

## Chapter 2

# Article 2: The Right to Non-discrimination

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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.

### What Did Children Say?

'This kind of activities, like the one that we are doing right now, should happen more in our schools. To make us overcome stereotypes. To be closer to each other and become better friends.' (*Western Europe/Other*)

'Campaigns through social media should help everyone understand, identify and avoid discrimination.' (*Western Europe/Other*)

'Opportunities should be given in school for familiarisation with diversity. Meetings should be organised with students from different countries. We should learn about cultures of other countries and learn to live together and not to be racist.' (*Western Europe/Other*)

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## Overview

Non-discrimination, and its positive corollary, equality, are cross-cutting human rights invoked in all international human rights instruments (United Nations OHCHR, 2012, p. 81). While equality means the absence of discrimination, upholding the principle of non-discrimination between groups will produce equality (Bayefsky, 1990, p. 5). Non-discrimination is both a substantive and a procedural right that must be applied in the realisation of all other rights (Abramson, 2008, p. 4).

Discrimination has been defined by the Human Rights Committee as

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 equal footing, of all rights and freedoms (UN Human Rights Committee, 1989, para. 7).

It is important to note that the provision of ‘or other status’ makes clear that this list is non-exhaustive. Non-discrimination is an absolute right, subject to no conditionality or qualifications such as progressive realisation, appropriateness or feasibility, or public welfare overrides (Abramson, 2008, pp. 40–42). The Committee on the Rights of Persons with Disabilities, for example, has affirmed that non-discrimination in respect of inclusive education is a core obligation that must be implemented with immediate effect (2016, para. 40(a)). However, the goal of equality sometimes requires States Parties to take affirmative action to diminish or eliminate conditions that cause or help to perpetuate discrimination. Such action is legitimate differentiation (UN Human Rights Committee, 1989, para. 8).

Within the Convention, Article 2 is worded in broadly comparable language with the Article 2 provisions on non-discrimination embodied in previous core human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights. However, it does contain significant differences. It includes two additional grounds for protection from discrimination, namely ethnic origin and disability. It also potentially strengthens the jurisdictional accountability of States Parties by removing the provision contained in the ICCPR that individuals must be living within the territory and subject to the state jurisdiction and requires only that they are within the jurisdiction of the state. Accordingly, the protection it affords extends to migrant, undocumented, refugee and asylum-seeking children living within the jurisdiction of the state. The Convention provision further, uniquely, protects children from discrimination based not only upon their personal traits and protected characteristics, but also from discrimination based upon their parents’ or guardians’ association with a class of persons protected from discrimination. In addition, in paragraph 2, this protection is reinforced by a new provision in international human rights law, whereby States Parties must take all appropriate measures to protect the child from all forms of discrimination or punishment on the basis of the actions, beliefs, or status of the parents, family members, or other guardians. In these ways, Article 2 affords children entitlement to the same

protections from discrimination as adults, while considering their special status as children dependent on the adults who care for them (Besson & Kleber, 2019).

## General Principles

**Article 3** The principle of non-discrimination underpins the determination of the best interests of the child. States Parties must undertake appropriate proactive measures to guarantee effective equal opportunities for all children to ensure their best interests are addressed and realised (UN Committee on the Rights of the Child, 2013, para. 41).

**Article 6** Discrimination impedes the optimum development of the child, whether it takes the form of denial of services, on the basis of equality of opportunity, prejudice, or social exclusion, or physical and psychological abuse. Compliance with Article 2 is therefore integral to the meaningful implementation of Article 6.

**Article 12** The views of the child, wherever appropriate, must be sought in any consideration of discrimination. In addition, when a child experiences discrimination on any grounds, they must be provided with the opportunity to register a complaint and be provided with safe and accessible means of seeking redress.

## Articles Related or Linked to Article 2

The Committee has identified Article 2 as one of four General Principles, and as such it must be applied as a constant reference for the implementation of all other rights (Pais, 1997). However, its implications need to be understood in relation to the following articles:

- **Article 1** provides an explanation as to who is a child in the context of the Convention. Article 2 then affirms that the rights in the Convention must be respected and ensured for every such child.
- **Article 4** elaborates the means by which the obligations to respect rights as described in Article 2 must be fulfilled.

In addition, the following articles highlight constituencies of children for whom additional attention is needed to ensure that their right to non-discrimination is equally protected on the same basis as other children:

- **Article 20**, children in need of alternative care
- **Article 21**, children being placed with adoptive families
- **Article 22**, children who are refugees or asylum seekers
- **Article 23**, children with disabilities
- **Article 30**, children from minority or indigenous communities

- **Article 37**, children deprived of liberty
- **Article 38**, children affected by armed conflict
- **Article 40**, children in conflict with the law

## Relevant Instruments

The principle of non-discrimination originates in the 1945 United Nations Charter, which in Article 1 (3) provides an equality guarantee, and establishes the foundation for all subsequent human rights treaty development:

To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Non-discrimination is therefore integral to all human rights treaties. Thus, the following list is indicative rather than exhaustive:

Common Article 2s are embodied in the following treaties:

- UN Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966).

In addition, there are specific non-discrimination treaties, which do not establish rights but elaborate the obligations on States Parties to uphold rights contained in other treaties, in respect of groups of individuals, for example:

- UN Convention against Discrimination in Education (1960)
- ILO Convention 111, Discrimination (Employment and Occupation) (1958)
- International Convention on the Elimination of all forms of Racial Discrimination (1966)
- UN Convention on the Elimination of All Forms of Discrimination against Women (1979)
- UN Convention on the Rights of Persons with Disabilities (2006).

Regional treaties including non-discrimination provisions, for example:

- European Convention on Human Rights (1950)
- American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (B-32) (1978)
- African Charter on the Rights and Welfare of the Child (1990).

## Attributes

### ***Attribute One: Non-discrimination in the Realisation of all Rights for All Children Within the Jurisdiction***

The first critical contribution of Article 2 is to define the scope of the obligations of States Parties regarding children. It does so in two ways. First, it introduces the obligation on States Parties to ‘respect and ensure’ the rights in the Convention, thus requiring them to refrain from actions that violate the rights of the child and to take all necessary actions to enable the child to enjoy their rights (Alston, 1992, p. 5). In this regard, it is closely linked with Article 4. Where Article 2 constitutes an obligation of result, Article 4 elaborates the measures necessary to achieve that result (Pais, 1997). Second, it extends those obligations to every child ‘within the jurisdiction,’ regardless of status, including visitors, children of migrant workers, and undocumented immigrants (UN Committee on the Rights of the Child, 2003a, para. 18).

In other words, States Parties must secure rights for all children under their authority and responsibility living within any territory over which the state has power (Abramson, 2008, pp. 127–28; Pais, 1997, p. 417). In this regard, the Committee has stressed the imperative, in federal states, of ensuring equal protection for all children (2003b, para. 19).

The concept of discrimination comprises three key dimensions (Abramson, 2008, p. 29):

- Treating a child differently
- When doing so has either the purpose or the effect of impairing or harming them
- The differentiation is based on a prohibited ground in relation to a right contained in the Convention.

The Committee has stressed the requirement for States Parties to adopt a proactive commitment to the elimination of discrimination through legislation which reflects all the prohibited grounds (1993, para. 14). The scope of such legislation must address governmental and private or non-governmental actors, given that violations are often perpetrated by private action or private individuals (Weiwei, 2004, p. 22). The prohibited grounds include the child’s or their parents’ or legal guardians’ race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, and birth or other status.

Existing legislation must also be reviewed to ensure it does not include provisions that discriminate (UN Committee on the Rights of the Child, 2002a, paras. 27–28). In its General Comments and its Concluding Observations, the Committee consistently highlights many different groups of children who are particularly vulnerable to discrimination, including girls, children with disabilities, Roma children, and

indigenous children.<sup>1</sup> In this regard, it is important to recognise intersectionality and multiple forms of discrimination that impact groups of children, for example, girls with disabilities.

The Committee has also elaborated on the provision ‘or other status’ to identify additional grounds for discrimination, including, for example, sexual orientation and transgender or intersex status (2016, para. 33), HIV status (2001, para. 3), and children in street situations (2017, para. 25). It has argued that both early childhood and adolescence can be a source of discrimination (2016, para. 21). For example, young children are particularly at risk of being denied their right to express their views and have them given due weight (UN Committee on the Rights of the Child, 2006, para. 11(b)), whereas adolescents can face hostile treatment directly as a consequence of their age and status (UN Committee on the Rights of the Child, 2016, para. 21).

### ***Attribute Two: Non-discrimination on the Basis of Status, Actions, or Beliefs, of Parents, Guardians, or Family Members***

Paragraph 2 introduces an obligation on States Parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, actions, or beliefs of parents, guardians, or family members. Unlike paragraph 1, this is a qualified and not an absolute obligation, requiring only that appropriate measures are undertaken (Abramson, 2008, p. 132). In other words, it establishes an obligation of conduct rather than result, as is the case with paragraph 1. However, interestingly, it also differs from paragraph 1 in that its scope is not limited to discrimination in respect of the rights in the Convention.

The text comprises two distinct elements. First, States Parties must not *discriminate* against a child because of family members’ status, actions, or beliefs. For example, affording differential legal status to a child born to unmarried rather than married parents would constitute a violation of Article 2 (UN Committee on the Rights of the Child, 1995b, para. 21), an issue highlighted repeatedly as of particular concern during the drafting of the Convention (Office of the United Nations High Commissioner for Human Rights & Rättsutskottet (Society: Sweden), 2007, pp. 315, 325–327). Second, a child must not be *punished* as a consequence of family members’ status, actions, or beliefs. For example, one sibling should not be excluded from school because of the behaviour of another sibling. Implementation of paragraph 2 requires that States Parties take measures to ensure that any existing

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<sup>1</sup> See, for example, the Committee report on the eighth session (1995a, p. 3); General Comment no. 9, Children with Disabilities (2007, paras. 8–10); Concluding Observations: Spain (2018, paras. 14–15).

constitution, legislation, court decisions, or administrative policy comply with both these elements.

### ***Attribute Three: Special Measures to Address Discrimination***

Beyond legislation, the Committee has identified measures required by States Parties to implement Article 2. It emphasises the importance of collecting disaggregated data to identify children experiencing discrimination (2003a, para. 12). It also recommends that States Parties<sup>2</sup>:

- Develop comprehensive strategies
- Undertake research into discrimination
- Introduce information and awareness raising campaigns
- Involve religious, community, and political leaders to influence attitudes and discourage discrimination
- Enact special measures or positive discrimination to eliminate barriers to the attainment of equality for a particular group of children.

Importance is also attached to the need for education systems to address issues such as gender discrimination in the curriculum and exclusion of children with disabilities, and to affirm the role of education in promoting respect for difference (UN Committee on the Rights of the Child, 2001, para. 10).

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<sup>2</sup>See, for example, Concluding observations for Niger (2002b, para. 28), Bangladesh (1997, paras. 15, 35), and India (2000, para. 31).

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