The Importance of a Socioeconomic Rights Approach to Transitional Justice
Written by Koldo Casla

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Social Exclusion in Deeply Divided Societies: A Socioeconomic Rights-approach to Transitional Justice

This paper claims that socioeconomic rights must be part of social reconstruction in deeply divided societies because the lack thereof lies at the core of the conflicts we aim to transform. The essay is divided in four sections. Firstly, it discusses the role of poverty and inequality in fostering violence and mistrust within societies. Secondly, the article suggests that the frame 'economic and social rights' is more suitable than other approaches covered in literature (such as 'human needs' or 'human security'). Third, it looks at three case studies where socioeconomic rights have been officially recognized as constitutive elements of transitional justice (Guatemala, South Africa and Northern Ireland) and critically examines some important empirical limitations of the inclusion of economic and social rights in the equation of conflict resolution. The article concludes with an appeal to overcome strictly legalistic and individualistic approaches to economic and social rights as a condition to get the most out of human rights in a period of transition.

Poverty, Exclusion and Inequality at the Core of the 'Problem'

If, during the Cold War, conflicts were presented in line with ideological paradigms, since the early 1990s, the argument of 'identity conflict' is preponderant. Nevertheless, we should not overlook that bad governance, ineffective avenues for political participation, and equitable distribution of resources, often make identification with a group very attractive and prominent, even in cases of destructive war[1]. As leaders and followers have different motivations to enter into armed confrontation, their practices, interests, discourse, etc., vary accordingly[2]. Consequently, the rationale of the conflict has diverse characteristics, vis-à-vis different actors. The salience of certain identities is fundamentally connected to the elites' political options. The decision to declare war based on religious, geographical or ethnic grounds, is upon leaders[3]. Followers, on the other hand, normally do not have the chance to alter the framing scenario of an armed conflict. Their behavior is the result of a double vulnerability, poverty and violence: A higher vulnerability to poverty and/or violence increases the risk of non-participation[4].

In order to understand violence in a given setting and formulate policy proposals to transform a violent context, one must first recognize that "each person's self-conception is a unique combination of many identifications"[5]. Violence can be covered by a variety of identities. We must transcend the reductionist culturalist understanding of violence and identity: "Understanding the multiplicity of our identity can be a huge force in combating the instigation of violence based on a singular identity, particularly religious identity"[6].

Academic literature in conflict resolution has widely acknowledged that economic problems lie at the core of armed conflict and other manifestations of social clash[7]. In particular, three broad economic and social factors have been identified as potential sources of internal conflict: 1) economic problems in the form of lack of or insufficient economic growth, 2) discriminatory economic systems, and 3) negative or unbalanced consequences of economic development and modernization[8].

Neither the availability of natural resources nor objective economic growth (in terms of GDP per capita) are sufficient

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conditions to overcome the aforementioned economic problems. This is the result of the "paradox of plenty", which explains why different governments of countries that are rich in natural resources have chosen similar development paths and sustained analogous trajectories that have produced perverse outcomes[9]. One of the outcomes of this paradox, also known as the "resource curse", is the outbreak and long continuity of civil wars as a consequence of rebels' armed seizure of territories that hold resources due to the insufficient distribution of the wealth generated by them[10]. As Kofi Annan, former UN Secretary General, noted: "The proximate cause of conflict may be an outbreak of public disorder or a protest over a particular incident, but the root cause may be, for example, socio-economic inequities and inequalities, systematic ethnic discrimination, denial of human rights, disputes over political participation or long-standing grievances over land and other resource allocation"[11].

Contrary to the agenda pushed by the Bretton Woods institutions and the great powers over recent decades, Roland Paris' 'Institutionalization Before Liberalization' approach moderately defends that, in transitional periods, certain promotional economic policies are more urgent than the immediate liberalization of the market[12]. Nevertheless, the economic dimension of transitional justice still remains invisible in most cases[13]. The invisibility of economics in transitions illustrates the failure to understand and respond effectively to three important issues: a) the reluctance to address the deep economic roots and consequences of a conflict, b) the preference of great powers to impose market liberalization over socioeconomic redistribution and c) the consequent plans of the ruling interest groups in the country[14]. If we truly want to turn violence and mistrust into peace and stability, we must adopt a broad interpretation of the idea of 'justice' (in transition) in order to cover social justice[15] and include economic and social rights[16] in the equation.

Economic and Social Rights at the Core of the 'Solution': Social Justice and Human Rights Framing

As previously noted, since the end of the Cold War, armed conflicts have been widely framed in culturalist terms. Cultural differences are highlighted to the point that, for many, they now seem to explain most cases of violence across the globe. However, this view is reductionist and does not explain the deep economic and social conditions that push ordinary individuals to risk their lives taking part in an armed conflict at different levels of intensity. We need to reframe armed conflict and its explanatory factors[17]. Human rights have an extraordinary potential for social transformation[18]. I hereby present a socioeconomic rights approach to transitional justice. 'Human rights' is a socially constructed notion and consequently its actual meaning reflects the power paradigms in a given society or epistemic community. The way we understand human rights shows the correlation of powers we are subjected to[19]. The frame proposed in this article aims to counteract the currently hegemonic (Neo)liberal creed that attempts to depoliticize and neutralize ideologically the process of social reconstruction, as if human rights violations in a war context were the mere product of individual decisions and had nothing to do with economic structures. Unaddressed social and economic grievances are a "powder keg" in post-conflict situations and threaten peace and stability[20]. Therefore, these grievances must be addressed as human rights issues. The distinction is not at all trivial: "Presenting socioeconomic root causes of conflict as historical context leaves policy change to the discretion of political leaders, while presenting them as rights violations makes redress and reform a political imperative"[21].

The relevance of the socioeconomic approach is palpable in the recent Egyptian revolution. Economic and social disparities were at the core of the revolts[22]. The Egyptians have finally reacted against the Neoliberal policies imposed since the 1970s with the backing of the domestic elites, the US and the international financial institutions[23]. It should not surprise that the *Roadmap of a nation of rights* proposed by the Egyptian forum of human rights organization insists upon the respect, protection and fulfillment of "all *economic, social, and cultural rights* to meet the demands of the January 25 revolution, especially a minimum wage and pension standard that is commensurate with the cost of living"[24].

What, however, does the frame 'human rights' concretely imply? What do human rights add to the transformation of socioeconomic grievances in comparison to other ideas, such as 'human needs' or 'human security'? A proper answer would require a long explanation, much more extensive than the space constraints of this paper permit. I will only mention a list of ten features that I see as the core elements of the added value of the human rights approach:

Minimum Core Obligations and Immediate Obligation to Act

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The UN Committee on Economic, Social and Cultural Rights states that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. (…). If the (1966 International Covenant on Economic, Social and Cultural Rights, hereafter the 'Covenant') were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. (…) In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations"[25]. The obligation "to take steps" (Article 2.1 of the Covenant) towards the fulfillment of socioeconomic rights is also of immediate effect. Steps must be concrete, deliberate and targeted[26].

Equality and Non-Discrimination

Another immediate obligation of state parties to the Covenant is the obligation of non-discrimination on any ground[27].

Particular Attention to Most Vulnerable Groups

Such as women, immigrants and children: "Even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes"[28].

Obligation to Respect, Protect and Fulfill.

The guarantee of socioeconomic rights has a tridimensional level of obligations: obligation to respect (that is, states must abstain from interfering in the normal enjoyment of socioeconomic rights), obligation to protect (states must ensure that non-state actors do not prevent individuals from enjoying socioeconomic rights) and obligation to fulfill (states must do whatever it takes to overcome obstacles to the full satisfaction of socioeconomic rights)[29].

Privatization and Basic Standards of Living

Even if a state decides to privatize a public service (such as prisons, schools or hospitals), it remains as the ultimate responsible for the protection of all human rights[30].

Progressive Achievement of Socioeconomic Rights

A state must take measures, "to the maximum of its available resources, with a view to achieving progressively the full realization" of socioeconomic rights (Article 2.1 of the Covenant). The state bears the burden of proof to show that its policies are moving forward expeditiously and effectively towards the ultimate fulfillment of these rights.

All Appropriate Policies

Article 2.1 of the Covenant mentions a few tools, such as international cooperation and legislative measures. Yet, it broadly refers to "all appropriate means", which opens the door for budget analysis and even judicial enforcement of socioeconomic rights.

No Retroactive Measures

The obligation to fulfill economic and social rights prevents states from taking measures that constitute a step back in the level of socioeconomic rights of the population[31]. This obligation is of immediate effect, so it is also applicable in times of economic recession. The state bears the burden of proof.

Accountability and Right to Remedy

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International human rights law and its domestication set up a collection of mechanisms that allow individuals and groups to monitor state policies and, in some instances, to lodge individual complaints and have access to effective remedies in case of violation of their rights.

Access to Information, Impact Assessment and Active Participation

As a corollary of all of the above, governments are obliged to provide information about the way in which they are getting the population closer to the ultimate goal of the fulfillment of socioeconomic rights. This requires institutionalizing impact assessment and facilitating active participation to monitor state practices.

The Frame in Practice: Guatemala, South Africa and Northern Ireland

We can identify a few cases over the past two decades where socioeconomic rights have been somehow recognized as constitutive elements of transitional justice. We will now focus only on three of those cases: Guatemala (1996), South Africa (1996) and Northern Ireland (1998). Space-constraints do not permit going deep into any of them, nor to carry out a comprehensive conflict map. The purpose is rather to pay attention to some of the practical implications and limits of integrating economic and social rights into the process of conflict transformation.

Guatemala: Talk Matters, but Action Matters More

Guatemala experienced a horrible internal armed conflict between 1962 and 1996. Inspired by the Cuban Revolution of 1959 and other national liberation movements, insurgent groups revolted against the state in the 1960s and 1970s. Their actions were stimulated by terror-based counter-insurgency. The conflict grew in intensity and bloodshed in the early 1980s. Between 30,000 and 40,000 people were disappeared. The government committed genocide and was responsible for the deaths of 200,000 people. Thousands of villages were destroyed. The state-led forces (army, police and paramilitaries) were held responsible for 93% of the violations, while 3% were attributed to the guerrilla forces[32]. 83% of the identified victims were Mayan[33].

After eight years of discussions, a final peace accord was signed on 29 December 1996 between the Government and the Guatemalan National Revolutionary Union (*Unidad Revolucionaria Nacional Guatemalteca*, URNG), a coalition of four insurgent organizations. In fact, this peace agreement was the last one of a list of several partial substantial and operational pacts that had been signed since 1994.

Based on one of the provisions of the peace accords, a national Historical Clarification Commission (*Comisión de Esclarecimiento Histórico*, CEH) was established in 1997. The Commission came up in 1999 with a comprehensive report (Memoria del Silencio, *The Memory of Silence*) about the human rights violations committed during the conflict, as well as the socioeconomic context in which they took place. The Commission analyzed the systemic causes of state violence, including economic exploitation, racism and political exclusion. The Commission acknowledged as soon as in the second paragraph of its extensive report that "in the complex task of historical understanding and judgment of the armed conflict, something is certain: This is a deeply heterogeneous and polarized society in economic, social and cultural terms, and it lacks a common national project to recognize equality of opportunity for all its citizens"[34]. The first chapter of the report addresses the historical roots of the conflict and goes back hundreds of years to the culture established by the Spanish colonizer that subordinated the Mayan population. The chapter also includes statistical evidence of socioeconomic indicators, such as health, education, literacy level and access to food, that show the levels of extreme poverty and social exclusion. The indigenous population, which is the majority in the country, suffers persistent manifestations of racism and discrimination notably reflected in their insufficient access to work, education, health and other social services, as well as in their inadequate political representation[35].

As socioeconomic factors were deemed of critical importance in order to understand the conflict, a specific accord was signed on the topic: the Agreement on Socio-Economic Matters and the Agrarian Situation, of 6 March 1996. However, even if the text never satisfied the expectations of civil society organizations, fifteen years later, it is fair to say that the implementation of this agreement has left a great deal to desire. A 160-page report published in

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November 2009 by the Guatemala-based *Instituto Centroamericano de Estudios Fiscales* and the *Center for Economic and Social Rights* (an international organization based in Madrid and New York) denounced the lack of fiscal commitment to uphold human rights in Guatemala which has had the most negative impact in the areas of food, health and education, particularly as regards to the rights of women, children and indigenous peoples[36].

Guatemala is an example of the recognition of the socioeconomic roots of an armed conflict. Parties in the conflict formally acknowledged in the 1996 Agreements that social exclusion was at the core of the division in the country. The national truth commission (CEH) formally and extensively documented the quantitative and qualitative dimensions of poverty and inequality. Nevertheless, thus far economic and social rights have not been taken seriously and the most vulnerable social groups (women, children and indigenous peoples) suffer the consequences more than anybody else.

South Africa: Economy and Law Don´t Speak the Same Language

Although apartheid was officially established in 1948, racial discrimination characterized South Africa for almost the whole of the 20th century. The political context changed dramatically in the 1990s, to some degree thanks to the pressure exercised by foreign actors, particularly the US, over the 1980s[37]. Another critical factor in the process of social transformation in South Africa was the role played by a few political leaders, notably Nelson Mandela and the last president of the apartheid-era, F. W. de Klerk[38]. The first democratic elections held in April 1994 marked the formal transition from the white exclusionist rule to democracy. Yet, the transitional period had already started in 1990, when a series of political pacts established the structure of a provisional power sharing system reflected in the 1993 Interim Constitution Pact[39]. In Sisk's opinion, the transition to democracy was facilitated by the conjunction of three factors: one, a sense of shared and common destiny, two, a high level of intergroup economic interdependence, and three, the inability of the apartheid regime to impose a geographical division based on ethnicity[40].

One of the first decisions of the new democratic South Africa was to write a new Constitution. After several years of negotiations, a Constitution was adopted in December 1996. This new text set up a power dividing political structure and enshrined a progressive bill of rights that included socioeconomic entitlements. The South African case illustrates how the cause of human rights can unite two parties but for quite different reasons: the white community that had supported the apartheid regime sought the protection of human rights in view of its minority status, while the liberation movement and black majority sought human rights as a tool to dismantle and redress the discriminatory regime of the past[41].

In order to understand the commitment to socioeconomic rights manifested in the 1996 Constitution, one must bear in mind that these rights were conspicuous by their absence for decades. In periods of political change like the one experienced by South Africa in the 1990s, "what is deemed just is contingent and informed by prior injustice"[42]. In other words, the meaning of justice in transitional justice is socially constructed by the transition itself. The constitution drafting and the judicial enforcement create something new while condemning something past at the same time. South Africa in the apartheid-era was characterized by social inequality and widespread poverty fundamentally among the black community. As noted by Justice Sachs in 1997, the old South Africa had "great experience in constitutionalising inequality"[43]. The goal of the new South African Constitution was to transform this situation. In the words of Justice Krieger, "the (1996) South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organizing principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyze properly whether a violation of the right has occurred"[44].

Almost from the beginning of its existence, the South African Constitutional Court adopted a very proactive attitude towards the judicial enforcement of socioeconomic rights. In fact, several of its judicial resolutions (such as *Soobramoney* case, *Grootboom* case or *Treatment Action Campaign* case[45]) are very well known in the global human rights community, have been commentated by scholars all around the world and have propelled the advocacy for economic and social rights in many countries.

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The fact that apartheid was based upon social inequality does not explain in its own the official recognition of economic and social rights in the South African transitional justice. The exceptional nature of this case is also explained by the lobby exercised by constitutional experts and human rights advocates in the country, as well as by the composition and nature of the first Constitutional Court, which gathered a group of judges that were very committed to the defense of social rights[46].

Unfortunately, reality has not fulfilled the expectations of those that fought for the radical recognition of socioeconomic rights as authentic human rights. South Africans "expected a 'developmental state' based on non-racial democratic principles concerned with social justice"[47]. In contrast, economics and law evolved through different pathways. While socioeconomic rights were recognized at the constitutional level and received the support of the highest judicial body, at the economic level South Africa surrendered to Neoliberalism, which imposed macroeconomic reforms that failed to address poverty and social inequality while enriching capital owners[48]. The inability to challenge the damage caused by Neoliberal policies may have paradoxically "frozen the hierarchies of apartheid by preserving the social and economic status quo"[49].

It is quite telling that in August 2008, Irene Grootboom died in the same conditions of homelessness that had led the Constitutional Court to rule in her favor in October 2000[50]. This tragic ending draws a big question mark under the effectiveness of judicial avenues for the real improvement of social protection and its impact over the society as a whole. In other words, it questions the power of law when political economy does not want to help.

Northern Ireland: What are Human Rights?

Since the late 1960s till the late 1990s, over 3,000 people were killed in the so-called 'Troubles' of Northern Ireland (total population around 1.5 million): approximately 50% by Republicans, 40% by Unionists and around 10% by UK forces[51]. Peace talks began almost as soon as the armed conflict itself. Finally, the political actors (with the exception of Ian Paisley's Democratic Unionist Party, then second largest unionist party) reached a settlement in 1998: Good Friday/Belfast Agreement[52].

One of the main features of the Belfast Agreement is its recurrent emphasis on the importance of protecting human rights. The Preamble of the Agreement sets a clear tone with the commitment of all parties to "honour (victims) through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all"[53]. Prior to 1998, human rights had resided at the margins of the Northern Irish political life. They had traditionally been seen as an instrument of the Republican side and, therefore, Unionists were initially wary of accepting this frame. The challenge then was to move human rights out from the margins and bring them into the political mainstream[54]. Over time, "opposing parties came to see that individual human rights protection could address mutual concerns of domination"[55]. The larger Unionist community found in human rights a shield in the likely future event they became a minority in Northern Ireland. Yet, even if human rights were formally placed at the core of the discourse, one important issue remained open: What human rights?

The answer to this question has been disputed over the last decade or so, since the Northern Ireland Human Rights Commission (NIHRC) began the drafting process of a Bill of Rights for Northern Ireland, in compliance with the mandate set by the Belfast Agreement[56]. This drafting process was characterized by the accent on public participation in order to enhance the legitimacy and the sense of public ownership of the Bill. Nearly 200 local organizations, congregated in the 'Bill of Rights Forum', discussed the content of an inclusive Bill of Rights for Northern Ireland. On 10 December 2008, the NIHRC delivered its final advice to the UK Government and submitted its proposal of a Bill of Rights.

The draft Bill includes economic and social rights as well as civil and political rights. Yet, the debate about the meaning of human rights in Northern Ireland is not at all over. Two Commissioners (Lady Daphne Trimble and Jonathan Bell) dissented from the NIHRC's Bill as they thought the Commission had gone too far in the recognition of socioeconomic rights. This is also the reason why the UK Government has been reluctant to accept the draft Bill thus far as it is its official view that socioeconomic rights must not be considered as equals to traditional civil and political

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rights[57].

In 1971, the unemployment rate among Catholics stood at 17%; it was 6% for Protestants. In 1981, the respective numbers were 30% and 12%. The tendency since the mid-1990s has leaned towards a progressive equilibrium, although Catholics are still worse off than Protestants: the proportion of Catholics that live with low incomes declined to 55% (from 58%) during the decade of the 1990s, but this figure is still disproportionately high (the proportion rose from 42 to 45% among Protestants). According to a survey, 36% of Catholic households and 25% of Protestant families are 'poor'[58]. In recent years, the regression of workers' rights in Northern Ireland has been blatant not only for Catholics but also for Protestants[59]. The recognition of socioeconomic rights as human rights would serve to tear apart the national/religious/ethnic division in Northern Ireland and facilitate a common framework of action for Protestants, Catholics, Unionists and Republicans in defense of their economic and social rights. The Northern Irish people need to remember why they adopted the Belfast Agreement in 1998. They need to remember why they put human rights at the core of the Agreement that got the support of the vast majority of the people in a referendum. As in the case of Guatemala and South Africa, socioeconomic rights must be preserved in the Bill of Rights because the lack thereof was a root cause of the conflict the population sought to overcome.

Concluding Remarks

This paper has presented a socioeconomic rights-approach to transitional justice. In short, it claims that as exclusion and poverty lie at the core of armed conflict and social division, economic and social rights must be a central landmark of the new society. The paper also includes a brief look at three case studies (Guatemala, South Africa and Northern Ireland), where socioeconomic rights were officially recognized as constitutive elements of their respective peace processes.

There is a shared limitation in our three case studies. In all of them, the emphasis was placed on the legal recognition of socioeconomic rights in the peace agreement (Guatemala), in the Constitution and case law (South Africa) or in the Bill of Rights (Northern Ireland). As important as this is, the epistemic community in conflict transformation and human rights will remain disoriented if it does not go beyond legalistic and individualistic accounts of the past. Thus far, transitional justice has focused on the individual responsibility for the violation of human rights (*justice*), the *truth* about those events and the *reparation* to the ones that have seen their rights breached. A socioeconomic rights-approach entails that the discipline of transitional justice must reinvent itself. This does not mean that we must step back from the individual right to truth, justice and reparation. Yet, taking economic and social rights seriously requires looking also at economic structures and social privileges. In sum, it demands transforming the role of the state from perpetrator or concealing actor to guarantor and promoter of human rights for all.

We must acknowledge that social inequality is not the only cause of conflict. Therefore, socioeconomic rights are not a magic bullet. Even if the general gap between rich and poor is growing since the beginning of the Neoliberal hegemony (early 1980s), not all societies in which this has been the case are necessarily deeply divided. There are generally many interrelated causes for violence in a given setting. The researcher ought to carry out a case-by-case study and avoid confusing generalizations.

This does not mean that the cause of socioeconomic rights is of less worth. The fact that poor people do not systematically grab weapons and risk their lives fighting governments does not play down the fact that they are poor. Human rights in general, and economic and social rights in particular, are relevant enough to be guaranteed in spite of the existence or inexistence of an armed conflict. Until the Arab world was soaked in blood, the comfortable global North never cared too much about the living conditions in North Africa. Yet, the bloodshed was nothing but a wake-up call about a reality that has persisted for decades. Egyptians, Tunisians, Libyans, Moroccans… do not deserve human rights because they suffer torture and extrajudicial killings. They deserve human rights. As simple as that. Their dignity is not dependent upon their suffering. However, their suffering questions our own commitment to human rights when we pretend it is not our business.

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[16] The discussion about the scope of this set of rights is intellectually enriching but clearly inoperative for the purposes of this project. Therefore, for the sole purposes of this article this author defines 'economic and social rights' as those rights enshrined in the 1966 International Covenant on Economic, Social and Cultural Rights, ratified by 160 states (up to February 2011).

[17] 'Frames' are "the specific metaphors, symbolic representations, and cognitive cues used to render or cast behavior and events in an evaluative mode and to suggest alternative modes of action"; from ZALD, Mayer, "Culture, ideology, and strategic framing", in McADAM, Doug *et al* (eds.) *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* , Cambridge: Cambridge University Press, 1996, pp. 261-274, at 262.

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[26] *Ibid*, para. 2.

[27] Article 2.2 of the Covenant; UN CESCR, *General Comment 20, Non-discrimination in economic, social and cultural rights*, UN doc. E/C.12/GC/20, 2 July 2009; UN Human Rights Committee, Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands*, Views adopted on 9 April 1987, para. 12.4; UN Human Rights Committee, *General Comment 18, Non-discrimination*, U.N. Doc. HRI/GEN/1/Rev.6, 10 November 1989.

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