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The Committee on Economic, Social and
Cultural Rights

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LETTER

Submission to the UN Committee on Economic, Social and Cultural Rights regarding the General Comment on the impacts of drug policies on ESC rights

The Norwegian Human Rights Institution (NIM) welcomes the opportunity to provide input on the draft annotated outline to the General Comment on the impacts of drug policies on economic, social and cultural rights, which is currently being prepared by the UN Committee on the Economic, Social and Cultural Rights (the Committee). We refer to the extension of the deadline for our submission granted by General Comment rapporteur Dr. Seree Nonthasoot via e-mail 26.02.2024.

NIM is an independent public body established by the Norwegian Parliament in 2015 to strengthen the implementation of human rights in Norway.¹ We have a mandate to, inter alia, participate in international cooperation to promote and protect human rights. The rights of people using drugs has been a prioritized issue for NIM in recent years. In 2022, NIM wrote a report which found a number of challenges in the implementation of human rights in the context of use of illegal drugs in Norway.² In 2024, we wrote a follow-up report which found that people with substance use disorders (SUD) in Norway experience discrimination and stigma from healthcare services, law enforcement and other public services.³

NIM welcomes the draft annotated outline, and believes it is an opportunity for important guidance to the interpretation of the UN Convention on Economic, Social

¹ NIM has 'A status' accreditation with the Global Alliance of National Human Rights Institutions (GANHRI), which means we comply with the requirements of independence, impartiality and integrity under the Paris Principles.

² An English summary of the report "Drug use and human rights" can be found here:

<https://www.nhri.no/en/2023/drug-use-and-human-rights/>.

³ An English summary of the report "You don't belong here" can be found here: <https://www.nhri.no/en/2024/you-dont-belong-here/>.

and Cultural Rights (ICESCR). Our input at the current stage is limited to the following overarching issues, which are non-exhaustive:

1. Interpretations and the legal weight of General Comments

Treaties like the ICESCR are interpreted in accordance with the Vienna Convention on the Law of Treaties (VCLT) Articles 31-33, where general comments from treaty bodies are not mentioned. However, the International Court of Justice (ICJ) has held that “[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of” the UN Human Rights Committee, “it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.⁴ More recently, the ICJ held that “the Court has carefully considered the position taken by the [Committee on the Elimination of Racial Discrimination]”, but came to another result by “applying, as it is required to do ... the relevant customary rules on treaty interpretation”.⁵

Under Norwegian law, statements in General Comments from UN treaty bodies are generally afforded weight according to *how well they are anchored in the text of the convention* based on the interpretative methods as described in the VCLT.⁶ The key point is whether the statement is *interpretive*, or whether it must be seen more as a *recommendation on optimal practice*.

To ensure that the General Comment provides *convincing legal interpretations* that will be relied upon by courts, the method applied throughout the text should be stringent and described in introductory paragraphs. The Committee should formulate the General Comment in a way that (i) makes it clear which statements are interpretative and which statements are recommendations, and (ii) explicitly anchors its interpretations in the text of the ICESCR, in accordance with the method described in VCLT Articles 31-33. A General Comment founded on stringent legal methodology would be particularly welcome in relation to drug policies, an area where human rights are highly politicized among State Parties.

⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Report 2010*, p. 369, para 66.

⁵ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71, para 101.

⁶ Rt. 2015 s. 193 para 42; HR-2018-2096-A, para 14.

2. Legal protection against discrimination

NIM welcomes an emphasis from the Committee on non-discrimination obligations under the Covenant in relation to drug policies (see heading “Non-discrimination, equality, and groups or persons requiring particular attention”). The draft annotated outline mentions several marginalized groups which are particularly negatively affected by existing drug laws in many countries. In addition to this, NIM encourages the Committee to clarify whether substance dependence *in itself* is an implied protected characteristic under “other status” in Article 2(2) of the Convention. Several reports indicate that people with substance use disorders (SUD) face negative attitudes, stigma and discrimination in various aspects of society. At the same time, the legal protection of people with SUD against discrimination under international human rights law remains an unexplored issue in the UN treaty body system. The state of the law is unclear regarding whether people with SUD are protected from discrimination, which groups and situations are covered and how to assess what kinds of differential treatment may be permissible.

ICESCR Article 2(2) obliges all State Parties to guarantee that the rights under the Covenant be exercised without discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Substance dependence is not specifically mentioned as a protected characteristic under the Covenant. However, the inclusion of “other status” indicates that the list is not exhaustive and other grounds may be protected.⁷

To our knowledge, the Committee has not explicitly considered whether people with SUD are legally protected against discrimination in its General Comments or individual complaints decisions.⁸ However, in its General Comment No. 20 on non-discrimination, the Committee emphasises that discrimination varies depending on the context and evolves over time. The Committee points out the need for a flexible approach to what forms of differential treatment are protected under the ground of “other status”. Particularly social groups that are vulnerable and subjected to marginalisation may fall within this criterion.⁹ Disability, health status (physical and mental health) and economic and social situation (including poverty and homelessness) are examples of characteristics which the Committee has found to be protected under “other status”.

⁷ CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 (2009), para. 15.

⁸ Searches have been made in the OHCHR JURIS database 12. Jan. 2024.

⁹ CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20 (2009), para. 27.

Based on the above, there is good reason to interpret at least some forms of SUD as a protected characteristic under “other status”. Substance dependence can be a lifelong condition, and people with SUD often constitute a vulnerable and marginalized social group. NIM hopes the Committee will clarify this issue, in order to improve the legal protection of people with SUD against discrimination under international human rights law.

3. Permitted limitations

NIM welcomes a section in the General Comment on permitted limitations on rights under the Covenant in relation to drug policy interventions. Differential treatment is not necessarily discriminatory in itself. According to ICESCR Article 4, the rights under the Covenant can be subject to limitations if they are determined by law, if they are compatible with the nature of the rights and if their purpose is to promote the general welfare in a democratic society. Central to such assessments is whether there is proportionality between the goal sought to be achieved and the negative effects the limitation (measure or omission) may have.

NIM encourages the Committee to base their exploration of this issue on these established principles, which are thoroughly founded in international human rights law. In practice, the requirements that any limitation must have a foundation in law and serve a legitimate purpose will often be fulfilled. Several forms of drug policy interventions aim to maintain law and order and reduce harms associated with substance use, both legitimate purposes under the Covenant. However, limitations must also uphold the principle of proportionality. This is not always the case in drug policy interventions. The principle of proportionality requires that any limitation is not more intrusive than what is strictly necessary to achieve the relevant purpose. Each case must be assessed individually, and any limitation on Covenant rights should address the specific situation as closely as possible.

NIM hopes the Committee will particularly explore the contents of the proportionality test in this area and provide concrete examples.

4. The relationship between the drug control conventions and the Covenant

The international drug control system and the three UN drug conventions are mentioned throughout the draft annotated outline. The draft annotated outline also mentions that it will cover alternatives to criminalisation in drug policy. This brings to the forefront assessments of how the drug conventions relates to the Covenant and other human rights conventions. At the time of writing, there is little practice on this issue in the UN treaty body system.

The UN convention against illicit traffic in narcotic drugs and psychotropic substances Article 3 obliges State Parties to criminalise a number of actions relating to narcotic drugs. However, Article 3(4)(d) under the convention states that alternative measures may be put in place instead of criminal prosecution and punishment. Measures mentioned in the article includes treatment, education, aftercare, rehabilitation and social reintegration measures. The International Narcotics Control Board (INCB), which monitors these conventions, concluded in their annual report for 2021 that decriminalisation of drugs for personal use and possession is *not* in violation of the drug conventions. INCB also states that “the adoption of alternative measures can constitute an integral part of a balanced and human rights-based approach to drug policy”.¹⁰

At the time of writing, there is no *obligation* in international human rights law to decriminalise the use and possession of narcotic drugs. However, a number of international bodies have *recommended* decriminalisation in order to better safeguard a number of human rights, such as the right to health. Central to these recommendations are the implementation of alternative measures which aim to protect against harmful and problematic drug use. One example of this is from the Committee of the Rights of the Child. The Convention on the Rights of the Child (CRC) Article 33 requires State Parties to take all appropriate measures to protect children from the use of illicit drugs. The Committee on the Rights of the Child has stated that “[a]lternatives to punitive or repressive drug control policies in relation to adolescents are welcome”. The Committee on the Rights of the Child recommends prevention, harm-reduction and treatment measures, as well as access to objective information regarding the harms relating to substance use.¹¹

NIM encourage the Committee to elaborate on the relationship between the Covenant and the three drug conventions, particularly when it comes to the criminalisation and decriminalisation of drugs for personal use and possession. NIM has no view as such on decriminalisation, but should the Committee decide to recommend this, we hope the Committee will suggest what alternative measures should be implemented.

¹⁰ International Narcotics Control Board, *Report of the International Narcotics Control Board for 2021*, para. 380–381.

¹¹ Committee on the Rights of the Child, *General Comment No. 20: The rights of the child during adolescence*, CRC/C/GC/20 (2016), para. 64.

5. Conclusion

NIM is grateful for the opportunity to make a submission to the draft annotated outline of the General Comment, which we believe will be important for people using drugs all over the world. We would be very happy to elaborate further on any of the matters below via further correspondence with the Committee.

Best regards

On behalf of the Norwegian Human Rights Institution

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