

## CRC General Principle: Non discrimination<sup>1</sup>

### Article 2 CRC

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction 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.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

### Comment on article 2<sup>2</sup>.

The first paragraph of article 2, along with article 3(2) and article 4, sets out the fundamental obligations of States Parties in relation to the rights outlined in the remainder of the Convention on the Rights of the Child – to “respect and ensure” all the rights in the Convention to all children in their jurisdiction without discrimination of any kind. “Non-discrimination” has been identified by the Committee on the Rights of the Child as a general principle of fundamental importance for implementation of the whole Convention.

In a relevant General Comment, the Human Rights Committee proposes that the term “discrimination” 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 non-discrimination principle does not bar affirmative action, the legitimate differentiation in treatment of individual children; a Human Rights Committee General Comment emphasizes that States will often have to take affirmative action to diminish or eliminate conditions that cause or help to perpetuate discrimination. In its Preamble, the Convention on the Rights of the Child recognizes that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration...”. In this respect, the Committee on the Rights of the Child has consistently underlined the need to give. For this reason certain articles set out special provisions for children particularly prone to forms of discrimination, for example, disabled children (article 23), and refugee children (article 22). Because discrimination is at the root of various forms of child exploitation, other articles to protect the child call for action that involves challenging discrimination.

The Committee on the Rights of the Child has asserted the fundamental importance of article 2 and raises the issue of non-discrimination in its consideration of each State Party report. The Committee has not, as at March 2006, issued any interpretative specific General Comment on article 2. However, in its first General Comment, issued in 2001, on the aims of education, the Committee states: “*Discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether it is overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities.*” It goes on to detail discriminatory practices which “*are in direct contradiction with the requirements in article 29(1)(a) that education be directed to ‘the development of the child’s personality, talents and mental and physical abilities to their fullest potential.’*”<sup>3</sup> (see article 29)

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<sup>1</sup> Die Zusammenstellung stammt aus dem vom BMSG anlässlich der österreichischen Ratspräsidentschaft 2006 bei ChildONEurope, Innocenti Florenz, beauftragten Survey der Abschließenden Beobachtungen zu den letzten Staatenberichten der EU-Mitgliedsstaaten. Die Studie sollte gemeinsame Stärken und häufig ausgesprochene Empfehlungen des UN-KR-Ausschusses für etwaige gemeinsame Handlungsmöglichkeiten aufzeigen.

<sup>2</sup> From the “Implementation Handbook for the Convention on the Rights of the Child”, UNICEF, 2002, pag. 19 – 37.

<sup>3</sup> Committee on the Rights of the Child, General Comment 1, 2001, HRI/GEN/1/Rev.5.

The language of article 2 itself and its interpretation by the Committee on the Rights of the Child emphasize that the obligation of States Parties to prevent discrimination is an active one, requiring, like other aspects of implementation, a range of measures that include review, strategic planning, legislation, monitoring, awareness-raising, education and information campaigns, and evaluation of measures taken to reduce disparities. In terms of international law, the obligation “to respect” requires States “to refrain from any actions which would violate any of the rights of the child under the Convention ... The obligation ‘to ensure’ goes well beyond that of ‘to respect’, since it implies an affirmative obligation on the part of the State to take whatever measures are necessary to enable individuals to enjoy and exercise the relevant rights”<sup>4</sup>.

Moreover, the CRC Committee in its General Comment no. 5 (2003) providing an interpretation of the wording “the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind” (article 2(1)) declares that “this non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment. A general comment by the Human Rights Committee has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination”<sup>5</sup>.

In relation to the second part of article 2 it is doubtful whether the very wide potential implications of this provision have been sufficiently considered during the preparation and consideration of reports by States Parties, because paragraph 1 of article 2 lists as grounds for discrimination “the child’s or his or her parent’s or legal guardian’s race, colour, sex...”, whereas paragraph 2 adds protection against “all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members”. In fact, while paragraph 1 concerns discrimination only in relation to the enjoyment of rights in the Convention, paragraph 2 requires action against “all forms of discrimination”, and is not confined to the issues raised by the Convention. Thus, implementation requires States to ensure that any existing Constitution, relevant legislation, court decisions and administrative policy and practice comply with this principle.

### **Comment on CRC Committee concluding observations related to article 2 CRC**

The CRC Committee had addressed the issue of non-discrimination in its Concluding Observations for 24 EU countries and 3 acceding countries<sup>6</sup>.

In relation to the obligation of the States Parties to respect and ensure the rights set forth in the CRC and to prevent discrimination in an active manner the Committee has constantly stressed the need for an active approach to implementation of the CRC principles without any kind of discrimination in the majority of the concluding observations analysed taking into consideration the peculiarity of any singular national case. Thus, the implementation of article 2 must be integrated into the implementation of all other articles – ensuring that all the rights mentioned are available to all children without discrimination of any kind.

In particular the Committee in its *Guidelines for Periodic Reports* asks whether non-discrimination is included as a binding principle in the Constitution or in domestic legislation specifically for children “and whether all the possible grounds for discrimination spelled out in article 2 of the

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<sup>4</sup> Philip Alston, “The legal framework of the Convention on the Rights of the Child”, *Bulletin of Human Rights*, 91/2, p. 5.

<sup>5</sup> Human Rights Committee, general comment No. 18 (1989), HRI/GEN/1/Rev.6, pp. 147 et seq.

<sup>6</sup> Austria, Belgium, Cyprus, Czech Rep., Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Croatia, Romania and Turkey

Convention are reflected in such legal provisions". In some States, a non-discrimination clause is written into the Constitution and therefore applies to all children. In others, non-discrimination principles are included in human rights legislation with reference to children. The Convention, like other human rights instruments, does not require States to have a Constitution. But where there is a Constitution, its provisions must be consistent with the Convention, or, in the terms of article 41, must be more conducive to the realization of the rights of the child.

On the base of the fact that article 2 emphasizes that all the rights in the Convention on the Rights of the Child must apply to all children in the State, including visitors, refugees, children of migrant workers and those in the State illegally. As mentioned above the bar on discrimination of any kind does not outlaw legitimate differentiation between children in implementation – for example to respect the “evolving capacities” of children and to give priority, “special consideration” or affirmative action to children living in exceptionally difficult conditions. However, the Convention’s Preamble recognizes that “in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration”. Inevitably, the category of children living in exceptionally difficult conditions includes children with widely different problems requiring widely different remedies. On this bases the *Guidelines for Periodic Reports* seeks information on “the specific measures adopted to reduce economic, social and geographical disparities, including between rural and urban areas, to prevent discrimination against the most disadvantaged groups of children, including children belonging to minorities or indigenous communities, disabled children, children born out of wedlock, children who are non-nationals, migrants, displaced, refugees or asylum-seekers, and children who are living and/or working on the streets”. The *Guidelines* also asks, under various articles, for information on special or specific measures adopted for disadvantaged children. The Committee on the Rights of the Child has consistently commented on the need to identify the most vulnerable and disadvantaged children in a State, has expressed concern about their situation and has recommended action to ensure that such children enjoy their rights under the Convention.

Other Convention articles highlight groups of children who may also suffer particular forms of discrimination, for example children without families (article 20), refugee children (article 22), disabled children (article 23), children of minorities or indigenous communities (article 30), children suffering economic and other exploitation (articles 32, 34, 36), children involved in the juvenile justice system and children whose liberty is restricted (articles 37 and 40), and children in situations of armed conflict (article 38).

In particular in 16 cases (15 EU countries and 1 EU acceding country)<sup>7</sup> the CRC Committee, manifested its concern in the development and adoption of effective strategies to eliminate the existing forms of discrimination among children at the national level. In this domain the Committee demanded the adoption of a proactive and comprehensive strategy to eliminate discrimination suffered by any group of children and focusing on those belonging to vulnerable groups. For example, in some cases required to pay particular attention to eliminate negative stereotype of refugee and asylum-seeking and to address the root causes of *de facto* segregation in schools and localities and to ensure equal access to education, health and other services for children of migrant families, families living in poverty or in less developed areas, Roma children, foreign children in detention and children with disabilities<sup>8</sup>.

Moreover, the CRC Committee, always in relation to the necessity to adopt a proactive approach against discrimination, indicated explicitly to many States the necessity to integrate into national legislation minimum standards in compliance with the convention at local and national levels<sup>9</sup> and recommended to increase their efforts to ensure the effective implementation of existing laws guaranteeing the principle of non-discrimination<sup>10</sup>. These latter recommendations seem to aim to stress the concern of the Committee in relation to the effective implementation of this principle for all children, reminding that the mention of this principle by the national legislation is not the final

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7 Austria, Belgium, Czech Rep., Finland, Germany, Greece, Italy, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, United Kingdom and Croatia.

8 Belgium, Greece, Italy, Malta, The Netherlands, Portugal, Slovakia, Slovenia, Spain, Sweden

9 Austria, Belgium, Czech Rep., Estonia, Hungary.

10 Austria, Cyprus, Czech Rep., France, Luxembourg, The Netherlands and Poland.

solution but it is only the starting point of the supported “active approach” against discrimination. Whereas only in one case Committee required the implementation of anti-discrimination laws and possibilities for children and their parents who have been victims of discrimination to seek recourse through the judicial system<sup>11</sup> and suggested to adoption and/or strengthen the efforts to criminalize and take appropriate penal sanctions against any act of racism, racial discrimination, xenophobia and related intolerance<sup>12</sup> and specifically recommended to collect disaggregated data to enable and facilitate the monitoring of discrimination against children<sup>13</sup>.

In addition, the Committee has emphasized the importance of collecting disaggregated data in order to monitor the extent of discrimination. It recommended to monitor and evaluate the quality, accessibility and availability of the care services dedicated to children, study the effectiveness of the measures taken to counter all forms of discrimination and evaluate existing disparity in the enjoyment by children of their rights and undertake on the basis of that evaluation the necessary steps to prevent and combat discriminatory disparities<sup>14</sup>.

The monitoring and evaluation activities seem to be essential for the realization of all rights within the Convention for all children, without discrimination. Thus the monitoring process and the indicators used must be sensitive to the various issues specifically mentioned in the article: race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. As the wording of article 2 indicates, the list is not exhaustive but merely illustrative, and States must consider other grounds that might cause discrimination. The *Guidelines for Periodic Reports* requests disaggregated data under many articles, for example by age, gender, region, rural/urban area, social and ethnic origin. The purpose is to ensure that States Parties have sufficient information to judge whether there is discrimination in implementing the article or provision concerned. The consideration of the implications of each and every article must include the consideration of possible discrimination against individual children or groups of children. Article 2 highlights the “double jeopardy” many children face, discriminated against not only on the grounds of their age and status but also on the grounds of their sex or race or disability.

Concluding, the Committee on the Rights of the Child has also suggested that strategies to combat discrimination should be evaluated: “...to each child within their jurisdiction...”

Always in relation to the prevent and combat negative social attitudes and eliminate negative stereotyping such as traditional roles of men and women in society the Committee invites to take all appropriate measures, such as comprehensive public education campaigns<sup>15</sup> and recommended to 18 EU countries and 2 EU acceding countries to include specific information on the measures undertaken by the State to follow up on the Declaration and Programme of Action adopted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance<sup>16</sup>.

This latter recommendation is formulated on the base of the first General Comment of the CRC Committee on the aims of education, in which it underlined the importance of education in combating discrimination, including racism: “Racism and related phenomena thrive where there is ignorance, unfounded fears of racial, ethnic, religious, cultural and linguistic or other forms of difference, the exploitation of prejudices, or the teaching or dissemination of distorted values. A reliable and enduring antidote to all of these failings is the provision of education which promotes an understanding and appreciation of the values reflected in article 29(1), including respect for differences, and challenges all aspects of discrimination and prejudice. Education should thus be accorded one of the highest priorities in all campaigns against the evils of racism and related phenomena”<sup>17</sup> (see the part on education).

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11 Greece

12 Estonia and Italy

13 Latvia, Lithuania, and Turkey.

14 Austria, Estonia, Germany, Italy, Slovakia, Spain, United Kingdom,

15 Belgium, Cyprus, Czech Republic, Estonia and Italy.

16 Belgium, Cyprus, Czech Rep., Denmark, Estonia, Finland, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, United Kingdom, Croatia, and Romania.

17 Committee on the Rights of the Child, General Comment 1, 2001, HRI/GEN/1/Rev.5, p. 258.