Submission to the UN Committee on the Elimination of Racial Discrimination considering the call for inputs on the draft "General Recommendation N° 37 on racial discrimination in the enjoyment of the right to health."

03 August 2023

The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) welcomes the opportunity to contribute to the consultation process initiated by the UN Committee on the Elimination of Racial Discrimination (CERD) in relation to its General Recommendation N° 37 on racial discrimination in the enjoyment of the right to health.

In this submission, we focus on how the draft General Recommendation addresses the problem of private actors in healthcare. Overall, we strongly support that the draft General Recommendation has several specific guidelines on private actors in healthcare and the prohibition of racial discrimination. We also welcome the significant inclusion of commercialisation and privatisation of healthcare amongst the potential systemic causes of racial discrimination. We suggest, however, two ways of further strengthening these aspects.

First, we propose to use more nuanced language when discussing private actors in healthcare. Our suggestions are based on our recent publication "Healthcare Services and the Commercialisation of Healthcare: A Glossary," which presents an overarching typology to classify public and private healthcare actors, as well as their relative roles in financing, providing or governing healthcare.[1] The policy brief also gives operational definitions of terms such as commercialisation, privatisation, financialisation, and marketisation in healthcare, explaining the links between them.

Second, we propose to further expand the list of normative guidelines related to the right to health and private actors in healthcare to be included in the upcoming General Recommendation. Our proposed wording is based on common normative trends emerging from health-related statements on private actors made by United Nations Treaty Bodies (UNTBs), including CERD, in their Concluding Observations. These

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[1] GI-ESCR, "Healthcare Services and the Commercialisation of Healthcare: A Glossary," (2023). Available at: https://gi-escr.org/en/resources/publications/healthcare-systems-and-the-commercialisation-of-healthcare-a-glossary. Last Accessed: 02/08/2023.

common standards are mapped in GI-ESCR's routinely updated Compendium on this topic.[2]

We comment on specific paragraphs and suggest alternative wording where appropriate in the section below.

List of Suggested Amendments

This section of the submission provides direct in-text suggestions to the draft General Recommendation. We include our modifications in bold, while we cross suggested deletions. We include reasoning below each of the amendments.

Section 2 (Title).

We suggest rewording the title of Section 2: "Racial discrimination in the right to public health, including healthcare facilities, services and goods" as follows:

"Racial discrimination i**n the right to** ~~**public**~~ **health, which includes an entitlement to public health as well as** healthcare facilities, services and goods".

Reasoning:

"Public health" is one element within the broader right to health framework. Using the right to health and then defining its sub-element, as we suggest, clarifies the legal framework of reference quoted in the Recommendation. This wording is also in line with phrasing in other health-specific treaties and statements of UNTBs. Likewise, we note that healthcare facilities, services, and goods are not only linked to the "public health" element of the right to health. Equal access to healthcare facilities, services and goods is essential for the realization of both collective and individual aspects of the right to health.

Section 2, Para 12.

We suggest rewording: "(…) subject to racial discrimination in all essential elements of the right to public health, including preventive, curative, and rehabilitative healthcare facilities, services and goods (…)" as follows:

"(…) subject to racial discrimination in all essential elements of the right to ~~public~~ health, **including access to public** preventive, curative, and rehabilitative healthcare facilities, services and goods (…)"

Reasoning

See reasoning applied for amendment in Section 2 (Title).

Paragraph 2. (b)

We suggest, in paragraph 2. (b), rewording: "Privatisation and commercialisation without due regard to (…)" as follows:

"~~Privatisation and~~ **Commercialisation, including as a result of privatisation, deregulation and liberalisation of healthcare**, without due regard (…)."

Reasoning:

[2] GI-ESCR, "Compendium on United Nations Human Rights Treaty Bodies' Statements on Private Actors in Healthcare" (2022). Available at: https://giescr.org/en/right-to-health/compendium-of-un-human-reghts-treaty-bodies-statements-on-private-actors-in-healthcare. Last Accessed: 02/08/2023.

We strongly support the inclusion of commercialisation and privatisation of healthcare among the potential causes of racial discrimination. To further strengthen the language, we suggest more precise wording. Commercialisation is, in fact, an umbrella term that may be caused by different dynamics within the public and private healthcare sectors and may include one or more market-oriented reforms like privatisation, deregulation and liberalisation.

Paragraph 53.

In Paragraph 53: "States should adopt regulation ensuring that private business enterprises, private health-care facilities […]" we suggest substituting **"facilities"** with "**providers"**.

Reasoning:

Healthcare providers include hospitals, clinics, and other healthcare facilities as well as individuals. Using "facilities" would exclude individuals from the analysis, such as doctors and nurses operating their medical businesses.

Section D. Private Actors

We suggest including an additional paragraph (54):

"States should ensure that higher involvement of private actors in healthcare financing, provision or supply of medical goods does not impinge on the availability, accessibility, acceptability, and quality of healthcare facilities for all, including groups at higher risk of racial discrimination. States should also ensure that privatisation plans do not restrict the level of the right to health previously enjoyed by these marginalised groups. The inclusion of private actors' involvement in healthcare, such as through public-private partnerships, should be assessed considering the obligation to use the maximum available resources to realise the right to health. Any private actor involved in healthcare must contribute to, and not impede, the fulfilment of the right to health.

Reasoning:

This paragraph gives recommendations on how to mitigate the systemic impacts of involving private healthcare actors in healthcare on equality and non-discrimination in health systems. Moreover, it gives guidelines on States' obligation to fulfil the right to health in the context of private actors' involvement in healthcare. This contributes to complementing and expanding the current focus on *the protect* dimension, primarily through monitoring and regulation, of the present version of Section D of the General Recommendations 37.

This is highly relevant because the commercialisation of healthcare can result in health systems tiered based on economic status, where better healthcare is available for those who can afford it.[3] Racial minorities often experience material deprivation, and they can be particularly impacted in unequal health systems where access depends on the ability to pay. Similarly, the commercialisation of healthcare can lead to the prioritisation of revenue-generating medical services and overinvestment in

[3] GI-ESCR, "Patients or Customers? The impact of Commercialised Healthcare on the Right to Health in Kenya during the COVID-19 pandemic" (2022). Available at: https://gi-escr.org/en/resources/publications/the-impact-of-commercialised-healthcare-in-kenya. Last Accessed 02/08/2023.

profitable drugs, at the expense of a more balanced approach that places public health and human rights concerns at the centre. This can negatively impact marginalised groups, such as racial minorities, that often lack the power to influence policy-making decisions in market-oriented health systems.

Relevant Publications:

- GI-ESCR, "Healthcare Systems and the Commercialisation of Healthcare. A Glossary" (2023).
- GI-ESCR, "Compendium on United Nations Human Rights Treaty Bodies' Statements on Private Actors in Healthcare" (2022).
- GI-ESCR, "Patients or Customers? The Impact of Commercialised Healthcare on the Right to Health in Kenya during the COVID-19 Pandemic" (2022).
- GI-ESCR and JEI, "The Failure of Commercialised Healthcare in Nigeria during the COVID-19 Pandemic. Discrimination and Inequality in the Enjoyment of the Right to Health" (2022).
- GI-ESCR, "Italy's Experience during COVID-19: the Limits of Privatisation in Healthcare" (2021).

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