**August 4, 2023**

Committee on the Elimination of All Forms of Racial Discrimination

Via Electronic Mail to: ohchr-cerd-gr37@un.org

**Re: Draft General Recommendation n°37 on Racial discrimination in the enjoyment of the right to health**

Dear Members of the Committee on the Elimination of All Forms of Racial Discrimination,

We applaud the initiative of the Committee in drafting a much-needed General Recommendation on racial discrimination in the enjoyment of the right to health. Though racial inequities in the realization of this right have long-persisted, the recent COVID-19 pandemic deeply underscored the extent to which structural racial discrimination that is the legacy of colonialism, slavery and historic racial subordination contributes to disproportionately negative health outcomes for racially marginalized people in their diversity. We take the call for contributions on the Draft General Recommendation nº37 (“Draft GR 37”) as an opportunity to direct the Committee’s attention to recent past submissions regarding the lack of equitable and non-discriminatory access to COVID-19 healthcare technologies and make corresponding recommendations to the draft text.

Our [June 2023](https://drive.google.com/file/d/1tUqmuTpUJS08PH_v_PoscAFx7JE6F59D/view?ts=62619c8b) Update Letter to our [March 2022](https://www.escr-net.org/sites/default/files/attachments/covid-19_urgent_appeal_to_cerd_-_final_with_links.pdf) Early Warning and Urgent Action Procedure petition details the gravity of Respondent States’ continued failure to implement the Committee’s determination detailed in its critical [April 2022 statement](https://drive.google.com/file/d/1Vf90PCis1Zxumg7ikY3CQOrNl2Htyla7/view). The statement, cited in Para 5 of the Draft General Recommendation, acknowledged the harm of Respondent States’ actions, stating that “the pattern of unequal distribution of lifesaving vaccines and COVID-19 technologies between and within countries manifests as a global system privileging those former colonial powers to the detriment of formerly colonized States and descendants of enslaved groups.”[[1]](#footnote-0) The Committee further observed that “failures to redress these injustices have impeded the ability of communities to enjoy fully the right to life, health and health care, and the capacity of States to address entrenched structural inequities which have been exposed and deepened by the pandemic and enduring practices of discrimination and exclusion.”[[2]](#footnote-1) We are thus pleased to see that the Committee has incorporated a section on International Cooperation in the Draft GR 37, in which it urges in Para 63 that “States should take all necessary national and multilateral measures, including temporary waivers of intellectual property protections on healthcare technologies, to mitigate the disparate impact of global challenges, such as pandemics, climate change and disasters, and their socioeconomic consequences on groups and minorities protected under the Convention.” This is crucial guidance as negotiations regarding a new pandemic treaty proceed, and as disasters multiply with the compounding crises of climate change and armed conflict.

As noted in our submissions, intellectual property barriers have historically served to entrench divisions between the Global North and the Global South, reifying relationships of dependence and extraction due to Global North States’ pattern of privileging the interests of pharmaceutical corporations over the rights to life, health, and equality of people within and beyond their borders. As recognized by the United Nations Special Rapporteur on the right to health, “[the Trade-Related Intellectual Property Rights Agreement] TRIPS and [Free Trade Agreements] FTAs have had an adverse impact on prices and availability of medicines, making it difficult for countries to comply with their obligations to respect, protect, and fulfill the right to health.”[[3]](#footnote-2) As such, we recommend that the Committee detail the broader harms of intellectual property barriers on the ability of public health systems to access life-saving drugs and healthcare products, and how inflated drug prices (exemplified by the tiered pricing schemes described in Para 15 of our Update Letter) exacerbate health inequities among racially marginalized people (and along intersecting identities such as gender, ability, age, socio-economic status and sexual orientation). Realizing human rights requires intellectual property rules to be suspended in a health crisis, so that every country can practice its rights to protect its population.

Relatedly, we believe it is important for Draft GR 37 to include mention of the role of other multilateral institutions, with their lack of transparency and inclusive decision-making (as illustrated by the wholly inadequate negotiation process around the TRIPS waiver request at the World Trade Organization’s 12th Ministerial Conference, detailed in Paras 24-31 of our Update Letter), in reinforcing structural racial discrimination. The absence of avenues for States or civil society to hold these institutions accountable make it unlikely that they will take decisions that uphold States’ obligations under CERD and international human rights instruments more generally. The COVID-19 pandemic revealed how the actions of multilateral institutions without accountability can lead to disastrous health outcomes (see, e.g., Para 6 of our Update Letter).

Furthermore, we urge the Committee to highlight the role of corporate capture in exacerbating racial and socioeconomic disparities in health and access to healthcare services, which must be recognized and redressed. In the case of COVID-19, the global public health response has been marred by hoarding of life-saving healthcare technologies, unjustified private monopolies on vaccines and other healthcare products developed with deep public subsidies, and corporate capture of states and healthcare systems, leading to inequitable access to vaccines, therapeutics and diagnostics along a Global North–Global South divide. Realizing human rights entails preventing corporate capture, protecting against business lobby interference in public health policymaking, as is done, for example, in the Article 5.3 safeguard against vested interest capture in the World Health Organisation Framework Convention on Tobacco Control.[[4]](#footnote-3)

Thank you once again for the opportunity to comment on Draft GR 37. We look forward to further engagement with the Committee as it continues to develop this important text.

Sincerely,

Centro de Estudios Legales y Sociales (CELS)

- On behalf of a consortium of organizations from the global North and global South working collaboratively for human rights and development globally. In addition to CELS, the petitioning organizations included: the African Alliance, Center for Economic and Social Rights (CESR), Campaign against Racism of Equal Health, Initiative for Social and Economic Rights (ISER), Minority Rights Group (MRG), Oxfam International, Treatment Action Campaign, and Women’s Legal Centre (WLC) with the support of SECTION 27, the Global Network of Movement Lawyers, housed at Movement Law Lab, and the secretariat of ESCR-Net - International Network for Economic, Social and Cultural Rights. Several of the petitioning organizations are members of these networks. These organizations contributed to the original amended petition filed in March 2022 and the June 2023 Update Letter.

1. Committee on the Elimination of All Forms of Racial Discrimination (CERD), *Statement on the lack of equitable and non-discriminatory access to COVID-19 vaccines,* (25 April 2022), pp. 2, <https://www.kpil.org/wp-content/uploads/2022/05/20220425-CERD-Statement-on-the-lack-of-equitable-and-non-discriminatory-access-to-COVID-19-vaccines.pdf>. [↑](#footnote-ref-0)
2. *Id.* [↑](#footnote-ref-1)
3. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, 31 March 2009, A/HRC/11/12, par. 94. [↑](#footnote-ref-2)
4. World Health Organisation, Guidelines for implementation of Article 5.3, WHO Framework Convention on Tobacco Control, Technical Document, 1 January 2013, <https://fctc.who.int/publications/m/item/guidelines-for-implementation-of-article-5.3>. [↑](#footnote-ref-3)