant rights apply to everyone including non-citizens and stateless persons.¹⁷ The Committee has regularly raised concerns over exclusion of non-nationals from access to Covenant rights and the Committee has previously emphasised, that all children within a State have a right to receive education, that refugees and asylum -seekers have the right to equal access to water and sanitation and that migrant workers should be able to benefit from social security contributions.

27. Marital and family status may differ between individuals because they are married, formally married to a partner, are married or in any relationship regarded as a family relationship under a particular legal regime, have responsibility for children and dependents or have a particular number of children. Differential treatment in access to social security benefits for survivors on the basis of marital status, for example, must be justified on reasonable and objective criteria.

¹⁴ See Article 2, Convention on the Rights of Persons with Disabilities.

¹⁵ See General Comment No. 12, para.18.

¹⁶ See further, General Comment No. 6.

¹⁷ Recommendation XI of CERD on non-citizens.

28. Sexual orientation. Sexual orientation has been recognised by the Committee in several General Comments as a prohibited ground under “other status”. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing or continuing employment.

29. Health status refers to a person’s physical or mental health, whether actual [or perceived]. While a person’s state of health may sometimes present a danger to him- or herself or others, differential treatment in the exercise of Covenant rights on this ground must be justified on reasonable and objective criteria.

30. Place of residence. States parties must ensure that the exercise of the Covenant rights is not made conditional on, or determined by, a person’s current or former place of residence. For example, whether they live or are registered in an urban or a rural area, or in a formal or an informal settlement. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution of health care facilities.

31. Civil, cultural, economic, political and social status. Individuals and groups can be arbitrarily treated simply on the basis of belonging to a certain group or strata within society. For example, States parties should ensure that membership of a political party or trade union does not affect a person’s employment or equal opportunity for promotion. A person’s economic and social status, such as living in poverty or being homeless may, in certain circumstances, overlap closely with the prohibited ground of property. For example, States parties must ensure that casual workers or workers in the informal economy are able to access adequate social security.

IV. NATIONAL IMPLEMENTATION

32. Every State party has a margin of discretion in determining the appropriate measures to comply with Article 2(2). However, the Committee examines closely whether concrete measures of implementation have been adopted. Individuals and groups, who may be distinguished by one or more prohibited grounds, have the right to participate in decision-making processes for such measures, which shall include:

33. Legislation. States parties are strongly encouraged to adopt specific legislation that prohibits discrimination. Such laws should aim at eliminating *de jure* and *de facto* discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and amendments made, where necessary, in order to ensure that they do not discriminate in relation to the Covenant rights.

34. Policies, plans and strategies. States parties must ensure that plans of action and strategies are in place to guarantee there is no *de jure* or *formal* discrimination by public and private actors and that steps are taken to eliminate *de facto* discrimination. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, amongst other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality; to require public and private institutions to develop plans of action to address non-discrimination; to conduct human rights education and training programmes for judges and public officials; to integrate, in formal and non-formal education, the principle of the equality and non-discrimination and to promote dialogue and tolerance between different groups in society.

35. Systemic discrimination. The Committee has regularly found that discrimination against some groups is pervasive and persistent. **Article 2(2) requires** States parties **should to** adopt a systematic approach to eliminating discrimination in practice. **More specifically, it obliges them to take steps to eliminate the root causes of**

systemic discrimination, such as stereotyping, that impede the elimination of all forms of discrimination and the realization of substantive equality. States parties should adopt measures towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in discrimination and prejudice.¹⁸ For example, in the area of the right to work, eradication of such discrimination may require strong incentives or penalties in order to encourage all employers to offer employment to groups facing systematic discrimination. In the area of residential segregation, measures such as ensuring equal rights to reside in a locality and developing incentives or penalties to ensure mixed housing could be adopted. Eliminating systemic discrimination will often require devoting greater resources to traditionally neglected groups.

36. Remedies and accountability. National policies and strategies should provide for the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudsmen, national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 2(2), including actions by private actors. They should be empowered to provide effective remedies, by which is meant remedies that respond to the individual and structural nature of the harm caused by discriminatory treatment. Effective remedies include ~~They should be empowered to provide effective remedies, such as~~ compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes. The State should ensure that these measures are implemented. Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions, to the greatest possible extent, in ways which facilitate and promote the full protection of economic, social and cultural rights.

37. Monitoring, indicators and benchmarks. States parties are obliged to monitor effectively the implementation of laws and policies to comply with Article 2(2). This includes establishing the necessary monitoring institutions and encouraging other

¹⁸ See, e.g., Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc. A/59/38 (2004), at para. 10.

actors such as civil society and the private sector to carry out such a function. National policies, plans and strategies should identify appropriate indicators and benchmarks in order to monitor effectively the State party's implementation of its obligations under Article 2(2). States parties should assess both the steps taken and the results achieved in the elimination of discrimination and should disaggregate indicators and benchmarks in the field of economic, social and cultural rights based on the prohibited grounds of discrimination.

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