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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**Study on non-discrimination as enshrined in article 2, paragraph 2, of the
International Covenant on Economic, Social and Cultural Rights***

Working paper prepared by Emmanuel Decaux

* The document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B, by which the Assembly decided that, if a report is submitted late, the reason should be included in a footnote to the document.

Executive summary

The Sub-Commission on the Promotion and Protection of Human Rights, in its resolution 2001/23 of 16 August 2001 entitled “Study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights”, noting with satisfaction that the Committee on Economic, Social and Cultural Rights had decided to request such a study, decided to entrust Mr. Fried van Hoof with the preparation of a working paper on the subject.

It acknowledged the need “to develop further understanding of the scope, content and implications of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights containing the general principle of non-discrimination, which states that the States parties to the Covenant undertake to guarantee that the rights enunciated in the 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”.

In its resolution 2003/12 of 13 August 2003, the Sub-Commission decided to entrust Mr. Emmanuel Decaux with the preparation of a working paper, “taking into account other relevant studies of the Sub-Commission, to be submitted under the agenda item entitled ‘Economic, social and cultural rights’, in order to enable it to take a decision at its fifty-sixth session on the feasibility of a study on that subject”.

Close coordination between the Sub-Commission and the Committee on Economic, Social and Cultural Rights will be vital at all stages of the study. Consulting States, national institutions and non-governmental organizations, either directly or on the basis of a questionnaire, is a further important step that may be contemplated in due course.

It may be concluded from this preliminary exploratory study that a number of basic questions merit further attention:

- (a) The scope of the principle of non-discrimination set forth in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights;
- (b) The relationship between general and specific clauses in the relevant instruments, focusing on neglected categories of discrimination;
- (c) Practical application of the provisions of article 2, paragraph 2, in different areas of economic, social and cultural rights as defined in the Covenant, in order to identify “blind spots” with respect to discrimination;
- (d) State responsibility for filling in gaps, where necessary, in the international and domestic legal framework and for ensuring effective justiciability of the principle of non-discrimination enshrined in article 2, paragraph 2;
- (e) Identification of good practices to promote respect for article 2, paragraph 2, in relations between private persons and, in particular, between corporations and individuals;
- (f) Development of the role in this regard of national institutions for the promotion and protection of human rights, particularly ombudsmen or independent administrative authorities.

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Introduction

1. The Sub-Commission, in its resolution 2001/23 of 16 August 2001 entitled “Study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights”, noted with satisfaction that the Committee on Economic, Social and Cultural Rights had decided to request such a study, and decided to entrust Mr. Fried van Hoof with the preparation of a working paper on the subject.

2. It acknowledged the need “to develop further understanding of the scope, content and implications of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights containing the general principle of non-discrimination, which states that the States parties to the Covenant undertake to guarantee that the rights enunciated in the 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”. Furthermore, “stressing the importance of the long-standing and continuing cooperation between the Sub-Commission and the Committee on Economic, Social and Cultural Rights in promoting and protecting economic, social and cultural rights worldwide”, it emphasized “the mutual benefits that would result from similar cooperation on the subject of non-discrimination, drawing upon the work and expertise of the Sub-Commission on the subject and the experience of the Committee on Economic, Social and Cultural Rights with States parties to the International Covenant on Economic, Social and Cultural Rights through the periodic reporting procedure”. The terms of reference of the Sub-Commission study and the working method to be adopted were thus very clearly enunciated.

3. The Sub-Commission reiterated its request to Mr. van Hoof, in identical terms, in its resolution 2002/9 of 14 August 2002. As Mr. van Hoof was unfortunately unable - for reasons of ill health - to carry out the study during his mandate, the Sub-Commission, in its resolution 2003/12 of 13 August 2003, decided to assign the task to Mr. Emmanuel Decaux, requesting him to submit a working paper “taking into account other relevant studies of the Sub-Commission, to be submitted under the agenda item entitled ‘Economic, social and cultural rights’, in order to enable it to take a decision at its fifty-sixth session on the feasibility of a study on that subject”.

4. As noted in the three resolutions cited above, many studies have already been undertaken on the subject of non-discrimination, both by the Sub-Commission and by the Committee on Economic, Social and Cultural Rights. Since its inception, the Sub-Commission has produced a number of important studies on non-discrimination, the most recent being Mr. Marc Bossuyt’s report on the concept and practice of affirmative action (E/CN.4/Sub.2/2002/21) and Mr. David Weissbrodt’s report on the rights of non-citizens (E/CN.4/Sub.2/2003/23 and Add.1 to 4), which was the subject of the recent Commission on Human Rights decisions 2004/112 and 2004/113. In related areas, special mention should also be made of the regrettably interrupted work of our greatly missed former colleague Ms. Leila Zerrougui on discrimination in the criminal justice system and the study embarked upon by Mr. Eide and Mr. Yokota of discrimination based on work and descent (E/CN.4/Sub.2/2003/24), which was the subject of Sub-Commission resolution 2003/22.

5. The Committee on Economic, Social and Cultural Rights has, for its part, adopted a number of general comments that have a direct or indirect bearing on the subject matter. Although there is as yet no comment on article 2, paragraph 2, the Committee has dealt with article 2, paragraph 1, in general comment No. 3 of 1990, and its many comments on the content of substantive law certainly have some bearing on the scope of the principle of non-discrimination. Close coordination between the Sub-Commission and the Committee on Economic, Social and Cultural Rights is therefore vital at all stages of the study.

6. Furthermore, as non-discrimination is a cross-cutting principle, the Human Rights Committee has developed a substantial body of jurisprudence on the subject, especially in respect of article 26 of the Covenant, the scope of which extends beyond the rights guaranteed by that instrument. In addition to the subject-specific treaties concluded under the auspices of the United Nations such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, mention should be made of treaties on the subject concluded in the framework of the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Lastly, a considerable body of practice, jurisprudence and legal opinion has been built up in regional organizations and national jurisdictions, especially in constitutional courts, as the principle of non-discrimination has come before major domestic courts for interpretation.

7. This illustrates the extent of the challenge presented by such a study. Failing comprehensive research, which is unfeasible and redundant, a sound option would be to develop a broad perspective, taking account of international developments pertaining to subject-specific and regional treaties and of national experience, thereby opening up a vast field of study in the area of comparative law. This overview would reveal existing strengths and weaknesses in the application of the principle of non-discrimination in the area of economic, social and cultural rights. It would bring to light areas of complementarity and perhaps of divergence between different regimes, through “positive conflicts” and possibly “negative conflicts”. It could also reveal gaps in the legal instruments or in administrative and social practices.

8. At this exploratory stage of the study, three sets of questions need to be addressed. They concern, first, what might be characterized as the “source” of discrimination (chap. I); second, the target of discrimination (chap. II); and, lastly, the scope of discrimination (chap. III).

I. THE SOURCE OF DISCRIMINATION

9. The term “source”, which is deliberately vague, was chosen in preference to “cause”, which could have an intentional connotation; the new French Criminal Code, for example, states that a person or group of persons may be discriminated against “on account of their origin or their actual or supposed membership or non-membership ...”. In some situations, discrimination may occur without its “cause” involving any element of intention.

10. Article 2, paragraph 2, contains an enumeration of discrimination “criteria”, a list that is at once specific and open-ended. Explicit mention is made of: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. The last element was included to cover any other forms of discrimination that might have been omitted from the enumeration or could not really be directly associated with one of the listed

“criteria”. Moreover, some forms of discrimination are covered elsewhere in the Covenant itself, for instance in article 3, pursuant to which States “undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”. To assess the full scope of article 2, paragraph 2, its overall structure and individual components need to be examined.

A. The general framework

1. International law references

11. The enumerative structure of article 2, paragraph 2, recurs in other basic international instruments, beginning with the Charter of the United Nations, a key theme of which is “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. The Universal Declaration of Human Rights develops this principle through a more exhaustive but open-ended enumeration. According to article 2, “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The list is doubly open-ended since it begins with the words “without distinction of any kind, such as ...” and ends with the words “or other status”.

12. The enumeration in the Universal Declaration of Human Rights is reproduced word for word in the two Covenants, in article 2, paragraph 1, and article 26 of the International Covenant on Civil and Political Rights and article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, the only difference being a tendency to vacillate between the words “distinction” and “discrimination” (see below). The interpretation of the principle of non-discrimination given by the Human Rights Committee in its general comment No. 18 of 1989 is therefore particularly pertinent.

13. The terms in this enumeration do not all enjoy equal status; the term “national origin” is used to avoid any direct reference to nationality. Moreover, article 2, paragraph 3, of the International Covenant on Economic, Social and Cultural Rights stipulates that developing countries may restrict the economic rights - but only those rights and within strictly defined limits - of “non-nationals”. Article 4 of the International Covenant on Civil and Political Rights, on states of emergency, contains a shorter list, omitting all reference to “national origin”, “political or other opinion” and “property, birth or other status”.

14. Recent treaties contain more extensive lists, such as the Convention on the Rights of the Child, in article 2 of which the parties undertake to guarantee those rights “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”. There has been a clear progression with respect to the omission of the term “political opinion” from article 24, paragraph 1, of the International Covenant on Civil and Political Rights and in terms of the insertion of “ethnic” origin and the new reference to “disability”.

2. Comparative law references

15. A systematic inventory would reveal a similar trend at the regional and national level, since there has been a continuous process of cross-fertilization between the different sources of the principle of non-discrimination, proceeding in a direct line from the Charter of the United Nations and the Universal Declaration of Human Rights. We shall confine ourselves for the time being to a brief inventory of the principal regional instruments.

16. The wording of the 1948 American Declaration of the Rights and Duties of Man keeps very close to that of the Charter of the United Nations, referring to equality before the law “without distinction as to race, sex, language, creed or any other factor” (art. II). The 1969 American Convention on Human Rights, in its very first article, states - merely replacing “property” with “economic status” - that “the States parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. In addition, article 24 on equality before the law reiterates that “all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

17. The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 1950 contains a long list that very closely resembles that in the Universal Declaration of Human Rights save for the addition of a reference to “association with a national minority”. When Protocol No. 12 to the Convention was adopted to broaden the scope of article 14, the drafters preferred to retain the initial open-ended wording rather than attempting to update it and thereby running the risk of omitting new categories of discrimination and laying themselves open to *a contrario* arguments. The preamble to the 1961 European Social Charter, for its part, stipulates that “enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin”.

18. The African Charter of Human and Peoples’ Rights of 1981 also reproduces in its article 2 the list in the Universal Declaration of Human Rights, merely adding the words “ethnic group”: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

19. Lastly, the 1994 Arab Charter on Human Rights, which also keeps very close to the Universal Declaration of Human Rights, stipulates in its article 2: “Each State party to the present Charter undertakes to ensure to all individuals within its territory and subject to its jurisdiction the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status and without any discrimination between men and women.”

B. The different components

20. The global approach demonstrates the existence of a common core of components stemming from the wording of the Charter of the United Nations but enumerated in an open-ended way that is modelled on the Universal Declaration of Human Rights. In other words, the initial list is only indicative, either because the terms used are sufficiently broad to include different subsets or because a general term (“such as” or “other status”) is inserted to confirm its open-ended character. Unless there are instances of explicit wording or contrary indications in the *travaux préparatoires* of a particular instrument, this interpretation is all the more logical in that it is hard to imagine opting for a form of wording of the principle of non-discrimination that might be conducive to the insidious endorsement - by omission rather than commission - of new forms of discrimination.

1. Racial discrimination

21. The existence of a general principle of non-discrimination does not preclude the placing of emphasis on specific categories of discrimination or on the phenomenon of “double discrimination”, as in the case of the International Convention on the Elimination of All Forms of Racial Discrimination, which defines racial discrimination in article 1 as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin ...” but which expressly excludes distinctions between “citizens and non-citizens” (art. 1, para. 2). The conventions against apartheid also belong in this category: the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 and the International Convention against Apartheid in Sports of 1985.

2. Gender discrimination

22. The same is true of the Convention on the Elimination of All Forms of Discrimination against Women. But that Convention fails to address all the issues related to discrimination “on the basis of sex” inasmuch as men may also be discriminated against, as demonstrated, for example, by the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Communities in the area of gender equality. Furthermore, the reference to sex is more and more frequently interpreted as encompassing sexual orientation. As noted by the Human Rights Committee in the *Toonen v. Australia* case, “in its view, the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation” (CCPR/C/50/D/488/1992, para. 8.7). The Committee on Economic, Social and Cultural Rights also included sexual orientation in its interpretation of article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights but explicitly included it, in addition, in its general comment No. 14 of 2000 on the right to health (E/C.12/2000/4, para. 18).¹

3. Vulnerable groups

23. The reference to “national or social origin” alongside “language” and “religion” may indicate the need to take into consideration a whole range of “vulnerable groups” who are not always explicitly mentioned in the traditional lists, be they migrant workers, national or ethnic, religious and linguistic minorities, or indigenous peoples. Another instrument to be borne in mind is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which, according to article 1, paragraph 1, is applicable to “all

migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status". Other reference sources are the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

24. More generally, it should be noted that, as a rule, it is the social standing, economic status or cultural isolation of an individual or group that constitutes the main obstacle to genuine equality of rights. Here again, account should be taken of work already done on extreme poverty, especially the Sub-Commission study by Mr. Leandro Despouy (E/CN.4/Sub.2/1996/13) and, more recently, the proceedings of the working group chaired by our colleague José Bengoa. This social dimension is particularly important with respect to the effective exercise of economic, social and cultural rights. Non-discrimination and equality of opportunity must go hand in hand.

4. Neglected categories of discrimination

25. Lastly, recent instruments may play an effective role in revealing gaps. We have seen, for example, that the Convention on the Rights of the Child refers to "disability" and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families mentions "age", apparently for the first time. In 1982, the Canadian Charter of Rights and Freedoms added "age or mental or physical disability" to the traditional list (art. 15).² The Bill of Rights in the South African Constitution of 1996 contains a particularly exhaustive article 9 on equality: "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." The European Union's Charter of Fundamental Rights refers to "genetic features" and "disability, age or sexual orientation" (art. 21).³

26. While children's rights are now protected as a separate category, the situation of older persons is all too frequently neglected. It cannot be assimilated as such to the category of disability, although the circumstances may in some cases be similar. In this connection, the work under way on a subject-specific convention should be given special attention in the light of general comment No. 5 on persons with disabilities adopted by the Committee on Economic, Social and Cultural Rights in 1994. Instruments dealing with older persons are still rare, notwithstanding the adoption of the United Nations Principles for Older Persons by the General Assembly in 1991 by resolution 46/91 and general comment No. 6 concerning the economic, social and cultural rights of older persons adopted by the Committee on Economic, Social and Cultural Rights in 1995, as well as the adoption by the General Assembly in 2002 of resolution 57/177 on the situation of older women in society.

27. But the scope of the issue is broader than the situation at either end of the human lifespan. The arbitrary age limits imposed for certain contests or jobs merit closer scrutiny. Other forms of discrimination based on genetic or other physical characteristics are too often neglected; a case in point, for instance in recruitment, is the role played by aesthetic criteria - appearance, weight or height - in selective practices that are widespread both in the United States of America and in China.⁴

II. THE TARGET OF DISCRIMINATION

28. Article 2, paragraph 2, refers to the “rights enunciated” in the Covenant, thus calling for cross-referencing with the substantive provisions set forth in Part III, in articles 6 to 15. The practice of the Committee on Economic, Social and Cultural Rights should serve as the main guide in this regard, but account should also be taken of the practice of the other treaty bodies, in particular the Human Rights Committee’s practice with regard to implementation of article 26 of the International Covenant on Civil and Political Rights. Moreover, domestic application of the International Covenant on Economic, Social and Cultural Rights is particularly relevant, especially where such rights are fully “justiciable” in the domestic regime.

29. At this preliminary stage, the articles to be studied will be listed in very cursory fashion in the light of the general principle of non-discrimination, with references to general comments elaborated by the Committee on Economic, Social and Cultural Rights that already incorporate this cross-cutting dimension. The study should address the three principal components of the International Covenant on Economic, Social and Cultural Rights.

A. Economic rights

30. Article 6 on the right to work and article 7 on conditions of work deal with a number of specific rights that should be viewed in the context of the major conventions concluded under the auspices of ILO. The same applies to article 8 on freedom of association and article 9, which recognizes “the right of everyone to social security, including social insurance”.

B. Social rights

31. Article 10 deals with protection and assistance for the family and for children, “without any discrimination for reasons of parentage or other conditions”. These provisions should now be read in the light of the Convention on the Rights of the Child. Article 11 concerns “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing”. The right to housing was addressed in general comment No. 4 of 1991 and general comment No. 7 of 1997, and the right to adequate food in general comment No. 12 of 1999. Similarly, article 12 on “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” was addressed in general comment No. 14 of 2000 referred to above.

C. Cultural rights

32. Articles 13 and 14 deal with the different components of the right to education. General comment No. 13 of 1999 addresses the right to education and general comment No. 11 of 1999 deals with the “plans of action for primary education” mentioned in article 14. Reference should be made in this regard to the Convention against Discrimination in Education concluded under the auspices of UNESCO in 1960. Lastly, article 15 deals with cultural rights and a new general comment on “the right of everyone to take part in cultural life” is in preparation.

III. THE SCOPE OF DISCRIMINATION

33. This part of the study is certainly the most promising, since the incidence of discrimination in the context of an individual society gives concrete form to an abstract general principle. It should examine the nature of existing discrimination and the remedies available. Here again, the study should simply identify the lines of inquiry to be followed.

A. The nature of discrimination

34. Not all distinctions are discrimination, as has been clear since Aristotle, but the very scope of the principle may, as a result, be contested in practice. How can “arbitrary” and unfair forms of discrimination be distinguished from “social distinctions founded upon the general good”, to use the terms of the French Declaration of the Rights of Man and of the Citizen (1789), according to which “All citizens, being equal in the eyes of the law, are equally eligible for all high-ranking public office and all public positions and employment, according to their ability and without any distinction other than that based on merit and talent” (art. 6)? A large body of relevant jurisprudence exists in all countries.

35. The confusion between “distinction” and “discrimination” is compounded by the different wording used in the Universal Declaration of Human Rights (art. 2, para. 2) and the International Covenant on Civil and Political Rights (art. 2, para. 1), which use the word “distinction” in both French and English, while the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 2) uses the word “discrimination” in both languages, as does article 26 of the International Covenant on Civil and Political Rights! This apparent inconsistency was noted during the *travaux préparatoires* before the Third Committee of the General Assembly in 1963. “Some speakers considered that the word ‘distinction’ should be replaced by ‘discrimination’, in order to bring about conformity with the text of article 2 of the draft Covenant on Economic, Social and Cultural Rights, adopted by the Committee at the seventeenth session of the General Assembly. Several members of the Committee felt, however, that the term ‘discrimination’ had acquired a shade of meaning which rendered it less appropriate in the present context. Moreover, the term ‘distinction’ was used both by the Charter of the United Nations and by the Universal Declaration of Human Rights.”⁵

36. Yet, as stated by the Human Rights Committee in its general comment No. 18, “the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”. The Committee adds to this two important remarks, stating first that “the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance” (para. 8) and also observing that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” (para. 13).

37. Furthermore, the question of “affirmative action”, already analysed by our colleague Marc Bossuyt (E/CN.4/Sub.2/2002/21), should be integrated into the field of inquiry. As stated in article 1, paragraph 4, of the International Convention on the Elimination of All Forms of

Racial Discrimination, “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved”. These observations with regard to temporary “special measures” may be extended, *mutatis mutandis*, to other types of discrimination.

38. This concern recurs in the *travaux préparatoires* of the International Covenant on Civil and Political Rights before the Third Committee of the General Assembly: “It was expressly emphasized by several members of the Committee that special measures for the advancement of any social and educationally backward sections of society should not be construed as ‘distinction’ within the meaning of article 2. The Committee agreed that that interpretation, to which there was no objection, should be specially mentioned in the report.”⁶ The Human Rights Committee adopted the same position in its general comment No. 18: “The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant” (para. 10).

B. Availability of relief

39. The first step is to develop the international and domestic legal regime in respect of non-discrimination. This calls for ratification of existing instruments of general scope and the successful conclusion of the current proceedings regarding persons with disabilities. Mention should also be made of the need to strengthen relevant regional regimes, following the example of Protocol No. 12 to the European Convention on Human Rights, which extends the scope of Convention article 14.

40. A key requirement, however, is effective compliance with international obligations in the domestic sphere. The question of the justiciability of economic, social and cultural rights should be a core concern in this regard. Without getting into the doctrinal debate over the specificity of these rights, it should be clear that the cross-cutting nature of the principle of non-discrimination renders it in any case fully justiciable, either in terms of direct application of “equality before the law” or indirectly, in conjunction with other rights. The Human Rights Committee’s jurisprudence with respect to article 26 of the International Covenant on Civil and Political Rights is instructive in this regard.⁷

41. Another factor to be taken into account is the imputability of discrimination. Even when States honour their international obligations and enact legislation enshrining the principle of non-discrimination, private persons may play a decisive discriminatory role. In this area, the application of human rights in “horizontal relations” between private persons is just as important as the State’s responsibility in “vertical relations” with its nationals. In addition to regulation, it

is also necessary to take account of practices, behaviour and mindsets. The inadequacy of the concept of human rights as negative obligations incumbent on the State is amply demonstrated in this context. “Similarly, one would probably wait in vain for the common law to afford protection against racial or sexual discrimination, however socially divisive or derogatory to human dignity such conduct may be. The common law ‘was that people could discriminate against others on the ground of colour, etc., to their heart’s content’.”⁸

42. These private forms of discrimination are very often implicit or covert, which makes it difficult both to measure the phenomenon in sociological terms and to obtain legal “evidence” of a punishable violation. To give just one example concerning France, where discrimination in respect of employment is punishable under article 225-1 of the Criminal Code, the Observatoire des discriminations has used a “testing” method to assess prejudice and discrimination in employment “whether based on ethnic criteria favoured by the employer, the sex or age of the jobseeker, his or her address or even physical appearance, or a disability: all these factors are often decisive in making recruitment choices, although such ‘sifting-out’ processes are illegal. Thus, an equally qualified North African candidate is a fifth as likely as a so-called ‘native’ Frenchman or woman to obtain an interview for a job as a sales representative. Someone who is able-bodied is 15 times as likely to be selected as a person with a disability. Persons in their fifties or who are ugly or live in a neighbourhood with a shady reputation are also turned down.”⁹ Many other examples relating to other countries or other rights could be mentioned but, alongside the institutional dimension of the issue, this interpersonal dimension seems crucial in the area of economic, social and cultural rights.

43. There are also many different options available to ensure effective application of the principle of non-discrimination. A number of measures are called for, ranging from preventive action through education and training to indicative measures involving the establishment of public institutions, such as national institutions for the promotion and protection of human rights, especially the office of ombudsman or independent administrative authorities, and punitive measures involving the punishment of discrimination, including through the criminal justice system where necessary. Stakeholders in the economy - businesses and trade unions - as well as associations and non-governmental organizations have a crucial role to play, be it through the negotiation of collective agreements or codes of conduct, mediation and good offices, or legal action and filing *amicus curiae* briefs. Lastly, full account should be taken of the cultural dimension, including the role of the media and cultural actors. A review of good practices in this regard would be very useful. Consulting States, national institutions, non-governmental organizations and all other interested organizations, either directly or on the basis of a questionnaire, is an important step that may be contemplated in due course.

IV. RECOMMENDATIONS

44. It may be concluded from this preliminary study that a number of basic questions merit further attention:

- (a) The scope of the principle of non-discrimination set forth in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights;
- (b) The relationship between general and specific clauses in the relevant instruments, focusing on neglected categories of discrimination;

(c) Practical application of the provisions of article 2, paragraph 2, in different areas of economic, social and cultural rights as defined in the Covenant, in order to identify “blind spots” with respect to discrimination;

(d) State responsibility for filling in gaps, where necessary, in the international and domestic legal framework and for ensuring effective justiciability of the principle of non-discrimination enshrined in article 2, paragraph 2;

(e) Identification of good practices to promote respect for article 2, paragraph 2, in relations between private persons and, in particular, between corporations and individuals;

(f) Development of the role in this regard of national institutions for the promotion and protection of human rights, particularly ombudsmen or independent administrative authorities.

Notes

¹ See also Amnesty International, *Human rights and sexual orientation and gender identity*, ACT 79/001/2204, March 2004.

² W.A. Schabas and D. Turp, *Droit international, canadien et québécois des droits et libertés: notes et documents*, Montreal, Éditions Yvon Blais, 2nd edition, 1998.

³ G. Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Paris, Le Seuil, 2001. The list reproduces that already incorporated in the Amsterdam Treaty (art. 6 A).

⁴ *International Herald Tribune*, 22 May 2004, “For many jobs in China, looks matter”.

⁵ A/5655, para. 19 (quoted by M. Bossuyt in *Guide to the “travaux préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht, Nijhoff, 1987, p. 55).

⁶ *Ibid.*, para. 20.

⁷ See the *Gueye et al. v. France* case, Views of 3 April 1989 (communication No. 196/1985), *Selected decisions of the Human Rights Committee under the Optional Protocol* (United Nations publication, Sales No.: E.02.XIV.1), vol. 3, 2002, p. 89.

⁸ N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, 2002, p. 101. The author cites *Applin v. Race Relations Board, House of Lords* [1975] AC 259.

⁹ *Le Figaro*, 19 May 2004.
