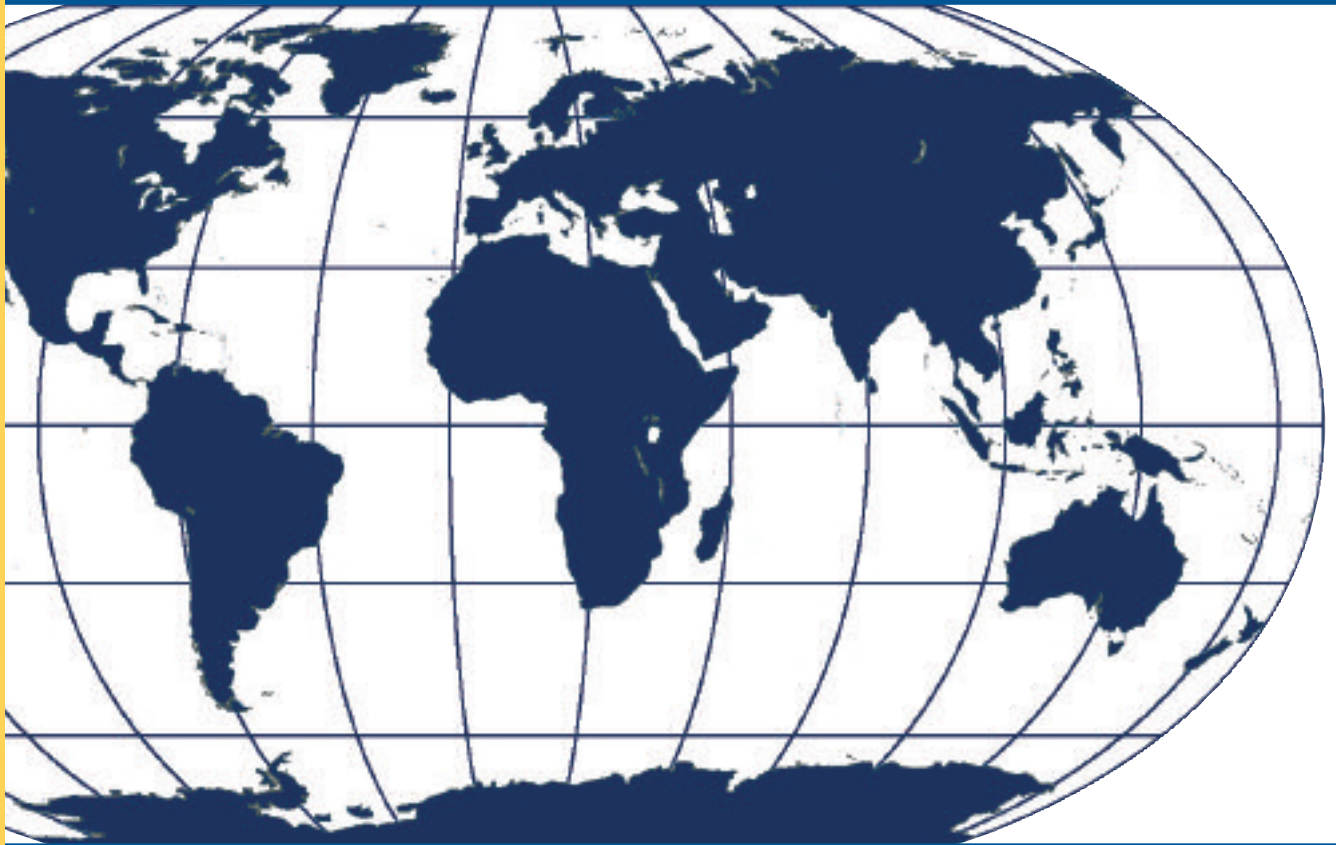


Non-Discrimination in International Law

A HANDBOOK FOR PRACTITIONERS



INTERIGHTS

With the generous support of The Sigrid Rausing Trust

STAFF

Helen Duffy
Legal Director

John Musgrave
Finance and Administration
Director

Iain Byrne
Commonwealth Law Officer

Andrea Coomber
Legal Officer for Equality

Beth Fernandez
Programme Assistant for CEE /
Equality

Erica Ffrench
Programme Assistant for ED /
Commonwealth

Ibrahima Kane
Legal Officer for Africa

Kevin Kitching
Legal Officer for CEE

Juliet McDermott
Programme Assistant for ED /
Africa

Judith Oder
Legal Officer for Africa

Connie Rafferty
Finance Manager

Cathal Sheerin
Administrator

Moni Shrestha
Programme Assistant for LD /
South Asia

Vesselina Vandova
Legal Officer for CEE

Lord Lester of Herne Hill QC
Honorary President
Senior Member of the English
Bar

BOARD

Laura Cox DBE
Chair
Judge of the High Court;
Member of the ILO Committee
of Experts

Jeremy McBride
Vice Chair
Director, Human Rights Law &
Practice Programme, University
of Birmingham

Alan Goodman
Treasurer
Former Management
Consultant,
PricewaterhouseCoopers

Chaloka Beyani
Lecturer in International Law and
Human Rights, London School
of Economics and Political
Science

Professor Christine Chinkin
Professor of International Law,
London School of Economics
and Political Science

Helena Cook
Deputy Director, Human Rights
Centre, London School of
Economics and Political Science

Tim Eicke
Practising Barrister

Geoffrey Lewis
Former Partner, Herbert Smith

Dr Neville Linton
Consultant in Political Affairs;
Former official, Commonwealth
Secretariat

William Norris
Practising Barrister

ADVISORY COUNCIL

Justice Sabihuddin Ahmed
(Pakistan) Judge of the High
Court of Sindh

Shirin Aumeeruddy Cziffra
(Mauritius) Human Rights
Advocate, Barrister, Former
Attorney General

Florence Butegwa
(Uganda) Advocate; co-founder
of Women in Law &

Development (Africa); member
of the African Commission on
Human & Peoples' Rights

Roberta Clarke
(Trinidad & Tobago) Lawyer;
women's rights specialist

Dr Ewa Eliaz
(United Kingdom) Barrister;
former adviser to Solidarity in
Poland; Consultant on Eastern
Europe

Roger Errera
(France) Conseiller D'Etat, Paris;
Member of the Conseil
Supérieur de la Magistrature

Professor Yash P Ghai
(Kenya) Member of the English
Bar; Professor of Law,
Universities of Warwick and
Hong Kong

Asma Khadar
(Jordan) Minister of State and
Government Spokesperson;
Lawyer

Harold Koh
(USA) Professor of International
Law, Yale Law School

Monica Macovei
(Romania) Member of Bucharest
Bar; Professor of Law, School of
Journalism, Vice-President of
the Helsinki Committee

Marek A Novicki
(Poland) Lawyer; Ombudsman in
Kosovo

Sonia Picado
(Costa Rica) Advocate, former
Judge of the Inter-American
Court

DJ Ravindran
(India) Lawyer; founder of Forum
Asia; Deputy Director, Cambodia
Office of the UN High
Commissioner for Human Rights

Mary Robinson
(Ireland) Former President of
Ireland and UN High
Commissioner for Human
Rights; Director of the Ethical
Globalization Initiative

Suriya Wickremasinghe
(Sri Lanka) Barrister, Attorney-
at-Law

Non-Discrimination in International Law

A HANDBOOK FOR PRACTITIONERS

Edited by Kevin Kitching

INTERIGHTS

Published by
INTERIGHTS
The International Centre for the Legal Protection of Human Rights
Lancaster House
33 Islington High Street
London N1 9LH
UK

Tel: +44 (0)20 7278 3230
Fax: +44 (0)20 7278 4334
Email: ir@interights.org
www.interights.org

Designed/Typset by JSW Creative Ltd
www.jswcreative.co.uk

© INTERIGHTS January 2005

All rights reserved. No part of this publication may be reproduced without the prior permission of the publisher. Copyright remains with INTERIGHTS. However, part or the whole of this publication may be transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without seeking prior permission from the publisher.

ISBN 1-869940-32-6

CONTENTS

ABBREVIATIONS	14
PREFACE	15
USING THE HANDBOOK	16
ACKNOWLEDGMENTS	17

CHAPTER I

INTRODUCTION TO INTERNATIONAL DISCRIMINATION LAW	19
A CONCEPTS OF EQUALITY	19
B BASIC PRINCIPLES OF INTERNATIONAL DISCRIMINATION LAW	20
C STATE OBLIGATIONS: PUBLIC AND PRIVATE DISCRIMINATION	22
1 Negative Obligations of the State	22
2 Positive Obligations of the State	23
2.1 The UN System	24
2.2 European Convention on Human Rights	25
2.3 The European Union	26
2.4 The Inter-American System	26

CHAPTER II

AN OVERVIEW OF INTERNATIONAL AND REGIONAL INSTRUMENTS	27
A 'UNIVERSAL' INSTRUMENTS	28
1 The International Covenant on Civil and Political Rights (ICCPR)	30
2 The International Covenant on Economic, Social, and Cultural Rights (ICESCR)	32
3 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	34
4 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	36
5 The Convention on the Rights of the Child (CRC)	38
6 The International Labour Organization (ILO) Conventions	39
7 Other Relevant UN Conventions	42
7.1 The CAT and the Migrants Convention	42
7.2 UNESCO Convention on Discrimination in Education	43
B INSTRUMENTS OF REGIONAL BODIES	43
1 The Council of Europe System	44

1.1	European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)	44
1.1.1	Article 14 of the European Convention on Human Rights	45
1.1.2	Protocol 12 to the European Convention on Human Rights	47
1.2	The European Social Charter	48
2	The European Union (EU)	51
2.1	Article 13 of the EC Treaty	53
2.2	Article 39 of the EC Treaty (Free movement of workers)	57
2.3	Article 141 of the EC Treaty (Sex discrimination)	58
2.4	Article 6 of the Treaty on European Union – the EU and Human Rights	61
3	THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS (AfCHPR)	63
4	THE AMERICAN CONVENTION ON HUMAN RIGHTS (AmCHR)	66

CHAPTER III

KEY LEGAL STANDARDS IN INTERNATIONAL DISCRIMINATION LAW		71
A	DIRECT DISCRIMINATION	71
1	UN Treaty Bodies	72
2	European Convention on Human Rights	74
3	European Union	77
3.1	Article 13 Legislation	77
3.2	Article 39 and Nationality	77
3.3	Article 141 and Sex Discrimination	77
4	African Charter on Human and Peoples’ Rights	78
5	American Convention on Human Rights	79
B	INDIRECT DISCRIMINATION	80
1	UN Treaty Bodies	82
2	European Convention on Human Rights	83
3	European Union	86
3.1	Article 13 Legislation	86
3.2	Article 39 and Nationality	87
3.3	Article 141 and Sex Discrimination	87
4	Indirect Discrimination in National Jurisdictions	89
C	GENUINE OCCUPATION REQUIREMENTS	90
1	The European Union	91
D	HARRASSMENT	92
E	VICTIMISATION	94
F	POSITIVE ACTION OR AFFIRMATIVE MEASURES	95
1	Introduction	95
2	Positive Action under International Instruments	97
2.1	International Covenant on Civil and Political Rights	97
2.2	International Convention on the Elimination of All Forms of Racial Discrimination	98
2.3	International Convention on the Elimination of All Forms of Discrimination Against Women	98
2.4	International Labour Organization	98
2.5	European Convention on Human Rights	99
2.6	European Union	100
2.7	American Convention on Human Rights	102
3	Types of Positive Action Measures	103
3.1	Training and Support	103

3.2	Policy Impact Assessment	103
3.3	Mainstreaming	104
3.4	Setting of Targets	104
3.5	Targeted Recruitment	105
3.6	Preferential Treatment	105
3.7	Quotas	108
3.8	Positive Action Programmes	109
G	REASONABLE ACCOMMODATION	110
1	Introduction	110
2	'Reasonable Accommodation' in International and EU Law	111
2.1	The EU Framework Directive	111
2.2	Other International Mechanisms	112
3	Reasonable Accommodation in Domestic Law	113
3.1	Canada	113
3.2	The United States	113
3.3	Other Jurisdictions	114

CHAPTER IV

	PROCEDURE: MAKING A DISCRIMINATION CLAIM	115
A	ELEMENTS OF A DISCRIMINATION CLAIM	115
1	The Basic Structure of a Discrimination Claim	115
2	Using a Comparator	116
2.1	Difficulties with Using Comparators	116
2.2	Alternatives to the Comparator: 'Substantive Standards'	118
3	Relevance of Intent	118
B	THE BURDEN OF PROOF	119
1	UN System	120
2	European Convention on Human Rights	120
3	European Union	121
4	National Jurisdictions	121
C	THE STANDARD OF PROOF	122
1	European Convention on Human Rights	123
2	Inter-American System	124
3	National Jurisdictions	124
D	ESTABLISHING A PRIMA FACIE CASE	124
1	Difficulties in Proving Discrimination	125
2	Overcoming Problems of Proof	125
2.1	Drawing Inferences	126
2.2	Statistical inference	127
E	JUSTIFICATION	128
1	Objective Justification and Proportionality	128
1.1	UN System	128
1.2	European Convention on Human Rights	129
1.3	European Union	130
1.4	Inter-American System	130
2	Suspect Classes	130
3	Common Justifications	131
3.1	Physical Safety and Capability	131

3.2	Economic or Market-based Justification	131
3.3	Freedom of Contract	132
3.4	Positive or Affirmative Action	133
F	LIABILITY FOR DISCRIMINATION	133
G	EFFECTIVE REMEDIES AND COMPENSATION	134
1	Criminal Sanctions	135
2	Financial Compensation	135
3	Court Ordered Performance	136
4	Consent Decrees	136

CHAPTER V

GROUPS OF DISCRIMINATION 137

A	SEX / GENDER DISCRIMINATION	138
1	Introduction	138
2	General Principles under International Instruments	138
2.1	International Covenant on Civil and Political Rights	138
2.1.1	Citizenship and Immigration	139
2.1.2	Status and Identity	140
2.1.3	Tax and Social Security	140
2.1.4	Property Rights	141
2.2	International Covenant on Economic Social and Cultural Rights	141
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	142
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	142
2.5	Convention on the Rights of the Child	143
2.6	International Labour Organization	143
2.7	European Convention on Human Rights	143
2.7.1	Immigration	143
2.7.2	Identity	144
2.7.3	Tax and Social Security	144
2.8	European Union	145
2.8.1	Employment Discrimination	146
2.8.2	Pregnancy and Maternity	147
2.8.3	Indirect Discrimination and Part-time Work	149
2.8.4	Benefits	150
2.8.5	Positive Action	151
2.9	African Charter on Human and Peoples' Rights	151
2.10	American Convention on Human Rights	152
2.10.1	Citizenship	152
2.10.2	Status	153
3	Trans-gender Cases	154
B	SEXUAL ORIENTATION	154
1	Introduction	154
2	General Principles under International Instruments	155
2.1	International Covenant for Civil and Political Rights	155
2.1.1	Criminalisation of Homosexuality	155
2.1.2	The Rights of Same-Sex Partners	156
2.1.3	The Right to Marry	157
2.1.4	Freedom of Expression and Homosexual Speech	157

2.2	International Covenant for Economic Social and Cultural Rights	157
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	158
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	158
2.5	Convention on the Rights of the Child	158
2.6	International Labour Organization	158
2.7	European Convention on Human Rights	158
2.7.1	Criminalisation of Homosexuality	159
2.7.2	Prosecution for 'Indecent' Acts	159
2.7.3	The Age of Consent	159
2.7.4	Exclusion from the Military	160
2.7.5	Child Custody and Adoption	161
2.7.6	The Rights of Same-Sex Partners	162
2.8	European Union	162
2.8.1	Rights of Same-Sex Partners	163
2.9	African Charter on Human and Peoples' Rights	164
2.10	American Convention on Human Rights	164
3	National Jurisdictions	165
C	RACE, COLOUR, DESCENT AND ETHNIC ORIGIN	165
1	Introduction	166
1.1	Definition of 'Racial Discrimination'	166
1.2	Racism and Racial Discrimination	167
1.3	Nationality, Language and Race	167
1.4	Social Origin	168
2	General Principles under International Instruments	168
2.1	International Covenant on Civil and Political Rights	168
2.1.1	Hate Speech	169
2.1.2	Racist Motivation for Crimes	169
2.2	International Covenant on Economic, Social and Cultural Rights	169
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	170
2.3.1	Employment	170
2.3.2	Access to Goods and Services (and Public Accommodation)	171
2.3.3	Hate Speech	172
2.3.4	Racism in the Administration of Justice	173
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	173
2.5	Convention on the Rights of the Child	173
2.6	International Labour Organization	174
2.7	European Convention on Human Rights	174
2.7.1	Human Rights Abuses Motivated by Racism	175
2.7.2	Hate Speech	176
2.7.3	Home, Privacy and Property	177
2.7.4	Racism in the Administration of Justice	179
2.8	European Union	179
2.9	African Charter on Human and Peoples' Rights	179
2.10	American Convention on Human Rights	180
3	Segregation	180
4	Apartheid	181
5	Caste and Descent	182
6	Slavery	182
D	NATIONALITY	183
1	Introduction	183
1.1	Definition of Nationality	183

1.2	The Position of Aliens: Permissible Differentiation	184
2	General Principles under International Instruments	184
2.1	International Covenant on Civil and Political Rights	185
2.1.1	Employment	185
2.1.2	Property	186
2.1.3	Voting Rights	186
2.1.4	Tax and Social Security	186
2.1.5	Immigration	187
2.2	International Covenant on Economic Social and Cultural Rights	187
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	187
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	189
2.5	Convention on the Rights of the Child	189
2.6	International Labour Organization	190
2.7	European Convention on Human Rights	190
2.7.1	Tax and Social Security	190
2.7.2	Criminal Justice Procedures	191
2.7.3	Immigration / Deportation	191
2.7.4	The Right to Life and Forced Disappearances	192
2.7.5	Freedom of Expression	193
2.8	European Union	194
2.9	African Charter on Human and Peoples' Rights	195
2.9.1	Mass Expulsions	195
2.10	American Convention on Human Rights	196
E	LANGUAGE	199
1	Introduction	199
2	General Principles under International Instruments	200
2.1	International Covenant on Civil and Political Rights	200
2.2	International Covenant on Economic Social and Cultural Rights	202
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	202
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	202
2.5	Convention on the Rights of the Child	203
2.6	International Labour Organization	203
2.7	European Convention on Human Rights	203
2.8	European Union	204
2.9	African Charter on Human and Peoples' Rights	204
2.10	American Convention on Human Rights	205
F	RELIGION AND BELIEF	205
1	Introduction	205
2	General Principles under International Instruments	206
2.1	International Covenant on Civil and Political Rights	206
2.2	International Covenant on Economic Social and Cultural Rights	207
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	207
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	207
2.5	Convention on the Rights of the Child	208
2.6	International Labour Organization	208
2.7	European Convention on Human Rights	208
2.7.1	Privacy and Family Life	209
2.7.2	Employment	210
2.7.3	Proselytism	210
2.7.4	Legal Personality	211
2.7.5	Property	211

	2.7.6 Education	211
	2.7.7 Religious Activities	212
	2.8 European Union	212
	2.9 African Charter on Human and Peoples' Rights	213
	2.10 American Convention on Human Rights	213
G	DISABILITY	214
1	Introduction	214
1.1	Recognition of Disability Discrimination	214
1.2	Definition of Disability	215
1.3	Developments in Disability Discrimination Law	215
2	General Principles under International Instruments	216
2.1	International Covenant on Civil and Political Rights	218
2.2	International Covenant on Economic Social and Cultural Rights	218
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	219
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	219
2.5	Convention on the Rights of the Child	219
2.6	International Labour Organization	219
2.7	European Convention on Human Rights	220
2.8	European Union	222
2.9	African Charter on Human and Peoples' Rights	223
2.10	American Convention on Human Rights	223
3	National Jurisdictions	224
H	AGE	225
1	Introduction	225
2	General Principles under International Instruments	226
2.1	International Covenant on Civil and Political Rights	226
2.2	International Covenant on Economic Social and Cultural Rights	227
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	227
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	227
2.5	Convention on the Rights of the Child	228
2.6	International Labour Organization	228
2.7	European Convention on Human Rights	228
2.8	European Union	228
2.9	African Charter on Human and Peoples' Rights	229
2.10	American Convention on Human Rights	229
I	POLITICAL OR OTHER OPINION	229
1	Introduction	229
2	General Principles under International Instruments	230
2.1	International Covenant on Civil and Political Rights	230
	2.1.1 Conscientious Objectors	230
	2.1.2 Admission to the Public Service	231
2.2	International Covenant on Economic Social and Cultural Rights	231
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	231
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	232
2.5	Convention on the Rights of the Child	232
2.6	International Labour Organization	232
2.7	European Convention on Human Rights	232
2.8	European Union	235
2.9	African Charter on Human and Peoples' Rights	235
2.10	American Convention on Human Rights	235

J	MARITAL, PARENTAL AND FAMILY STATUS	235
1	Introduction	235
2	General Principles under International Instruments	236
2.1	International Covenant on Civil and Political Rights	236
2.1.1	Tax and Social Security	236
2.1.2	Foster Children	237
2.2	International Covenant on Economic Social and Cultural Rights	237
2.3	International Convention on the Elimination of All Forms of Racial Discrimination	237
2.4	Convention on the Elimination of All Forms of Discrimination Against Women	237
2.5	Convention on the Rights of the Child	237
2.6	International Labour Organization	238
2.7	European Convention on Human Rights	238
2.8	European Union	239
2.9	African Charter on Human and Peoples' Rights	239
2.10	American Convention on Human Rights	239

CHAPTER VI

	INTERSECTIONS IN INTERNATIONAL DISCRIMINATION LAW	240
A	MULTIPLE DISCRIMINATION	240
B	DIGNITY RIGHTS AND 'EQUALITY AS DIGNITY'	242
1	Introduction	242
2	Dignity Rights	244
3	Equality as Dignity: South Africa and Canada	245
3.1	South Africa	245
3.2	Canada	246
C	DISCRIMINATION AS 'DEGRADING TREATMENT'	247
1	Introduction	247
2	European Convention on Human Rights	248
3	Other Jurisdictions	251
D	VIOLENCE AS DISCRIMINATION	251
1	Introduction	251
2	UN System	252
3	European Convention on Human Rights	253
4	African Charter on Human and Peoples' Rights	254
5	Inter-American System	254
6	Other International Law	254
E	PRIVACY RIGHTS AND NON-DISCRIMINATION	255
1	Introduction	255
2	The UN System	257
3	European Convention on Human Rights	258
3.1	The Concept of Private Life	258
3.2	The Concept of Family Life	259
3.3	Positive Obligations under Article 8 of the ECHR	259
3.4	The 'Botta' Case and Subsequent Jurisprudence	260
4	Other Jurisdictions	262
F	MINORITY OR GROUP RIGHTS APPROACHES	263
1	Introduction	263
1.1	Definition or Recognition of 'Minorities' and the Scope of Minority Rights	264

1.2	Balancing Minority Rights and Other Rights	265
2	Minority Rights in the UN System	265
2.1	International Covenant on Civil and Political Rights	265
2.2	UN Declaration on the Rights of Persons Belonging to Minorities	266
2.3	International Labour Organization	267
3	Minority Rights in Europe	267

CHAPTER VII

CONCLUSION	269
COMPARISON OF INTERNATIONAL AND REGIONAL INSTRUMENTS ON EQUALITY	271
GLOSSARY	273
INDEX OF CASES	277
Also from INTERIGHTS	289

ABBREVIATIONS

AfCHPR	African (Banjul) Charter on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights (ICESCR)
CRC	Convention on the Rights of the Child
ECHR	European Convention for the Protection of Fundamental Rights and Freedoms
ECJ	Court of Justice of the European Communities
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee (ICCPR)
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization

PREFACE

The principles of equality and non-discrimination are central to any system of human rights protection. This is evident from both the provisions of international human rights instruments and the case law of their supervisory bodies. Although international human rights instruments have core equality provisions in common, the text and interpretation of these equality provisions, the nature of the cases considered and, consequently, the level of development and expertise in each facet of equality protection vary considerably. Such variations reflect the politics and imperatives underlying each system of human rights protection and the social systems of the States from which cases arise. In its equality work, INTERIGHTS has long recognised the potential to strengthen protection by use of comparative jurisprudence and strategies. Cases in one country or under one international or regional system may be of great value in setting precedents elsewhere, and successes achieved in relation to one form of discrimination may be used in combating other forms of discrimination.

As part of this comparative approach, *Non-Discrimination in International Law: A Handbook for Practitioners* (the “Handbook”) provides an overview of the key principles of non-discrimination and equality from each of the most important systems of international human rights protection. It aims to provide a guide to the most important international decisions on equality with a view to facilitating cross-fertilisation of jurisprudence across grounds and ‘themes’ of non-discrimination and between systems of protection. The focus of the Handbook is *international* human rights law. In the absence of relevant international case law, the Handbook discusses international cases on relevant substantive rights, for example, freedom of religion cases relevant to discrimination on grounds of religion. Where appropriate, the Handbook also refers to cases before courts of final instance (i.e., supreme courts or constitutional courts) in key national legal systems to illustrate how international bodies might treat certain issues or how they might evolve.

The Handbook is primarily directed at lawyers, judges and NGO activists. The provision of ready-access to essential concepts and case law should assist in the process of drafting advice and preparing legal cases, and in devising strategic litigation on equality issues. It may also contribute to bringing a greater depth of analysis to the work of practitioners.

The Handbook is composed of six main chapters:

- Chapter I introduces the key concepts underlying the idea of equality and the basic principles of international discrimination law. It also discusses the nature of State obligations under international law to prohibit discrimination and promote equality.
- Chapter II provides an overview of the chief universal and regional international human rights instruments and briefly discusses their equality and non-discrimination provisions.
- Chapter III discusses in detail the key legal standards in international equality protection, such as the prohibitions of direct discrimination, indirect discrimination and provisions regarding positive action.
- Chapter IV looks at procedural and evidential issues involved in claiming discrimination, including the burden and standard of proof, and also examines the possible remedies available to discrimination claimants.
- Chapter V presents the approach of each international system to each of the most significant ‘grounds’ of discrimination. Those international instruments that deal directly with particular grounds are discussed in detail. Where an international instrument does not address a particular ‘ground’ of discrimination, this is noted in the text.
- Chapter VI looks at some of the most important ‘intersections’ in international discrimination law and, in particular, at the impact certain other substantive rights and other themes in international human rights law may have on international discrimination law or discrimination claims.

USING THE HANDBOOK

As the landscape of international discrimination law is continually evolving, INTERIGHTS considers that the Handbook is of most value in an electronic or Web format (with links between relevant points in the text) so that it can be updated periodically on INTERIGHTS’ web-site (see www.interights.org). The structure of the document reflects this approach. The Handbook is not intended to be a fully comprehensive ‘textbook’ of all international discrimination law. Instead it focuses on key instruments and includes references and links to outside sources.

The Handbook reflects the law as it stood on 1 September 2004. Any errors, omissions or faults in this publication are those of the authors. However, INTERIGHTS takes no responsibility for the accuracy of the information found in the many external references and web-links in the text.

Alternative formats of the Handbook are available upon request.

ACKNOWLEDGMENTS

INTERIGHTS would like to thank all those who have been involved in this project. Kevin Kitching, Legal Officer of INTERIGHTS' Central and Eastern European Programme, was the chief editor, researcher and author of the first edition of the publication. Colm O'Conneide, Lecturer in Law at University College London, was the external editor. Helen Duffy, Legal Director of INTERIGHTS, reviewed the Handbook on behalf of INTERIGHTS. Andrea Coomber, Legal Officer of INTERIGHTS' Equality Programme, had overall responsibility for the project and was also involved in the drafting and internal review of the Handbook. Andrea Coomber's predecessor, Mariann Meier Wang, first conceived of the Handbook and got the project off the ground. INTERIGHTS is also grateful to its many interns and volunteers who contributed to the research for and writing of the Handbook, in particular, Barbora Bukovska, David Murphy, Maya de Souza, Odette Lienau, and Paul Green. Erica Ffrench, Information/Programme Assistant for INTERIGHTS' Commonwealth Programme, was instrumental in the production and design of the Handbook. We are also extremely grateful to Jerry Watkiss of JSW Creative, (www.jswcreative.co.uk) who designed and formatted the published version of the Handbook.

Above all, INTERIGHTS would like to thank The Sigrid Rausing Trust, without whose financial and moral support this project could never have been completed.

INTRODUCTION TO INTERNATIONAL DISCRIMINATION LAW

A CONCEPTS OF EQUALITY

Useful references: Equality Concepts

- For an analysis of equality concepts, see: Sandra Fredman, *Discrimination Law*, Oxford University Press, 2002.

There are two broad conceptual approaches to equality evident in equality and non-discrimination provisions in both domestic and international law:

- Formal or ‘juridical’ equality refers to a basic idea: that individuals in like situations should be treated alike. Formal equality focuses on equal treatment based on the appearance of similarity regardless of the broader context. Laws or practices with the purpose of granting different treatment to individuals in similar situations may result in direct discrimination. Structural factors can ensure that regardless of any equal treatment or prohibition of direct discrimination, certain groups fall behind the rest of society. Therefore, applied on its own and if differences are not taken into account as well as similarities, consistency of treatment is inadequate to ensure the broader aims of equality.
- ‘Substantive equality’ refers to the notion that individuals in different situations should be treated differently. It encompasses two distinct ideas – equality of results and equality of opportunity.

- ‘Equality of results’ requires that the result of the measure under review must be equal. It recognises that apparently identical treatment can in practice reinforce inequality because of past or ongoing discrimination or differences in access to power or resources. Under this approach, the effects as well as the purpose of a measure must be taken into account.
- ‘Equality of opportunity’ suggests that the law can ensure that all individuals have equal opportunity, taking into consideration their different starting positions, to gain access to the desired benefit. Equal opportunity aims to provide equal chances but not results. The concept of equal opportunity is currently the most frequently applied equality concept in modern legislation. This is perhaps because it is the most compatible with the free market economy. Civil rights legislation provides equal opportunities for underrepresented or vulnerable groups by opening the gates for those who have been unable to participate in the market.

B BASIC PRINCIPLES OF INTERNATIONAL DISCRIMINATION LAW

Useful references: Basic Principles

- For an analysis of the principle of equality, see: Anne Bayefsky, *The Principle of Equality and Non-Discrimination in International Law*, 11 HRLJ (1990) 1.
- For a history of the development of the principle of equality under international law, see: Warwick McKean, *Equality and Non-Discrimination under International Law*, Oxford University Press, 1983.

A classic statement of the principle of equality in international law is found in the dissenting opinion of Judge Tanaka in the *South West Africa* case (ICJ Rep. 1966, 4) before the International Court of Justice:

“The principle of equality before the law does not mean...absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means...relative equality, namely the principle to treat equally what are equal and unequally what are unequal...To treat unequal matters differently according to their inequality is not only permitted but required.”

There are a number of types of conduct that are prohibited by international discrimination law.

- **Direct discrimination** is based on the idea of formal equality. It may be defined as less favourable or detrimental treatment of an individual or group of individuals on the basis of a prohibited characteristic or ground such as race, sex, or disability.

- **Indirect discrimination** occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups, unless that practice, rule, requirement or condition is justified. Prohibitions of indirect discrimination require a State to take account of relevant differences between groups.
- **Harassment** may be defined as occurring where unwanted conduct takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
- **Victimisation** may be defined as any adverse measure taken by an organisation or an individual in retaliation for efforts to enforce legal principles, including those of equality and non-discrimination.

Under international discrimination law, a State may also be required (or permitted) to take measures to ensure the 'equality in fact' or substantive equality of protected groups.

- **Positive action or affirmative measures** (also known as 'special measures') are proactive measures taken by a government or private institution to remedy the effects of past and present discrimination by providing reverse preferences favouring members of classes previously disadvantaged. Such preferential treatment runs counter to the strictly formal notion of equality. Many international instruments explicitly permit positive action without imposing an obligation on States to take such measures.
- **Reasonable accommodation** is any modification of, or adjustment to a job, an employment practice, the work environment, or the manner or circumstances under which a position is held or customarily performed that makes it possible for a qualified individual to apply for, perform the essential functions of, and enjoy the equal benefits and privileges of employment. The requirement to accommodate difference has arisen most frequently in the context of disability.

Not all differences of treatment are prohibited discrimination under international discrimination law. There may be very good reasons for different treatment, such as the achievement of substantive equality in the case of positive action. In order to be justified under international law, a distinction must have an 'objective and reasonable justification.' In other words, it must (i) pursue a legitimate aim and (ii) there must be a reasonable relationship of proportionality between the aim sought to be realised and the means employed. In other words, the means of achieving the legitimate aim must be appropriate and necessary and the reasons given relevant to the difference that is sought to be made in the way people are treated.

- In some jurisdictions, discrimination laws provide an exception to the general prohibition of discrimination whereby a job may be restricted to people of a particular group (e.g., a race, a sex or national origin) if the characteristic defining that group is a genuine occupational requirement or genuine occupational

qualification for the job. In other words, employers may lawfully discriminate based on certain personal characteristics such as race or religion in limited circumstances where they are essential to the job. For example, a film producer may reasonably require a black actor to play the part of Martin Luther King, Jr. or a mosque may require religious staff to be Muslims.

In applying the test for discrimination, it must be determined what groups or individuals are to be compared in order to determine whether there is different treatment. Equality is a comparative concept: an individual can ascertain whether they have 'equality' only by comparing their conditions with the conditions of others. The concept of a [comparator](#) has played a central role in equality law. In many jurisdictions, the law recognises that discrimination has occurred when a person of a protected status demonstrates how he or she has suffered less favourable treatment compared to a similarly situated person of the opposite status (i.e., the comparator). Of course, comparisons may be made in a number of ways depending on the reference points used, for example, the groups or individuals that are compared, how those groups are defined or how the measure being impugned distinguishes between them. Because of the need to 'accommodate' difference in the case of pregnancy or disability, the requirement of a comparator has been effectively dispensed with in these contexts.

C STATE OBLIGATIONS: PUBLIC AND PRIVATE DISCRIMINATION

Useful references: State Obligations

- For an analysis of positive obligations under the ECHR, see, for example, Oddn_ Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights*, Kluwer Law International, 2003.
- See also, A. R. Mowbray, 'The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights', *Human Rights Law in Perspective*, Hart Publishing, 2004.

1 Negative Obligations of the State

Traditional human rights jurisprudence has focused primarily on protecting private individuals from abuse by public authorities. The governments of States and their various agencies, with the power to make laws, to tax and to spend, have in practice the greatest effect on the level of equality in society. States are also the primary subjects of international law, they are the parties subject to obligations under international human rights treaties, and they are responsible under international law if such obligations are breached. Therefore, international human rights tribunals have focused on cases involving discrimination by the State itself or those that act on its

behalf. In other words, the emphasis has been on the ‘negative obligations’ of the State not to discriminate.

This negative obligation not to discriminate applies to the introduction of legislation or the application of such legislation. In its General Comment 18 (see, <http://www1.umn.edu/humanrts/gencomm/hrcomms.htm>), the UN Human Rights Committee (“HRC”) stated that:

“Article 26 [of the ICCPR] is... concerned with the obligation imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content not be discriminatory.”

A public authority may also be ultimately responsible for any discrimination that occurs when its functions are delegated or sub-contracted to a private entity or individual. In *B.d.b. v the Netherlands* (273/1988, ICCPR), the HRC said that a State is “not relieved of obligations under the Covenant when some of its functions are delegated to other autonomous organs.”

2 Positive Obligations of the State

It is clear that equality cannot be achieved if only public authorities are subject to rules on non-discrimination. Efforts by the State to further the equality of vulnerable groups may be limited if society in general discriminates against them. Recent case law of some international bodies has looked at the obligations of the State not only to comply with non-discrimination principles itself, but also to ensure that those principles are implemented within the State between private actors.

Positive obligations of the State under international instruments may include obligations to implement, to ensure or guarantee rights as well as respecting them. Such obligations are rarely explicitly set out in such instruments. Nevertheless, international tribunals have been active in developing positive obligations in cases where if they did not exist there would be no practical and effective guarantee of rights or no effective remedy. In this, they have relied on provisions such as Article 2 of the International Covenant on Civil and Political Rights (“ICCPR”) which obliges each State party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights in the Covenant.”

Positive obligations in international human rights law are most developed with regard to substantive rights such as the right to life and freedom of torture. There is limited international jurisprudence on the positive obligations of the State to ensure equality or prevent discrimination. However, certain international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination

(“**ICERD**”) allow individuals to bring claims against public authorities that fail to enforce equality provisions in both private and public realms. Also, the European Convention on Human Rights (“**ECHR**”) case of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004) is concerned with whether there is a positive obligation on the State under Article 14 to investigate the racist motive for the use of lethal force by the police. Positive obligations of the State under equality provisions may require it to prevent discrimination by banning it, to extend existing measures to similar groups, to accommodate difference and to prevent discrimination in the private sphere.

2.1 The UN System

The United Nations (“**UN**”) treaty bodies have noted the obligations of the State to prevent discrimination between private actors. In paragraph 31 of its General Comment 28 (see, <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>), the HRC states that:

“The right to equality before the law and freedom from discrimination protected by Article 26 requires states to act against discrimination by private, as well as public agents in all fields.”

The Committee on the Elimination of Racial Discrimination (“**CERD**”), set up under the ICERD, is also explicit about the obligation on the State to eliminate discrimination in the private sphere. It has noted that, to the extent that private institutions influence the exercise of rights or the availability of opportunities, the State Party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination. ICERD Article 2(1)(d) ([below](#)) provides that States must prohibit and prevent racial discrimination “by any person, group or organisation.” In the case of *Yilmaz-Dogan v The Netherlands* (No. 1/1984, ICERD), CERD found that the Netherlands had violated its responsibilities to ensure non-discrimination by failing to address evidence of discrimination in a domestic case. In the case of *Lacko v Slovak Republic* (No. 11/1998, ICERD), a Roma man claimed that the failure of the Slovakian authorities initially to prosecute a restaurant owner for denying him access to a restaurant on the basis of his race constituted a violation of CERD.

Lacko v Slovak Republic (ICERD)

Miroslav Lacko, a Slovak Romani man, was denied access to a restaurant on the basis of his race. Lacko, accompanied by other persons of Romani ethnicity, went to the Railway Station Restaurant located in the main railway station in Kosice, Slovakia, to have a drink. Shortly after entering the restaurant the applicant and his company were told by a waitress to leave the restaurant. The waitress explained that she was acting in accordance with an order given by the owner of the restaurant not to serve Roma. After requesting to speak with her supervisor, Mr. Lacko was directed to a man who explained that the restaurant was not serving Roma, because several Roma had previously destroyed equipment in the restaurant. When Lacko related that neither he nor his company had damaged any equipment, the person in charge repeated that only polite Roma would be served.

Mr. Lacko filed a criminal complaint that was dismissed. Subsequently, he complained to CERD that he had suffered discrimination in access to public accommodation and that the failure by the national authorities to afford him adequate redress amounted to racial discrimination as well.

CERD declared the case admissible. In doing so, it found that there has to be a criminal remedy for a violation of this kind and that administrative and/or civil remedies will not suffice. Following the submission of the communication to CERD, the Slovak authorities indicted the restaurant owner for incitement to racial hatred, a crime clearly not applicable to the incident at issue. He was found guilty and fined.

CERD found no violation on the merits because ultimately the restaurant owner was convicted and thus redress was afforded. But CERD recommended to the State party that it complete its legislation in order to guarantee the right of access to public places and to sanction the refusal of access to such places for reason of racial discrimination. CERD also recommended to the State party to take the necessary measures to ensure that the procedure for the investigation of such violations is not unduly prolonged.

2.2 European Convention on Human Rights

The European Court of Human Rights (“[ECtHR](#)”) has recognised that the ECHR may also impose positive obligations on the State to take steps to secure the rights under the Convention.

- There have been many cases that support the existence of positive obligations under Articles 2 and 3 (for example, the obligation to investigate serious violence where there is loss of life or allegations of torture). See, for example, the cases of *Assenov and others v Bulgaria* (No. 24760/94, 28/10/1998), *Shanaghan v the United Kingdom* (No. 37715/97, 04/05/2001), *Pretty v the United Kingdom* (No. 2346/02, 29/04/2002) and *M.C. v Bulgaria* (No. 39272/98, 04/12/2003).
- The ECtHR has also recognised positive obligations under a number of other provisions, for example, Article 8 (the right to privacy) and Article 11 (freedom of assembly and association). See, for example, the case of *X and Y v the Netherlands* (No. 8978/80, 26/03/1985) where the ECtHR noted that positive obligations might require the State to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The subject of positive obligations under Article 8 is dealt with in detail in Chapter VI below under ‘Privacy Rights and Non-Discrimination.’

As discussed in Chapter II below, Article 14 provides an ‘accessory right’ to equality in the enjoyment of the substantive rights and freedoms guaranteed by the ECHR. For that reason, the existence of positive obligations in Article 14 cases has usually been considered in the context of those substantive articles rather than under Article 14 itself. However, in the recent Chamber judgment in *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004) the ECtHR found that, where there is a suspicion the racial attitudes induced a violent act, the State has an obligation to use best endeavours to

investigate such racist overtones. This positive obligation arises under Article 14. The Court noted that “[A] failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14.” At time of writing, the *Nachova* case has been referred to the Grand Chamber of the ECtHR and is subject to a full re-hearing. Therefore, the final outcome of the case is as yet unknown.

2.3 The European Union

The approach of the European Union (“EU”) to private discrimination must be contrasted to the international law approach of the other instruments outlined in the Handbook. As discussed in Chapter II below, the EU legal system is of a ‘supranational’ character and its laws may be directly applicable in domestic courts or have ‘direct effect’ against the State. The public/private distinction discussed here only has relevance to the extent that a EU directive has not yet been implemented. The European Court of Justice (“ECJ”) has made clear that EU member States must apply the non-discrimination provisions in the Treaty of Amsterdam in both the public and private realms. In *Case C-281/98, Roman Angonese v Cassa de Risparmio di Bolzano SpA* [2000] ECR I-4139, the ECJ held that [Article 39](#), regarding discrimination on the basis of nationality, applied to private as well as public bodies.

2.4 The Inter-American System

The Inter-American system has adopted a similar approach to the UN bodies regarding the responsibility of the State for discrimination by private actors. In *Velásquez-Rodríguez v Honduras* (Series C., No. 4, 29 July 1988), the Inter-American Court of Human Rights (“IACtHR”) stated (at paragraph 164) that “[A]ny impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State.” Citing the *Velásquez* case, the Inter-American Commission on Human Rights (“IACHR”) in the *Morales de Sierra* case (discussed below), noted (at paragraph 51) that Article 1 of the American Convention on Human Rights (“AmCHR”) “imposes both negative and positive obligations on the State in pursuing the objective of guaranteeing rights which are practical and effective.” The IACHR concluded (at paragraph 54) that “[T]he failure of the State to honor the obligations set forth in Articles 1 and 2 of the Convention generates liability, pursuant to the principles of international responsibility, for all acts, public and private, committed pursuant to the discrimination effectuated against the victim in violation of the rights recognised in the American Convention and other applicable treaties.” See also [Advisory Opinion OC-18/03](#) at paragraphs 146-156.

AN OVERVIEW OF INTERNATIONAL AND REGIONAL INSTRUMENTS

This chapter describes the major international law instruments that aim to promote equality and prevent discrimination. It presents relevant text from each instrument, highlights key principles and points out material differences between instruments, where appropriate. In particular, it addresses whether the non-discrimination provisions contained in such instruments:

- a) Specify or enumerate all of the grounds of discrimination on which a claim can be made (exhaustive or ‘closed’) or allow for claims on new grounds as well (‘open-ended’)
- b) Apply only to certain specified substantive rights (‘dependent’) or apply to any rights under domestic or international law and are thus actionable independent of whether another substantive right is applicable or has been violated (‘free standing’)
- c) Address both [direct discrimination](#) and [indirect discrimination](#).
- d) Provide for positive action or affirmative measures to promote equality in addition to prohibiting discrimination
- e) Cover ‘group’ as well as individual rights.

This information is presented in tabular format in [Appendix A](#).

Although the language of equality in many international and regional instruments is similar, practical enforcement varies greatly. Variations arise from differences in the scope or ‘jurisdiction’ of the instruments, rules governing who has standing to make a complaint, and the effectiveness of enforcement mechanisms. Discussion and analysis of the procedure for making a claim under each international human rights instrument

is beyond the scope of the Handbook. Please refer to the websites of the relevant monitoring or enforcement bodies provided throughout the Handbook for further guidance.

A ‘UNIVERSAL’ INSTRUMENTS

The Universal Declaration of Human Rights (“UDHR”), adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948, has provided the inspiration for many subsequent human rights instruments, in particular, those at the ‘universal level’ sponsored by the UN and its specialised agencies. Although intended as a non-binding declaration (rather than a treaty), it is also often cited in cases before both national and international tribunals. The following provisions of the UDHR are particularly relevant to equality and non-discrimination issues:

Universal Declaration of Human Rights

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

International human rights instruments at the ‘universal level’ that address equality issues include two general UN human rights treaties - the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) - and a number of UN treaties on specific human rights themes. These ‘thematic’ instruments include the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”), the Convention on the Rights of the Child (“CRC”) and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). The Handbook discusses these five instruments in detail. Other relevant ‘thematic’ UN conventions include the Convention

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the “[Migration Convention](#)”).

The International Labour Organization has also sponsored a number of conventions dealing with non-discrimination in the workplace. Section B of this chapter covers regional international human rights instruments.

Among the UN human rights instruments mentioned above there are two main methods of enforcement: (i) periodic reporting and (ii) individual complaints.

- (1) **Periodic reporting.** State parties have an obligation to report regularly to committees established under each treaty to review compliance. Upon receipt of a report, the relevant committee examines it, takes submissions where possible from non-governmental organisations (“NGOs”), holds an open hearing and then produces its own report commenting on the State’s degree of compliance.
- (2) **Individual complaints.** The individual complaint mechanisms of international human rights instruments have become increasingly important in the promotion and protection of human rights. Within the UN system, these mechanisms include:
 - The Human Rights Committee (“HRC”), established under the ICCPR,
 - The Committee on the Elimination of Racial Discrimination (“CERD”), established under ICERD,
 - The Committee on the Elimination of Discrimination Against Women established under CEDAW, and
 - The Committee against Torture established under the CAT.

There have also been efforts to establish an individual complaints procedure for the ICESCR. The ICESCR’s supervisory mechanism, the Committee for Economic, Social and Cultural Rights (“CESCR”), has prepared a draft optional protocol to the Covenant but it has yet to be officially adopted by the relevant UN organs.

The four established UN ‘committees’ have the power to receive submissions (called ‘communications’) from individuals regarding alleged human rights violations by State parties. The relevant committee reviews each communication and presents its ‘opinions’ to the State party and the individual concerned but has no powers of enforcement. These committees are not traditional courts of law with compulsory jurisdiction and powers of enforcing compliance. Their jurisdiction to consider communications is not automatic either, as States have a choice whether or not to allow individual complaints against them. In the case of the ICCPR and CEDAW, individual complaint mechanisms were established under separate optional protocols. In the case of ICERD and the CAT, a special ‘opt-in’ provision was included in the main body of the text of the treaty. By becoming a party to the protocol (or acting pursuant to any special provision) each State recognises the competence of the relevant

committee to consider communications against it, provided that all domestic remedies have been exhausted and other admissibility criteria fulfilled. In order to have standing to submit a communication, an individual must be subject to the State party's jurisdiction and must be either the victim of the alleged violation or a duly appointed representative. The HRC, for example, will accept submissions from a lawyer or a close relative whom the individual has appointed, but not from a member of a non-governmental organisation claiming an interest in the situation. See, for example, *L.A. v Uruguay* (No. 128/1982, ICCPR). It must be noted that the procedures of the human rights instruments discussed in this section vary considerably. Detailed discussion of those procedural differences is beyond the scope of the Handbook. For all such procedural questions refer to the relevant treaty body.

1 The International Covenant on Civil and Political Rights (ICCPR)

Useful links: ICCPR

- For the text of the ICCPR, see: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.
- For the website of the HRC, see: <http://www.unhchr.ch/html/menu2/6/hrc.htm>.
- For HRC jurisprudence, see: <http://www.unhchr.ch>.
- For status of ratification of UN instruments, see: <http://www.unhchr.ch/pdf/report.pdf>.
- For links to instruments and ratification: <http://www.hrdc.net/accesshr/> (portal site)
- For link to UN materials: <http://www.bayefsky.com> (website specialising in UN treaty bodies)
- For University of Minnesota human rights library, see: <http://www1.umn.edu/humanrts/google/localsearch.htm>.

The UN [General Assembly](#) adopted the ICCPR in 1966, which entered into force in 1976. The HRC oversees its enforcement. As of 9 June 2004, *152 States were parties to the ICCPR and *104 States had ratified the optional [protocol](#) allowing the HRC to consider individual communications.

The provisions of the ICCPR that most directly address equality issues are as follows:

International Covenant on Civil and Political Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 is the central provision of the ICCPR dealing with non-discrimination. It has been interpreted as a ‘[free standing](#)’ guarantee of non-discrimination in that it prohibits discrimination with regard to all rights and benefits recognised by the law. Article 2, by contrast, is a ‘[dependent](#)’ provision as it guarantees non-discrimination with respect only to the rights guaranteed by the ICCPR. Article 26, as interpreted by subsequent case law, extends that protection by specifying that all individuals are ‘equal before the law’ and are entitled to ‘equal protection of the law.’ In *Broeks v the Netherlands* (No. 172/1984, ICCPR), the HRC stated at paragraph 12.4 that “[A]lthough article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matter that may be provided for by legislation.” However, the HRC found that “when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with article 26 of the Covenant.” In other words, the ICCPR requires that any rights or benefits granted by legislation must be provided without discrimination, even if there is no legal obligation on the State to provide such rights or benefits in the first place. These views were repeated in *Danning v the Netherlands* (No. 180/1984, ICCPR).

Although the focus of the ICCPR is on civil and political rights, Article 1 refers to the social, economic, and cultural rights highlighted in the [ICESCR](#) and the HRC has heard cases on these grounds as well. In *Broeks v the Netherlands* (No. 172/1984, ICCPR), the HRC explicitly denied the State’s claim that the HRC had no jurisdiction in the case because of concurrent ICESCR jurisdiction. It stated at paragraph 12.1 that “the

International Covenant on Civil and Political Rights would still apply even if a particular subject-matter is referred to or covered in other international instruments [...].”

The use of the phrase “or other status” in Article 26 suggests that the ICCPR is ‘open-ended’ as to the grounds of discrimination that are covered. HRC jurisprudence has confirmed that the phrase ‘or other status’ means that Article 26 prohibits discrimination on additional grounds to those specified (i.e., the grounds listed are not exhaustive). Such additional grounds are determined by the HRC on a case-by-case basis. In *Gueye v France* (No. 196/1983, ICCPR), for example, the HRC held that, although the ICCPR did not explicitly mention nationality, discrimination on grounds of nationality was prohibited by the words ‘or other status’ in Articles 2 and 26. The prohibited grounds of discrimination that have been recognised by the HRC are described in Chapter V below.

The ICCPR does not explicitly mention direct and indirect discrimination. However, HRC General Comment 18 (see, <http://www1.umn.edu/humanrts/gencomm/hrcomms.htm>) makes clear that both the *purpose* and *effect* of any measure must comply with Articles 2 and 26. The principal focus of the ICCPR is individual rights. The recognition in Article 1(1) of peoples’ right to self-determination is the document’s sole reference to group rights.

According to Article 4(1) of the ICCPR, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Therefore, even though the ICCPR does not list Article 26 as a non-derogable provision, it recognises that there are certain elements of non-discrimination that cannot be derogated from in any circumstances. See HRC General Comment 29 for more information.

2 The International Covenant on Economic, Social, and Cultural Rights (ICESCR)

Useful links: ICESCR

- For the text of the ICESCR, see: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.
- For materials of the CESCR, see: <http://www.unhchr.ch/html/menu2/6/ceschr.htm>
- For links to instruments, ratification, etc., see: www.hrdc.net/accessshr.
- For status of ratification of UN instruments, see: <http://www.unhchr.ch/pdf/report.pdf>.

Useful references: Optional Protocol

- For a discussion of the optional protocol, see: Philip Alston, 'Establishing a right to petition under the Covenant on Economic, Social and Cultural Rights', *Collected Courses of the Academy of European Law: The Protection of Rights in Europe*, Vol. IV, book 2, European University Institute.
- For a discussion of the unofficial petition procedure, see: Matthew Craven, 'Towards an unofficial petition procedure: A review of the role of the UN Committee on Economic, Social and Cultural Rights' in K. Drzewicki, C. Krause and A. Rosas (eds.), *Social Rights as Human Rights: A European Challenge*, Abo Akademi University, Institute for Human Rights, 1994.

The ICESCR entered into force in 1976. As of 9 June 2004, it had *149 State parties. The [CESCR](#), established in 1985 under the Economic and Social Council, monitors the implementation of the Covenant through the review of reports submitted by States. There is currently no mechanism to enable individuals to bring communications before the CESCR. The CESCR has prepared a draft optional protocol to the Covenant to permit individual complaints but it has yet to be adopted by the relevant UN bodies.

Individuals may have recourse to the procedures of the CESCR by way of an unofficial petition procedure. For a description of such a procedure, see the references listed above. However, the absence of a formal individual complaints mechanism has meant that there is no case law under the CESCR.

The provisions of the ICESCR that most directly address equality issues are as follows:

International Covenant on Economic, Social and Cultural Rights

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. ...

Article 2

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and

women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

The Covenant's central provision dealing with non-discrimination is Article 2(2), which has been interpreted as a 'dependent' guarantee of non-discrimination as it only guarantees "rights enunciated in the present Covenant." The "or other status" language in the same article, reflecting identical language in Article 2 and Article 26 of the ICCPR, indicates that the ICESCR is open-ended as to the grounds of discrimination covered. Article 1(1) uses identical language to that of the ICCPR to endorse the group right to self-determination. HRC General Comment 18 (see, <http://www1.umn.edu/humanrts/gencomm/hrcomms.htm>) interprets the general prohibition of discrimination in Articles 2 and 26 as embracing both direct and indirect discrimination.

3 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Useful links: ICERD

- For the text of ICERD, see: http://www.unhchr.ch/html/menu3/b/d_icerd.htm
- For materials of CERD see: <http://www.unhchr.ch/tbs/doc.nsf/FramePage/TypeJurisprudence?OpenDocument>
- For links to instruments, ratification, etc., see: www.hrdc.net/accessshr
- For status of ratification of UN instruments, see: <http://www.unhchr.ch/pdf/report.pdf>

ICERD was adopted in 1965 and entered into force in 1969. As of 9 June 2004, it had *169 State parties. It is monitored by CERD, which issues guidelines and recommendations and publishes country reports. ICERD provides for an individual complaints mechanism by way of an optional declaration under Article 14(1) of ICERD, not through an additional optional protocol. Article 14(1) provides that:

“A State Party may at any time declare that it recognises the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention.”

As of 9 June 2004, *42 State parties had recognised the competence of CERD to consider individual communications under Article 14.

The provisions that most directly address equality issues are as follows:

International Convention on the Elimination of All Forms of Racial Discrimination

Article 1

1. In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
 - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations;
 - (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
 - (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation;
 - (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

ICERD’s principal provision dealing with anti-discrimination is Article 1(1). The protection of ICERD is limited to the specified grounds of ‘race, color, descent, or

national or ethnic origin.’ Article 5 provides for ‘equality before the law’ (see the section on ‘race’ in Chapter V below). Article 1(1) suggests that the Convention is **free standing**, in that it covers all forms of discrimination in ‘any field.’ This free standing nature has been confirmed by case law (see paragraph 2.4 of Section C of Chapter III below). CERD has interpreted ICERD to prohibit both direct and indirect discrimination through the ‘purpose or effect’ language of Article 1(1) (see CERD General Recommendation 14 (<http://www1.umn.edu/humanrts/gencomm/genrxiv.htm>)). Articles 1(4) and 2(2) support positive action and CERD communications and country reviews have reiterated that positive action is permissible.

4 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Useful links: CEDAW

- For the text of CEDAW, see: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>
- For materials of the Committee on the Elimination of Discrimination Against Women see: <http://www.un.org/womenwatch/daw/cedaw/committee.htm>
- Information on CEDAW: www.equalitynow.org (women’s rights organisation)
- For status of ratification of UN instruments, see: <http://www.unhchr.ch/pdf/report.pdf>
- For text of the optional protocol, see: <http://www.ohchr.org/english/law/cedaw-one.htm>
- For status of ratification of the optional protocol, see: <http://www.un.org/womenwatch/daw/cedaw/sigop.htm>

CEDAW was adopted in 1979 and entered into force in 1981. As of 9 June 2004, it had *177 State parties and *60 States had ratified the optional protocol permitting individual complaints. The Committee on the Elimination of Discrimination Against Women monitors State compliance with CEDAW. It issues guidelines and recommendations and publishes country reports. The optional protocol was adopted by the UN **General Assembly** on 6 October 1999 and entered into force in 22 December 2000. The Committee has recently considered its first individual complaints under the CEDAW.

The provisions of CEDAW that most directly address equality issues are as follows:

Convention on the Elimination of All Forms of Discrimination Against Women

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or

purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Protection against discrimination in CEDAW is limited to ‘discrimination against women.’ Article 1(1) refers only to one ground of discrimination, sex discrimination, but also explicitly prohibits sex discrimination to the extent that it may occur by way of discrimination on grounds of marital status. The prohibition of discrimination in Article 1(1) is **free standing** as it applies to rights and freedoms ‘in any other field.’ By reference to HRC General Comment 18 (<http://www1.umn.edu/humanrts/gencomm/hrcomms.htm>) and CERD General Recommendation 14 (<http://www1.umn.edu/>

humanrts/gencomm/genrxiv.htm), it is clear that the ‘purpose or effect’ language in Article 1(1) is intended to cover both direct and indirect discrimination. Article 4(1) permits positive measures by States to facilitate equality.

5 The Convention on the Rights of the Child (CRC)

Useful links: Universal Instruments

- For the text of the CRC, see: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>
- For materials of the CRC, see: <http://www.unhchr.ch/html/menu2/6/crc/>
- For status of ratification of UN instruments, see: <http://www.unhchr.ch/pdf/report.pdf>

The CRC was adopted in 1989 and entered into force in 1990. As of 9 June 2004, it had *192 State parties. The Committee on the Rights of the Child is the monitoring body. It receives information on signatory States, examines country reports, and publishes its concerns and recommendations, referred to as “concluding observations.” The CRC does not have an individual complaints mechanism, but States are required to submit periodic reports to the Committee on the measures they have adopted which give effect to the rights protected under the CRC.

The provisions that most directly address equality issues are as follows:

Convention on the Rights of the Child

Article 2

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, color, 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.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right,

in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

Article 2(1) is limited to ‘rights set forth in the present Convention,’ suggesting that it is a **dependent** provision. Protection against discrimination under the CRC is also limited to children. However, the “other status” language in Article 2(1), reflecting identical language in the ICCPR and the ICESCR, indicates that the CRC is **open-ended** as to the grounds of discrimination covered. Article 2 would seem to prohibit both direct and indirect discrimination, given its reference to ‘discrimination of any kind.’ Article 30 protects the rights of children as members of a group.

6 The International Labour Organization (ILO) Conventions

Useful links: Universal Instruments

- For the ILO website, see: <http://www.ilo.org>
- For ILO conventions, see: <http://www.ilo.org/ilolex/english/convdisp1.htm>
- For ILO documents, see: <http://www.ilo.org/ilolex/english/iloquery.htm>
- For ILO General Surveys, see: <http://www.ilo.org/ilolex/english/surlist.htm>
- For ILO membership, see:
<http://www.ilo.org/public/english/standards/relm/country.htm>

The International Labour Organization (“ILO”) is the UN specialised agency that focuses on the promotion of social justice and internationally recognised human and labour rights. As of 1 June 2004, *177 States were members of the ILO.

One of the chief functions of the ILO is to formulate international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights, including equality of opportunity and treatment. Under Article 22 of the ILO Constitution (see, <http://www.ilo.org/public/english/about/iloconst.htm>) each State agrees to make periodic reports on the measures it has taken to give effect to each of the conventions to which it is a party. This system of supervision is supplemented by separate mechanisms under Articles 24 and 26 that permit workers or employers’ representative bodies and other States, respectively, to file complaints regarding a State’s non-compliance with a convention. Article 26 complaints can be referred on to a commission of inquiry for investigation, although this has occurred infrequently and never in the case of equality claims. A State concerned also has the option of referring the complaint to the International Court of Justice for final decision.

The most important ILO conventions in the field of equality are the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Equal Remuneration Convention, 1951 (No. 100). The ILO governing body has recognised these two conventions as being two of only eight ‘fundamental’ ILO conventions that must be implemented by States regardless of their level of economic or social development. Both conventions were pioneering efforts in combating discrimination in the workplace. According to Article 2(1), the ILO Equal Remuneration Convention seeks to “ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.” Article 2(2) advocates promoting this principle through national regulation, wage determination standards, and collective agreements.

The provisions of Convention No. 111 that are most relevant are as follows:

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Article 1

1. For the purpose of this Convention the term discrimination includes--
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.
3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

The prohibition of discrimination of Article 1(1) of Convention No. 111 applies only to employment or occupation. Under Article 1(3) “the terms *employment* and *occupation* include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.” Convention No. 111 thus prohibits discrimination only with respect to specified employment-related rights; it is not a ‘free standing’ prohibition of discrimination such as [Article 26](#) of the ICCPR. The prohibition of discrimination is also limited to a set of specified grounds (hence it is not ‘open-ended’) but allows for extension of those grounds by agreement between the State and employers’ and workers’ bodies.

Convention No. 111 addresses both direct and indirect discrimination by prohibiting “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment.” The use of the term ‘effect’ reflects language used by [HRC General Comment 18](#) in relation to the ICCPR. It indicates that the right to non-discrimination under Convention No. 111 embraces indirect discrimination as well as direct discrimination. Article 5(1) of the Convention also indicates that positive action to ensure equal treatment (“special measures of protection or assistance”) is not deemed to constitute discrimination.

Other noteworthy ILO conventions include the Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (No. 159) which establishes equality of opportunity and treatment between disabled workers and workers generally and allows positive action to further equality. See also the Maternity Protection Convention 1919 (No. 3); the Maternity Protection Convention (Revised) 1952 (No. 103); the Convention on Indigenous Peoples 1989 (No. 169) and the Part-Time Work Convention 1994 (No. 175). In 1988 and again in 1996 the ILO produced a comprehensive general survey on *Equality in Employment and Occupation*. In 1986 it produced a similar survey on Equal Remuneration. Each of these surveys is available on the ILO website (www.ilo.org).

7 Other Relevant UN Conventions

7.1 The CAT and the Migrants Convention

Useful links: CAT and the Migrants Convention

- For the text of the CAT, see: <http://www.ohchr.org/english/law/cat.htm>
- For materials of the CAT, see: <http://www.ohchr.org/english/bodies/cat/>
- For status of ratification, see: <http://www.ohchr.org/english/law/cat-ratify.htm>
- For the text of the Migrants Convention, see: <http://www.ohchr.org/english/law/cmw.htm>
- For materials of the Migrants Convention, see: <http://www.ohchr.org/english/bodies/cmw>
- For status of ratification, see: <http://www.ohchr.org/english/law/cmw-ratify.htm>

The CAT was adopted by the UN General Assembly on 10 December 1984 and entered into force on 26 June 1987. According to Article 1 of the Convention, “torture” includes “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person [...] for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Under Article 3, “[N]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The Committee against Torture monitors the implementation of the Convention. State parties may recognise the competence of the Committee to receive and consider communications from individuals by way of a declaration under Article 22. As of 23 April 2004, *136 States were parties to the CAT.

The Migrants Convention was adopted by the UN General Assembly on 18 December 1990 and entered into force on 1 July 2003. The Convention provides a set of binding international standards to address the treatment, welfare and human rights of both documented and undocumented migrants, as well as the obligations and responsibilities on the part of sending and receiving States. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families monitors the implementation of the Convention. State parties may recognise the competence of the Committee to receive and consider communications from individuals by way of a declaration under Article 77. As of 16 March 2004, *25 States were parties to the Convention but *no States had recognised the competence of the Committee to receive individual complaints.

Unlike the other UN Conventions discussed in this first chapter, the CAT and the Migrants Convention are not analysed in detail throughout the Handbook. Instead, they are discussed where relevant to particular grounds of discrimination.

7.2 UNESCO Convention on Discrimination in Education

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) is a UN specialised agency that aims to further respect for justice, the rule of law and human rights without discrimination by promoting collaboration among States through education, science and culture. As of 1 October 2003, *190 States were members of UNESCO and there were 6 associate members.

One of the chief functions of UNESCO (set forth in Article 2b of its Constitution) is to realise gradually “the ideal of equality of educational opportunity without regard to race, sex or any distinctions, economic or social”. On 14 December 1960, UNESCO adopted the Convention against Discrimination in Education, which entered into force on 22 May 1962. As of 3 May 2004, *91 States had ratified the Convention.

Under Article 1 of the Convention, “the term ‘discrimination’ includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education.” Education refers to all types and levels of education and includes access to education, the standard and quality of education and the conditions under which it is given. Under the Convention, States parties are required, among other things, to change laws and practices that involve discrimination in education. They are also required to take positive measures to guarantee non-discrimination in education between private actors. Under Article 7 of the Convention, States parties must include information on the implementation of the Convention in their periodic reports to UNESCO.

B INSTRUMENTS OF REGIONAL BODIES

The foremost international human rights instruments at the regional level are:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention on Human Rights” or “[ECHR](#)”) of the Council of Europe,
- European Union (“[EU](#)”) treaty provisions and legislation,
- The African Charter on Human and Peoples’ Rights (the “African Charter” or “[AfCHPR](#)”) and
- The American Convention on Human Rights (the “American Convention” or “[AmCHR](#)”).

1 The Council of Europe System

1.1 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

Useful links: ECHR

- For the text of the ECHR, see: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>
- For the website of the ECtHR, see: <http://www.echr.coe.int>
- For ECtHR jurisprudence, see: <http://www.echr.coe.int/Eng/Judgments.htm>
- For status of ratification of the ECHR, see: <http://www.echr.coe.int/Eng/EDocs/DatesOfRatifications.html>
- For the Council of Europe, see: www.coe.int
- For ECRI, see: <http://www.coe.int/ecri>

The ECHR was adopted by the Council of Europe in 1950 and entered into force in 1953. It has been supplemented and amended on a number of occasions by separate [protocols](#). Almost every State in Europe is a full member of the Council of Europe (as of June 2004, *45 States) and a party to the ECHR. The European Court of Human Rights (“ECtHR”) is the body charged with enforcing the rights and freedoms protected under the ECHR. The ECtHR has reviewed cases on almost every aspect of human rights and much of its jurisprudence has been incorporated into domestic law on human rights across Europe. Enforcement procedures have been changed a number of times since 1950. Until 31 October 1999 (one year after Protocol No. 11 came into force), the [European Commission on Human Rights](#) had a role in assessing the admissibility of applications. This screening role has now been taken over by a panel of the ECtHR. (For historical background on the ECHR, see <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm>). Individuals have standing to bring complaints to the ECtHR, subject to the exhaustion of domestic remedies and the satisfaction of other admissibility criteria.

The provisions of the ECHR that most directly address equality issues are as follows:

European Convention on Human Rights

Article 1 (Obligation to respect human rights)

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 14 (Prohibition of discrimination)

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Protocol 7, Article 5 (Equality between spouses) [*adopted 22/11/1984*]

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Protocol 12, Article 1 (General prohibition of discrimination) [*adopted 4/11/2000; not yet in force*]

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.
-

1.1.1 Article 14 of the European Convention on Human Rights

Article 14 is the central provision of the ECHR concerning equality. It has been interpreted as an **open-ended** prohibition of discrimination because of the use of the words “other status” (compare Article 2(1) and 26 of the ICCPR above). However, the protection it gives is ‘**dependent**’ in that it only covers “the rights and freedoms set forth in [the] Convention.” In other words, claims brought to the ECtHR under Article 14 must relate to discrimination in the enjoyment of other Convention rights, such as the right to privacy and family life, the right to freedom of religion, or the other rights contained in the ECHR and its Protocols; Article 14 can not be invoked on its own but only ‘in conjunction with’ substantive rights.

The nature of the dependent relationship between Article 14 and substantive rights has been clarified by the case law of the ECtHR:

- For Article 14 to be applicable, a complaint of discrimination must fall within the scope of a Convention right. If the facts at issue fall ‘outside the scope of’ a Convention right, therefore, there is no recourse to Article 14. See, for example, the case of *Botta v Italy* (No. 21439/93, 24/02/1998). The effect of this limitation is to exclude from the protection of Article 14 many rights and benefits granted under domestic law, for example, in the employment or social security field. In the case of *Rasmussen v Denmark* (No. 8777/79, 28/11/1984), the ECtHR (at paragraph 29) provided a clear statement of the accessory nature of the provision:

“Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it has autonomous meaning – there can be no room for its

application unless the facts at issue fall within the ambit of one or more of the latter.”

- There need not be a violation of the substantive right for Article 14 to be applicable, however. A measure, that does not violate a particular substantive right under the ECHR, taken alone, may breach such right in conjunction with Article 14 if it is of a discriminatory nature. In the *Belgian Linguistics* case (Nos. 1474/62, etc., 23/07/1968), the ECHR used the example of appeal courts to illustrate this point. Article 6 (fair trial) of the ECHR does not require States to institute a system of appeal courts – such a requirement is outside the scope of the ECHR. However, a State would violate Article 6 read in conjunction with Article 14 if it were to grant access to appeal courts to certain persons whilst denying access to others in respect of the same type of action.
- A limitation on a substantive right permitted under the ECHR (for example under the second paragraphs of Articles 8 to 11) must not be applied in a discriminatory manner otherwise it may infringe that substantive right taken together with Article 14. Even if a restriction on a substantive right is permitted under the relevant provision, if it discriminates it will breach that provision read together with Article 14. There has been no ECHR jurisprudence dealing with the question of whether derogation under Article 15 in times of war or public emergency must comply with Article 14. However, it is unlikely that any discriminatory treatment that is not objectively and reasonably justified under Article 14 will be required by the exigencies of the situation under Article 15.
- It is the practice of the ECtHR to first address if there has been a violation of a substantive provision before examining any Article 14 claim made in conjunction with that substantive provision. If a violation of the substantive provision is found, the Court does not always consider separately an allegation of a violation under Article 14. It will only look also at Article 14 if there is a clear inequality of treatment in the enjoyment of the right in question, which is a fundamental aspect of the case. Whether this is the case will be determined by the ECtHR. See, in particular, the case of *Chassagnou and others v France* (Nos. 25088/94, 28331/95 and 28443/95, 29/04/1999).

According to ECHR jurisprudence, discrimination for the purposes of Article 14 occurs where (i) there is different treatment of persons in analogous or relevantly similar situations and (ii) that difference in treatment has no “objective and reasonable justification.” “Objective and reasonable justification” is established if the measure in question has a legitimate aim and there is “a reasonable relationship of proportionality between the means employed and the aim sought to be realised” (see the *Belgian Linguistics case* (Nos. 1474/62, etc., 23/07/1968) at paragraph 10).

There is limited ECHR jurisprudence on indirect discrimination but its approach to indirect discrimination can be seen in its examination of cases where the effects of a measure rather than its purpose are alleged to discriminate. The ECtHR has made clear

that, although neither the ECtHR nor the ECHR use the term ‘indirect discrimination’, the ECHR covers it in substance. In the case of *Hugh Jordan v the United Kingdom* (No. 24746/94, 04/05/2001) the ECtHR indicated that indirect discrimination is covered by the ECHR (at paragraph 154):

“Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.”

However, the ECtHR has never found a violation of Article 14 arising out of indirect discrimination. Furthermore, it has provided little guidance on how to prove indirect discrimination.

ECtHR case law has confirmed that the ECHR permits positive action to promote full and effective equality. See, for example, the case of *Thlimmenos v Greece* (No. 34369/97, 06/04/2000), discussed below in Chapter V. In that case (at paragraph 44), the ECtHR held that discrimination arises if States “without objective and reasonable justification fail to treat differently persons whose situations are significantly different.” ECHR jurisprudence on positive action is discussed in Chapter III below.

1.1.2 Protocol 12 to the European Convention on Human Rights

In recognition of the need for an ‘independent’ right to strengthen the ECHR’s protection of equality, Protocol 12 was signed in November 2000. The Explanatory Report to Protocol 12 to the ECHR makes clear that it is intended to broaden the field of application of Article 14 beyond the rights included in the ECHR to cover cases where a person is discriminated against:

- In the enjoyment of any right specifically granted to an individual under national law;
- In the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- By a public authority in the exercise of discretionary power (for example, granting certain subsidies);
- By any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).

Article 1 of Protocol 12 is thus a ‘free standing’ provision prohibiting discrimination in the enjoyment of any right or benefit under national law (‘any right set forth by law’) in addition to the rights set forth in the ECHR. This is clear from the references in the preamble to Protocol 12 to all persons being equal before the law and being entitled to equal protection of the law.

The language used in Protocol 12 is identical to that used in Article 14, except regarding its application outside the rights set forth in the ECHR. Protocol 12 is intended to complement Article 14 not replace it. In their common language, they will likely be subject to similar interpretation – for example, the list of grounds in Article 1 of Protocol 12 is also [open-ended](#). However, Protocol 12 will provide greater opportunities for the ECtHR to apply the ECHR’s equality principles and to adopt a more proactive approach to equality cases. The preamble to Protocol 12 also reaffirms that the principle of non-discrimination does not prevent States from taking positive action, provided that it is objectively and reasonably justified. Protocol 12 will come into force when 10 member States of the Council of Europe have signed and ratified it in accordance with the terms of its Articles 4 and 5. As of 12 September 2004, *8 States had ratified Protocol 12.

1.2 The European Social Charter

The Council of Europe adopted the European Social Charter (Revised) (“Revised European Social Charter” or “Revised Charter”) on 3 May 1996. It entered into force on 1 July 1999. As of 16 November 2004, *19 States had ratified the Revised Charter and *18 other States had signed but not yet ratified it.

The Revised Charter incorporates the rights set out in the European Social Charter of 1961 (the “Social Charter”), the Additional Protocol to the European Social Charter of 1988, and a number of additional rights taking account of developments in labour law and social policies since the Social Charter was drawn up. The Social Charter and the Revised Charter both aim to facilitate economic and social progress by promoting and protecting ‘social’ rights, such as the right to work, the right to fair remuneration and fair conditions of employment and the right to social security. According to the Explanatory Report to the Revised Charter (at paragraph 7), its amendments to the Social Charter were intended to increase the scope of protection and not “represent a lowering of the level of protection provided.” The Social Charter will remain in force until the Revised Charter eventually replaces it - the Explanatory Report makes clear that the provisions of the Social Charter no longer apply to any State that has ratified the Revised Charter (see paragraph 10). The Social Charter itself came into force on 26 February 1965. As of 16 November 2004, *26 States had ratified the Social Charter. Out of those 26 States, *8 had also ratified the Revised Charter.

Article C of the Revised Charter provides that it is to have the “same supervision” as the Social Charter, consisting of the examination of periodic State reports by an appointed Committee of Experts (see Part IV of the Social Charter). In addition, Article D provides that the system of collective complaints established by the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints of 1995 (the “Collective Complaints Protocol”) may apply also to State obligations under the Revised Charter. Any State that has ratified the Collective Complaints Protocol prior to ratifying the Revised Charter automatically submits to the

collective complaints procedure in respect of its Revised Charter obligations. Any State that has not ratified the Collective Complaints Protocol may submit to the collective complaints procedure by way of an optional declaration under Article D (1) of the Revised Charter. The Collective Complaints Protocol entered into force on 1 July 1998. As of 16 November 2004, *11 States had ratified the Protocol (*9 of those had also ratified the Revised Charter).

Under Article 1 of the Collective Complaints Protocol, only organisations such as trade unions and employers' bodies have the right to submit complaints alleging unsatisfactory application of the Charter. In addition, international NGOs that have consultative status with the Council of Europe may be placed on the list of permitted organisations by the Charter bodies. A State party may also recognise the right of any other representative national NGO within its jurisdiction, which has particular competence in Charter matters, to lodge complaints against it. NGOs may only submit complaints in respect of matters "regarding which they have been recognised as having particular competence." The Committee of Independent Experts (the "European Committee of Social Rights") is the body that examines both the admissibility and merits of collective complaints under the Protocol. It reports its conclusions on the merits to the Committee of Ministers, which then decides by majority voting whether to make a recommendation to the State concerned. Under Article 10 of the Protocol, such State must report on the measures it has taken to comply with the recommendation of the Committee of Ministers. Each report of the European Committee of Social Rights must be made public no later than four months after its transmission to the Committee of Ministers.

The provisions of the Social Charter and Revised Social Charter that most directly address equality issues are, as follows:

European Social Charter

Preamble

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;

European Social Charter (Revised)

Article 4 – The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: ...

3. to recognise the right of men and women workers to equal pay for work of equal value

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national

The Social Charter does not contain any operative provision dealing explicitly with discrimination. However, the European Committee of Social Rights has interpreted the non-discrimination clause in the preamble of the Charter to apply to all the provisions of the Social Charter. The European Committee of Social Rights has also indicated in its case law that grounds other than those listed in the preamble apply to the rights guaranteed under the Social Charter.

Article E is the principal non-discrimination provision of the Revised Charter. It confirms the case law of the European Committee on Social Rights in respect of the Social Charter but contains a more extensive enumeration of grounds. The words “such as” contained in Article E indicate that it is an open-ended prohibition of discrimination, i.e., the list of grounds on which discrimination is prohibited is not exhaustive. This open-ended nature has been confirmed by the case law of the European Committee of Social Rights (see *Syndicat national des professions du tourisme v France* (No. 6/1999, ESC)). According to the Explanatory Report to the Revised Charter, Article E is based on Article 14 of the ECHR. Like Article 14, it is a dependent prohibition of discrimination in that its protection is limited to the “rights set forth in this Charter,” such as the right to work, the right to social security or the right to fair remuneration.

The appendix to Article E provides that “differential treatment based on an objective and reasonable justification shall not be deemed discriminatory.” This reflects the jurisprudence of the ECtHR regarding Article 14 in the *Belgian Linguistics case* discussed above. Like Article 14, Article E does not explicitly state that it covers direct and indirect discrimination. However, in its jurisprudence, the European Committee of Social Rights has interpreted Article E to prohibit indirect as well as direct discrimination. In *Autisme-Europe v France* (No. 13/2002, ESC), the Committee used indirect discrimination analysis in considering that “the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled...”

Article E does not explicitly refer to positive action. However, many social rights, by their nature, require positive measures on the part of the State for their implementation. It is clear from the jurisprudence of the European Committee of Social Rights that States may be required to take positive steps to advance social rights through, for example, the provision of education for persons with autism (see *Autisme-Europe*). In addition to non-discrimination provisions, the Revised Charter also contains a number of rights that express the broader principle of equality. For example, the right to maternity protection under Article 8 and the rights of persons with disabilities under Article 15 each require the State to take positive measures to promote equality for a particular vulnerable group. Other equality provisions in the Revised Charter include

Article 4 (equal pay for work of equal value), which is identical to the corresponding provision (also Article 4) in the Social Charter. See also Article 27 (the right of workers with family responsibilities to equal opportunities and equal treatment), which was inspired by ILO Convention No. 156 (Workers with Family Responsibilities) of 1981. Article 27 provides for measures of accommodation for men and women workers with family responsibilities to enable them to enter and remain in employment, including provision for day care and parental leave.

There have as yet been only two full decisions on the merits in equality cases before the European Committee on Social Rights. However, there are a number of pending cases, some of which have already been declared admissible (see *International Federation for Human Rights v France* (No. 14/2003, ESC), *European Roma Rights Center v Greece* (No. 15/2003, ESC).

2 The European Union (EU)

Useful links: EU

- For the website of the EU, see: <http://europa.eu.int>
- For legal materials of the EU, see: <http://curia.eu.int/en/index.htm>
- For the text of the Treaty of Amsterdam, see: <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html>
- For EU Human Rights activities, see: http://europa.eu.int/pol/rights/index_en.htm
- For a portal to EU law, see: <http://europa.eu.int/eur-lex/en/index.html>
- For EU Anti-discrimination legislation, see: http://europa.eu.int/comm/employment_social/fundamental_rights/legis/legln_en.htm
- For the text of the EU Charter of Fundamental Rights, see: http://www.europarl.eu.int/charter/default_en.htm

Useful references: EU

- See Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, 3rd edition, Oxford University Press, 2003.

The *25 member States of the European Union (“EU”) are subject to its primary laws (the treaties), its legislation and the case law of the Court of Justice of the European Communities (“ECJ”). The EU has the power to legislate (or take other action) in those areas of competence transferred to it by its member States by the treaties through the voluntary limitation of their sovereign rights. Such areas of competence have expanded over the years from originally primarily economic fields to social and political matters (including asylum, immigration and human rights). One of the most important characteristics of the EU system is that its laws take precedence over domestic law

within its field of competence. This ‘supremacy’ of EU law entails that national courts must give primacy to EU law over inconsistent domestic measures. The EU legal system has thus been described as ‘supranational’ in character. Although the core of the EU system is the European Community (or “[EC](#)”) pillar of the EU, for brevity’s sake this Handbook uses the terms EU and EU law to refer to all legal instruments and cases discussed here. For a more complete description of the complex institutional structure of the EU and the nature and scope of its powers, see Craig and De Búrca, referenced above.

The EU treaties themselves have been amended and supplemented on a number of occasions. The Treaty of Amsterdam (which came into force on 1 May 1999) changed the names of the EU institutions and the numbering of treaty articles. Any relevant changes are noted below.

The primary legislating body of the EU is the Council. The ECJ is the body charged with interpreting the treaties and EU legislation. However, national courts also have a role in enforcement - the provisions of the treaties and EU regulations (i.e., legal instruments enforceable in themselves) are directly applicable in domestic courts and must be enforced by them both against member States and individuals (i.e., in both the public and private sphere). The EU legislates also by way of a ‘directive’ that specifies the key principles to be incorporated in domestic law but leaves to the State both a time-period for implementation and discretion as to the form of any implementing measure. Under principles laid down by the ECJ in *Case 26/62, Van Gend en Loos* [1963] ECR 1, in certain conditions directives have ‘[direct effect](#)’ and can be asserted by individuals against the member State before national courts.

The chief powers of the EU in the field of equality and non-discrimination are found in Articles 13 and 141 of the Treaty Establishing the European Community (the “[EC Treaty](#)”). Article 6 of the Treaty on European Union is also relevant. Article 39 of the EC Treaty prohibits discrimination on grounds of nationality to the extent that it prejudices the achievement of the single internal market. Article 39 has significance in combating discrimination against migrant workers within the EU.

EU Treaty Provisions

Article 13 of the EC Treaty

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

Article 39 (ex Article 48) of the EC Treaty

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
4. The provisions of this article shall not apply to employment in the public service.

Article 141 (ex Article 119) of the EC Treaty)

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 6 - Treaty on European Union

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States.
4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

2.1 Article 13 of the EC Treaty

Article 13 of the EC Treaty gives the EU specific powers to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, age, disability or sexual orientation. It does not provide enforceable rights for individuals. However, the Council has passed two [Directives](#) pursuant to its Article 13 powers, which provide a framework for member States to introduce measures to eliminate discrimination:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the “[Race Directive](#)”); and
- Council Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation (the “[Framework Directive](#)”).

The most important provisions of these Directives are as follows:

Race Directive

Article 1 (Purpose)

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 (Concept of discrimination)

1. For the purpose of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
 - (a) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.
 - (b) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 5 (Positive action)

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for advantages linked to racial or ethnic origin.

Article 8 (Burden of proof)

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Article 9 (Victimisation)

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.

According to Article 3, the Race Directive applies to employment; education and vocational training; membership of professional, workers' and employers' bodies; social protection; 'social advantages'; education; and the access to and supply of goods and services. 'Social advantages' have been defined by the ECJ in the context of Regulation (EEC) No. 1612/68 on free movement of migrant workers as "benefits of an economic or cultural nature which are granted within the Member States either by public authorities or private organisations." The Explanatory Memorandum to the proposal for the Race Directive notes that 'social advantages' have a similar meaning here. Examples given in the Explanatory Memorandum include concessionary travel on public transport, reduced prices for access to cultural or other events and subsidised meals in schools for children from low-income families.

The Race Directive specifies a deadline of 19 July 2003 for implementation by member States. Even if States fail to implement (or fully implement) it, the Directive may have direct effect in national systems after the deadline for implementation has passed if it complies with the conditions laid down in *Van Gend en Loos* (i.e., judged sufficiently precise and unconditional). If directly effective, the Directive can be asserted by an individual against the State in domestic courts. In *Case C-6/90, Francovich* [1991] ECR I-5357, the ECJ held that individuals can bring claims against a State to enforce a right protected by the EU, even if the right in question is against a third party. Member States are required to implement the Directive so as to prohibit discrimination in both the private and the public spheres. For a more detailed discussion of the direct effect of the Race Directive, see *Strategic Litigation of Race Discrimination in Europe: from principles to practice – A Manual on the Theory and Practice of Strategic Litigation with particular reference to the Race Directive*, published by the European Roma Rights Center, INTERIGHTS and Migration Policy Group (2004) at www.interights.org/pubs/strategic%20manual.pdf.

Framework Directive

Article 1 (Purpose)

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation with a view to putting into effect in the Member States the principle of equal treatment.

Article 2 (Concept of discrimination)

1. For the purpose of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
 - (a) Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to in Article 1.
 - (b) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a

particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
 - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.
3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
 4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 7 (Positive action)

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for advantages linked to any of the grounds referred to in Article 1.
 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.
-

The Framework Directive applies to employment (including employment-related benefits provided as part of remuneration); vocational guidance and training; and membership of professional, workers' and employers' bodies. It contains identical provisions to the Race Directive regarding the burden of proof (Article 10) and victimisation (Article 11). The Framework Directive specifies a deadline of 2 December 2003 for implementation by member States. Like the Race Directive, the Framework Directive may have direct effect after the passing of the deadline for implementation and must be enforced both in the public and private spheres. For the status of transposition of the Directives into national law and a description of implementation problems, see *Strategic Litigation of Race Discrimination in Europe: from principles to practice*, cited above.

The Framework Directive contains a number of exceptions and limitations in scope that are important to note. Article 3 of the Directive provides that the Directive does not apply to state social security or social protection schemes. It provides further that the provisions of the Directive regarding disability and age discrimination shall not apply to the armed forces. In Article 2, the Framework Directive provides an important exception to the principle of non-discrimination for 'genuine occupational requirements,' including for requirements based on religious ethos (see the section on

'Genuine Occupational Requirements' below in Chapter III). Article 6 provides that differences in treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. Such differences of treatment may include the fixing of minimum conditions of age, professional experience or seniority in service for access to employment and the fixing of a maximum age for recruitment that is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement. Article 6(2) also excludes the fixing of ages for occupational social security schemes, provided that the use of age criteria does not constitute discrimination on grounds of sex.

The Directives provide for the prohibition of discrimination on specified grounds (race; religion and belief; disability; age; and sexual orientation) related to employment and occupations (see Article 3 (scope)). Both Directives exclude discrimination on grounds of nationality and immigration matters (see Article 3(2) of each Directive). They contemplate the prohibition of both direct and indirect discrimination (Article 2), allow for positive action (Article 7) and explicitly provide for protection against harassment and victimisation (Article 2). Indirect discrimination is prohibited unless the measure at issue can be 'objectively justified' by a legitimate aim and the means of achieving that aim are appropriate and necessary. The Framework Directive also provides in Article 5 for reasonable accommodation for disabled persons (see the section on 'Reasonable Accommodation' below in Chapter III). In the Framework Directive, there is also a specific exemption from indirect discrimination claims for reasonable accommodation measures by an employer required by law.

2.2 Article 39 of the EC Treaty (Free movement of workers)

Article 39 (formerly 48) of the EC Treaty is one of the most fundamental provisions of EU law as the free movement of workers and non-discrimination on grounds of nationality is essential to create a single economic market. The provisions on free movement have direct effect in national law (see *Case 36/74 Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405; and *Case C-415/93 Union Royale Belge des Sociétés de Football Association and others v Bosman* [1995] ECR I-4921). They can be asserted in domestic courts against private individuals as well as the State (see *Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139). The ECJ has made clear in its case law that both direct discrimination (see, for example, *Case 167/73, Commission v French Republic* [1974] ECR 359) and indirect discrimination (see, for example, *Case 35/97 Commission v Belgium* [1998] ECR I-5325) on grounds of nationality are prohibited.

2.3 Article 141 of the EC Treaty (Sex discrimination)

Selected EU Gender Discrimination Provisions

Revised Equal Treatment Directive

Article 1

1. The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".
 - 1a. Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in paragraph 1.
2. With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

Article 2

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. For the purposes of this Directive, the following definitions shall apply:
 - direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,
 - indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,
 - harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,
 - sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
4. An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination within the meaning of this Directive.
6. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
7. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/ 85/EEC shall constitute discrimination within the meaning of this Directive.....

8. Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women.

Article 7

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Burden of Proof Directive

Article 4

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
2. This Directive shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.
3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 141 (formerly Article 119) of the EC Treaty establishes the principle of equal pay between the sexes. Following the Treaty of Amsterdam, it was amended to impose a legislative obligation on the EC to adopt measures in the area of equal opportunities and equal treatment at work generally and permitting forms of 'positive action.' Case 43/75, *Defrenne v Sabena* [1976] ECR 455 established that Article 119 (as it then was) has direct effect in national law. Much of the jurisprudence of the ECJ on indirect discrimination is based on Article 119. The section on indirect discrimination in Chapter III below discusses a number of the most important cases. Others are discussed in Chapter V below. The prohibition of discrimination in Article 141 relates only to work conditions, employment and remuneration and the ground of sex. Article 141 also allows for positive action for the advancement of women in employment.

The EU has passed a number of Directives under Article 141 with regard to sex discrimination in the workplace, including the following:

- Council Directive 75/117/EEC (on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women) (the “Equal Pay Directive”) aimed to harmonise member State laws regarding the principle of equal pay for equal work.
- Council Directive 76/207/EEC provides for equal treatment with regard to access to employment, vocational training, promotion and working conditions (the “Equal Treatment Directive”). It specifically prohibits direct and indirect sex discrimination, noting that “the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status” (see Article 2(1)). It also provided the opportunity for positive measures, noting in Article 2(4) (now Article 2(8)) that: “this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).” See also Council Directive 86/613/EEC on equal treatment of self-employed men and women. In 2002, Council Directive 2002/73/EC amended the Equal Treatment Directive (as amended, the “Revised Equal Treatment Directive”), which provided a much more comprehensive non-discrimination instrument and codified much of the existing case law on pregnancy and other matters developed under the Equal Treatment Directive. The Revised Equal Treatment Directive introduced definitions of direct and indirect discrimination, prohibited instruction to discriminate, provided an expanded definition of victimisation, and made explicit reference in Article 2(8) to positive measures permitted under Article 141(4) of the EC Treaty. The Directive also introduced the concept of sexual harassment, noting that sexual harassment is a form of discrimination in violation of the equal treatment principle (see Article 2(3)).

Sexual harassment had already been recognised in many jurisdictions as being covered by the terms of the existing Equal Treatment Directive or domestic legislation implementing that Directive. See, for example, the UK cases of *Strathclyde Regional Council v Porcelli* [1986] IRLR 134 and *Stewart v Cleveland (Engineering) Ltd.* [1999] IRLR 440, and the Irish Labour Court decision in *A Garage Proprietor v A Worker* (EE 02/1985) (regarding the Employment Equality Act 1977). Thus, the introduction of the concept of sexual harassment represented less of a breakthrough and more of a codification of existing domestic practice at European level.

- Council Directive 79/7/EEC requires the progressive implementation of equal treatment with regard to statutory social security schemes (the “Social Security Directive”). Council Directive 86/378/EEC (as amended by Council Directive 96/97/EEC) provides for equal treatment in occupational social security schemes.
- Council Directive 97/80/EC deals with the burden of proof in cases of discrimination based on sex (the “Burden of Proof Directive”). The Race and Framework Directives also contain provisions regarding the burden of proof in discrimination cases. As discussed in Chapter II, the burden of proof has been one

of the greatest obstacles to indirect discrimination claims. The effect of Article 4 of the Burden of Proof Directive was to transfer the burden of proof to the respondent once the claimant has established facts from which it may be presumed that there has been direct discrimination or indirect discrimination.

2.4 Article 6 of the Treaty on European Union – the EU and Human Rights

Although there was no reference to human rights in the original EC treaties, in *Case 29/69, Stauder v City of Ulm* [1969] ECR 419 the ECJ held that fundamental human rights were ‘general principles of Community law’ requiring protection by the Court. In that case, the ECJ found that the impugned EC measure could be interpreted in conformity with the human rights principle that had been invoked so there was no need to strike the EC measure down. Subsequently, in *Case 11/70, International Handelgesellschaft* [1970] ECR 1125, the ECJ reiterated that fundamental rights were to be regarded “as part of the general principles of law which the Community had to respect in its activities.” *International Handelgesellschaft* concerned an EC measure conflicting with a right protected under the law of a member State. The ECJ held that the measure did not infringe the right claimed because the restriction was not disproportionate to the general interest advanced. These and subsequent judgments make clear that EC legislation, acts of the EU institutions under EC legislation and national measures incorporating the provisions of EC Directives may be challenged on the basis of fundamental rights.

Over the years the ECJ has determined the nature and extent of fundamental rights on a case-by-case basis. See, for example, *Case 4/73, Nold v Commission* [1974] ECR 491 and *Case 44/79, Hauer v Land Rheinland-Pfalz* [1979] ECR 3727. A statement of the ‘sources’ of fundamental rights recognised by EC law was finally incorporated into EU basic law through Article 6 of the Treaty on European Union. These sources include (i) fundamental rights as guaranteed in the European Convention on Human Rights (ECHR), (ii) rights that result from the constitutional traditions common to member States and (iii) general principles of Community law (i.e., EC law). It is unclear at this stage to what extent ‘general principles’ may be used to further the principles of equality and non-discrimination as the content and scope of these rights is unknown.

In an attempt to clarify and expand the scope of EU human rights law, the European Union Charter of Fundamental Rights was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000. Many of the rights recognised by the Charter are based on similar provisions in the ECHR and on the jurisprudence of the ECJ (much of it concerning the ‘general principles’). The Charter is not yet a legally binding document, however, and so it does not of itself create rights enforceable in national courts or the ECJ. However, because some of the rights listed in the Charter arise from sources such as the EU treaties, secondary EC legislation and the case law of the ECJ,

they are already legally binding within the EC legal order. Despite its lack of formal legal status, the Charter is also regarded as a highly persuasive instrument by the ECJ. The text of the Charter is included in the version of the proposed EU Constitution, approved by EU leaders in June 2004 and now subject to ratification by the member States of the EU. If the EU Constitution is ratified, the Charter will become legally binding in EC law.

The provisions of the Charter most directly relevant to equality are as follows:

EU Charter of Fundamental Rights

Article 20 (Equality before the law)

Everyone is equal before the law.

Article 21 (Non-discrimination)

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 23 (Equality between men and women)

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 21 is the central provision of the Charter concerning equality and non-discrimination. It is an open-ended prohibition of all forms of discrimination and lists 17 grounds in particular. Both direct discrimination and indirect discrimination are explicitly prohibited through the reference to 'equality before the law' in Article 20 and 'any discrimination' in Article 21. The Charter, if it comes into force, will operate within the scope of EU law; therefore, the prohibition of discrimination will not apply to all measures adopted pursuant to national law. However, national measures designed to implement Directives may be subject to the Charter's prohibition on discrimination, as they fall within the scope of EU law. This may prove to be the most significant field of application for the Charter.

3 THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (AfCHPR)

Useful links: African Charter

- For the text of the African Charter, see: http://www.achpr.org/english/_info/charter_en.html
- For the African Commission, see: <http://www.achpr.org>
- For materials on the African Charter see: <http://www.achpr.org>
- For the Protocol on the Establishment of an African Court, see: http://www.achpr.org/english/_info/court_en.html
- For the Protocol on the Rights of Women, see: http://www.achpr.org/english/_info/women_en.html
- For general information on human rights in Africa, see: <http://www.africaninstitute.org>
- For the African Union, see: <http://www.africa-union.org>
- For status of ratification, see: http://www.achpr.org/english/_info/index_ratifications_en.html

Useful references

- For decisions of the African Commission, see: *Compilation of Decisions and Communications of the African Commission on Human and Peoples' Rights extracted from the Commission's Activity Reports 1994-2001*, Institute for Human Rights and Development in Africa (www.africaninstitute.org)

The AfCHPR was adopted by the Organization of African Unity (“OAU”) in 1981 and entered into force in 1986. In 2002 the African Union (the “AU”) succeeded the OAU as the chief pan-African international organisation and as the sponsor of the AfCHPR and related instruments. As of 3 July 2004, all *53 members of the AU had ratified the AfCHPR. The African Commission on Human and Peoples' Rights (the “[African Commission](#)”) is responsible for the promotion and protection of the rights guaranteed under the AfCHPR. The African Commission has the power to investigate and consider ‘communications’ from States and individuals regarding violations of the Charter. However, its recommendations are not binding and its proceedings take place in private. The African Commission also reviews periodic reports from State parties regarding their implementation of the AfCHPR and it has the power to interpret the AfCHPR.

Until recently the African Commission was the only oversight mechanism for the AfCHPR. However, the AU created an additional mechanism, the African Court on Human and Peoples' Rights (the “[African Court](#)”), pursuant to the Protocol on the Establishment of an African Court on Human and Peoples' Rights adopted on 9 June 1998. As of 17 July 2004, the Protocol had been signed by *43 of the *53 AU members

and ratified by *19 members. The Protocol entered into force on 25 January 2004. This new mechanism will complement the protective mandate of the African Commission (see Article 2 of the Protocol). The African Court is empowered to consider alleged violations on the basis not only of the African Charter, but also of any other international human rights instrument ratified by the State concerned. The Court may thus consider and apply principles developed under other international human rights instruments in cases of alleged violations by States that are party to such instruments (see Articles 3 and 7 of the Protocol, respectively). As such, the African Court may have the potential to develop jurisprudence relevant to a whole range of national jurisdictions and international instruments. States may make a declaration pursuant to Article 34 of the Protocol recognising the competence of the African Court to consider individual complaints and complaints from NGOs with observer status before the African Commission. Without a declaration of the State party, the African Court is permitted to consider cases against it only from the African Commission, other State parties and African intergovernmental organisations (Article 5 of the Protocol).

The provisions of the AfCHPR that most directly address equality are as follows (in relevant part):

African Charter

Article 2

Every individual shall be entitled to the enjoyment of rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic groups, color, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Article 3

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 12

5. The mass expulsion of non-nationals shall be prohibited. Mass expulsions shall be that which is aimed at national, ethnic or religious groups.

Article 13

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Article 18

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.

Article 19

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Article 28

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

The AfCHPR, through the ‘other status’ language of its Article 2, provides for an **open-ended** guarantee of equal treatment for individuals regardless of their status. Article 2 appears to be a ‘**dependent**’ prohibition of discrimination, in that it applies only to the rights “recognised and guaranteed in the present Charter.” However, Article 3 of the Charter provides for both equality before the law and equal protection of the law and is thus a ‘free standing’ guarantee of non-discrimination similar to Article 26 of the ICCPR and Article 3 of the AmCHR. This has been confirmed by the case law of the African Commission. In *Legal Resources Foundation / Zambia* (No. 211/98) the Commission stated at paragraph 63 that:

“The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens.”

The text of Articles 2 and 3 does not explicitly address direct and indirect discrimination. However, the jurisprudence of the African Commission suggests that indirect discrimination is prohibited. In the case of *Association Mauritanienne des Droits de l’Homme / Mauritania* (No. 210/98), the African Commission stated at paragraph 131 that:

“Article 2 of the Charter lays down a principles that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities adopted by the General Assembly of the United Nations in resolutions 47/135 of 18 December

1992.... From the foregoing, it is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination in all its guises.”

Article 18(3) also makes reference to the prohibition of “every discrimination” against women in accordance with international declarations and covenants.

Unlike other international and regional instruments that focus only on the individual, Article 19 of the AfCHPR expressly prohibits domination or discrimination of one group of people by another group. This group rights focus extends to Article 22, which promotes the right of a people to economic, social and cultural development. Article 12(5) recognises the considerable problems in Africa with mass expulsions of non-nationals, largely on discriminatory grounds.

Although Article 18 of the AfCHPR concerns women’s rights and sex discrimination, a more detailed Protocol on the Rights of Women in Africa was adopted by the African Union on 11 July 2003. As of 26 August 2004, *31 States had signed the Protocol and *4 States had ratified it. It will come into force 30 days after the deposit of the fifteenth instrument of ratification. This Protocol concentrates on the principle of equality with regard to sex and gender. It provides a **free standing** prohibition against discrimination “in all spheres of life” including both direct and indirect discrimination (see Article 1). It also promotes positive action (see Article 2(1)(iv)). Additional provisions include a prohibition on polygamy, a right to divorce, and a right to medical abortion in cases of rape and incest. However, the Protocol has yet to come into force and several States have already registered significant reservations to key provisions.

4 THE AMERICAN CONVENTION ON HUMAN RIGHTS (AMCHR)

Useful links: AmCHR

- For the text of the AmCHR, see: <http://www.cidh.oas.org/basicos/basic3.htm>
- For materials on the AmCHR, see: <http://www.wcl.american.edu/pub/humright/digest/inter-american/index.html>
- For the website of the IACtHR, see: <http://www.corteidh.or.cr>
- For the website of the IACHR, see: <http://www.cidh.org>
- For Center for Justice and International Law, the most prominent specialist NGO, see: <http://www.cejil.org>
- For the OAS, see: <http://www.oas.org>

The American Convention on Human Rights (“AmCHR”) was adopted by the Organization of American States (the “OAS”) in 1969 and entered into force on 18 July 1978. As of August 2004, 25 States (of the 35 OAS members) had ratified the Convention. The AmCHR is the central human rights instrument in the Americas, although it is not the only international human rights treaty of the Inter-American system of human rights protection sponsored by the OAS. For a list of international human rights instruments in the Inter-American system, see <http://www.cidh.org/basic.eng.htm>. On 17 November 1988, the OAS adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”). It entered into force on 16 November 1999. As of 1 September 2004, 13 States had ratified the Protocol. The Protocol aims to gradually incorporate economic, social and cultural rights, such as the rights to work, social security, health, food and education, into the protective system established by the AmCHR.

Even prior to the adoption of the AmCHR, the OAS had been active in the field of equality and non-discrimination. Both the OAS Charter and the American Declaration of the Rights and Duties of Man (the “American Declaration”) adopted in 1948 contain provisions relevant to equality.

Other OAS Instruments

American Declaration: Article II

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

OAS Charter: Article 3

The American States reaffirm the following principles:

- l) The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex;

After the publication of the American Declaration, the OAS created the Inter-American Commission on Human Rights (the “IACHR”) to promote and protect human rights in the region. Since 1965, the IACHR has been expressly authorised to examine individual complaints or petitions regarding human rights violations under the American Declaration. The adoption of the AmCHR in 1969 granted additional powers to the IACHR to consider individual complaints under that instrument. The AmCHR also created the Inter-American Court of Human Rights (the “IACtHR”) as a supplementary enforcement organ for the AmCHR. Despite the introduction of this new enforcement machinery and the more comprehensive list of rights in the AmCHR, the IACHR has

also retained its pre-AmCHR powers to consider individual complaints not derived directly from the AmCHR. Under Article 20 of the Statute of the Inter-American Commission on Human Rights, in relation to those members of the OAS that are not party to the AmCHR (such as the United States), the IACHR is empowered to consider individual complaints with reference to the American Declaration but such complaints are not within the jurisdiction of the IACtHR. See, for example, the case of *Haitian Boat People v United States*, Report N° 51/96, Case 10.675 (13 March 1997).

The IACHR and the IACtHR are the enforcement organs of the AmCHR. Pursuant to Article 42 through 51 of the AmCHR, the IACHR is empowered to receive petitions from individuals or NGOs alleging a human rights violation, once domestic remedies have been exhausted. The IACHR may investigate any complaint, seek information from the State concerned and seek a friendly settlement. It may also produce a report with recommendations for the State. State parties or the IACHR may submit a case to the IACtHR under Article 61, once the IACHR has investigated the matter and failed to reach a friendly settlement. Unlike in the case of the IACHR, it is a condition to the jurisdiction of the IACtHR that States make a declaration recognising its judgments as binding.

The provisions of AmCHR (including the Protocol of San Salvador) that most directly address equality are as follows:

American Convention on Human Rights

Article 1 (Obligation to Respect Rights)

1. The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 2 (Domestic Legal Effects)

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the State Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this present Convention, such legislative or other measures as may be necessary to give effect to these rights or freedoms.

Article 20 (Right to Nationality)

1. Every person has the right to a nationality.
2. Every person has the right to a nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 24 (Right to Equal Protection)

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 26 (Progressive Development)

The States Parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Protocol of San Salvador

Article 3 (Obligation of non-discrimination)

The States Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

The ‘any other social condition’ language of Article 1 of the AmCHR (and Article 3 of the Protocol) suggests that it is an open-ended prohibition of discrimination that covers all possible grounds of discrimination. It is not clear from the case law, however, whether ‘social condition’ embraces a narrower range of grounds than the ‘other status’ language used in other international instruments and thus rules out some claimants (e.g., gay, lesbian or trans-gendered claimants). In *Advisory Opinion OC-4/84*, the IACtHR held that the scope of the equality right in Article 24 of the AmCHR is also limited to the grounds listed in Article 1(1).

Like in the case of the AfCHPR, the prohibition of discrimination in Article 1 appears to be ‘dependent’ in that it applies only to the “rights and freedoms recognised” in the AmCHR. However, Article 24 of the AmCHR provides in addition for equality before the law and equal protection of the law and is thus a ‘free standing’ guarantee of non-discrimination like Article 26 of the ICCPR. In *Advisory Opinion OC-4/84*, the IACtHR confirmed that Article 1(1) is a dependent or parasitic provision. However, it recognised that Article 24 is a ‘free standing’ equality right that guarantees equality not only in the enjoyment of the rights set forth in the Convention but also in the application of any domestic legal norm (within the grounds listed in Article 1(1)).

Articles 1 and 24 of the AmCHR explicitly prohibit direct discrimination. The case law of the IACHR and the IACtHR suggests that indirect discrimination is also prohibited. In *Advisory Opinion OC-18/03*, (17 September 2003), the IACtHR (at paragraph 103) stated that “States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination.” The distinction between indirect discrimination and direct discrimination is not noted explicitly in the case law because, like the ECHR, the IACHR uses a legal test similar to

that of the *Belgian Linguistics case* rather than definitions of the various types of discrimination.

Advisory Opinion OC-18/03 makes clear that the AmCHR obliges States to take positive measures to promote equality. At paragraph 104, the IACtHR stated that:

“States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.”

The AmCHR does not address group or collective rights in the same way as the African Charter, for example. Article 26, on progressive development of economic, social and cultural rights, focuses on development on a national scale rather than the rights of internal groups against domination by other groups.

Article 27 of the AmCHR, like Article 4 of the ICCPR, provides that derogations by a State in time of war, public danger, or other emergency that threatens its independence or security must not discriminate on the grounds of race, colour, sex, language, religion, or social origin.

KEY LEGAL STANDARDS IN INTERNATIONAL DISCRIMINATION LAW

International discrimination law uses a number of legal standards to express the principle of equality. These include the prohibitions of direct discrimination, indirect discrimination, harassment and victimisation and the obligations to take positive action and reasonable accommodation measures. Each legal standard is discussed below with examples of case law from different jurisdictions. Also discussed in this chapter is one of the most common exceptions to non-discrimination provisions, for genuine occupational requirements. Further examples are provided in the discussion of specific grounds of discrimination in Chapter V.

A DIRECT DISCRIMINATION

Useful links: Direct Discrimination

- For the UN approach to discrimination, see: <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3888b0541f8501c9c12563ed004b8d0e?OpenDocument>
- For the EU Race Directive, see: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf
- For the EU Framework Directive, see: http://europa.eu.int/comm/employment_social/fundamental_rights/index.htm

Approaches based on direct discrimination provide for ‘formal equality’ by prohibiting less favourable or detrimental treatment of an individual or group of individuals on the

basis of a prohibited characteristic or ground such as race, sex, or disability. The treatment given must be different to that which would have been afforded a person from a different relevant group in the same or comparable circumstances.

Unequal treatment may include a lesser degree of protection or service from a private or public organisation, lower pay, and victimisation and harassment, among others. Direct discrimination may occur when standard legal, political, or economic rights or benefits are withheld from an individual or class of individuals on the basis of their membership in a certain group. This type of discrimination may be committed by public authorities, such as through national legislation, agency decisions, public appointments or budgetary allocations, or by private employers or organisations, such as through differential pay, delayed promotion or the refusal of entry to public accommodation. Segregation is often considered a particularly blatant form of direct discrimination. It is discussed below in Chapter V.

Direct discrimination is by definition ‘intentional’ so no proof of intention is necessary for such a claim. In most jurisdictions, with the exception of the US federal laws on indirect discrimination, in both direct and indirect discrimination cases intention is irrelevant. See further the section on ‘Relevance of Intent’ below.

The approaches of the main international systems of human rights protection are discussed below.

1 UN Treaty Bodies

The UN treaty bodies (HRC, CESCR, CERD, etc.) share a common approach to direct discrimination. In paragraph 7 of [HRC General Comment 18](#), the HRC interpreted the prohibition of “discrimination” under Article 2 and Article 26 of the ICCPR to include both direct and indirect discrimination:

“[T]he Committee believes that the terms ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, color, 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 an equal footing, of all rights and freedoms.”

The ICCPR prohibits measures that have the *purpose* (direct discrimination) and the *effect* (indirect discrimination) of interfering with rights on a prohibited ground. The other UN treaty bodies use the same formula. See, for example, CERD General Recommendation 14 (see, http://www.bayefsky.com/general/cerd_genrecom_14.php).

A number of cases of direct discrimination have come before UN treaty bodies. The case of *Lovelace v Canada* (No. 24/1977, ICCPR) discussed below provides an example of a measure that provides for different treatment between two groups (men and women) in identical circumstances. The effect of the measure was to deprive the applicant of her 'Indian' status and the benefits that came with such status. Although, the HRC decided the case on other grounds, it is clear that the HRC regarded the treatment of Lovelace as direct discrimination on the grounds of sex (i.e., a distinction *de jure* on the ground of sex).

Lovelace v Canada

Sandra Lovelace was born and registered as "Maliseet Indian" but has lost her rights and status as an Indian in accordance with the Canadian *Indian Act*, after having married a non-Indian. As an Indian man marrying a non-Indian woman would not have lost his Indian status, Lovelace claimed that the *Indian Act* discriminated against her on the grounds of sex and was contrary to Articles 2 (1), 3 and 26 of the ICCPR. She also claimed violations of Articles 23 (right to marry) and 27 (rights of minorities).

Despite the obvious merit of the claim, the case raised problems for the HRC in that the ICCPR entered into force in Canada after the applicant's marriage. Therefore, the cause of her loss of status (the discriminatory effect of the *Indian Act*) was outside the jurisdiction of the HRC. Although the HRC recognised that the relevant provision of the *Indian Act* "was-and still is- based on a distinction *de jure* on the ground of sex" (paragraph 10) and that Article 2 and 3 were applicable, it was not competent to examine those claims. Instead, the HRC avoided the issue of jurisdiction (and the 'necessity' of making a determination regarding discrimination) by determining that the "essence of the complaint" was the continuing effect of the Indian Act in denying Lovelace her Indian status, not the original cause of the loss of status.

Among other things, as a result of her loss of status Lovelace was denied the right to live on an Indian reserve with resultant separation from the Indian community and members of their families. According to the HRC, the most directly applicable provision was Article 27 of the ICCPR, which guarantees the rights of persons belonging to minorities to enjoy their own culture and to use their own language in community with other members of their group. The HRC felt that Lovelace was entitled to be regarded as 'belonging' to a minority and to claim the benefits of [Article 27](#) as she was ethnically a Maliseet Indian and had only been absent from her home reserve for a few years during the existence of her marriage.

Clearly the continuing effects of the *Indian Act* interfered with Lovelace's Article 27 rights. The HRC focused on whether such interference was justified. It held (in paragraph 16) that a restriction:

"must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be."

The purpose of the relevant part of the Indian Act was to preserve the identity of the tribe. In this case, because Lovelace's marriage had broken up, the HRC felt that to deny her the right to reside on the reserve was not reasonable, nor necessary to preserve the identity of the tribe. The HRC concluded that to prevent her recognition as belonging to the band was an unjustifiable denial of her rights under Article 27 of the Covenant, read in the context of the other provisions including Articles 2, 3 and 26.

Chapter V below contains other examples of explicit distinctions in laws made on prohibited grounds such as sex and sexual orientation that were held by UN treaty bodies to amount to (direct) discrimination.

- In *Broeks v the Netherlands* (No. 172/1984, ICCPR), *Zwaan de Vries v the Netherlands* (No. 182/1984, ICCPR), *Pauger v Austria* (No. 415/1990, ICCPR) and *Johannes Vos v Netherlands* (No. 786/1997, ICCPR), the HRC held that distinctions on the grounds of sex in social security laws had no reasonable or objective aims and thus violated Article 26 of the ICCPR.
- In *Avellanal v Peru* (No. 202/1986, ICCPR), the HRC decided that the Peruvian law that prevented married women from representing matrimonial property before the courts violated Article 26.
- In *Young v Australia* (No. 941/2000, ICCPR), the HRC held that the State had failed to show how the unequal treatment of same-sex partners who were denied benefits and unmarried heterosexual partners who were granted benefit was based on 'reasonable and objective' criteria.
- In the *Mauritian Women case* (No. 35/1978, ICCPR), the HRC found that the Mauritian immigration law that limited residency rights of alien husbands of Mauritian women but not of alien wives of Mauritian men, discriminated on the grounds of sex.

2 European Convention on Human Rights

As noted in Chapter II above, the distinction between direct and indirect discrimination is not something that the ECtHR focuses on in its jurisprudence. Instead, the ECtHR applies the test for discrimination it laid down in the *Belgian Linguistics case*.

'Relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (the 'Belgian Linguistics' case)

The applicants, French-speaking residents of Belgium, sought to have access to a French language education for their children. However, the Belgian State only provided subsidised education in the language of the region in areas designated as unilingual, in the maternal language in bilingual areas and provided an option in designated 'special status' areas. The applicants claimed that aspects of the system discriminated against French speaking families in violation of Article 14 of the ECHR.

As this was one of the first cases in which Article 14 was considered, the ECtHR had to consider some fundamental questions regarding the nature of the prohibition of discrimination.

With regard to the nature of Article 14 as a dependent or 'accessory' prohibition against discrimination, the ECtHR found that there could be a violation of Article 14 when taken in consideration with another Article in the Convention even when there was no violation of this other Article. At Section 1B, paragraph 9 it stated that:

"While it is true that this guarantee has no independent existence in the sense that under the terms of Article 14 (art. 14) it relates solely to 'rights and freedoms set

forth in the Convention', a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 (art. 14) for the reason that it is of a discriminatory nature."

The ECtHR also had to consider what differential treatment was permissible under Article 14. At Section 1B, paragraph 10, it stated that:

"On this question the Court..... holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

The Belgian State argued that positive discrimination in favour of the Flemish language was in the public interest and pursued a legitimate aim, that of the protection of the linguistic homogeneity of certain regions in order to prevent the 'phenomenon of francisation' in Dutch speaking areas in Flanders.

The ECtHR held that measures that tend to ensure that, in a unilingual region, the teaching language of official or subsidised schools should be exclusively that of the region are not arbitrary and therefore not discriminatory. However, the measure preventing certain children, solely on the basis of their parents' residence, from having access to French-language schools in the communes of 'special status', was found to be contrary to Article 2 of Protocol 1 and Articles 8 and 14 of the Convention.



In practice (following on from the *Belgian Linguistics* case), the ECtHR now follows a standard methodology in addressing claims of discrimination under Article 14.

- First, it decides whether the complaint of discrimination falls within the sphere of one of the rights protected by the ECHR. This reflects again the 'accessory' nature of Article 14 discussed in Chapter II above. If the complaint does not fall within the sphere of a protected right, the Court cannot examine a claim under Article 14. See, for example, the case of *Botta v Italy* (No. 21439/93, 24/02/1998), discussed under 'Disability' in Chapter V below, where the Court could not rule on the Article 14 claim because it found that the applicant's claim fell outside the scope of Article 8.
- Second, the ECtHR rules on whether there has been a violation of the substantive provision. If such a violation is found it does not always consider separately a violation of Article 14 in conjunction with the substantive provision. The reason for this is that in many such cases the Article 14 complaint is in effect the same complaint, albeit seen from a different angle. However, the Court will consider a complaint of violation of Article 14 read together with the substantive provision if there is a clear inequality of treatment in the enjoyment of the right in question which is a fundamental aspect of the case. See, for example, *Chassagnou and others v France* (Nos. 25088/94, 28331/95 and 28443/95, 29/04/1999).

- Third, the applicant must show that there has been a difference of treatment. The ECHR safeguards persons who are in ‘analogous situations’ from discriminatory treatment. Hence an applicant must identify the group that is treated differently and show how his situation and the situation of that group are comparable. In order for discrimination in breach of Article 14 to have taken place, the situation of the victim must be considered similar to that of persons who have been better treated. Furthermore, measures must provide for different treatment (or with adverse effect) of the victim by reason of the characteristics identified. See, for example, *Lithgow and others v the United Kingdom* (No. 9006/80, 08/07/1996).
- Fourth, the State may show that such a difference in treatment is justified. A difference in treatment is discriminatory under Article 14 if it has no objective or reasonable justification. A measure has no objective and reasonable justification if it does not pursue a ‘legitimate aim’ or if the means employed are disproportionate to the legitimate aim.

The effect of the application of this test has resulted in many equality cases before the ECtHR being decided on the basis of whether the measures being impugned are objective and reasonable, rather than the effect on vulnerable groups. This test is similar to that used to determine whether interference with substantive rights under the ECHR, such as the right to freedom of expression, can be justified. Although there is a significant ‘margin of appreciation’ afforded to States under the ECHR regarding the appropriateness of domestic measures, there have been some successful direct discrimination cases before the ECtHR. In cases involving distinctions based on sex, race or nationality, it seems the level of scrutiny of the ECtHR is higher and ‘weighty reasons’ are needed to justify different treatment.

Chapter V contains examples of distinctions or detrimental treatment that were held by the ECtHR to amount to (direct) discrimination, including:

- In *Schuler-Zraggen v Switzerland* (No. 14518/89, 24/06/1993) the ECtHR found that the denial of an invalidity pension to the applicant in circumstances where it would have been granted to a man constituted discrimination on grounds of sex.
- In *Willis v the United Kingdom* (No. 36042/97, 11/05/1999), *Van Raalte v the Netherlands* (No. 20060/92, 21/02/1997) and *Karlheinz Schmidt v Germany* (No. 13580/88, 18/07/1994), the ECtHR found that legislation that explicitly distinguished on the grounds of sex (in each case treating men less favourably) violated Article 14.
- In *Salgueiro Da Silva Mouta v Portugal* (No. 33290/96, 21/12/1999), the ECtHR held that granting parental responsibility to the mother of a child rather than the father on the ground of the father’s sexual orientation was discriminatory.

3 European Union

EU law prohibits direct discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation and nationality, subject to very limited grounds of exception. In *Case C-391/97, Frans Gschwind v Finanzamt Aachen-Aussenstadt* [1999] ECR I-5451 (at paragraph 26), the ECJ made clear that discrimination occurs under EU law if, having regard to the purpose and content of the provisions at issue, two groups in a comparable situation are treated differently (on prohibited grounds). Although similar definitions of direct and indirect discrimination apply in all of the fields of EU law relevant to the Handbook, the exact content of the law in each area and the exceptions that permit justification to occur vary considerably. Chapter V goes into detail about the scope and content of EC law protection under each prohibited ground (i.e., race, sex, etc.).

3.1 Article 13 Legislation

Article 2.2(a) of the EU *Race Directive* provides that “direct discrimination shall be taken to occur when one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.” The EU *Framework Directive* uses the same formulation but applies it to a broader list of prohibited grounds listed in Article 1 (including religion, disability, etc.).

3.2 Article 39 and Nationality

Article 39 (ex. Article 48) prohibits rules that directly discriminate on grounds of nationality. For example, In *Case C-212/99, Commission v Italy* the ECJ held that Article 39 was directly applicable in the legal systems of member States so as to render inapplicable a provision in the French maritime code that required a certain proportion of the crew of a French ship to be of French nationality.

3.3 Article 141 and Sex Discrimination

EU law on sex discrimination can be neatly divided into three areas: equal pay, equal treatment, and social security. Although different legal provisions govern each area, the basic principle of non-discrimination on grounds of sex is common to all three areas.

In the case of equal pay, Article 141 states explicitly that “Member States shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.” In other words, direct discrimination (paying less for equal work) is prohibited. The ECJ has not considered whether direct pay discrimination can be justified. However, in a number of cases the ECJ has considered whether men and women who appear to be doing the same job are actually similarly situated at all. For example in *Case 132/92, Roberts v Birds Eye Walls Ltd.* [1993] ECR I-5579, the ECJ concluded that the payment of different pensions to men and women did not constitute

discrimination since they were not similarly situated in all relevant respects. See also Case C-218/98, *Abdoulaye and Others* [1999] ECR I-5723.

In *Case 149/77, Defrenne v Sabena* (No. 3) [1978] ECR 1365, the ECJ ruled that the elimination of sex discrimination was fundamental to EU law. Article 2 of the Equal Treatment Directive defines the equal treatment principle to prohibit any discrimination “on grounds of sex either directly or indirectly by reference in particular to marital or family status.”

The Revised Equal Treatment Directive permits several exceptions to the equal treatment principle, for example, certain occupations that by their nature are limited to one sex, and protective restrictions regarding maternity. The ECJ has used the concept of ‘genuine occupational requirement’ in justifying discrimination on grounds of sex under Article 2 of the Equal Treatment Directive. In *Case C-312/86, Commission v France* [1998] ECR 3559 a system of separate recruitment according to sex for prison wardens was not permitted for want of proportionality. The ECJ has interpreted such requirements narrowly and will not accept blanket refusals to hire women. However, exceptions have been applied in context of armed forces. In *Case C-273/97 Sirdar v Army Board* [1999] ECR I-7403, discussed below in Chapter V, the ECJ accepted that the treatment of Sirdar, a woman refused a job as a chef with the UK Royal Marines on the grounds of sex, was justified under Article 2(2). See also *Case C-285/98, Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 and *Case 165/82, Commission v the United Kingdom* [1983] ECR 3431. For the application of genuine occupational requirements in contexts other than sex discrimination see the section on ‘Genuine Occupational Requirements’ below. The [Social Security Directive](#) uses the same definition of discrimination used in the Equal Treatment Directive.

4 African Charter on Human and Peoples’ Rights

Article 2 and Article 3 of the AfCHPR clearly prohibit direct discrimination.

- In *Association Mauritanienne des Droits de l’Homme / Mauritania* (No. 210/98) the African Commission held in paragraph 131 that the detention, torture, killing and forced flight of Black Mauritians by government forces solely because of the colour of their skin was “an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its Article 2.”
- In the case of *OMCT and others / Rwanda* (Nos. 27/89, 46/91, 49/91, 99/93), the Commission stated at paragraph 23 that “the denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.”
- In *Legal Resources Foundation / Zambia* (No. 211/98), the African Commission made clear that any measure seeking to exclude a section of the citizenry from

participating in the democratic process (as the provision at issue sought to do) is discriminatory and falls foul of the African Charter.

5 American Convention on Human Rights

Few cases under the AmCHR have been decided on the basis of equality principles. In general, the IACHR takes an approach to discrimination similar to that of the ECHR. In fact, the *Belgian Linguistics case* has been cited frequently in reports of the IACHR and IACtHR in discrimination cases. Again, the IACHR does not focus on the distinction between direct and indirect discrimination in its jurisprudence.

In the case of *Carlos Garcia Saccone v Argentina* (No. 8/98), the IACHR defined ‘unequal treatment’ for the purposes of Article 24 of the AmCHR as:

“i. the denial of a right to someone which is accorded to others; ii. diminishing the right to someone while fully granting it to others; iii. the imposition of a duty on some which is not imposed on others; iv. the imposition of a duty on some which is imposed less strenuously on others.”

Of course consideration of unequal treatment requires a standard of comparison. In this regard, the IACHR referred to the test set out in *Advisory Opinion OC-4/84* discussed in the ‘nationality’ section of Chapter V below. In that case, the IACHR laid down the test for determining discrimination permissible under Article 24 of the AmCHR. The IACHR held at paragraph 10 that:

“...there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.”

In *María Eugenia Morales de Sierra v Guatemala* (No. 4/01) (discussed below in Chapter V) and again in *Marcelino Hanríquez et al v Argentina* (No. 73/00), the IACHR described the test in *Advisory Opinion OC-4/84* as being consistent with the *Belgian Linguistics* test. At paragraph 37 of *Hanríquez*, the IACHR stated that under Article 24 a distinction involves discrimination when “a) the treatment in analogous or similar situations is different, b) the difference has no objective and reasonable justification and c) the means employed are not reasonably proportional to the aim being sought.” The IACHR has also employed the ‘weighty reasons’ phrase of the ECHR regarding the justification for different treatment on certain grounds such as sex. In *María Eugenia Morales de Sierra v Guatemala*, the IACHR noted that:

“Statutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny. What the European Court and Commission have stated is also true for the Americas, that as ‘the advancement of the equality of the sexes is today a major goal.... very weighty reasons would have to be put forward’ to justify a distinction based solely on the grounds of sex” (citing *Karlheinz Schmidt v Germany*, *Schuler-Zgraggen v Switzerland* and *Burghartz v Switzerland*).

Like in ECHR cases, applicants alleging discrimination under Article 24 have had difficulty combating the burden of proving that there was no objective and reasonable justification for a measure, despite the ‘very weighty reasons’ requirement. See, for example, *Marzioni v Argentina* (No. 39/96). The *María Eugenia Morales de Sierra* case discussed below represents one of the few successful reported direct discrimination cases. For an example of a strong discrimination case that was settled, see *Carabantes v Chile* (No. 33/02). See also *Advisory Opinion OC-18/03*.

B INDIRECT DISCRIMINATION

Useful links: Indirect Discrimination

- For the UN approach to discrimination, see: <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3888b0541f8501c9c12563ed004b8d0e?OpenDocument>
- For the EU Race Directive, see: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf
- For the EU Framework Directive, see: http://europa.eu.int/comm/employment_social/fundamental_rights/index.htm

Useful references: Indirect Discrimination

- For a discussion of indirect discrimination under the ICCPR, see: Lord Lester of Herne Hill QC and S. Joseph, ‘Obligations of Non-Discrimination’ in D. Harris and S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Clarendon Press, 1995, p. 575.

The concept of indirect discrimination has been formulated in a number of different ways by different jurisdictions but it is generally understood to consist of two components:

- **Disproportionate impact.** A *prima facie* case of indirect discrimination occurs when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups.
- **No justification.** Because the provision or condition is facially neutral, however, the analysis will also generally consider whether there is a strong enough reason for the practice to justify the differential impact. Such justification must demonstrate the policy or practice is objectively reasonable and proportional.

If the requirement is not reasonable in all the circumstances, it is likely to constitute indirect discrimination. The law measures whether a requirement is reasonable by balancing the reason for having the requirement against its discriminatory effect - including the numbers of people disadvantaged by it and the degree of that disadvantage. It then considers whether there is some fairer way of achieving the same aims. Indirect discrimination is often less obviously unfair than direct discrimination because it relates to people from different groups being treated the same way, but in circumstances that disadvantage a much higher proportion of people from a particular group or groups than people from other groups. A more detailed discussion of both proving a *prima facie* case and justification appears below in Chapter IV.

The first step in proving an indirect discrimination claim involves establishing that facially neutral criteria have disparate impact across different groups. While the explicit or direct basis for different treatment may not be race, disability, or any other impermissible ground, the provision may impact negatively on a particular group. Facially neutral criteria are often used in the imposition of requirements or qualifications as a condition for some benefit. Although certain qualifications are necessary for particular activities or positions, these qualifications must be directly relevant and proportional to the job or activity at hand.

In all discrimination cases the burden of proof initially rests with the applicant to establish a *prima facie* case of the elements of discrimination (i.e., disproportionately prejudicial impact, etc.). Such matters are relatively difficult to prove and statistics have often proven the best way to raise a *prima facie* case, as they provide the best means of identifying the varying impact of measures on different segments of society. The effect of Article 4 of the EU Burden of Proof Directive is to transfer the burden of proof to the respondent once the claimant has established facts from which it may be presumed that there has been direct discrimination or indirect discrimination. See also Article 8 of the Race Directive and Article 10 of the Framework Directive. For a discussion of indirect discrimination and the use of statistics, see the legal brief prepared jointly by INTERIGHTS and Human Rights Watch for the case of *D.H. v Czech Republic* (No. 73907/01) at www.interights.org.

In most jurisdictions, intention is irrelevant to the finding of indirect discrimination. However, under the US Constitution equal protection clause and under Title VII of the Civil Rights Act, it must be shown that there is 'discriminatory intent' for facially neutral measures with discriminatory effect to constitute prohibited discrimination ('disparate

impact’). See, for example, *Village of Arlington Heights v Metropolitan Housing Development Corp.*, 429 U.S. Reports 252.

1 UN Treaty Bodies

As discussed under direct discrimination above, paragraph 7 of [HRC General Comment 18](#) indicates that Articles 2 and 26 of the ICCPR prohibit both direct and indirect discrimination. Identical language is used in the corresponding provisions of ICERD and CEDAW and is considered by their monitoring bodies to encompass indirect discrimination as well. CERD General Recommendation 14 clarifies that discriminatory effect may be claimed on the basis of disparate impact:

“A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States parties by article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.”

And paragraph 2 continues:

“[In] seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.”

CERD has also addressed issues of indirect discrimination when reporting on State party compliance to ICERD in the periodic reporting procedure. In its concluding comments regarding Australia (2000), it stated that minimum mandatory sentencing schemes with regard to minor property offences contravened the Convention due to their indirect discriminatory effect on aborigines.

An example of the UN treaty bodies approach to indirect discrimination is the case of *Bhinder Singh v Canada* (No. 208/1986, ICCPR). This case also provides support for arguments in favour of ‘reasonable accommodation.’ See below the discussion of reasonable accommodation in this chapter.

Bhinder Singh v Canada

The author of the complaint, Karnel Singh Bhinder, a Sikh by religion, was dismissed from his post with the Canadian National Railway Company for refusal to comply with new Canadian safety regulations requiring the wearing of hard hats during work. As it is a fundamental tenet of Sikh religion that men's headwear should consist exclusively of a turban, he claimed that Canada had restricted his right to manifest his religious beliefs under Article 18, paragraph 1 of the ICCPR. Furthermore, such restriction was not justified under Article 18, paragraph 3, as

it was not necessary to protect public safety, since any safety risk ensuing from his refusal to wear safety headgear was confined to him.

The Canadian Human Rights Commission had found a violation of the Canadian Human Rights Act on the grounds that the hard hat regulation denied him employment because of religion. The Canadian Federal Court of Appeal overturned this decision on the grounds that the Canadian Human Rights Charter prohibited only direct and intentional discrimination and that it did not encompass any concept of reasonable accommodation. The Supreme Court upheld this decision.

Before the HRC, the State of Canada submitted that the author was not discharged from his employment because of his religion as such but rather because of his refusal to wear a hard hat, and contended that a neutral legal requirement, imposed for legitimate reasons and applied to all members of the relevant work force without aiming at any religious group, could not violate Article 18 of the ICCPR. In this respect, it referred to the HRC decision in communication No. 185/1984 (*L. T. K. v Finland*), where it observed, that “[...] (the author) was not prosecuted and sentenced because of his beliefs or opinions as such, but because he refused to perform military service.”

The HRC examined the case under Articles 18 and 26 of the ICCPR. It characterised the safety legislation as a measure which, “on the face of it, is neutral in that it applies to all persons without distinction.” The HRC felt that it was a measure justified under Article 18, paragraph 3 and that, if it was seen as discrimination *de facto* against persons of the Sikh religion under Article 26, it was reasonable and directed towards objective purposes compatible with the ICCPR. On the facts, therefore, there was no violation of the ICCPR.

The cases most often cited as examples of the UN treaty bodies approach to indirect discrimination are *Althammer v Austria* (No. 998/2001, ICCPR) and *Simunek v Czech Republic* (No. 516/1992, ICCPR). In *Althammer*, the authors claimed that they were victims of discrimination because the abolition of household benefits affected them, as retired persons, to a greater extent than it affected active employees. The HRC noted that a violation of Article 26 could result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However it held that “such indirect discrimination can only be said to be based on the grounds enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour” etc. In the circumstances of the case, the authors failed to show that the impact of the measure on them was disproportionate. At any rate, the HRC was satisfied that the measure was based on objective and reasonable grounds.

2 European Convention on Human Rights

As noted above in Chapter II, there are no clear examples from ECHR jurisprudence of a successful allegation of indirect discrimination. At any rate, the distinction between direct and indirect discrimination is not something that the ECtHR focuses on in its jurisprudence. Instead, the ECtHR applies the test for discrimination first laid down in the *Belgian Linguistics* case discussed above.

The judgment of the ECtHR in the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80; 9473/81; 9474/81, 28/05/1985) suggested that the ECHR did not cover indirect discrimination at all. The ECtHR held that the applicants had failed to establish that immigration rules with the effect of excluding immigration by people from the Indian sub-continent made a distinction on grounds of race. The ECtHR focused only on the purpose of the measures in question – the protection of the labour market in the UK.

However, in subsequent cases, although the ECtHR has never found a case of proven indirect discrimination, it has indicated that indirect discrimination is prohibited by the ECHR. In the case of *Hugh Jordan v the United Kingdom* (No. 24746/94, 04/05/2001) discussed below in the ‘nationality’ section of Chapter IV, the ECtHR suggested that indirect discrimination is covered by the ECHR. It stated at paragraph 154 that:

“Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.”

See also *McKerr v the United Kingdom* (No. 28883/95, 04/05/2001); *Shanaghan v the United Kingdom* (No. 37715/97, 04/05/2001); *Kelly and others v the United Kingdom* (No. 30054/96, 04/05/2001), and *McShane v the United Kingdom* (No. 43290/98, 28/05/2002).

The possible reason why there has been no successful indirect discrimination case is that disproportionate effect or impact is very difficult to prove. Statistical evidence may not be available to prove impact and it is not clear that the ECtHR would accept it or regard it as decisive anyway. In a number of cases involving serious abuses of human rights by the State, applicants have attempted to argue that the disproportionate impact on a certain community of those abuses indicated a discriminatory policy. None of those claims were successful. This was in part because the standard of proof required was that of ‘beyond reasonable doubt.’ See further the discussion of burden of proof in this chapter and the cases of *Anguelova v Bulgaria* (No. 38361/97, 13/06/2002) (particularly the dissenting judgment of Judge Bonello) and the case of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004).

In *Kurt v Turkey* (No. 24276/94, 25/05/1998), the applicant contended that forced disappearances primarily affected persons of Kurdish origin so that the disappearance of her son breached Article 14. The applicant stated that her claim was borne out by the findings contained in the reports published between 1991 and 1995 by the United Nations Working Group on Enforced or Involuntary Disappearances. The ECtHR found that the evidence presented by the applicant did not substantiate her allegation that her son was the deliberate target of a forced disappearance on account of his ethnic origin. Accordingly, there was no violation of the Convention under this head of complaint. Other similar cases are discussed under the ‘nationality’ section below.

However, there may be evidence of an emerging ‘substantive’ equality approach to discrimination by the ECtHR in the case of *Thlimmenos v Greece* (No. 34369/97, 06/04/2000). In that case, the ECtHR held that the right of non-discrimination under Article 14 was also violated when a State without objective and reasonable justification fails to treat differently persons whose situations are significantly different. This was the first indication that accommodation for differences was covered by the ECHR.

The denial of civil rights to Roma, in particular the failure to investigate allegations of police brutality and excessive force, had been raised frequently before the European Court of Human Rights. Surprisingly, however, in spite of evidence of racial motivation for such treatment, it is only with the recent groundbreaking case of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004) that the violation of a right under the ECHR has been linked to a corresponding violation of the prohibition against discrimination. *Nachova* may also prove positive for indirect discrimination cases in another way by allowing for the burden of proof to be lowered in specific cases.

Nachova v Bulgaria

The case concerned two conscripts in the Bulgarian army of Roma origin shot and fatally wounded by military police trying to arrest them for being absent without leave. At the time of the attempted arrest they were unarmed and had no previous history of violence. There was evidence of racist verbal abuse by the military police directed against Roma during the operation. This was coupled with a history of racially motivated mistreatment of Roma by the authorities in Bulgaria that was well documented by non-governmental and international organisations. In line with its practice in previous cases, the ECtHR first examined an alleged breach of the substantive right to life under Article 2 of the ECHR before looking at allegations of discrimination. According to the ECtHR, Bulgaria breached Article 2 both through the inappropriate use of force in the circumstances and flawed investigations into the deaths that were characterised by serious and unexplained omissions.

In previous cases on similar grounds, such as *Anguelova v Bulgaria* (No. 38361/97, 13/06/2002) and *Velikova v Bulgaria* (No. 41488/98, 18/05/2000), the ECtHR avoided analysing claims of discrimination under Article 14 of the ECHR (taken together with the relevant substantive provision) by arguing that the applicants’ submissions did not fulfil the applicable standard of proof beyond reasonable doubt. This was partly due to the inherent difficulty in establishing subjective intent to directly discriminate. In fact, the ECtHR had never found that a violation of the right to life under Article 2 or prohibition against torture in Article 3 had been induced by any racist motive. Judge Bonello, in his partly dissenting opinion in *Anguelova*, criticised this approach of the ECtHR for its failure to link the mistreatment of minorities to their ethnicity. This link between physical abuse and ethnicity was particularly obvious in the case of the treatment of Roma by Bulgarian police, as it had come frequently before the ECtHR. He argued further that the application of a standard of proof beyond all reasonable doubt in human rights cases was unwarranted and had the effect of making the protection against racial discrimination “illusory and inoperative.”

The ECtHR in *Nachova*, following Bonello’s argument, considered that the suspicion of racial motivations in the actions of the military police warranted further investigation by the authorities. The failure by the authorities to distinguish in their investigations between this kind of case (alleged racist killing) and a case with no racial overtones (excessive use of force) constituted a breach of Article 14, taken together with Article 2. The ECtHR went on to state that the standard of proof beyond reasonable doubt in ECHR jurisprudence was not the criminal standard. Moreover, specific approaches to proof could be taken in some cases (e.g., indirect discrimination). In this case, facts suggesting racist motivations had the effect of

shifting the burden of proof to the respondent government to satisfy the ECtHR that the alleged events were not motivated by a prohibited discriminatory attitude. The Bulgarian authorities provided no such explanation.

The *Thlimmenos* judgment was seized on by the ECtHR when it stated (at paragraph 58) that to consider such cases:

“on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, mutatis mutandis, *Thlimmenos v Greece* (No. 34369/97, 06/04/2000).”

The *Nachova* case has been deferred to the Grand Chamber of the ECtHR pursuant to Article 43 of the ECHR for reconsideration.

3 European Union

EU law has played a leading role in developing the concept of indirect discrimination, in defining the concept and indicating how it may be enforced. EU law prohibits indirect discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation and nationality unless it can be justified. The grounds for justification are broad. For example, a language requirement for a job that has disproportionately prejudicial effects on non-nationals may be justified by what is required to do the job. In *Case 96/80, Jenkins v Kingsgate (Clothing Productions) Ltd.* [1981] ECR 911, the payment of a higher hourly wage to full-time rather than part-time workers could be justified by the needs of the employer even though it indirectly discriminated against women.

3.1 Article 13 Legislation

Articles 2(2) of both the EU Race Directive and Framework Directive understand indirect discrimination to have occurred:

“[W]here an apparently neutral provision, criterion, or practice would put persons having a particular [religion or belief, disability, race, or other grounds] at a particular disadvantage compared with other persons unless (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary...”

The Revised Equal Treatment Directive adopts the same definition of indirect discrimination.

3.2 Article 39 and Nationality

Indirect discrimination on grounds of nationality is prohibited by Article 39. In each of *Case C-356/98, Arben Kaba v Home Secretary* [2000] ECR I-2623 (at paragraph 27); *Case C-57/96, Meints v Minister van Landbouw* [1997] ECR I-6689 (at paragraph 44); and *Case C-237/94, O'Flynn v Adjudication Officer* [1996] ECR I-2617 (at paragraph 17), the ECJ stated that:

“[t]he Court has consistently held that the equal treatment rule laid down in Article 48 of the Treaty and in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result.”

At paragraph 45 of *Meints*, the ECJ went on to say that:

“Unless it is objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.”

Another example of indirect discrimination is *Case 152/73, Sotgiu v Deutsche Bundespost* [1974] ECR 153 where there was a difference in pay based on the country or place of recruitment, rather than nationality per se.

3.3 Article 141 and Sex Discrimination

Indirect discrimination was defined first in the Burden of Proof Directive (Council Directive 97/80/EC) in 1997 and then subsequently in the Race and Framework Directives. The Burden of Proof Directive provided in Article 2(2) that:

“For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.”

In *Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 (see box below) the ECJ suggested that a “far greater number” of individuals of the protected group must be affected to constitute legally significant differential impact. In *Case C-243/95, Hill and Stapleton v Revenue Commissioners* [1998] ECR I-3739, the ECJ held that national courts must determine whether the practice affects “a greater number” of individuals of the specified group.

In *Case C-167/97, Seymour-Smith and Perez* [1999] ECR I-623, the ECJ responded to an advisory request from the British House of Lords as to whether conditions required for bringing unfair dismissal claims constituted indirect sex discrimination. The Court held that the conditions would constitute a *prima facie* case of discrimination if the statistics available indicated that a 'considerably smaller' percentage of woman than men were able to satisfy the condition. It even suggested that a difference which was 'lesser' than 'considerably smaller' might indicate indirect discrimination if the difference is 'persistent and relatively constant.' Both statistics available at the point in time the act was adopted and statistics compiled subsequently and likely to provide an indication of impact could be taken into account. *Seymour-Smith* also laid down the legal criteria for establishing objective justification of indirect discrimination prohibited by Article 119 (now Article 141) of the EC Treaty. The ECJ noted that any indirectly discriminatory measure must be justified by objective reasons unrelated to any discrimination on grounds of sex (relying on *Case 171/88, Rinner-Kühn* [1989] ECR 2743, at paragraph 15). The ECJ held that it is for the member State, as the author of the allegedly discriminatory rule, to show that the rule reflects a legitimate aim of social policy, that that aim is unrelated to any discrimination based on sex and that it could reasonably consider that the means chosen were suitable for attaining that aim.

Bilka-Kaufhaus GmbH v Karin Weber von Hartz

Bilka, a department store in West Germany, operated an occupational pension scheme for its employees. In 1973, the scheme was extended to provide pensions for part-time employees (the majority of whom were women) if they had worked full-time for a total of 15 out of 20 years.

When Mrs Von Hartz retired she did not receive a pension because she had not worked full-time for 15 out of 20 years. Before the German labour court, she argued that the scheme indirectly discriminated against women because women were more likely to work part-time and therefore less able to meet the 15 years full-time work requirement. According to Bilka, the requirement could be justified on effective economic grounds because it provided an incentive for employees to work full-time.

On a reference from the national court, the ECJ examined the justification for the requirement to have 15 years full-time service to qualify for an occupational pension. It held that the employer had to show that the means used to achieve the objective (of discouraging part-time work) must correspond to a real need of the business and, be appropriate and necessary for achieving that objective. The employer was unable to show this and Mrs Von Hartz's case was successful.

Hill and Stapleton v Revenue Commissioners

Ms Hill and Ms Stapleton worked job-share for two years for the Irish civil service. Each worked half the time of a full-time employee. During the period of job-sharing, each employee moved one point up the incremental pay scale with each year of service. After two years of job sharing they moved to full-time working. At that point, their position on the incremental pay scale was adjusted down by one point in accordance with departmental instructions. Such instructions stated that, since each year's job-sharing service was reckonable as six

months full-time service, an officer who had served for two years in a job sharing capacity should be placed on the equivalent of one year's full-time service.

The women argued that this instruction indirectly discriminated against women contrary to Article 119 and the Equal Pay Directive. The Irish labour courts referred the matter to the ECJ.

The ECJ decided that the issue came within the definition of pay under Article 119. It stated that rules that treat full-time workers who previously job-shared at a disadvantage by comparison to other full-time workers by applying a criterion of service calculated by length of time actually worked in a post, must in principle be contrary to Article 119 and the Equal Pay Directive, where 98% of those employed under a job sharing contract are women, unless a difference in treatment can be justified.

The ECJ also held that an employer could not justify discrimination arising from a job-sharing scheme solely on the grounds of cost. Nor was it relevant that this was an established practice within the civil service.

4 Indirect Discrimination in National Jurisdictions

- Under Canadian law, indirect ‘adverse effect’ discrimination was held by the Supreme Court in *Ontario (Human Rights Commission) v Simpson-Sears Ltd.* [1985] 2 S.C.R. 536 (at paragraph 18) to occur where:

“[a]n employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on an employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.”

Claims of indirect discrimination may be made under Section 15 of the Canadian Charter or the Canadian Human Rights Act. There is no need to establish an intention to discriminate either under the Charter or the Human Rights Act. See, in particular, *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143. In the case of *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees’ Union* [1999] 3 S.C.R. 3 (“Meiorin”) the Supreme Court rejected the distinction between direct and indirect discrimination as artificial. It held that the same test should be used for both and the same remedies made available. In *Meiorin* the Court also laid down the test that a respondent must satisfy to successfully defend an allegation of discrimination. This test is laid out in the section on ‘Reasonable Accommodation’ in this chapter. Other relevant Canadian cases on indirect discrimination include *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 (“Grismer”) (regarding the application of *Meiorin* outside the employment context); *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 (laying down the test of

discriminatory treatment under the Charter); and *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R. 624 (regarding the use of statistics in disability cases).

- Prominent UK cases on indirect discrimination include *Mandla v Dowell Lee* [1983] 2 AC 548; *Perera v Civil Service Commission* [1983] ICR 428; *London Underground v Edwards* [1999] ICR 494; *R v Secretary of State for Employment, ex parte Seymour-Smith* [1999] ECR I-623.
- In South African law, relevant cases include *Brink v Kitshoff N.O.* 1996 (4) SA 107 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Harksen v Lane N.O. and others* 1998 (1) SA 300 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); and *Beukes v Krugersdorp Transitional Local Council and another* 1996 (3) SA 467 (W).
- In US law, key cases include *Griggs v Duke Power Co.* 401 U.S. 424 (1971) and *Hunter v Underwood* 471 U.S. 222 (1985).

C GENUINE OCCUPATION REQUIREMENTS

In many jurisdictions, a job may be restricted to people of a particular group (e.g., a race, or sex, or national origin) if the characteristic defining that group is a 'genuine occupational requirement' or 'genuine occupational qualification' for the job. In other words, employers may lawfully discriminate based on certain personal characteristics such as race or religion in limited circumstances where they are essential to the job. For example, a film producer may reasonably require a black actor to play Martin Luther King, Jr. or a mosque may require religious staff to be Muslims. Genuine occupational requirements act as an exception to the normal prohibition of discrimination.

When deciding if a genuine occupational requirement applies, it is necessary to consider the nature of the work and the context in which it is carried out. A Catholic primary school could reasonably require a Catholic to be the principal teacher but might not be able to insist on ordinary members of the teaching staff being Catholic. Race may be a genuine occupational requirement for a job where authenticity is an issue – such as for certain parts in a film or play or for an artists' or photographer's model. There is always a delicate balancing exercise between the need to guard against discrimination and the meeting of genuine and legitimate occupational needs. Employers must usually show also that it is proportionate to apply the genuine occupational requirement to the job.

1 The European Union

Article 4(1) of the EU [Framework Directive](#) provides that a difference of treatment based on the prohibited grounds listed in the Directive (religion or belief, disability, age or sexual orientation) shall not constitute discrimination where:

“by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”

Furthermore, Article 4(2) of the Directive permits member States to retain existing law and practice regarding occupational requirements for religious institutions. Under subsection (2), States may allow persons to be treated differently on the grounds of religion or belief in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief where:

“by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.”

If the exemptions in Article 4 are interpreted like the similar exemptions in the Equal Treatment Directive (see the section on the European Union under ‘Direct Discrimination’ in this chapter above) they will be limited and narrow. With regard to the ‘religious ethos’ exemption, it may be necessary to show that a person’s religion is a determining factor in their actual ability to discharge the duties of their job, rather than simply showing the employer’s perception that such religion or belief is fitting in light of the organisation’s ethos. Article 4(2) also contains a proviso to the effect that permitted religious differentiation ‘should not constitute discrimination on another ground.’ This will have implications for homosexuals in some religions; although, for example, the Roman Catholic Church frowns upon homosexual practices, it will not be able to discriminate on this ground. Any difference in treatment under Article 4 will also have to take into account member States’ constitutional provisions and principles’ and ‘general principles of Community law’ (including fundamental rights).

In the UK, under Section 7 of the Sex Discrimination Act and Section 5 of the Race Relations Act, employers are permitted to discriminate on grounds of sex and race in cases in which being a man or woman or a member of a particular racial group is a ‘genuine occupational qualification’ for the job.

The Canadian courts have dealt frequently with the issue of genuine occupational requirements, in part because their test for discriminatory treatment laid down in the *Meiorin* case (discussed in the section on ‘reasonable accommodation in this chapter)

incorporates a similar test. See, in addition to *Meiorin, Large v Stratford (City)* [1995] 3 S.C.R. 733; and *Saskatchewan (Human Rights Commission) v Saskatoon (City)* [1989] 2 S.C.R. 1297.

D HARRASSMENT

Useful references: Harassment

- For more detail on harassment, see: 'Harassment at the Workplace', *The Report of the Employment and Social Affairs Committee of the European Commission*, July 2001, 2001/2339 (INI).

Most reported cases of harassment (including sexual harassment) arise out of treatment at the workplace. Inside the workplace, harassment may consist of leering, embarrassing jokes or remarks, unwelcome comments about appearance, dress or person's characteristics, hostile action intended to isolate the victim, unjustifiable criticism, unwanted physical contact, demand for sexual favours and physical assaults. Harassment outside the workplace may include conduct similar to that prohibited in the workplace but by someone who has a business, service or professional relationship with the person harassed (such as teacher or medical doctor). It may also include racial, sexual or disability-related abuse or unjustified interference by the police or other authorities.

It has long been accepted in certain domestic jurisdictions that harassment can amount to discrimination. In the US harassment claims first arose in the context of racial discrimination. In some jurisdictions, the courts have held that sexual harassment amounts to direct discrimination even where it has not been explicitly mentioned in the relevant legislation. For example, in the Irish employment equality case of *A Garage Proprietor v A Worker* (EE 02/1985), the continued sexual harassment of a 15-year-old petrol pump attendant was held to amount to a violation of the prohibition of direct discrimination in the Employment Equality Act (1977), despite the absence of a reference to harassment in the Act. There have been similar cases on harassment in the UK.

EU law, through its Framework and Race Directives (which draw from the Revised Equal Treatment Directive) provides the clearest 'international' definition of harassment. Under Articles 2(3) of each instrument, harassment is:

“Unwanted conduct related to [the relevant grounds] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating, or offensive environment. In

this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.”

This definition above notes that the unwanted conduct “takes place with the purpose or effect” of violating dignity. This suggests that even if the purpose is not to harass, establishing a degrading effect is sufficient for a finding of harassment. It is unclear whether the definition of a degrading environment is subjective or objective. A subjective standard would take into close consideration the standards of dignity held by the victim or group of victims. An objective standard would attempt to present set standards applicable to all individuals across all groups; these would likely incorporate the standards of acceptable behaviour adopted by the majority or group in power. For example, an individual of a minority religion wearing a head covering out of religious duty or feeling may be affronted to remove such covering. A member of the majority population wearing such a covering, on the other hand, may not be affronted at all.

There have been few international cases on harassment. But, as the case of *Hagan v Australia* (No. 26/2002, ICCPR) demonstrates, harassment does not need to be directed at the complainant personally.

Hagan v Australia

The HRC dealt with a complaint of an Australian national, Stephen Hagan, of indigenous Australian ethnic origin. He alleged that he was a victim of harassment by Australia.

In 1960, the grandstand of an important sporting ground in the town where the complainant lived was named the “E.S. ‘Nigger’ Brown Stand”, in honour of a well-known sporting and civic personality. The word “nigger” appeared on a large sign on the stand. Mr. Brown, who was also a member of the body overseeing the sports ground and who died in 1972, was of white Anglo-Saxon origin who acquired the term “nigger” as his nickname, either “because of his fair skin and blond hair or because he had a penchant for using ‘Nigger Brown’ shoe polish.” The term is also repeated orally in public announcements relating to facilities at the ground and in match commentaries.

In June 1999, the applicant requested the trustees of the sports ground to remove the term “nigger”, which he found objectionable and offensive. After considering the views of numerous members of the community who had no objection to the use of the term on the stand, the trustees advised the applicant that no further action would be taken. Later, a public meeting chaired by a prominent member of the local indigenous community, and attended by a cross-section of the local Aboriginal community, the mayor and the chair of the sports ground trust, passed a resolution: “That the name ‘E.S. Nigger Brown’ remain on the stand in honour of a great sportsman and that in the interest of the spirit of reconciliation, racially derogative or offensive terms will not be used or displayed in future”.

The applicant’s legal action was unsuccessful in the domestic federal courts. At CERD, he alleged that the use of the term “nigger” (on the grandstand and orally) violated Articles 2; 4; 5, 6 and 7 of ICERD. He contended that the term is “the most racially offensive, or one of the most racially offensive, words in the English language.” Because he and his family were offended by its use at the ground, they were unable to attend functions at what was the area’s most important football venue. He argued that, whatever may have been the position in 1960, contemporary display and use of the offending term is “extremely offensive, especially to the Aboriginal people, and falls within the definition of racial discrimination in Article 1” of the Convention.

The Committee considered that use and maintenance of the term could at the present time be considered offensive and insulting and recommended not to use it in the future.

At the domestic level, tribunals have found unlawful sexual harassment in cases where a hostile environment was created at the work place.

- In the American case of *Robinson v Jacksonville Shipyards, Inc* (No. 86-927-Civ-J-12, 760 F. Supp. 1486; 1991 U.S. Dist. LEXIS 4678; 136 L.R.R.M.), a female welder working for a shipyard company was continually subjected to nude and partially nude pictures posted by her male co-workers. The men posted these pictures not only in common areas, but also in places where the victim would have to encounter them, including her toolbox. The men referred to her as 'baby,' 'sugar,' and 'dear.' In addition, the men wrote obscene graffiti directed at the victim all over the workplace. The men also made numerous suggestive and offensive remarks to the victim concerning her body and the pictures posted on the walls. Although the victim complained about this atmosphere of harassment on a number of occasions, the company's supervisory personnel provided little or no assistance. The domestic court, in ruling in her favour, held that, because the harassment was based on sex, it affected a term or condition of her employment, and the employer knew or should have known about the harassment and failed to take remedial action.
- In the UK case of *Stewart v Cleveland (Engineering) Ltd.* [1999] IRLR 440, the plaintiff was embarrassed by the display of calendars and pictures of nude women in her work area. She asked her manager to remove the offending pictures but no action was taken. She became depressed and felt unable to return to work because of the reaction of colleagues to her complaint. The tribunal found that she had been constructively dismissed because of the employers' inadequate response to her complaints. However, the tribunal found that a man could have been equally offended by the display so there was no sex discrimination. At an appeal hearing, the employment tribunal made it clear that this did not mean that it was never an act of sex discrimination for a company to allow its male employees to display 'pin-ups' in the workplace.

E VICTIMISATION

'Victimisation' in discrimination law describes any adverse measure taken by an organisation (including employers and public authorities) or an individual in retaliation for efforts to enforce legal principles, including those of equality and non-discrimination. The clearest example is where an employee complains about – or takes

legal action – because of harassment or any other denial of equal treatment, and the employer responds by dismissing or failing to promote the employee.

Article 7 of the EU Revised Equal Treatment Directive requires member States to introduce measures to prohibit victimisation. In a similar fashion, the EU Race and Framework Directives both define victimisation as one form of unlawful discrimination. Article 9 of the Race Directive states that:

“Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.”

Article 11 of the Framework Directive uses a similar formulation:

“Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment.”

The ECtHR also seemed to accept victimisation as grounds for a case. *Fogarty v the United Kingdom* (No. 3711/97, 21/11/2001) concerned an applicant who had taken a case under the UK Sex Discrimination Act that provided specific protection against victimisation. The Act defined victimisation principally as a cause of action, which arises when an employer treats an employee or a potential employee less favourably because he or she brought or gave evidence for proceedings against the discriminator. Although the ECtHR eventually held against the applicant on procedural grounds, the ECtHR seemed to accept protection against victimisation as an extension of the rights guaranteed in the ECHR.

F POSITIVE ACTION OR AFFIRMATIVE MEASURES

1 Introduction

Many international and regional instruments, as well as national laws, indicate that positive or affirmative action (sometimes described as ‘special’ or restitutionary measures) may be used to promote equality. Article 4 of CERD goes further in requiring States to take positive measures. CEDAW also obliges on States to undertake positive

action. Positive action refers to all measures that go beyond the prohibition of discrimination and seek to remedy disadvantage.

There are five broad categories of positive action:

- Positive measures to eradicate discrimination by, for example, the removal of discriminatory practices against groups historically disadvantaged,
- Facially neutral policies that have the purpose of assisting disadvantaged groups,
- Programmes designed to attract candidates from under-represented groups,
- Preferential treatment (such as the use of quotas or 'plus' factors); and
- The redefinition of merit in order to make a prohibited ground of discrimination a qualification for a position.

Each of these categories (to a greater or lesser degree) is an expression of substantive equality. Formal equality would demand that all individuals be treated in exactly the same manner. It would prohibit even remedial forms of discrimination, and would be relatively passive in eliminating the sources of inequality. The main aim of most equality provisions is to eliminate discrimination rather than to favour previously disadvantaged groups. Conceiving of equality in a broader sense, as addressing the underlying structures of inequality, requires some form of positive action.

Positive action is controversial because it runs counter to a strictly formal notion of equality. It also tends to privilege group over individual rights when in many systems individual rights are paramount. The right to equal treatment is an individual right; preferential treatment concerns group rights. A key issue in legal analysis of positive action is whether the individual's right not to be discriminated against yields to the rights of the disadvantaged group to be compensated for past discrimination. In the case of *Fullilove v Klutznick* 448 U.S. 448 (1980), the U.S. Supreme Court found that a 'sharing of the burden' by innocent parties was not prohibited under US federal equality laws. In many systems, more inflexible forms of positive action (such as strict quotas) are impermissible 'positive discrimination,' however, because they take less account of the rights of the individual. Positive action measures must, therefore, strike the appropriate balance between group and individual rights. Both national and international tribunals have made clear that all forms of positive action should be reasonable and objective, and work proportionately to their goals. In this regard, positive action is often limited in time and scope to take into account the specific disadvantage suffered by a person or group.

This section looks at positive action under international law. However, national law has, in many cases, provided the source of new trends in international law. Therefore, relevant domestic law is discussed where appropriate.

2 Positive Action under International Instruments

Generally, international instruments recognise that positive or affirmative action may be necessary in order to overcome past discrimination.

2.1 International Covenant on Civil and Political Rights

In its General Comment 18 (at paragraph 10), the HRC recognised the need for positive action in the following terms:

“[T]he principle of equality sometimes requires States to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”

General Comment 4 on Article 3 of the ICCPR further provides (at paragraph 2) that “Article 3, as Articles 2(1) and 26... requires not only measures of protection but also affirmative action to ensure the positive enjoyment of those rights.” The HRC specifically addressed the issue of positive action with regard to minority rights protected in Article 27 of the ICCPR. In General Comment 23 the HRC recognised that the rights protected under Article 27 are individual rights. However, it stressed (in paragraph 6.2) that “positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the groups.”

The HRC has also supported preferential treatment for disadvantaged groups applying for educational, public service, or other positions. It has upheld preferential treatment policies even when other individuals have felt disadvantaged or discriminated by them. For example, in *Stalla Costa v Uruguay* (No. 198/1995, ICCPR) the applicant complained that preference was given to certain public officials in getting admitted to the public service. Those officials had previously been unfairly dismissed on ideological, political or trade-union grounds. The HRC observed that in light of previous discrimination against these individuals, the alleged discrimination was found to be permissible affirmative action.

The HRC has approved the use of quotas in several of its country reports. For example, in its concluding observations on India, it approved a constitutional amendment in

India that reserves one third of seats in elected local bodies for women. It also approved the practice of reserving elected positions for members of certain tribes and castes (see UN Doc. CCPR/C/79/Add.81, paragraph 10).

2.2 International Convention on the Elimination of All Forms of Racial Discrimination

As indicated in Chapter II, Article 1(4) of ICERD permits affirmative action to correct discrimination and, in Article 2(2), states that, in certain circumstances, States may be required to take positive action measures.

CERD addresses the issue of affirmative action regularly in its concluding observations to State party periodic reports. See, for instance, *A/51/18* (30 September 1996) at 503, where CERD recommended that the government of Namibia adopt affirmative action measures “to overcome vestiges of the past that still hamper the possibilities for black people, including vulnerable groups among them” in areas of education and employment. See also *A/53/18* (10 September 1998), at 434, where CERD welcomed the Government of Nepal’s affirmative action programmes for “less developed groups”, but requested information on the results of those programmes. A recent area of interest in the affirmative action debate is the condition of the Roma population in Europe. The HRC devoted a special session to Roma issues that ended in the passage of General Comment 27 on Discrimination against Roma (2000). General Comment 27 recognises Roma communities as among the most disadvantaged and most subject to discrimination in the contemporary world and calls on States to adopt affirmation action on behalf of the Roma in a number of fields, including education, public and private employment, public contracting and the media.

2.3 International Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW obliges States to undertake affirmative action, and specifies (in Article 4(1)) that such measures should be primarily aimed at redressing imbalances and past discriminatory practices. CEDAW indicates that such measures should be of limited duration, but does not suggest a specific time frame. In General Recommendation 23, CEDAW also explicitly advocates the imposition of quotas to achieve gender balance in public and political bodies.

2.4 International Labour Organization

ILO Conventions have also indicated that special affirmative action measures do not constitute impermissible discrimination. See, for example, Article 5 of Convention No. 111.

2.5 European Convention on Human Rights

Article 14 of the ECHR provides that the enjoyment of the rights and freedoms in the Convention “shall be secured” without discrimination. This emphasises that States may have positive obligations under Article 14 as well as negative obligation not to discriminate in its official acts. Recital 3 to the Preamble of Protocol 12 to the ECHR reiterates the importance of positive action:

“Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.”

In the *Belgian Linguistics* case discussed above under ‘direct discrimination’, the ECtHR made clear that positive action is not incompatible with Article 14 (at paragraph 3):

“However, it cannot be concluded from this that the State has no positive obligation to ensure respect for such a right as is protected by Article 2 of the Protocol. As a ‘right’ does exist, it is secured, by virtue of Article 1 of the Convention, to everyone within the jurisdiction of a Contracting State. [...] They have stated, on the other hand, their interpretation of Article 14 on several issues. In the first place they expressed the opinion that the word ‘secured’ implies the existence of obligations upon the Contracting States to take action and not simply a duty to abstain from action.”

Recent cases have suggested that the State may have a positive obligation under Article 14 to guarantee equality as well as obligations not to discriminate and to prevent discrimination. In *Thlimmenos v Greece* (No. 34369/97, 06/04/2000), the ECtHR held that discrimination might arise if States: “without objective and reasonable justification fail to treat differently persons whose situations are significantly different.” In that case, the discrimination of which the applicant complained consisted of a failure by the State to treat the applicant differently from others convicted of a similar crime, even though his refusal to wear military uniform was the result of religious conviction. The discrimination was therefore a result of the failure by the State to fulfil its positive obligation to accommodate the applicant’s difference. See also the judgment of the ECtHR in *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004) discussed above. Contrast the cases of *Beard*, *Chapman*, and others, discussed below under ‘Nationality’ in Chapter V.

The different treatment of persons in different situations could be viewed as less favourable treatment for the majority not receiving the different treatment. The justification for the different treatment is rooted in substantive equality. The ECHR ensures that “positive action” will not result in reverse discrimination by requiring any

measures adopted to be proportionate to the legitimate aim to be achieved (i.e., the 'objectively justified' test).

2.6 European Union

The EU has taken a number of measures during its history to provide for positive action. EU jurisprudence on positive action has developed in the field of sex discrimination, in particular, Article 141 (formerly Article 119) of the EC Treaty and the Equal Treatment Directive. Such EU measures permit rather than require the member States to take positive action between equally qualified candidates where one sex is underrepresented. Council Recommendation 84/35/EEC addressing sex discrimination, highlighted underlying prejudicial effects "which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women."

As noted above, the ECJ allows automatic preference in limited circumstances and only where candidates after individual assessment are deemed to have equivalent merit. This was laid down in a number of cases. The effect of ECJ jurisprudence is to limit the scope of positive action. Article 2 of the Revised Equal Treatment Directive codified the existing law regarding positive action in gender cases.

- In *Case C-450/93, Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, the ECJ prohibited national rules that allowed automatic promotion of women in sectors (in which they were under-represented) where equally qualified candidates of different sexes had been short-listed for promotion (i.e., a tie break measure). Both candidates in this case had diplomas in landscape gardening and had worked in the Parks Department for a substantial period of time. The ECJ held that tie-break measures that guarantee women absolute and unconditional priority for appointment or promotion "substitute equality of result for equality of opportunity" and, in this case, discriminated on grounds of sex contrary to Article 2(1) of the Equal Treatment Directive. Furthermore, such measures were not permissible under Article 2(4) as unconditional priority went beyond promoting equal opportunities and overstepped the limits of Article 2(4).
- In *Case C-409/95, Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, the applicant was turned down for a promotion because the post was reserved for an equally qualified female candidate in accordance with national equality laws. The ECJ considered that such national laws providing for priority for women where they were under-represented were permissible under the Equal Treatment Directive. It held that the women given priority had to be equally qualified in terms of suitability, competence, and professional performance and there had to be a 'saving clause' that allowed consideration of reasons that tilted the balance in favour of a specific male candidate. In other words, such laws must include a guarantee that equally qualified male candidates will be given an objective assessment taking into account all relevant factors. This represented a revision of the test laid down in the

Kalanke case. The ECJ also held that the criteria for such an assessment could not discriminate against women.

- In *Case C-158/97, Badeck* [2000] ECR I-1875, at paragraph 23, the ECJ summed up the test laid down in *Kalanke* and *Marschall* as follows:

“A measure which is intended to give priority in promotion to women in sectors...where they are underrepresented must be regarded as compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidates are the subject of an objective assessment which takes account of the specific personal situations of all candidates.”

In *Badeck* the ECJ also held that the Equal Treatment Directive did not prohibit national rules pursuant to which the binding targets for temporary posts in the academic service provided for a minimum percentage of women equivalent to their percentage of graduates and students. The ECJ also approved quotas of training places for women and places on administrative and supervisory bodies subject to certain conditions. The formula outlined in *Badeck* was applied again in the cases of *Abrahamsson* and *Lommers* below.

- *Case C-407/98, Abrahamsson v Fogelqvist* [2000] ECR I-5539 concerned the application of positive action in recruitment for a post of university professor. A female candidate who was sufficiently qualified for the post was given priority over a male candidate despite the fact that she had inferior qualifications. The ECJ stated that EU law does not preclude some preference being given to underrepresented sex as long as the candidates possess equivalent or substantially equivalent merits and are subjected to objective assessment that takes account of the specific personal situations of all candidates. However, the legislation at issue in this case automatically granted preference to qualified female candidates even if their qualifications were inferior to those of a candidate of the opposite sex. Furthermore, candidates were not subjected to an objective assessment taking account of the specific person situations of all candidates. The ECJ concluded that the scheme at issue was disproportionate to the aim pursued and hence was not permitted under Article 2(1) and Article 2(4) of the Equal Treatment Directive.
- *Case C-476/99, Lommers v Minister van Landbouw* [2002] ECR 1289 concerned rules of a public service employer under which subsidised nursery places were made available only to female employees, except in the case of an emergency. The ECJ found that the situations of a male and female employee were comparable and hence there was a clear difference of treatment. The ECJ examined whether the measure was nevertheless permissible under Article 2(4) of the Equal Treatment Directive. It held that the measure in principle fell into the category of measures designed to eliminate the causes of women’s reduced opportunities for access to employment and careers. The Court observed that any derogation from the individual right to equal treatment must comply with the principle of

proportionality. Key facts the Court noted were the insufficiency of nursery places available for all of the women who required them, the availability of alternative nursery places in the relevant services market and the fact that places could be allocated to male officials in emergency situations. The Court concluded that the scheme at issue complied with Article 2(4); however, this was the case only in so far as the 'emergency' exception was construed as allowing male officials who took care of their children by themselves to have access to nursery places on the same conditions as female officials. See also *Case C-312/86, Commission v France* [1998] ECR 6315 where the ECJ held that a range of French measures which afforded special rights to women workers breached the terms of the Equal Treatment Directive.

The recent Framework and Race Directives also permit rather than require member States to take positive action measures. At Articles 7(1) and 5, respectively, the Directives state that:

“[W]ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.”

The ECJ has not so far ruled in cases where positive action programmes for ethnic minorities have been applied. However, the Race and Framework Directive positive action provisions mirror Article 141(4) of the EC Treaty regarding positive action in gender cases. Although there has been no case law yet under the Race or Framework Directives, it is likely that the same approach to the positive action provisions will be taken as under Article 141 and the Equal Treatment Directives. The Framework Directive also contains an additional ground regarding disabled persons (Article 7(2)).

2.7 American Convention on Human Rights

Positive action is permitted under the AmCHR. In its Human Rights Report on Ecuador in 1996, the IACHR accepted that that affirmative action might be required in certain circumstances:

“Where a group has historically been subjected to forms of public or private discrimination, the existence of legislative prescriptions may not provide a sufficient mechanism for ensuring the right of all inhabitants to equality within society. Ensuring the right to equal protection of and before the law may require the adoption of positive measures, for example, to ensure non-discriminatory treatment in education and employment, to remedy and protect against public and private discrimination.”

The IACHR in its Report of 1993 stated that the broad principles of Articles 1 and 24 require action to address inequalities in internal distribution and opportunities. The

IACHR has also recognised the need for affirmative action in regard to economic rights and cultural and group rights. In its Human Rights Report 1984 on the situation of a segment of the Nicaraguan population of Miskito Origin, the IACHR looked to Article 27 of ICCPR to extend individual rights protection to group rights. It suggested that true equality requires the education of a child in his native language in order to safeguard a distinctive language and culture.

3 Types of Positive Action Measures

The most commonly used types of positive action measures are (i) training and support programmes, (ii) policy impact assessment, (iii) the setting of targets, (iv) targeted recruitment, (v) preferential treatment and (vi) quotas. Such measures are often undertaken as part of an overall positive action programme.

3.1 Training and Support

Several national human rights instruments explicitly mention training and support as one method of addressing problems of inequality. Training facilitates equality of opportunity but does not address discrimination that occurs in the final selection or promotion of candidates. Although members of different groups may have the same or similar qualifications and capability, underlying prejudice may still prevent genuinely equal opportunity. Section 38 of the UK Race Relations Act 1976 and Section 48 of the UK Sex Discrimination Act 1975 provide that under specified conditions (including the under-representation of a relevant group) employers may provide training for employees of that particular group or encourage them to take advantage of opportunities for doing work at that establishment. However, employers are not permitted to discriminate in favour of a particular sex or people from under-represented racial groups at the point of recruitment unless a genuine occupational or other defence applies.

3.2 Policy Impact Assessment

In some national jurisdictions, public bodies have a duty to assess the impact of their policies on particular disadvantaged groups, to monitor their policies to assess any adverse impact, and to make public such assessments. Section 75 of the Northern Ireland Act (1998) requires public authorities to have due regard to the need to promote equality of opportunity on a number of grounds. Each covered public authority is required to put in place an equality scheme as a statement of commitment to these duties and a plan for their performance. This includes assessing the impact on equality of all policies. See also Section 71(2) of the UK Race Relations Act.

3.3 Mainstreaming

The concept of 'mainstreaming' whereby equality is made central to the whole range of public policy decision-making is a closely related idea. The Council of Europe Group of Specialists on Mainstreaming provided the following definition of mainstreaming in its report of May 1998 (Gender Mainstreaming: Conceptual framework, methodology and presentation of good practices, (EG-S-MS (98) 2)):

“The (re)organisation, improvement, development and evaluation of policy processes so that an equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making.”

Mainstreaming attempts to integrate an equal opportunity perspective into the day-to-day work of public bodies so that equality informs all aspects of their business. Public consultation is often a key part of this process. This enables those who may be adversely affected by public policy to participate in the process of policy-making.

3.4 Setting of Targets

Positive action programmes sometimes require that employers aim to achieve certain percentages of under-represented groups in the make-up of their workforce. In many jurisdictions, it is unlawful to use a target as the reason for selecting someone for employment (i.e., as a quota) but it is not unlawful to take steps to get more qualified applicants from particular groups.

The U.S. Supreme Court case of *United Steelworkers v Weber* 443 U.S. 193 (1979) concerned a private, voluntary affirmative action plan designed to eliminate racial imbalances in an almost exclusively white workforce. This was to be achieved by reserving for black employees 50% of the openings in training programmes until the percentage of black workers in a plant was commensurate with the percentage of black workers in the local labour force. Weber, a white production worker, alleged that the affirmative action programme had resulted in junior black employees receiving training in preference to senior white employees thus discriminating against him and other similarly situated white employees on grounds of race in violation of the Civil Rights Act of 1964. The U.S. Supreme Court held that the Civil Rights Act provisions against racial discrimination did not condemn all private, voluntary, race-conscious affirmative action plans. This was clear from the purpose of Congress in enacting the Civil Rights Act of opening opportunities to black people in occupations traditionally closed to them. The Supreme Court noted that the action taken in this case was permissible in that its purposes were to break down old patterns of racial segregation and hierarchy. At the same time, the plan in this case did not unnecessarily trammel the interests of white employees and was a temporary measure.

3.5 Targeted Recruitment

Targeted recruitment programmes are designed to attract candidates from under-represented groups. Targeted recruitment can include targeting job advertisements at under-represented groups, encouraging their job applications, the use of employment agencies and careers offices in areas in which under-represented groups are concentrated, and recruitment and training schemes designed to reach such groups. Such measures often include encouragement of employees to apply for promotion and transfer opportunities and provision of training for members of under-represented groups who lack particular expertise but show potential.

3.6 Preferential Treatment

The granting of preferential treatment to members of disadvantaged groups is a form of positive action sometimes prohibited by international instruments. Automatic priority or special consideration, by which individuals or groups are selected or preferred for employment or training based on certain personal characteristics, is prohibited in some jurisdictions because of its discriminatory effect on individuals negatively affected. This may be the case even where the personal characteristic such as race or sex is used just as a 'plus' factor to distinguish between two equally qualified candidates. See, for example, cases under the UK Race Relations Act. An alternative form of preferential treatment involves taking into consideration an individual's membership of a disadvantaged group along with a whole range of other factors relevant to a recruitment decision.

The ECJ has looked at the issue of automatic priority primarily in cases of gender discrimination in the work place. EU law allows automatic priority but only where candidates after individual assessment are deemed to have equivalent merit. In such circumstances priority can be given to the equally qualified person from the disadvantaged class.

It is useful to compare the EU approach to the US approach to preferential treatment as it has the longest history. The US anti-discrimination approach regards affirmative action measures as a suspect category that must pass strict judicial scrutiny. See, for example, *Adarand Constructors, Inc. v Peña*, 515 U.S. 200. But not all affirmative action measures are invalidated by strict scrutiny. Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause of the U.S. Constitution so long as it is narrowly tailored to further that interest. Context is relevant when reviewing such action. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the government's reasons for using race in a particular context.

- In *Morton v Mancari* 417 U.S. 535 (1974), the U.S. Supreme Court upheld an exclusive Indian employment preference in the Bureau of Indian Affairs. The court

rejected a traditional equal protection analysis, considering that a rational basis for the legislation existed because of the unique and protected legal status of Indian tribes under federal law. See also *Alaska Chapter, Associated General Contractors of America v Pierce* 694 F.2d 1162 (1982), where the U.S. Court of Appeal held that a Department of Housing and Urban Development regulation that directed Indian housing authorities to give contracting preference to Indian-owned businesses did not violate equal protection principles. It found that the preference furthered the special obligation Congress had towards Indians.

- *Fullilove v Klutznick* 448 U.S. 448 (1980) concerned federal legislation that required at least 10% of federal funds granted for local public works projects to be used by the state or local grantee to procure services or supplies from businesses owned by certain minority group members. Under the Equal Protection Clause of the U.S. Constitution, Congress was not required to act in a wholly “colour-blind” fashion in legislating for affirmative action. When effecting a limited and properly tailored remedy to cure the effects of prior discrimination, “a sharing of the burden” by innocent parties was not impermissible. The Court characterised the programme at issue as being remedial in character so the failure to include certain minority groups was not discriminatory. The Court found that the measure at issue was narrowly limited to accomplishing Congress' remedial objectives; it was limited in extent and duration and subject to review.
- The most significant U.S. case on preferential treatment is *University of California Regents v Bakke*, 438 U.S. 265 (1978). It concerned the special admissions programmes of the medical school of the University of California, which was designed to ensure the admission of a specified number of students from certain minority groups. The respondent, a white applicant, was rejected a number of times even though some minority applicants were admitted with significantly lower scores. He claimed that the special admission programme was effectively a racial and ethnic quota in violation of the Equal Protection Clause of the U.S. Constitution. Justice Powell, the leading judgment of the Court, noted that, under the U.S. Constitution, racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. He found that, while the goal of achieving a diverse student body was sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, the University of California's admissions programme was unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause.
- *Grutter v Bollinger* (No. 02-241, U.S. Supreme Court, 23 June 2003) concerned the University of Michigan's admissions policy that sought to achieve student body diversity through compliance with the *Bakke* case. The admissions policy focused on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential and their probable contribution to university life and diversity. Grutter, a white applicant, claimed that the policy discriminated against her on the basis of race in violation of instruments including the Equal Protection

Clause of the U.S. Constitution and the Civil Rights Act of 1964. She argued that she was rejected because the school used race as a “predominant” factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavoured racial groups. The Supreme Court reviewed the *Bakke* case noting that Justice Powell’s view that attaining a diverse student body was the only interest asserted by the university that survived scrutiny. Under this analysis, race or ethnicity could only be considered as a ‘plus’ in a particular applicant’s file to be considered with other factors not as a defining factor. The Court made clear that enrolling minority students to ensure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional. In other words, quotas were not permitted. But defining the number of minority students in terms of diversity was acceptable. In addition, the admissions programme was narrowly tailored in terms of scope and time. The Court noted the importance of flexibility in such programmes to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the application.

Many cases on preferential treatment can be found in other national jurisdictions. For example:

- In *Government of Andhra Pradesh v P B Vijayakumar & Anor* AIR 1995 SC 1648, the Supreme Court of India held that preferential appointment of women was authorised by the Constitution. According to the Supreme Court, unequally situated groups could be treated differently provided that the identification of such a group was founded on ‘intelligible differentia’ and there was a rational nexus between the differentia and the objects of the statute. Here, the national rule gave preference to female over male candidates in selection for public service posts, where men and women were “equally suited” and the preferential treatment would not exceed 30% of the posts in any category.
- The South African case of *Minister of Finance and others v Van Heerden* (CCT63/03, 29 July 2004) concerned a challenge to the constitutionality of certain rules of a pension fund for political office-bearers that provided for differentiated employer contributions in respect of current members of Parliament and other political office-bearers. The equality challenge was contested on the basis that the differentiation was not unfairly discriminatory because it constituted a “tightly circumscribed affirmative action measure” permissible under Section 9 of the Constitution. Moseneke J. for the majority of the Constitutional Court observed that South African equality jurisprudence recognised a conception of equality that goes beyond mere formal equality. At paragraph 27, he noted that:

“This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist... It is therefore incumbent on courts to scrutinise in each equality claim the

situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."

Section 9(2) of the Constitution authorised legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The Court recognised that remedial measures were not derogations from, but substantive and composite parts of, the equality protection envisaged in the Constitution. It found that the evidence demonstrated a clear connection between the membership differentiations the scheme made and the relative need of each class for increased pension benefits. In that sense the scheme promoted the achievement of equality. It reflected a clear and rational consideration of the need of the groups involved and served the purpose of advancing persons disadvantaged by unfair discrimination. Regarding the approach of the South African courts to positive action, see also the judgment of Ngcobo J. in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* (CCT27/03, 12 March 2004).

3.7 Quotas

Quotas are a form of preferential treatment and are subject to a similar form of analysis. Although quotas often have the legitimate aim of ensuring disadvantaged groups have access to opportunities and participation, their blanket application may result in discrimination against individuals who are competing for the same opportunities. See, for example, the *Bakke* case discussed above under 'preferential treatment.' Quotas are sometimes applied to educational institutions, political bodies, and even employment. In areas where participation itself is a central goal, such as in democratic politics, quotas are often used.

Quotas are generally only permitted where they are temporary and limited in nature rather than where there is persisting disadvantage such as in the case of disability. Whether discrimination provisions permit quotas is also affected by the understanding that quotas may have negative effects in some circumstances. For example, a quota requirement of disabled employees may suggest that such employees cannot compete for a job in a truly open labour market. This sometimes creates a 'quota trap' giving the message that such workers are less valuable economically and less productive.

3.8 Positive Action Programmes

Positive action is often undertaken as part of a broad programme involving many of the types of positive action discussed above.

The following are examples of national positive action programmes:

- Under Section 15 of the South African Employment Equity Act 1998, employers of a certain size are required to implement affirmative action measures, defined as “measures intended to ensure that suitably qualified employees from designated groups have equal employment opportunity and are equitably represented in all occupational categories and levels of workforce.” Such measures must include (i) identification and elimination of barriers with an adverse impact on designated groups, (ii) measures to promote diversity, (iii) reasonable accommodation to ensure equal opportunities and equitable representation in the workforce of the employer, (iv) retention, development and training of designated groups and (v) preferential treatment and numerical goals to ensure equitable representation (but excluding quotas). In addition, under Section 20 of the Act certain employers must prepare and implement a plan to achieve employment equity. These plans must set numerical goals to achieve the equitable representation in occupational categories and the workforce in general and provide a timetable and strategies for the achievement of such goals.
- The Northern Ireland Fair Employment Act (1989) aims to ensure equality in employment for Northern Ireland’s two main religious communities. The Act (as implemented) imposes compulsory duties on employers including (i) registration with enforcement body, (ii) religious monitoring of workforces and applicants, (iii) regular reviews of workforce composition and recruitment, training and promotion practices and (iv) mandatory affirmative action if reviews indicate that either community is not enjoying fair participation in employment (i.e., setting of goals and timetables but not quotas). If there is an under-representation of one particular community, the employer could encourage applications from that community or provide training to help the under-represented community. However, the employer could not restrict recruitment to that one community and would have to award the position on merit. The 1989 Act specifically protects three types of affirmative action from claims of direct or indirect discrimination – (a) target training in a particular area or for a particular class of person, (b) specifically encouraging applications for employment or training from persons from the under-represented group (e.g., the inclusion of statements in recruitment advertisements welcoming them or contacting schools likely to supply such persons) and (c) negotiating redundancy schemes to preserve gains made by the under-represented group.

G REASONABLE ACCOMMODATION

1 Introduction

Reasonable accommodation is any modification of or adjustment to a job, an employment practice, the work environment, or the manner or circumstances under which a position is held or customarily performed that makes it possible for a qualified individual to apply for, perform the essential functions of, and enjoy equal benefits and privileges of employment. The essence of the reasonable accommodation idea is that employers are under an obligation to furnish whatever is 'reasonable' or feasible in order to facilitate an employee in performing the 'essential tasks' of the job and a failure to do so in general is deemed discriminatory.

The rationale for reasonable accommodation is the same as the argument for positive action. Accommodation measures aim to remove discriminatory effects on a 'protected' individual or group, such as women, disabled persons or religious groups. Legal requirements to take such measures stem from the recognition that identical treatment of individuals and groups does not always eliminate discrimination. Without measures to accommodate their needs, certain groups could be so disadvantaged that they are unable to participate fully in life and work. Accommodation, therefore, represents another step away from the notion of formal equality, closely related to the obligation to treat differently persons in different situations. Examples of reasonable accommodation requirements include obligations on employers to cater to the needs of workers with disabilities and requirements to provide maternity or paternity leave. Reasonable accommodation differs from other forms of positive action in that it is often an absolute requirement subject only to consideration of whether it imposes a disproportionate burden on the employer. In most jurisdictions where accommodation is recognised, it is only required where it is 'reasonable' or does not cause 'undue hardship' to the employer.

It is worth noting that the concept of a comparator is not relevant to a determination of whether an employer fails to accommodate in situations where this is required by law. In the UK Court of Appeal case of *Clark v TDG Limited (t/a Novacold)* [1999] ICR 951, the court held that the test of less favourable treatment is based on the reason for the treatment of the disabled person and not the fact of his disability. See also the case of *Case 32/93, Webb v EMO Cargo (UK) Ltd.* [1994] ECR I-3567 discussed below in Chapter V.

No international instruments, with the exception of the EU Framework Directive, deal explicitly with reasonable accommodation. Aspects of accommodation can be seen in certain judgments of international tribunals, particularly regarding positive action or indirect discrimination. Some of these cases are noted below. However, the major developments in the concept of accommodation have taken place in national law. The

following are some of the more important international and national legal formulations of reasonable accommodation:

Accommodation Provisions

EU Framework Directive: Article 5

“In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

Canadian Human Rights Act (1976)

Section 2

The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

Section 15(2)

For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

2 ‘Reasonable Accommodation’ in International and EU Law

The most familiar type of accommodation is that concerning people with disabilities. This can be seen in ramped entrances or automatic doors for wheel chair users, accessible or alternative transportation systems and technical training aids such as large print manuals.

2.1 The EU Framework Directive

Article 5 of the EU Framework Directive requires employers to take whatever steps are ‘reasonable’ to enable people with disabilities to work, advance in their careers and participate in training, so long as this does not involve a disproportionate burden on the

employer. Article 5 follows national disability discrimination laws (e.g., UK Disability Discrimination Act 1995, Ireland Employment Equality Act 1998) that recognise that to ensure equality of opportunity for people with disabilities it is necessary to adapt work practices and barriers within the physical environment that tend to exclude people with disabilities.

2.2 Other International Mechanisms

Although the main UN human rights instruments such as the ICCPR and CERD do not address the issue of reasonable accommodation, in some cases their supervising bodies have hinted that they are prepared to adopt a similar approach based on existing principles.

- In *Hamilton v Jamaica* (No. 333/1988, ICCPR), the HRC ruled on the application of Article 10 of the ICCPR (treatment of detained persons with humanity) to disabled prisoners. The case involved the treatment and conditions of confinement of a disabled prisoner on death row. He was paralysed in both legs and experienced extreme difficulty in slopping out his cell and climbing onto his bed. The applicant argued before the HRC that his rights under Articles 7 and 10 of the ICCPR had been violated because the prison authorities had failed to take his disability into account and make proper arrangements for him. In essence, he argued that the failure to accommodate his condition violated the ICCPR. The HRC held (at paragraph 8.2) that the conditions in which he was held violated his right to be treated with humanity and respect for the inherent dignity of the human person, and were therefore contrary to Article 10(1) of the ICCPR. It went on to state at paragraph 10 that the State is under an obligation to place the applicant in conditions that take full account of his disability.
- In *Bhinder Singh v Canada* (No. 208/1986, ICCPR) (discussed earlier in Chapter III) held that a Canadian measure which required the wearing of hard hats during certain work constituted *de facto* indirect discrimination against a Sikh man, whose religion required him to wear a turban.

The ECHR does not deal explicitly with reasonable accommodation either. However, the approach of the ECtHR to indirect discrimination cases outlined in *Thlimmenos v Greece* (i.e., different treatment to individuals in different situations) clearly overlaps with reasonable accommodation. In *Price v the United Kingdom* (No. 33394/96, 10/07/2001), the Court considered that to detain a severely disabled person in very poor conditions constituted degrading treatment contrary to Article 3 of the ECHR. Citing *Thlimmenos v Greece* (No. 34369/97, 06/04/2000) the Court stated (at paragraph 30): “the applicant is different from other people to the extent that treating her like others is not only discrimination but brings about a violation of Article 3.”

3 Reasonable Accommodation in Domestic Law

3.1 Canada

Under Canadian law the ‘duty to accommodate’ refers to an employer’s obligation to take appropriate steps to eliminate discrimination against employees, prospective employees or clients resulting from a rule, practice, or barrier that has or can have an adverse impact on individuals. The Canadian Human Rights Act (1976) provides that accommodation is required, except in cases of undue hardship, across all of the grounds of discrimination. The duty to accommodate is also commonly included in the human rights statutes of provinces and territories. This legal duty applies to work, education and access to public services and other areas and activities. Because of rulings made by higher courts, the duty to accommodate now applies everywhere in the country, even if the human rights statute of the particular province or territory does not state the duty explicitly.

The main exception to a discrimination claim under Canadian law is for “bona fide occupational requirements.” For a practice to be based on a bona fide occupational requirement, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship, considering health, safety and cost. Supreme Court rulings have further defined the employer’s obligations to provide accommodations.

- The *Meiorin* case suggests that reasonable accommodation analysis is applicable outside the disability context in Canada to other vulnerable groups such as women, religious groups and others.
- See also the cases of *Ontario (Human Rights Commission) v Simpson-Sears Ltd.* [1985] 2 S.C.R. 536; *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489; and *Canadian National Railway Co. v Canada (Human Rights Commission) and Bhinder* (1985), 7 C.H.R.R. D/3093 (S.C.C).

3.2 The United States

The concept of reasonable accommodation was first fashioned by the U.S. courts in interpreting the very first anti-discrimination provisions of the Rehabilitation Act of 1973. It has since been added to the Americans with Disabilities Act (1990). Under the Americans with Disabilities Act reasonable accommodation is “any modification or adjustment to a job or work environment that will enable a qualified applicant or employee with a disability to perform essential job functions.” In addition to reasonable accommodation with regard to disability, U.S. law through Title VII of the Civil Rights Act of 1964 provides for religious accommodation.

The Americans with Disabilities Act prohibits an employer from discriminating against “an individual with a disability” who with “reasonable accommodation” can perform a job’s essential functions (see Section 12112); unless the employer “can demonstrate

that the accommodation would impose an undue hardship on the operation of [its] business.” The individuals protected by the Act are individuals with a disability who, with or without reasonable accommodation, can perform the essential functions of the relevant “employment position.”

Much of U.S. case law concerns whether the accommodation requested is reasonable or whether it imposes ‘undue hardship’ on the operation of its business. See, for example, *U.S. Airways Inc v Barnett* (U.S. Court of Appeals, 9th Circuit, No. 00-1250, 29 April 2002); *Garcia-Ayala v Lederle Parenterals, Inc.*, 212 F. 3d 638, 648 (CA1 2000); *Hendricks-Robinson v Excel Corp.*, 154 F. 3d 685, 699 (CA7 1998); *Reed v LePage Bakeries, Inc.*, 244 F. 3d 254, 259 (CA1 2001); *Borkowski v Valley Central School Dist.*, 63 F. 3d 131, 138 (CA2 1995); and *Barth v Gelb*, 2 F. 3d 1180, 1187 (CADC 1993).

3.3 Other Jurisdictions

The UK Disability Discrimination Act 1995 requires that ‘reasonable adjustments’ be made in respect of the needs of disabled people. See the cases of *Jones v Post Office* [2001] IRLR 384; *Clark v TDG Limited (t/a Novacold)* [1999] IRLR 318; and *Morse v Wiltshire County Council* [1998] IRLR 352.

Under the Australian Disability Discrimination Act 1992, making changes to ensure equal opportunity for people with a disability is commonly referred to as ‘reasonable adjustment’ or ‘reasonable accommodation.’ The general requirement under the Act to make reasonable adjustment results from Section 6, on indirect discrimination. This section requires the removal of unreasonable requirements that disadvantage people with a disability.

PROCEDURE: MAKING A DISCRIMINATION CLAIM

This section addresses certain procedural and evidential issues involved in arguing or deciding a discrimination case. It discusses key elements of discrimination claims, the burden and standard of proof required, difficulties in proving a *prima facie* case and justification for different treatment. It also examines the issue of liability for discrimination and the remedies and compensation available.

A ELEMENTS OF A DISCRIMINATION CLAIM

1 The Basic Structure of a Discrimination Claim

Many international and national tribunals, for example, the ECJ, tend to analyse discrimination claims in two steps. Although the analysis differs for direct and indirect discrimination and varies among jurisdictions, the basic structure of the analysis is similar.

- First, the complainant must establish a *prima facie* case of discrimination. In other words the complainant must show that he or she has been treated or impacted negatively as a consequence of membership in a group.
- If the complainant succeeds in proving a *prima facie* case of discrimination, then in many jurisdictions, the burden of proof shifts to the defendant. The shifting of the burden of proof varies among jurisdictions and will be discussed below in more detail. If the burden of proof shifts, defendants must then provide evidence to justify the discriminatory action or show that the *prima facie* case is ill founded, otherwise they will be held liable for discrimination. This justification must show:

- i. A legitimate goal (i.e., that is reasonable and non-discriminatory)
- ii. An objective link between this goal or goals and the discriminatory treatment or impact; and
- iii. That the relationship between the goal and the discriminatory policies or provisions is proportional. A reasonable but minor goal cannot justify a disproportionately large discriminatory result. If the applicant can argue that other less discriminatory regulations or policies could meet the reasonable goals presented, then the defendant may still be found liable for discrimination.

2 Using a Comparator

The main method of establishing a case of discrimination is to compare the position of the complainant or complainants against that of a comparator individual or group. In the *Belgian Linguistics case*, for example, the ECtHR held that different treatment is improper only if it exists between individuals in relevantly similar situations. See also *National Union of Belgian Police v Belgium* (No. 4464/70, 21/10/1975) at paragraph 44. The complainant (e.g., a woman) must demonstrate how the comparator, a similarly situated person or group of the opposite status (e.g., a man), has received more favourable treatment than the complainant. This suggests that the complainant or complainants may have suffered discrimination on account of their membership in a particular group and shifts the burden of proof to the defendant to prove any different treatment or impact is justified. In indirect discrimination cases, comparisons are drawn between groups to determine whether there has been a disproportionate negative impact on a particular protected group.

2.1 Difficulties with Using Comparators

The requirement to have a 'comparator' raises both practical and philosophical problems for persons making equality claims before the courts. A concept of equality based on the notion of comparison generally uses as a reference group against which treatment is judged the 'majority' or dominant group (i.e., the group of the opposite status). The application of such a notion might, for example, grant women what men have, as long as they are like men - judging women according to the male standard. This has the effect of encouraging integration or assimilation thus removing the difference and diversity the law is trying to protect. The notion of comparison based on one ground also ignores the different overlapping and intersecting identities of individual (see 'Multiple Discrimination' discussed below in Chapter VI).

Practical problems also arise in choosing an appropriate comparator.

- If a tribunal considers a comparison inappropriate, it may find no improperly different treatment or impact. Alternatively, a tribunal or the State may elect to compare the applicant against a group or individual that is also discriminated

against. The result is that, although the two groups or individuals are treated equally, they are treated equally poorly. A good example of this scenario is the ECJ case of *Case C-249/96, Grant v Southwest Trains* [1998] ECR I-621. In that case, a company's decision to deny family benefits to a woman employee's female partner was held not to constitute illegal discrimination on the grounds of sex because the company would have equally denied benefits to a homosexual employee's male partner. Comparing the employee against a heterosexual employee of either sex would have led to a different result. The *Grant* case highlights the difficulty of determining objective criteria for selecting appropriate comparators. It suggests that there is a risk that subjective and possibly prejudicial factors may enter into the selection of a comparator.

- There may be no appropriate comparator against whom treatment can be measured. This issue is particularly evident in cases on discrimination on grounds of pregnancy and disability. As it is not possible for men to become pregnant, against whom do you measure treatment of pregnant women? See the discussion of *Case C-32/93, Webb v EMO Cargo (UK) Ltd.* [1994] ECR I-3567 below in the 'Sex Discrimination' section of Chapter V. An employer could argue that other persons would have been treated in a similar way if they were unavailable for work and that therefore there was no discrimination.

Other issues that raise difficulty in dealing with comparators include the breadth of the comparison and the significance of the difference between the groups or individuals.

- **Breadth of the Comparison.** It is not always clear how expansive the comparator group should be. The employees of certain companies and industry sectors are almost entirely women. Workers within the same company may receive equal treatment, but as a whole these workers may receive less favourable treatment than workers for other similarly situated employers that mostly employ men. If the comparator group is 'male workers working at the same company' there may be no evident different treatment and hence of provable case of discrimination. If the comparator selected is another majority-male company or the sector as a whole, however, the company's wages may be considered discriminatory on the basis of gender. In *Case 320/00, Lawrence and others v Regent Office Care Ltd. and others*, the ECJ held that differences in pay must be attributable to a single source to fall within the EU equal pay legislation. If it were to be followed more broadly, this narrow construction would hinder a consideration of larger structural inequalities between largely female and largely male sectors.
- **Significance of the Difference.** Another difficulty is comparing individuals in similar positions who have different qualifications when those qualifications are distributed differently across groups. This issue arose before the ECJ in *Case 309/97, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] ECR I-2865. In that case psychotherapists, who were mostly women and were lower-paid than medical doctors, alleged that they should be compared with doctors doing the same work. The ECJ held that under EC equal pay legislation the other doctors

were not comparable to the psychotherapists due to their different qualifications. The choice of comparator can, therefore, have a decisive bearing on the outcome of any complaint, particularly in direct discrimination cases where, as noted by the ECtHR in *Rasmussen v Denmark* (No. 8777/79, 28/11/1984), the State has a ‘margin of appreciation’ to assess “whether and to what extent differences in otherwise similar situations justify a different treatment in law” (at paragraph 40).

2.2 Alternatives to the Comparator: ‘Substantive Standards’

If it is not possible to find a comparator, a complainant may be able to compare the treatment suffered against a substantive ideal of human dignity or standard of treatment that is widely acknowledged. Substantive standards or principles are enshrined in the founding charters of international or regional organisations and in national constitutions. The idea of human dignity and the rights with which it is associated are central. Such rights include freedom from domination and undue interference, due process rights and the right to liberty and privacy.

It seems possible to use substantive standards to prove discrimination in both the EU Race and Framework Directives. According to the Directives, direct discrimination is where “[o]ne person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to....” The “would be” language of this clause indicates that a court may consider the treatment in light of theoretical standards rather than concrete individuals.

Appealing to substantive ideals has several advantages over other methods of establishing a case. It eliminates the need to find a similarly situated individual or group for individual or statistical comparison. Finding such a comparator may be difficult in certain situations or with certain types of discrimination. This approach also helps raise human rights standards by focusing on higher standards rather than relative standards of comparison.

The use of substantive ideals is also useful in harassment cases. As noted in the introduction to harassment above, it is difficult to compare the victims of harassment against other groups or individuals, in part because the same treatment or effect on members of other groups would not be considered as serious. An approach based on the substantive ideals of human dignity looks more closely at the understandings of the victim. A similar approach is helpful in examining cases of persecution.

3 Relevance of Intent

Generally speaking, intent or lack of intent is irrelevant to a finding of discrimination, i.e., it need not be alleged or proved by the claimant. This was established in the case in which the notion of indirect discrimination was first elucidated: *Griggs v Duke Power Company* 401 U.S. 424 (1971) before the U.S. Supreme Court. In that case Chief

Justice Berger stated (at p.424) that “good intent or absence of discriminatory intent does not redeem...procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring... capability.” The irrelevance of intent to discriminate has been widely recognised by international human rights tribunals.

A similar analysis has been confirmed by a number of international bodies:

- In the HRC case of *Broeks v the Netherlands* (No. 172/1984, ICCPR) the applicant claimed to be a victim of a violation of Article 26 of the ICCPR as there was an unacceptable distinction under Dutch unemployment benefit law on the grounds of sex and status: because she was a woman and married the law deprived her of unemployment benefits; if she were a man, married or unmarried, the law in question would not have deprived her of such benefits. The HRC found a violation of Article 26 on the ground of sex discrimination, even though it noted that the State party had not intended to discriminate against women. This confirmed that prohibited discrimination might occur unintentionally or without malice.
- *Simunek at al v Czech Republic* (No. 516/1992, ICCPR) concerned confiscation of private property and the failure by a State party to pay compensation for such confiscation. The State was found to be in breach of Article 26 because the conditions of residence and citizenship laid down by law for compensation entitlements discriminated among the victims of confiscation. The HRC expressed the view (at paragraph 11.7) that “the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory.” See also *Althammer v Austria* (No. 998/01); HRC General Comment No. 18 (at paragraph 2) and CERD General Recommendation 19.
- See also the ECtHR case of *Hugh Jordan v United Kingdom* (No. 24746/94, 04/05/2001) (at paragraph 154); the ECJ case of *Bilka Kaufhaus GmbH v Karin Weber von Hartz* discussed above and the IACtHR *Advisory Opinion OC-18/03* of 17 September 2003.

B THE BURDEN OF PROOF

In civil cases the general rule is that each party bears the burden of proving those facts it alleges and from which it derives favourable legal consequences. In discrimination cases, the claimant bears the burden of proving the discriminatory treatment or impact alleged. The practice in some international tribunals suggests that once the complainant establishes a *prima facie* case the burden of proof moves to the respondent to prove that discrimination played no part in the treatment or impact complained of. If the respondent is unable to justify or explain the treatment in neutral

terms (i.e., give objective reasons unrelated to discrimination) they will be liable for a breach of the relevant provision.

1 UN System

The shifting burden of proof in discrimination cases is well-established practice before the UN treaty bodies.

- In *Bhinder Singh v Canada* (No. 208/1986, ICCPR) the HRC considered whether work safety requirements mandating the wearing of a helmet discriminated against Sikhs, whose religious custom required the wearing of a turban. The HRC held that a *prima facie* case of discrimination had been established – the safety requirement had infringed the applicant’s right to manifest his religion, albeit indirectly and unintentionally. The HRC then considered whether the State has met its burden of proving that its justification for the measure was sufficient to overcome this *prima facie* case. It held that the requirement proportionally fulfilled the objective and non-discriminatory purpose of the workers’ safety.
- In *Chedi Ben Ahmed Karoui v Sweden* (No. 185/2001, ICCPR) the HRC stated (at paragraph 10) that “substantive reliable documentation” would shift the burden of proof to the respondent State. See also Conclusions of the Committee of Economic, Social and Cultural Rights on Luxembourg, U.N.Doc. E/C.12/1/Add.86 (2003) (at paragraph 10), and Poland, U.N.Doc. E/C.12/1/Add.82 (2002) (at paragraph 7); Conclusions of CERD, United Kingdom of Great Britain and Northern Ireland, U.N.Doc. CERD/C/63/CO/11 (2003) (at paragraph 4).

2 European Convention on Human Rights

In *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004) the ECtHR accepted in principle that in discrimination cases it may be appropriate for the burden of proof to shift to the respondent to justify the treatment. Specifically, it held that when examining Article 14, where lines of investigation have not been pursued and evidence of discrimination has been disregarded, the burden of proof shifts to the State to provide additional evidence or a convincing explanation of events, not shaped by a discriminatory attitude. It is then for the State to show that the treatment was reasonably and objectively justified in the circumstances, with reference to the Court’s established jurisprudence on justification. At time of writing the *Nachova* case is pending before a Grand Chamber of the ECtHR.

3 European Union

The importance of a shifting burden of proof in securing effective protection against discrimination has been recognised by various EU Directives, which explicitly require a shift in the burden of proof.

- The [Burden of Proof Directive](#) establishes the rationale for the mechanism, recognising that complainants “could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminatory.” Article 4 of the Directive states that the burden of proof shifts to the defendant once the applicant has provided evidence of a *prima facie* case. Regarding the shifting of the burden of proof in cases of discrimination on grounds of sex, see also *Bilka Kaufhaus* at paragraph 31; *Case C-33/89 Kowalska* [1990] ECR I-2591 at paragraph 16; *Case C-184/89 Nimz* [1991] ECR I-297 at paragraph 15; and *Case 109/88 Danfoss* [1989] ECR 3199, at paragraph 16.
- The EU Framework Directive (Article 10) and Race Directive (Article 8) lay out the following directions for discrimination cases:
 - “1. [W]hen persons who consider themselves wronged because the principle has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.
 2. Para. 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.”

In *Case 127/92, Enderby* [1993] ECR 673 (at paragraph 16), the ECJ found a *prima facie* case had been established when it was shown that the pay of speech therapists was significantly lower than that of pharmacists, and that the former were almost exclusively women while the latter were predominantly men. This information sufficed to shift the burden of proof in the case.

4 National Jurisdictions

The mechanism of shifting the burden of proof in discrimination cases is also well established in many national jurisdictions.

- The U.S. Supreme Court has held that, once an applicant has established 'an arguable claim' (or *prima facie* case), the burden of proof then shifts to the defendant to satisfy the court of the legitimacy and justification of the action impugned. See *Griggs v Duke Power Co.* 401 U.S. 424, 427 (1971); *McDonnell*

Douglas Corp. v Green, 411 U.S. 792, 802 (1973) and *St. Mary's Honor Centre v Hicks*, 509 U.S. 502 (1993) at 507.

- The Supreme Court of Canada has confirmed the shifting of the burden of proof as a matter of course in discrimination cases, regardless of the field of discrimination. Once a *prima facie* case is established, “the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard... has a bona fide and reasonable justification”. See *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 (“Grismer”) at paragraph 20.
- Under South African law, if the discrimination is based on a “specified ground” it is presumed to be unfair and unconstitutional. See *Harksen v Lane N.O. and others*, 1998 (1) SA 300 (CC). Once the complainant shows that a government policy or private action treats members of his or her group differently, the burden moves to the defendant to prove that the discrimination is “fair.” The determination of fairness or unfairness depends “primarily on the impact of the discrimination on the complainant and others in his or her situation.” At all stages parties are held to a ‘balance of probabilities’ standard.
- In other jurisdictions, such as Australia and England, the burden does not generally shift but courts evaluate cases through the establishment of rebuttable presumptions and inferences of discrimination, which are similar in effect. For the approach in English cases see Neill LJ in *King v Great British-China Centre* (1992) ICR 516 at 528, cited with approval by Lord Browne-Wilkinson in *Glasgow City Council v Zafar* (1998) ICR 120.

C THE STANDARD OF PROOF

There is a close relationship between the effective protection of human rights and the standard of proof required by courts to find a violation: the higher the standard of proof, the more alleged violators are protected, and the more difficult it is for victims to access redress. There are two standards of proof commonly used in international and domestic tribunals:

- A ‘beyond reasonable doubt’ standard is the highest standard of proof. It is used as the criminal law standard in certain common law jurisdictions, because it is appropriate for the worst offences that hold the most serious consequences for alleged perpetrators.
- A ‘balance of probabilities’ standard lowers the threshold, meaning that the court needs to believe that the complainant’s claim is ‘more likely than not’ to be true. Most common law jurisdictions use this as the civil standard of proof, including for discrimination claims.

Many international human rights tribunals have demonstrated considerable flexibility in the application of the standard of proof where it would undermine the protection of substantive rights. A human rights court is not called upon to adjudicate on the guilt or innocence of individuals, but to determine whether the State has discharged its obligations to protect and prevent violations and provide redress for victims.

1 European Convention on Human Rights

Although not explicitly required by the terms of the ECHR or the Rules of Court, the ECtHR appears to have established a ‘beyond reasonable doubt’ standard of proof for violations under the Convention. At the same time, it has noted in *Nachova v Bulgaria* (at paragraph 166) that this “should not be interpreted as requiring such a high degree of probability as in criminal trials”. It seems, therefore, to be an intermediate standard somewhere between a ‘balance of probabilities’ and ‘beyond a reasonable doubt’, which, while not reaching the criminal level, is a heightened civil standard.

- In *Anguelova v Bulgaria* (No. 38361/97, 13/06/2002) the ECtHR used the criminal standard of proof in a case of alleged discrimination on the basis of race, origin, or ethnicity. A man of Roma ethnicity died during detention by police. His mother claimed that this was the result of racially motivated actions and failure to properly care for her son. The police officers had referred to her son as “the gypsy,” and she argued that actions or omissions of the police and the investigation authorities had to be viewed in the wider context of the systematic racism of Bulgarian law-enforcement authorities. The ECtHR held that, although these were serious arguments, they were not ‘proved beyond a reasonable doubt.’ In many case pre-dating *Anguelova*, such as *Velikova v Bulgaria* (No. 41488/98, 18/05/2000) the Court found itself unable to hold a violation of Article 14 because the supporting evidence for what the Court acknowledged as “serious arguments” was not able to meet its standard of proof.
- There were a number of strong dissenting judgments in *Anguelova* and subsequent cases regarding the use of this heightened standard. In a partly dissenting opinion in *Anguelova*, Judge Bonello expressed the view (at paragraphs 9-10) that the ‘beyond reasonable doubt’ standard is not the appropriate standard for proving human rights cases, in particular allegations of discrimination, which rather should be found on the ‘balance of probabilities’. See also Judge Bonello’s partly dissenting opinion in *Vezenadaroglu v Turkey* (No. 342357/96, 11/04/2000).
- In the recent Chamber judgment in *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004), the ECtHR held that the standard of proof required was not the criminal standard. At time of writing, this case is pending before the Grand Chamber of the ECtHR and will be subject to a full re-hearing on the merits. For detail on the arguments before the ECtHR regarding the burden of proof, see the

amicus brief prepared by INTERIGHTS for the *Nachova* Grand Chamber hearing at www.interights.org.

2 Inter-American System

Other international and national tribunals have expressed reservations about the use of this higher burden of proof in equality cases, particularly in light of the difficulties in proving discrimination. The IACtHR has explicitly rejected the application of a higher burden of proof in human rights cases. In *Velasquez Rodriguez (Interpretation of the Compensatory Damages Judgment)* (Series C No. 7, 21 July 1989) the IACHR (at paragraph 134) stated that:

“The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of states responsible.”

3 National Jurisdictions

Many national jurisdictions (notably in common law systems) adopt a ‘balance of probabilities’ standard for discrimination cases. For example, the United Kingdom (Neill LJ in *King v Great British-China Centre* (1992) ICR 516 at 528; and *Glasgow City Council v Zafar* (1998) ICR 120); Canada (*Re Blainey and Ontario Hockey Association et al.*, 1986 A.C.W.S.J); South Africa (*Harksen v Lane N.O. and others*, para. 53); Australia (*Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, (1992) ALR 449, 449-450); and the U.S. (U.S. Supreme Court in *Desert Palace, Inc. v Costa*, 539 U.S. 90, 99 (2003)).

D ESTABLISHING A PRIMA FACIE CASE

In order to establish direct discrimination, the complainant must prove different treatment. Similarly, to prove indirect discrimination depends on showing differential impact across groups. This section addresses the different ways of proving treatment or impact, the first step in proving a *prima facie* case of discrimination.

1 Difficulties in Proving Discrimination

Proving discrimination claims can be particularly problematic. In the vast majority of cases there is little, if any direct evidence of discrimination, since those who discriminate against particular groups do not generally advertise their prejudices: indeed they may not even be aware of them. While intent is not an element of discrimination, there often remains a question of motivation in discrimination claims that is also difficult to prove. For example, although victims may be from a racial minority, it is sometimes difficult to show that their identity contributed to the way they were treated. Where States discriminate as a matter of policy proof may exist but it may not be accessible. Indirect discrimination is particularly difficult to prove, as it requires evidence of disproportionate impact. In many instances, statistics to support a claim of indirect discrimination are not available or are inadmissible as evidence. Frequently, problems of proving discrimination are also compounded by the power disparities between complainants and alleged discriminators, with respondents having more resources and information at their disposal than complainants.

These difficulties of proof inevitably have an impact on the effective protection of equality rights. Until its recent judgment in *Nachova v Bulgaria*, the ECtHR had never found a violation of Article 14 in respect of acts of violence against racial minorities in Europe, despite evidence (statistical and otherwise) of widespread prejudice and abuse. Many such cases failed due to inability to satisfy the ECtHR in evidentiary terms that discrimination had actually occurred.

2 Overcoming Problems of Proof

Recognising the problems in proving discrimination, the EU and a number of national jurisdictions have attempted to ease the evidentiary demands on victims in discrimination cases. Two approaches, the use of inferences and statistics are discussed in more detail in subsequent sections.

- The Race Directive provides an accommodating approach to establishing indirect discrimination in that it allows for the use of a hypothetical comparator in establishing disproportionate effect (see Article 2(2)(b)).
- In some jurisdictions, courts have held that evidence of ‘a general picture’ of disadvantage, or ‘common knowledge’ of discrimination might be enough to establish a *prima facie* case. See, for example, the UK case of *London Underground v Edwards (No. 2)* [1999] IRLR 364: and the Australian case of *Mayer v Australian Nuclear Science and Technology Organisation* (2003) EOC 93-285. In New Zealand, courts find discrimination on the basis of ‘judicial notice’, which involves the court taking note of “a fact that is so generally known that every ordinary person may be reasonably presumed to be aware of it”. See, for example,

Auckland City Council v Hapimana [1976] 1 NZLR 731, and *Northern Regional Health Authority v Human Rights Commission*, [1998] 2 NZLR 218, 242.

- In Australia, discrimination provisions are construed in favour of potential victims of discriminatory conduct. See, for example, *Waters v Public Transport Corporation* (1991) 173 CLR 349. Similarly, in South African constitutional and statutory cases, if the discrimination is based on a “specified ground” (including, inter alia, race) it is presumed to be unfair and unconstitutional. See *Harksen v Lane N.O. and others* 1998 (1) SA 300 (CC). Once complainants show that a government policy or private action treats members of their race differently, the burden moves to the defendant to prove that the discrimination is “fair”. The determination of fairness or unfairness depends “primarily on the impact of the discrimination on the complainant and others in his or her situation.”
- Shifting the burden of proof and lowering the overall standard of proof and the proof required for a *prima facie* case also may contribute to alleviating the difficulties faced by plaintiffs. The burden of proof shifts once the complainant has established a *prima facie* case, that is, facts from which the court would be entitled to conclude that he or she had been discriminated against. What will amount to a *prima facie* case depends on the facts of the case, but the U.S. Supreme Court, for one, has emphasised that “[t]he burden of establishing a *prima facie* case of disparate treatment is not onerous.” *Texas Dept. of Cmty. Affairs v Burdine*, 450 U.S. 248, 253 (1981). See also the UK case of *Nagarajan v London Regional Transport* [2000] 1 AC 501 and the Canadian case of *Canada (Human Rights Commission) v Canada (Department of National Health and Welfare)* (1998), 32 C.H.R.R. D/168 (F.C.T.D.).

2.1 Drawing Inferences

Some international and domestic tribunals allow the establishment of *prima facie* cases by drawing inferences based on circumstantial evidence. In light of the difficulties in finding direct evidence of some forms of discrimination, the drawing of inferences has particular significance. Inferences are particularly important in the context of combating “institutional” or “systemic” discrimination, where a discriminator may be unaware of their own prejudices, and is merely acting in accordance with a framework of entrenched societal or workplace bias. An employer, for example, may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race, for example. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. See, the Canadian case of *Meiorin* and the UK case of *Nagarajan* cited above.

This approach has been used extensively in UK case law.

- In *King v Great Britain-China Centre* [1992] ICR 516 the Court of Appeal acknowledged that, in cases of racial discrimination concerning recruitment or promotion, it is unusual for a tribunal to be faced with direct evidence of discrimination. It therefore held that the tribunal has to make its findings on the primary facts, which may include evasive or equivocal responses to questioning, and draw inferences. Where an employer cannot supply good reasons for its decision, the tribunal is entitled to find discrimination proven.
- *Kells v Pilkington* [2002] 2 CMLR 63 built on this case, holding that the existence of an offensive policy, rule or practice could be decided by way of inference. If an applicant presents evidence of a continuing act or impact that appears consistent with the existence of a discriminatory policy, rule or practice, an employer may be required to explain its action or face a losing judgment. The act required does not have to be specific, nor reduced to formal expression.
- See also *Anya v Oxford University* [2001] IRLR 377 (at paragraph 9) the Court of Appeal stressed that due to the evidentiary difficulties inherent in race discrimination cases, such cases will often be established by drawing inferences from facts. The Court went on to hold that those facts may well be background facts and may predate or postdate the acts relating to the claim. See also *Rowden v Dutton Gregory* [2002] ICR 971.

2.2 Statistical inference

An applicant may also be able to prove a *prima facie* case of discrimination through the use of statistics, particularly in indirect discrimination cases where there is a need to establish a disproportionate effect, of which evidence may not be readily available. If an applicant can statistically demonstrate patterns of discriminatory impact or disadvantage, and rationally connect these patterns to a facially neutral policy or practice, a court may consider this sufficient evidence of discrimination on the basis of that policy or practice. The burden then shifts to the allegedly discriminatory actor to prove that the statistical difference is insignificant or objectively justified. Statistics are, however, not available in many cases. Although a comparator group must still be selected, the use of statistics helps to shift focus away from narrow individual comparisons and toward the identification of broader underlying structural inequalities. As such, statistics can be a useful tool for identifying problems for broader legislation as well as for deciding particular cases. Some domestic jurisdictions, such as the U.S., New Zealand, the United Kingdom and Germany, have moved away from the use of individual comparators toward the use of statistics. The EU has also adopted this approach in a number of cases:

- In *Case 109/88, Handels-og Kontofunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting on behalf of Danfoss)* [1989] ECR 3199 (the “Danfoss” case), the complainants demonstrated that the average wage for men was 6.85% higher than women doing the same work. The ECJ considered that the granting of individual pay supplements based on mobility, training, and seniority was “totally

lacking in transparency” and that the burden, therefore, rested with the employer to prove that its wage practice was objective and not discriminatory. Article 6 of the Equal Pay Directive provided that member States must “take measures necessary to ensure that the principle of equal pay is applied and effective means are available to ensure that it is observed.” The ECJ held that in ‘special cases’ national burden of proof rules must be adjusted to fully implement the Directive.

- In *Case C-167/97, Seymour-Smith and Perez* [1999] ECR I-623, the ECJ held that statistical difference was one way to establish different outcomes, although it left to national courts to fine tune the statistical ranges deemed legally significant. The ECJ suggested that the conditions associated with certain employment rights or privileges would constitute a *prima facie* case of indirect discrimination if available statistics indicated that a considerably smaller percentage of a women than men were able to satisfy the condition.

Although statistical differences in themselves do not constitute indirect discrimination, they may indicate the presence of a problem. Employers, industry groups, or governments may be required or encouraged to institute training or other programmes to make opportunities equally available for individuals of all statuses.

For a discussion of the use of statistics in indirect discrimination cases, see the legal brief prepared jointly by INTERIGHTS and Human Rights Watch for the case of *D.H. v Czech Republic* (No. 73907/01) at www.interights.org.

E JUSTIFICATION

1 Objective Justification and Proportionality

Every international instrument allows discrimination to be justified in certain circumstances. As outlined above, once the applicant establishes a *prima facie* case of discrimination, the burden of proof generally shifts to the defendant. The defendant must present a justification of the policy or practice that results in discriminatory treatment (or impact) that is objective and reasonable, and proportional to the larger goals of the policy. This emphasis on objective reasons and proportionality is echoed through the jurisprudence of many jurisdictions.

1.1 UN System

In paragraph 13 of General Comment 18 to the ICCPR, the HRC stated that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose

which is legitimate under the Covenant.” In paragraph 2 of General Recommendation 14, CERD stated that:

“...[a] differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention.....”

The HRC has applied the ‘reasonable and objective’ test in a wide range of cases, but the reasoning has not always been consistent. Differential treatment was found to be reasonable and objective in the provision of State subsidies for students at private and public schools in *Blom v Sweden* (No. 191/1985, ICCPR) and *Lindgren v Sweden* (No. 198-99/1988, ICCPR) and in the distinction between foster and natural children for the granting of child benefits in *Oulajin and Kaiss v the Netherlands* (Nos. 406, 426/1990, ICCPR). However, differing educational subsidies for schools of differing religious faith was found not to be reasonable and objective in *Waldman v Canada* (No. 694/1996, ICCPR). The HRC found differences in social security rights not to be ‘reasonable and objective’ with regard to men and women (see *Zwaan-de Vries v the Netherlands*; and *Broeks v the Netherlands*) but justified between married and unmarried couples (see the *Danning* and *Sprenger* cases).

1.2 European Convention on Human Rights

In the seminal *Belgian Linguistics case*, the ECtHR emphasised the importance of both objective goals and a relationship of proportionality (at Section 1B, paragraph 10):

“The existence of such [an objective and reasonable] justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14... is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

See also *National Union of Belgian Police v Belgium* (No. 4464/70, 27/09/1975), at paragraph 46; *Marckx v Belgium* (No. 6833/74, 13/06/1979) at paragraph 33; *Rasmussen v Denmark*, (No. 8777/79, 28/11/1984), at paragraph 38; *Abdulaziz v the United Kingdom*, (Nos. 9214/80; 9473/81; 9474/81, 28/05/1985), at paragraph 72; *Lithgow and others v the United Kingdom* (No. 9006/80, 8/07/1986) at paragraph 177; and *Thlimmenos v Greece* (No. 34369/97, 06/04/2000) at paragraph 46.

1.3 European Union

In *Bilka Kaufhaus* discussed above under ‘Indirect discrimination,’ the ECJ emphasised that discrimination exists “unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on [the grounds claimed].” The ECJ has made clear that these justifications should not be broad generalisations about groups, but should be identifiable and objective non-discriminatory criteria. In *Case 171/88, Rinner-Kühn v FWW Spezial* [1989] ECR 2743, the ECJ considered the German Government’s argument that part-time workers, a greater number of whom were women, were “not as integrated in, or as dependent on, the undertaking employing them as other workers” to be an impermissible generalization.

1.4 Inter-American System

The IACtHR followed a similar line in its comments on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica A No 4* (1984) 5 HRLJ 161 (Advisory Opinion No. 4). The IACtHR emphasised the need for principled objectives and proportionality, stating that:

“[I]t follows that there would be no discrimination in differences of treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of human kind.”

2 Suspect Classes

This emphasis on proportionality suggests that the acceptability of certain justifications may diminish as the importance of the value to be protected increases. Some jurisdictions grant certain ‘suspect’ classes, classifications or categories a higher degree of judicial scrutiny than ‘regular’ discrimination cases.

- For example, the ICCPR non-discrimination clause, Article 4(1), which delimits the scope of the derogation rule in time of public emergency, appears to give more fundamental status to the grounds of race, colour, sex, language, religion or social origin. It states that measures that States take in derogation from the Covenant’s provisions in times of national emergency must not involve discrimination *solely* on the aforementioned grounds.
- The ECtHR also seems to grant claims based on race, nationality, religion, birth and sex a higher degree of judicial scrutiny. The usual language the ECtHR has used to indicate that a higher degree of scrutiny is required is the ‘very weighty

reasons' test laid down in the *Abdulaziz* case (discussed below in Chapter V). This indicates that the State has a narrower margin of appreciation in introducing measures that distinguish on such grounds. See further the ECtHR cases of *Abdulaziz* (sex), *Gaygusuz* (nationality), *Hoffman v Austria* (religion) in the relevant sections of Chapter V, *East African Asians* (race) in the section on degrading treatment in Chapter VI, and *Inze v Austria* (No. 8695/79, 28/10/1987) in respect of birth.

3 Common Justifications

This following section presents some of the most common justifications in defence of discrimination claims that have been considered to be 'objective and reasonable' by international tribunals.

3.1 Physical Safety and Capability

Public authorities or private groups or organisations may introduce requirements related to the safety of workers or of others in the vicinity. While the goal of safety is generally considered objectively desirable, defendants may have to show that there are not other reasonable and non-discriminatory measures that would meet such goals.

The HRC accepted that physical safety as a justification in *Bhinder Singh v Canada* (No. 208/1986, ICCPR) discussed in the 'direct discrimination' section at the start of Chapter II, in which the applicant claimed discrimination on the basis of religion. The HRC regarded the justification as directed towards the objectively reasonable purpose of the workers' safety, and as therefore non-discriminatory and compatible with the Convention. Similarly, in *Case 222/84, Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, the ECJ accepted that the policy that led to the non-renewal of the contracts of Ms Johnston and other women, and to the denial to them of firearms training, could be justified in light of the serious internal disturbances in Northern Ireland and the additional risks of assassination. Also in *Case C-273/97, Sirdar v Secretary of State for Defence* [1999] ECR I-7403, the ECJ found that a ban on women from combat roles did not abuse the principle of proportionality and was capable of justification. Following *Sirdar*, in *Case C-285/98, Kreil v Germany* [2000] ECR I-69, the ECJ accepted that a ban on women's combat role could be justified. However, it was not proportional to keep all armed units within the voluntary army exclusively male.

3.2 Economic or Market-based Justification

In EU law, many justifications or defences for discriminatory impact are economic or market-based. However, a distinction must be made between economic excuses for direct discrimination and objectively justifiable economic justifications accompanying good faith efforts at fair practice. While it might be cheaper and economically feasible

for a government or organisation to provide lower wages or sub-standard service to women or minorities, a court may strike this direct discrimination down regardless. For example, the ECJ has not given weight to arguments regarding the higher cost of ensuring equal pay between men and women for governments, national economies, or private enterprises. See *Case 43/75, Defrenne v Sabena* [1976] ECR 455.

If the discriminatory effect arises from objectively justified factors unrelated to any discrimination and proportional to the desired goal, the ECJ may allow the practice to continue. *Danfoss*, discussed above, established several specific possible justifications in the area of employment relations. The ECJ indicated that an employer might justify a requirement only if it demonstrates its importance to the performance of specific tasks. It indicated that mobility could not be used independently as an indicator or proxy for quality of work. Difference in pay based on different training could be justified by showing its importance for the performance of specific tasks. *Danfoss* suggested that pay differentials based on length of service required no particular justifications. However, in the later case of *Case 184/99, Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, the ECJ decided that rewarding total hours (rather than years) worked must be justified by a “relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours have been completed.” *Case 127/92, Enderby v Frenchay Health Authority* [1993] ECR 5535 allowed another possible justification for differential pay - the needs of the employer to raise pay to attract candidates because of the state of the job market.

In the ECtHR case of *Abdulaziz*, the aim of protecting the domestic labour market was legitimate, however the difference of the respective impacts of men and women on the labour market did not justify the different treatment of the sexes under the immigration rules.

3.3 Freedom of Contract

Defendants may also argue that the principle of freedom of contract should override provisions promoting equality. If individuals have contractually agreed to work for lower pay or under worse conditions, then governments or other judicial authorities should not interfere with this decision. Several courts have come to a general consensus, however, that individuals may not contract away their publicly recognised rights, including rights of equality. The ECJ holds that EU equal pay provisions override freedom of contract - equal pay is protected even if individual and collective agreements contract for unequal compensation. See *Case 43/75 Defrenne v Sabena* [1976] ECR 455. This is reiterated in *Nimz*, in which the ECJ held that national courts could set aside discriminatory provisions in collective agreements.

3.4 Positive or Affirmative Action

Most international instruments permit affirmative action as legitimate different treatment. For example, the HRC in paragraph 10 of its General Comment 18 stated that: “affirmative action, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.” Positive action is discussed in more detail in Chapter V below.

F LIABILITY FOR DISCRIMINATION

In addition to liability for discriminatory treatment directly caused by the person against whom the claim is made, a defendant may be found responsible for discrimination through the concept of vicarious liability. With vicarious liability, responsibility is assigned not only to the immediate perpetrator of a discriminatory act, but also to the individual or organisation with supervisory authority over the perpetrator. The supervisor has the power and the authority to both monitor and end discriminatory practices. The continuation of such practices suggests the complicity of the supervisor in the discrimination and indicates that the employer should be held at least partially responsible for it. This is particularly so if an organisation or individual had actual knowledge of discrimination (i.e. witnessing the actions or receiving a complaint), and did nothing to punish that act or prevent further discrimination. Assigning liability may still be appropriate where the supervisory individual or organisation did not but should have known of the discrimination, particularly in light of the difficulty of proving knowledge. By assigning responsibility in this way, courts encourage organisations to check their own practices and ensure that their employees are not acting in a discriminatory manner.

Some national jurisdictions provide for vicarious liability by statute in discrimination or harassment cases. Section 41 of the Sex Discrimination Act 1975 in the UK provides that anything done by a person in the scope of his employment shall be treated for the purposes of the Act as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval. Similarly, Section 15 of the Employment Equality Act in Ireland provides that ‘anything done by a person in the course of his or her employment shall... be treated for the purposes of this Act as done also by that person’s employer, whether or not it was done with the employer’s knowledge or approval.’

Although an employer may not be personally responsible for discrimination, an employer may be held legally responsible for the broader environment or conditions under which employees work. This may include responsibility for harassment that takes place after work and also liability for the acts of third parties over which the employer had control. These issues may be illustrated by the following examples from national law:

- The Irish case of *A Limited Company v One Female Employee* (EE 10/1998) involved a residential training programme in a hotel away from work. The claimant returned to her hotel room to find it ransacked and her personal belongings littered in a sexually disturbing and suggestive manner. Fellow employees had been responsible. The Equality Officer considered that the events constituted discrimination for which the employer was responsible even though the events took place outside the work place. Compare and contrast the UK cases of *Chief Constable of the Lincolnshire Police v Stubbs* [1999] IRLR 81 (where the sexual harassment of a woman police officer in a pub after work after her shift was held to be within the course of employment) and *Sidhu v Aerospace Composite Technology* [2000] IRLR 602 (where the racial abuse of the applicant by a fellow employee during a day out organised by the employer did not fall within the course of the harasser's employment).
- In *A Worker v A Company* (EE 3/1991), the Irish Labour Court held that the employer was responsible for harassment of an employee by a visitor to the premises, because the visitor was there with the consent and acquiescence of the employer, who had a duty to protect the worker and provide an environment free from discrimination. Compare the UK cases of *Barton and Rhule v De Vere Hotels* [1996] IRLR 596, and *Thompson v Black Country Housing Association Ltd* (1999) DCLD 39.

G EFFECTIVE REMEDIES AND COMPENSATION

There are two central goals of any remedy for discrimination - (1) to compensate the individual or class of individuals who have been harmed, and (2) to deter future discrimination by the same defendant (specific deterrence) and by other potential defendants (general deterrence). These goals are generally reflected in the instruments and cases that directly address remedies and compensation. For example, the EU Framework and Race Directives specify (each at Article 15) that "sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive." Earlier ECJ case law on compensating employment discrimination required member States to "guarantee real and effective judicial protection" and provide remedies that "have a real deterrent effect on the employer". See, for example, *Case C-271/91, Marshall v Southampton and South West Area Health Authority* [1986] ECR 723 ("*Marshall II*").

For all procedures, several important requirements must be kept in mind with regard to discrimination as well as other claims. Plaintiffs must have easy access to courts or other judicial bodies and a fair opportunity to have the merits of their case heard. As defendants may be wealthier and more powerful than individual plaintiffs, legal aid and litigation support groups are often necessary for effective enforcement of equality provisions.

1 Criminal Sanctions

Criminal sanctions, administered by a national government or possibly an extra-national body, may be available for certain types of discrimination. Flagrant acts of actual or threatened persecution or harassment, including abuses of freedom of speech ('hate speech') that incite discriminatory violence often involve criminal sanctions. Criminal sanctions are also used for acts with widespread detrimental impact and that may lead individuals to fear retaliation if they bring claims.

Criminal proceedings have a number of disadvantages for the enforcement of anti-discrimination measures. The victim of discrimination generally does not have control over the prosecution of the case, as responsibility rests with the prosecutor of the body enforcing the sanction, and hence he or she may not be able to ensure the claim gets the attention it deserves. Criminal proceedings also generally require a higher burden of proof, and so may not be an appropriate method for the prevention of discrimination that is difficult to prove directly. Nevertheless, for certain discrimination cases involving violence, criminal sanctions may be the only appropriate remedy. See, for example, the ECHR case of *M.C. v Bulgaria* (No. 39272/98, 04/12/2003) discussed in the section on 'Violence as Discrimination' below. Also in *Nachova v Bulgaria*, a Chamber of the ECtHR held that State authorities have a positive duty to investigate racist motive for lethal force. At time of writing this case is pending before the ECtHR Grand Chamber.

2 Financial Compensation

Financial compensation for past discrimination is also an important tool for enforcing equality provisions. Financial compensation may include lost wages or other direct financial damage and also lost opportunities, interest on financial losses, injury to feelings, and litigation costs.

The ECJ addressed the issue of whether legislation may restrict financial compensation for victims of discrimination in *Case C-78/98, Preston and others v Wolverhampton Healthcare NHS Trust* [1999] ECR I-3201. The ECJ held that a UK law capping compensation for discrimination to a maximum of losses suffered in the two years preceding the date of the claim was incompatible with EC law. It held that this rule would deprive applicants of a fair remedy, as it would prevent their full period of service from being taken into account. The ECJ suggested that, at a minimum, the actual financial detriment suffered by plaintiffs should be fully compensated.

CERD has addressed issues of financial compensation above and beyond basic financial damage. In General Comment 26 elaborating on Article 6 of ICERD, CERD suggested that the right under Article 6 to seek just and adequate reparation or satisfaction for any damage suffered as a result of discrimination should be secured by awards of financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.

In its discussion of the case of *B.J. v Denmark* (No. 17/1999, ICERD), CERD held that financial compensation for acts of discrimination that have purely emotional effect is also appropriate and that imposing a criminal sanction may not be adequate.

3 Court Ordered Performance

A defendant may be instructed by a court to engage in particular actions to remedy a discriminatory situation. This may take place through individual reinstatement or reengagement, or in the form of instructions to undertake broader structural measures or granting preferential treatment to previously disadvantaged groups. For example, in *Stalla Costa v Uruguay* (No. 198/1995, ICCPR) the HRC held that preferential treatment of citizens wrongfully dismissed by the military government, relative to other public servants, was a measure of redress for past discrimination.

4 Consent Decrees

A consent decree is an agreement entered into by the mutual accord of both parties in a lawsuit that, in discrimination law, often involves an agreement by a jurisdiction or company to end discriminatory practices and to implement affirmative action programmes.

The Department of Justice in the U.S. often uses consent decrees as a means of settling civil rights litigation against private firms or public authorities such as police forces and obligating them to establish affirmative action programmes. For a discussion of the court's role in consent decrees in the U.S. see the U.S. Supreme Court decision in *Carson v American Brands, Inc.* 450 U.S. 79 (1981). In that case the petitioners claimed that the respondent employers and unions had engaged in racially discriminatory employment practices. The parties negotiated a settlement and jointly moved the trial court to enter a proposed consent decree but the court denied the motion, holding that there was no showing of present or past discrimination. The Supreme Court found that the failure of the trial court to order a consent decree exposed the petitioners to serious and irreparable harm and endangered their settlement.

Under Schedule 9 of the Northern Ireland Act 1998 the Northern Ireland Equality Commission has authority to approve an Equality Scheme submitted by a designated public authority. Such Equality Schemes must comply with the guidelines laid down by the Equality Commission. The Disability Rights Commission in the UK provides for voluntary agreements with employers or other institutions. However, those are 'private law' agreements that require litigation for enforcement.

FOUNDATIONS OF DISCRIMINATION

Not every unequal treatment of persons constitutes discrimination prohibited by human rights instruments. States may establish reasonable differences in view of different situations and categorise groups of individuals for a legitimate purpose. Only detrimental treatment (or effect) based on particular ‘grounds’ is prohibited (i.e., where the categories employed are race, sex, etc.). This section discusses the most established ‘grounds’ of discrimination in international human rights law: (A) sex and gender, (B) sexual orientation, (C) race, colour, descent and ethnic origin, (D) nationality, (E) language, (F) religion and belief, (G) disability, (H) age, (I) political or other opinion and (J) marital, parental and family status. As noted in Chapter II of the Handbook, some international instruments only address specified grounds of discrimination. Others are open-ended and allow discrimination claims to be brought on the basis of any ‘status.’ This gives these instruments the flexibility to encompass new grounds of discrimination and underlines that the currently prohibited grounds of discrimination are not exhaustive.

The level of protection and development of each ground of discrimination varies among grounds and human rights instruments. In some cases, this is due to political and social circumstances. For example, early EU legislation and case law focused on the area of sex or gender discrimination, particularly in employment and in the provision of social services. This stemmed from the EU’s primarily economic function and fears that discriminatory imbalances in pay and social provision would distort the effects of market integration. In the same way, cases related to the African Charter have focused on nationality, freedom from domination, and social and cultural rights.

A SEX / GENDER DISCRIMINATION

1 Introduction

Sex or ‘gender’ discrimination is widely prohibited by international and regional human rights instruments and in national legal systems. In certain discussions, ‘sex’ and ‘gender’ are defined separately, with sex carrying a more biological connotation and gender addressing a larger and more sociological sphere. These terms will be used interchangeably throughout the Handbook.

There are several different ways of understanding what constitutes sex and thus what constitutes discrimination on these grounds. The most common understanding is the distinction between male and female. However, courts and tribunals have extended the understanding of sex to include discrimination with regard to the activities or responsibilities biologically or traditionally associated with being female, such as pregnancy and childcare.

Direct discrimination on the basis of sex appears frequently in the case law. It has been particularly evident in employment cases. Discriminatory practices include bias in hiring, promotion, job assignment, termination and compensation. Indirect discrimination on the basis of sex is less extensively addressed. The EU, however, has dealt with one of the important subsets of indirect sex discrimination in employment, the differential treatment of part-time workers. Positive action designed to achieve full sexual equality is generally permissible under international instruments and CEDAW explicitly contemplates positive action. Sexual harassment is treated as a form of direct sex discrimination in jurisdictions such as India because it unreasonably interferes with a woman’s performance at work and creates a hostile working environment. See, for example, the cases of *Apparel Export Promotion Council v A K Chopra* AIR [1999] SC 625 and *Vishaka v State of Rajasthan* [1997] VII AD SC53.

As with other forms of discrimination, sex discrimination often manifests itself in a denial to the individual victim (or group) the rights that others enjoy such as civil and political rights, employment rights and property rights. However, sex discrimination also includes matters specific to status of women, such as pregnancy-related issues (like maternity leave).

2 General Principles under International Instruments

2.1 International Covenant on Civil and Political Rights

Articles 2 and 26 of the ICCPR prohibit discrimination on grounds of sex. According to [HRC General Comment 18](#) (at paragraph 6), States have a positive duty to ensure by

legislative, administrative and other measures equal rights for spouses in consonance with the principles of the Covenant. Differentiation that is reasonable and objective and has a legitimate purpose is not construed as discrimination prohibited by the Covenant (see paragraph 13). However, in cases where the difference in treatment is based on one of the specific grounds enumerated in Article 26, such as sex, the State party is under a heavy burden to explain the reason for such differentiation. In other words, such differentiation is subject to greater scrutiny.

The HRC has considered sex discrimination cases involving (i) citizenship and immigration, (ii) status and identity, (iii) tax and social security and (iii) property rights.

2.1.1 *Citizenship and Immigration*

- In *Aumeeruddy-Cziffra v Mauritius (or Mauritian Women case)* (No. 35/1978), the HRC examined the immigration law of Mauritius that granted automatic residence rights to foreign women who married Mauritian men but did not do so in respect of foreign men who married Mauritian women. It held that the immigration law discriminated against women on the ground of sex in violation of the ICCPR.

Mauritian Women Case

In 1977, Mauritius amended its immigration legislation to limit residency rights of alien husbands of Mauritian women, but not of alien wives of Mauritian men. Twenty Mauritian women challenged the laws through a communication to the HRC on the grounds that they violated the prohibitions of sex-discrimination in the ICCPR – the equal protection provision, the provision securing the right to participation in public affairs, and the provisions for protection of the family. In its submission to the HRC, Mauritius admitted that:

- The statutes discriminated on the basis of sex,
- Choosing to leave the country because her husband cannot stay in Mauritius may affect a woman's ability to exercise her rights to participate in public affairs, and
- The exclusion of a person whose family is living in the country may result in an infringement of that person's rights to family life.

Mauritius stated, however, that if the exclusion of a non-citizen is lawful and based upon security or public interest grounds, it could not be an arbitrary interference with the family life of its nationals.

The HRC found that it was not necessary to decide how far the restrictions imposed by the new legislation might conflict with the substantive provisions of the ICCPR if applied without discrimination of any kind.

“[...] Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights.”

The HRC found no sufficient justification of the different treatment of married women and men and held that the State violated Articles 2(1), 3 and 26 independently and in conjunction with Article 17(1).

2.1.2 Status and Identity

- In *Lovelace v Canada* (No. 24/1977, ICCPR), the HRC found that Canada had discriminated against the applicant on the basis of sex by taking away her Aboriginal status under domestic legislation when she married a non-Aboriginal person. Under the same legislation, a man would not have lost his status by marrying a non-Aboriginal woman.
- In *Müller and Engelhard v Namibia* (No. 919/2000, ICCPR), the HRC held that legislation requiring a husband to apply to the authorities for authorisation to change his surname to that of his wife, while allowing a wife to assume her husband's surname without any formalities, violated Article 26 of the ICCPR. In view of the important principle of equality between men and women, the argument that the objectionable measure reflected a long-standing tradition was not accepted as a justification for the difference in treatment.

2.1.3 Tax and Social Security

The HRC has made clear that the principle of equality covers benefits, such as pension schemes and severance policies. It has also indicated that traditional notions of gender roles in employment and the home do not justify discrimination.

- In *Broeks v the Netherlands* (No. 172/1984, ICCPR) the HRC found that the denial of social security benefit to Mrs. Broeks, as a married woman, on an equal footing with a married man constituted discrimination under Article 26 of the ICCPR. The HRC observed that, under relevant Dutch law, a married woman in order to receive unemployment benefits, had to prove that she was a “breadwinner,” a condition that did not apply to married men. Such a differentiation placed married women at a disadvantage compared with married men. The *Broeks* case also established that Article 26 gives protection beyond the civil and political rights enumerated in the ICCPR. In other words, it prohibits discrimination with regard to all civil, political, economic, social and other rights. See also the cases of *Vos v the Netherlands* (No. 218/1986, ICCPR), *Sprenger v the Netherlands* (No. 395/1990, ICCPR) and *Oulajin and Kaiss v the Netherlands* (Nos. 406, 426/1990, ICCPR).
- The landmark case of *Zwaan de Vries v Netherlands* (No. 182/1984, ICCPR) reiterated this principle. The HRC noted that, even though the ICCPR guarantees no right to public benefits as such, once such payments are provided for, they may not be granted unequally. At paragraph 12.4, it stated that:

“Although Article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with Article 26 of the Covenant.”

The State denied equal pension benefits to married men and married women in the same circumstances based on a “breadwinner” criterion. The HRC held that this constituted impermissible sex discrimination.

- Contrast *Cavalcanti Araujo-Jongen v the Netherlands* (No. 418/1990, ICCPR) where the author, an unemployed married woman, was refused unemployment benefit in circumstances in which an unemployed married man would have received benefit due to the ‘breadwinner’ criterion previously successfully challenged in *Broeks*. While her complaint was pending the Dutch amended the law but required that applicants be ‘presently unemployed’ at the time of the application. This new requirement ruled out the applicant from claiming retroactive benefits and she claimed that the requirement of ‘present employment’ indirectly discriminated against her. The HRC however held that the requirement was reasonable and objective and thus found no violation of the ICCPR.
- *Pauger v Austria* (No. 415/1990, ICCPR) concerned Austrian pension legislation that permitted widows to receive a pension, regardless of their income, whereas widowers could receive pensions only if they did not have any other form of income. The applicant, a widower, claimed that this unequal treatment constituted impermissible sex discrimination of men and women whose social circumstances were otherwise similar. Such differentiation based on sex was not reasonable or objective and violated Article 26 of the ICCPR.

Other cases to note include *Johannes Vos v the Netherlands* (No. 786/1997, ICCPR) where the HRC held that the payment of a pension at a lower rate to a male civil servant than a similarly placed female civil servant constituted discriminatory treatment prohibited by Article 26. *J.H.W. v the Netherlands* (No. 501/1992, ICCPR) established that the principles discussed in this section could apply also to the assessment of income tax.

2.1.4 Property Rights

Historically, denial of full property rights has been one way in which women have been denied equality. In *Avellanal v Peru* (No. 202/1986, ICCPR) legal proceedings initiated by the complainant to recover overdue rent on apartment buildings she owned were quashed by the courts because, under the Peruvian Civil Code, only the husband of a married woman was entitled to represent matrimonial property before the courts. The HRC noted that the effect of the Code was that the wife was not equal to her husband for purposes of litigation. This resulted in denial of her right to equality and constituted discrimination on the ground of sex prohibited by Article 26 of the ICCPR.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant parts to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted above in Chapter

II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD is concerned with discrimination “in all its forms” on the specified grounds of “race, colour, descent, or national or ethnic origin.” It does not explicitly address sex discrimination. However, sex discrimination may concern ICERD to the extent that it arises together with racial discrimination (or the two overlap), such as in the case of multiple discrimination. In General Recommendation No. 25 (Gender related dimensions of racial discrimination), CERD recognised that “some forms of racial discrimination have a unique and specific impact on women.”

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is specifically addressed to issues of sex discrimination. In Article 1 it defines “discrimination against women” as:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Pursuant to Article 2, the State Parties to CEDAW “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” and to this end, undertake, among other things to:

- Take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; and
- Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Thus, one of the most important aspects of CEDAW is that it not only addresses States, but also explicitly refers to the private sphere, as this field is where the most serious violations of women's rights often take place. One of the more progressive provisions in CEDAW, Article 5, urges the States to modify the social and cultural patterns of conduct of men and women. Furthermore, this provision promotes

establishing the common responsibility of men and women in the upbringing and development of their children. Article 16 promotes equality in all matters related to marriage and family relations.

The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC prohibits discrimination against any child on the grounds of sex.

2.6 International Labour Organization

The ILO has established a number of conventions on non-discrimination on grounds of sex in the workplace. The ILO Equal Remuneration Convention, 1951 (No. 100) seeks to further the principle of equal pay for equal work for men and women and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) prohibits discrimination on the grounds of sex in employment.

2.7 European Convention on Human Rights

Article 14 of the ECHR prohibits discrimination on the grounds of sex. The ECtHR has recognised that a difference of treatment, based exclusively on the ground of sex can be justified, only by “very weighty reasons” so as to be compatible with the ECHR. This is because equality of the sexes is a major goal of the contracting States. See the cases of *Abdulaziz*, *Schuler-Zraggen*, *Karlheinz Schmidt*, *Willis*, and *Burghartz*.

Surprisingly, not many cases of sex discrimination have come before the ECtHR. The most important cases have come in the areas of (i) immigration, (ii) identity and (ii) tax and social security. Often these cases have alleged discrimination against men.

2.7.1 Immigration

Like in the case of the ICCPR, certain immigration measures have been considered as discriminatory on the grounds of sex.

- In *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80; 9473/81; 9474/81, 28/05/1985) the ECtHR held that immigration rules that denied the husbands of the applicants permission to remain with or join them in the UK while granting permission to wives of husbands in a similar situation, discriminated on the grounds of sex. The ECtHR agreed that the immigration rules had the legitimate aim of protecting the domestic labour market, upon which male immigrants had a larger impact. However, it held that States have a smaller ‘margin

of appreciation' for differential treatment on grounds of sex so 'weighty reasons' were required before such a difference of treatment could be justified. Differences in impact on the labour market caused by male and female immigrants were not sufficiently 'weighty' in this case.

- Compare *Schuler-Zgraggen v Switzerland* (No. 14518/89, 24/06/1993) where the ECtHR found no 'weighty reasons' to justify the denial of an invalidity pension to the applicant, particularly, as such denial was based on the assumption that she was a woman with a young child and would not have worked outside the home anyway.

2.7.2 Identity

The ECtHR has shown that it is also strict regarding distinctions that function against men. In *Burghartz v Switzerland* (No. 16213/90, 22/02/1994) the applicants claimed that the refusal of the Swiss authorities to allow them to register the wife's name as their family name constituted discrimination on the grounds of sex prohibited by Article 14. The ECtHR held that there was no objective and reasonable justification for the different treatment between husband and wife as regards the same application and thus the refusal violated Article 14.

2.7.3 Tax and Social Security

There have been a large number of cases taken under the ECHR claiming discrimination in tax and social security laws. Many of these have settled out of court. The following are cases that have gone to full hearing.

- In *Willis v United Kingdom* (No. 36042/97, 11/05/1999) the applicant claimed that social security and benefits legislation that granted benefits to widows but not to widowers in similar circumstances discriminated against him on grounds of sex in breach of Article 14. The applicant's wife had worked full time during her married life and had been the primary breadwinner for the family. When she died the applicant ceased employment to care for his children on a full time basis. The policy behind the legislation was based on the assumption that married women rarely worked, were more dependent on their spouses' earnings and thus their need for financial assistance was greater than that of men when their spouses died. The ECtHR observed that the denial of benefits was based exclusively on the sex of the applicant. A female in the same position as the applicant had an enforceable right to receive the benefits. The difference in treatment between men and women was not based on any "objective and reasonable justification" and constituted a violation of Article 14 of the ECHR taken together with Article 1 of Protocol No. 1.
- In *Van Raalte v the Netherlands* (No. 20060/92, 21/02/1997) the applicant claimed that denial of an exemption from an obligation to pay child benefit contributions to a man when such exemption was granted to a woman in similar circumstances constituted discrimination on the grounds of sex. The ECtHR observed that the

levy of contributions from unmarried childless men aged 45 and over but not from unmarried childless women undoubtedly constituted a difference in treatment between persons in similar situations based on sex. The ECtHR in this case found no compelling reasons to justify such a difference in treatment. It violated Article 14 of the ECHR taken together with Article 1 of Protocol 1.

- *Petrovic v Austria* (No. 20458/92, 27/03/1998) concerned an applicant whose claim for parental leave allowance was rejected on the grounds that under relevant unemployment benefit legislation, only mothers could claim such allowance. The ECtHR held that although there had been a difference in treatment in law on the grounds of sex, the different treatment could be justified. The State had not exceeded its margin of appreciation and it was entitled to assess whether and to what extent differences in otherwise similar situations justified a different treatment in law. Accordingly, the difference in treatment complained of was not discriminatory within the meaning of Article 14.
- In *Karlheinz Schmidt v Germany* (No. 13580/88, 18/07/1994), the ECtHR found that a law that required all male adults but not females to serve as firemen or pay a fire service levy in lieu constituted discrimination on the ground of sex in breach of Article 14 taken in conjunction with Article 4(3)(d). It came to this conclusion because at the material time of the application, the obligation to perform such a service was exclusively one of law and theory. It observed that, in view of the continuing existence of a sufficient number of volunteers, no male person was in practice obliged to serve in a fire brigade. Thus it held that the financial contribution had in fact, lost its compensatory character and become in effect a duty and in the imposition of such financial burden, a difference of treatment on the ground of sex could not be justified.

2.8 European Union

Article 141 (ex Article 119) of the EC Treaty is the primary EU law directed at elimination of discrimination based on sex. The EU has also legislated in the area of sex discrimination. Some of the relevant measures are discussed in Chapter II of the Handbook. They include Council Directives on equal pay (75/117), equal treatment (76/207), social security (79/7), the burden of proof in cases of sex discrimination (97/80), part-time work (97/81) and parental leave (96/34). Under jurisprudence developed by the ECJ, the general rule is that direct discrimination based on sex can never be justified. However indirect discrimination may be objectively justified if (a) the measures used correspond to a genuine need, (b) the measures are appropriate to achieving objectives and (c) the measures are necessary to that end. See *Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

The EU has been very active in combating sex discrimination in areas that affect the operation of the market - in the social and economic field. The most significant jurisprudence has concerned (i) employment, (ii) maternity, (iii) indirect discrimination and part-time work and (iv) social benefits. The ECJ has also been active in attempts to

stop indirect discrimination against women in the job market and has also looked at positive action to remedy structural discrimination.

2.8.1 Employment Discrimination

The EU has traditionally focused on sex discrimination in the workplace – especially with regard to equality of pay, benefits, and opportunity, or the “public” aspects of sex discrimination.

- *Case 43/75, Defrenne v Sabena* [1976] ECR 455 is the case in which the ECJ established the unacceptability of direct sex discrimination with regard to wages. *Defrenne* established that men and women doing identical work must be paid the same amount, and mandated that this principle of equality override employment contracts specifying differential pay. Further, the ECJ held that if a pay differential existed on average between men and women working in the same job, this might constitute direct discrimination. It held that in order not to be discriminatory, the criteria to justify such a differential must be objective and transparent, and that the burden lies with the employer to demonstrate the objectivity of such criteria. See also the *Danfoss* case [1989] ECR 3199.

Defrenne v Sabena

In a series of three cases before the ECJ during the 1970s, Gabrielle Defrenne, a Belgian airline hostess, was responsible for a radical overhaul of the attitude of the EC and Member States towards the rights granted by Article 119. Article 119 EC provided that:

“Each Member State shall ... ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.”

For the purpose of this Article “pay” means ordinary or basic minimum wage or salary or other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment for his employer.

Ms. Defrenne was working as an air hostess until 1970 when, at age of 40 in accordance with a condition in her contract of employment, the Belgian State airline SABENA compulsorily retired her from her position. That condition required female cabin crewmembers to retire at the age of forty. There was no similar condition for male cabin crew members performing the same duties. Thus, males were able to continue working until they reached the age of fifty-five. Ms. Defrenne took exception to her mandatory retirement and brought an action against the Belgian State before the Belgian Conseil d'Etat. Ms. Defrenne claimed that forced retirement deprived her of the improved pension conditions available to her male counterparts. Therefore, she argued that the terms of her retirement, its resulting effect upon her retirement pension, and its discriminatory effect backed by a Belgian regulatory provision, were contrary to Article 119 because retirement pension equalled pay for the purposes of that provision. Three cases involving Defrenne were ultimately brought to the ECJ.

Importantly, the ECJ ruled that Article 119 (now Article 141) applies to individuals as well as to Member States, although it was expressly addressed only to Member States and ruled that, pursuant to its treaty obligations, Belgium should have outlawed sex discrimination in pay. The ECJ held:

“that the principle of equal pay contained in [...] Article 119 may be relied upon

before the national courts and that these courts have the duty to ensure the protection of the rights which this protection vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service whether private or public.”

Article 141 legislation prohibits forms of employment discrimination other than pay, although different treatment may be “objectively justifiable” in the circumstances.

- In *Case C-273/97, Sirdar v Secretary of State for Defence* [1997] ECR I-7403, a woman was excluded from service in the Royal Marines as a chef because of a policy that required every marine, irrespective of specialisation, to be capable of fighting in a commando unit. The ECJ looked at whether such a policy discriminated against women in breach of the Equal Treatment Directive and the EC Treaty. The ECJ held that the exclusion of women from service in special combat units such as the Royal Marines could be justified under the Directive by reason of the nature of the activities in question and the context in which they were carried out. The ECJ observed that national authorities had a certain degree of discretion when adopting measures that they considered necessary to guarantee public security in a member State. Furthermore, the impugned measures had the purpose of guaranteeing public security and were appropriate and necessary to achieve that aim. The Royal Marines differed fundamentally from other units in British armed forces, as they were a small force intended to be the first line of attack. All members were engaged and trained for that purpose and there were no exceptions to the rule. Accordingly, exclusion of women from such employment was justified.

2.8.2 Pregnancy and Maternity

Discrimination with regard to pregnancy constitutes one sub-set of discrimination on the basis of sex.

- Regarding recruitment, in *Case C-177/88, Dekker v Stichting VJV* [1990] ECR I-3941, the ECJ held that an employer’s decision not to employ an applicant who was pregnant, although she was the best person for the job, constituted direct discrimination on the grounds of sex. It considered the fact that insurers had refused to cover the cost of maternity leave irrelevant. In *Case 438/99, Jiménez Melgar v Ayuntamiento de los Barrios* [2001] ECR I-6915, the ECJ held that the decision not to renew a fixed-term contract due to pregnancy also constituted direct sexual discrimination.

Dekker v Stichting VJV

In *Dekker*, the ECJ was presented with the question of whether an employer was in violation of the Equal Treatment Directive when it refused to enter into a contract of employment with a candidate because of the anticipated economic consequences of her pregnancy. Dekker applied for a position with VJV-Centrum and two weeks later she informed the hiring committee that she was three months pregnant. Despite knowledge of her pregnancy, the hiring committee recommended Dekker to the management board as the most suitable candidate for the job. Less than a month later, Dekker was informed by letter that she did not get the job because she was pregnant. Because the employer's insurance company would not reimburse it for foreseeable sickness, the VJV would have been financially unable to hire a replacement for Dekker during the time she was on maternity leave and would therefore have been short-staffed.

Even though Dutch law required the employer to provide paid maternity leave, and despite the fact that the insurance underwriter would not reimburse for pre-existing conditions, the ECJ held that the employer had violated Article 2(3) of the Equal Treatment Directive when it refused to hire Dekker.

“[I]t should be observed that only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave.”

Since only women can become pregnant, the ECJ reasoned, discrimination on the basis of pregnancy was equivalent to sex discrimination. The ECJ created a strong presumption against employment decisions that attach a negative significance to pregnancy.

-
- Regarding dismissal on grounds of pregnancy, in *Case 32/93, Webb v EMO Cargo (UK) Ltd.* [1994] ECR I-3567, the ECJ held that employees may not be dismissed when they become pregnant, even if they were hired in part to cover the maternity leave of another worker. In *Case C-109/00, Teledanmark v Handels og Kontorfunktionærernes Forbund i Danmark* [2001] ECR I-6993, the ECJ prohibited such a dismissal even if the candidate was recruited exclusively for maternity cover.

The scope of protection against discrimination during pregnancy can also extend to maternity pay issues.

- In *Case 342/93, Gillespie and others v Northern Health and Social Services Board* [1996] ECR I-0475 the ECJ held that a woman's pay might be reduced while she was actually on maternity leave, although not so low as to undermine the purpose of maternity leave.

A related element of protection addresses the status of contractual terms during leave.

- In *Case C-136/95, Thibault* [1998] ECR I-2011, the ECJ held that a woman on maternity leave is entitled to any pay increases that she would have received had she been at work. It stated that “to deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.” Regarding illness during pregnancy, In *Case C-66/96, HK (for Hoj Pedersen) v Faellesforeningen for Danmarks Brugforeninger (for Kvickly Skive)* [1998] ECR I-7327, the ECJ held that if workers are generally entitled to full pay during illness, the same provision must extend to pregnant women for illnesses related or unrelated to pregnancy. The ECJ has also looked at a number of specific contractual clauses regarding pay and conditions during pregnancy and maternity leave. See, for example, *Case C-411/96, Boyle and others v Equal Opportunities Commission* [1998] ECR I-6401. It has also considered pay bonuses to constitute part of the pay to which workers on maternity and parental leave are entitled. See *Case C-333/97, Lewen v Denda* [1999] ECR I-7243.

Finally, one of the most critical issues in employment discrimination on the basis of pregnancy is the determination of what constitutes a comparator for pregnant women. The question of whether pregnancy is a disability for the purposes of anti-discrimination law and whether pregnant employees should be treated similarly to other workers incapable for medical or other reasons remains to be a controversial issue in many jurisdictions. The ECJ, however, has firmly dispensed with the need for a comparator for pregnant women.

- In *Case 32/93, Webb v EMO Cargo (UK) Ltd.* [1994] ECR I-3567 discussed above, the ECJ stated that the situation of a woman who finds herself incapable, by reason of pregnancy, of performing the task for which she is recruited should not be compared to that of a man incapable for medical or other reasons. The ECJ held that pregnancy is not in any way comparable to a pathological condition and even less so with unavailability for work on non-medical grounds, both of which are situations that may justify dismissal of a woman without discriminating on grounds of sex. See also *Case C-179/88, Handels-og Kontorfunction-aerernes Forbund i Danmark* [1990] ECR I-3979.

2.8.3 Indirect Discrimination and Part-time Work

A greater proportion of women tend to work part-time due to traditional family responsibilities. Different treatment on the basis of part-time status may thus indirectly discriminate on the basis of sex.

- In *Case 170/84, Bilka Kaufhaus GmbH v Karin von Hartz* [1986] ECR 1607, the ECJ interpreted Article 119/141 on equal pay for equal work to include a prohibition on indirect discrimination. The employer in this case refused to allow long-term part-time workers, the far greater part of whom were women, to participate in an occupational pension scheme. The ECJ held that such discrimination is impermissible, unless an objectively justified factor existed as an acceptable basis

for this differential effect. It left it to the national court, however, to determine whether the explanation presented (i.e., that the employer preferred full-time workers because they were more likely to work at certain times) was justified.

- In *Case 184/89, Helga Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, a collective employment agreement linked promotions and higher salary grades to total hours worked rather than years worked, thus disadvantaging part-time workers, the majority of whom were women. The ECJ held that this would be unacceptable unless the employer could show that the condition was objectively justified by a “relationship between the nature of the duties performed and the experience afforded by the performance of those duties after a certain number of working hours.”
- In *Case 243/95, Hill and Stapleton v Revenue Commissioners* [1998] ECR I-3739, employees switching from a job-share to a full-time schedule were graded as if they had worked for half the number of years. The ECJ held this was unacceptable unless such legislation could be justified by objective criteria unrelated to discrimination on grounds of sex.
- *Case 171/88, Rinner-Kühn v FWW Spezial* [1989] ECR 2743 established that legislation allowing employers to exclude employees working below a certain number of hours from sick pay is indirectly discriminatory where that measure affects a far greater number of women than men. This is the case unless the State shows that the legislation is justified by specific objective factors unrelated to sex discrimination.

Intent to discriminate is not necessary for a finding of discrimination, and many cases of indirect discrimination occur without any intent to discriminate (e.g., *Bilka Kaufhaus* discussed above). Intent to discriminate is not entirely irrelevant, however. Even if a regulation or practice is found not to be discriminatory in terms of impact, it may be held impermissible if there is discriminatory intent behind the regulation or practice.

- In *Case 96/80, Jenkins v Kingsgate Clothing Productions Ltd.* [1981] ECR 0911, although the defendant was not found responsible in terms of discriminatory impact, the ECJ indicated that if discriminatory intent had existed, it would have come to a different decision.

2.8.4 Benefits

A number of cases have come before the ECJ with similar facts to the HRC cases of *Broeks* and *Pauger*.

- In *Case 262/88, Barber v Guardian Royal Exchange* [1990] ECR I-1889, the ECJ held that delaying payments for men until age 55 as compared to 50 for women constituted direct discrimination.
- In *Case C-109/91, Ten Oever* [1993] ECR I-4879, the ECJ held that survivors’ pensions also may not be distributed discriminatorily.

2.8.5 Positive Action

In *Case 407/98, Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539, the ECJ reiterated that it considered automatic priority systems that neglected to look at candidates' individual characteristics unacceptable. It struck down a rule allowing female candidates with sufficient qualifications to be selected over male candidates, provided that the difference in qualifications was not so great that the selection would constitute a breach of objectivity. It specified that rules must consider individual situations, and that the rule in question was disproportionately discriminatory of male candidates.

2.9 African Charter on Human and Peoples' Rights

Article 2 of the AfCHPR prohibits discrimination on the grounds of sex. Article 18(3) provides that the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. The African Union adopted a new Protocol on the Rights of Women in Africa in July 2003.

Although there is not a lot of jurisprudence of the African Commission in the area of discrimination on the grounds of sex, there have been some developments at the national level in Africa.

- In the case of *Mojekwu v Mojekwu* [1997] 7 NWLR 283, the Nigerian Court of Appeal found customary law preventing females from inheriting property discriminatory. The court held that any form of societal discrimination on grounds of sex is unconstitutional and against the principles of an egalitarian society.
- See also the landmark case of *Attorney General (Botswana) v Unity Dow* (124/1990) (CA No. 4/1991) which concerned Section 4 of the Botswana Citizenship Act 1984. Section 4 granted citizenship by birth and descent to all children of Botswanan fathers regardless of the citizenship of their mother but denied citizenship to children of Botswanan mothers who were married to non-citizens. This provision had the effect of depriving two of the applicant's children of Botswanan citizenship because their father was a non-citizen. The applicant claimed that Section 4 discriminated against her on the grounds of sex in breach of relevant provisions of the Botswana Constitution. Much of the judgments of both the High Court and Court of Appeal concern the interpretation of Section 15 of the Constitution, which prohibited discriminatory laws on a number of grounds but omitted discrimination on the basis of sex. The High Court adopted an aggressive interpretation of Section 15. It found that the fact that Botswana was party to a number of international human rights instruments (including CEDAW, the AfCHPR and others) that clearly prohibit discrimination on grounds of sex indicated that the Constitution was not intended to omit discrimination on grounds of sex even if the international instruments were not incorporated into domestic law. The High Court could not accept that Botswana would deliberately

discriminate against women in its legislation while internationally supporting non-discrimination against women and it interpreted the Constitution accordingly. By contrast, the Court did not give similar weight to local customary law, which suggested a contrary interpretation. The Court of Appeal followed the High Court in finding that the Citizenship Act breached, among other rights, the right not to be subjected to degrading treatment and the right not to be discriminated against on the grounds of sex.

2.10 American Convention on Human Rights

The Inter-American system, like other international and regional human rights systems, is based on broad principles of non-discrimination and equal protection of, and before the law. Article 3 of the OAS Charter reaffirms as a basic principle of the organisation “the fundamental rights of the individual without distinction as to race, nationality, creed or sex.” Article 1(1) of the AmCHR contains a guarantee of non-discrimination on the grounds of sex limited to the rights in the Charter. Article 24 of the AmCHR guarantees equality before the law and equal protection of the law for all persons.

There persists in many regions of the Americas a structural inequality that especially affects women as a group. To combat this, the Inter-American system has made strides towards incorporating a gender perspective in its daily work and has examined a number of cases regarding issues including (i) citizenship and naturalisation and (ii) status.

2.10.1 Citizenship

- In *Advisory Opinion No. 4: Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*, IACtHR, Series A, No. 4 (1983) 5 HRLJ 161, the IACtHR looked at the compatibility with the AmCHR of proposed amendments to the Costa Rican Constitution. The opinion concerned a provision in the Costa Rican Constitution, which gave women who married Costa Ricans, but not men, a special status for purposes of naturalisation. The IACtHR stated (at paragraph 64) that one of the assumptions behind such a proposition was;

“[...] notions about parental authority and the fact that authority over minor children was as a rule vested in the father and that it was the husband on whom the law conferred a privileged status of power, giving him authority for example, to fix the marital domicile and to administer the marital property. Viewed in this light, the right accorded to women to acquire the nationality of their husbands was an outgrowth of conjugal inequality.”

The IACtHR concluded that the differential treatment envisaged for spouses could not be justified and was discriminatory.

2.10.2 Status

- In *María Eugenia Morales de Sierra v Guatemala* (No. 4/01), the IACtHR ruled on the provisions of Guatemalan Civil Code that defined the role of each spouse in marriage and established differences between men and women.

María Eugenia Morales de Sierra v Guatemala

This case concerned provisions of the Guatemalan Civil Code that defined the role of each spouse in marriage and allocated different responsibilities to men and women. According to the Code, financial support was the responsibility of the husband and looking after the children and the home the responsibility of the wife. The Code did not prohibit a wife from working outside the home but provided that it did not interfere with her responsibilities in the home. The applicant complained that the Code, by treating women and men differently on the basis of sex, violated her right to equal protection of and before the law under Article 24 of the IACHR.

The IACtHR laid out its interpretation of the meaning of 'equal protection of the law under Article 24 of the AmCHR. At paragraph 31, it stated (in relevant part) that:

“[T]he right to equal protection of the law set forth in Article 24 of the American Convention requires that national legislation accord its protections without discrimination. Differences in treatment in otherwise similar circumstances are not necessarily discriminatory [citing *Belgian Linguistics*]....A distinction which is based on 'reasonable and objective criteria' may serve a legitimate state interest in conformity with the terms of Article 24 [citing *Broeks v the Netherlands* and *Zwaan de Vries v the Netherlands*]. It may, in fact, be required to achieve justice or to protect persons requiring the application of special measures [citing *Advisory Opinion OC-4/84*]. A distinction based on reasonable and objective criteria (1) pursues a legitimate aim and (2) employs means which are proportional to the end sought [again citing *Belgian Linguistics*]....”

The IACtHR also cited the obligations of Guatemala under CEDAW and Article 29 of the IACHR not to discriminate against women. At paragraph 36, it noted that: “[S]tatutory distinctions based on status criteria, such as, for example, race or sex, therefore necessarily give rise to heightened scrutiny.” Citing ECHR jurisprudence, it stated that “very weighty reasons would have to be put forward to justify a distinction based solely on the ground of sex.”

The IACtHR did not consider that the restrictions imposed by the Code were consistent with the aims they were meant to serve, nor were they proportional to those aims. It felt that the overall effect of the Code was to deny women legal autonomy and leave the applicant's rights vulnerable to violation without recourse. The gender-based distinctions established in the challenged articles could not be justified and contravened the rights of the applicant under Article 24.

3 Trans-gender Cases

Some systems, most notably the EU, address discrimination against trans-gendered and trans-sexual individuals as a form of sex discrimination. In *Case C-13/94, P v S and Cornwall County Council* [1996] ECR I-2143, the ECJ prohibited the dismissal of a trans-sexual for reasons relating to gender reassignment. It specified that the right not to be discriminated against on the ground of sex is a fundamental human right, and that the EU directive protecting this right could not be limited to a person being of a particular sex. They are considered applicable to all individuals along what some have called a ‘gender continuum.’ This holding suggests that the ECJ would protect the full range of employment-related rights, such as equal opportunities and promotion, for trans-sexual and trans-gendered individuals. See also the ECHR case of *Sheffield and Horsham v the United Kingdom* (No. 22985/93 and 23390/94, 04/05/2001).

B SEXUAL ORIENTATION

Useful links: Sexual Orientation

- For International Gay and Lesbian Human Rights Commission, see: www.iglhrc.org
- For International Lesbian and Gay Association, see: www.ilga.org
- For other gay and lesbian rights NGOs, see: www.stonewall.org.uk

1 Introduction

‘Sexual orientation’ can be distinguished from other aspects of sexuality including biological sex, gender identity (the psychological sense of being male or female) and the social gender role (adherence to cultural norms for feminine and masculine behaviour). Sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality. It is different from sexual behaviour because it refers to feelings and self-concept; people do not necessarily express their sexual orientation in their behaviour.

Discrimination on the basis of sexual orientation is prohibited under several international instruments and domestic laws; however, it is rarely mentioned explicitly as a ground of discrimination. International or national instruments that contain a non-exhaustive list of anti-discrimination grounds may permit sexual orientation to be read into a catch all ‘other status’ ground. Some international tribunals have interpreted discrimination on the basis of sexual orientation as a subset of sex discrimination, reading it into the enumerated ground of ‘sex’ in the relevant instrument. In *Toonen v Australia* (No. 488/1992, ICCPR), the HRC found that Tasmanian laws criminalising sexual relations between consenting males violated Toonen’s right to privacy protected under the ICCPR. The HRC noted (at paragraph 8.7) that the ICCPR’s reference to ‘sex’ in its Articles 2(1) and 26 included sexual orientation. This approach is also followed in

certain national jurisdictions. Contrast *Case C-249/96, Grant v South West Trains Ltd.* [1998] ECR I-621 where the ECJ considered that the observation of the HRC in *Toonen* did not reflect the generally accepted interpretation of the concept of discrimination based on sex in international instruments. Indeed the HRC reversed its position in *Young v Australia* (No. 941/2000, ICCPR) where it held that sexual orientation was covered by the 'other status' ground of Article 26 of the ICCPR, rather than as an aspect of sex.

Determination of the appropriate comparator for sexual orientation discrimination may have a decisive bearing on the level of protection enjoyed. Homosexual individuals of different sexes may be treated poorly, but because they are treated equally poorly a court might hold that no discrimination has occurred. If homosexuals and bisexuals are compared against the majority heterosexual population, their treatment may be considered inferior. However, if they are compared against one another, for example, two male partners compared with two female partners, the treatment they receive is more likely to be equal, albeit detrimental compared with heterosexual couples. In *Case C-249/96, Grant v South West Trains Ltd.* [1998] ECR I-621 (at paragraph 26-28) the comparison of a lesbian employee with a male homosexual employee resulted in her failure to prove different treatment. The applicant in that case had argued that she and her partner ought to be compared to similarly situated couples from the majority heterosexual population.

2 General Principles under International Instruments

2.1 International Covenant for Civil and Political Rights

Sexual orientation is not mentioned explicitly in any provisions of the ICCPR. However, the HRC has indicated that Article 26 prohibits discrimination on the grounds of sexual orientation. The provisions of the ICCPR that concern sexual orientation discrimination are Article 2 and Article 26. Issues considered by the HRC in its case law on sexual orientation discrimination include (i) the criminalisation of homosexuality, (ii) rights of same-sex partners (iii) the right to marriage for homosexual couples, and (iv) freedom of expression and homosexual speech.

2.1.1 Criminalisation of Homosexuality

The criminalisation of homosexuality has been one of the greatest obstacles to equality for those not part of the majority heterosexual population. In its concluding observations to State reports under the ICCPR from the United States (1995), Sudan (1998), Chile (1999) and Romania (1999), among others, the HRC has drawn attention to the discriminatory effect of criminal prohibitions of homosexual activity.

- In *Toonen v Australia* (No. 488/1992, ICCPR) the HRC found that Tasmanian laws criminalising homosexual acts between consenting adults, even if not enforced in practice, constituted an unlawful and arbitrary interference with the privacy of the applicant, contrary to Article 17(1) of the ICCPR. Rather than finding that such laws violated Article 17 per se, the HRC examined two arguments put forward by the Tasmanian authorities to justify criminalisation of homosexual acts: public health (to prevent the spread of HIV/AIDS) and moral grounds.
- First, the HRC found that criminalisation was not a reasonable and proportionate means of preventing the spread of HIV/AIDS as it tended to impede public health and education programmes and as there was no proven link between continued criminalisation of homosexual activity and control of the spread of HIV/AIDS.
- Second, given the repeal of laws criminalising homosexuality throughout Australia, the lack of consensus in Tasmania on the issue and the failure to enforce the relevant laws in Tasmania, such laws were not deemed essential to the protection of morals in Tasmania and thus failed to meet the test of ‘reasonableness.’ This approach suggests that there may be circumstances in which such laws may be acceptable under the ICCPR.

Having found a violation of Article 17 the HRC did not go on to consider whether there had been a violation of the anti-discrimination provision of Article 26. However, the HRC noted that the reference to ‘sex’ in Articles 2(1) and 26 includes sexual orientation.

2.1.2 The Rights of Same-Sex Partners

- In *Young v Australia* (No. 941/2000, ICCPR) the applicant was in a same-sex relationship for many years. His partner was a war veteran and when he died the author applied for a pension as a veteran’s dependent. He was denied because the relevant rules granted a pension only to unmarried cohabiting partners of the opposite sex. The HRC found that this violated his right to equal treatment before the law contrary to Article 26. The author, as a same sex partner, did not have the possibility of marriage and was not recognised as a cohabiting partner by the legislation because of his sex or sexual orientation. The State failed to show how this unequal treatment of same-sex partners, who were denied benefits, and unmarried heterosexual partners, who were granted benefits, was based on ‘reasonable and objective criteria.’ The HRC also indicated that ‘sexual orientation’ is a prohibited ground under Article 26 of the ICCPR as an ‘other status.’
- Compare the earlier case of *Danning v the Netherlands* (No. 180/1984, ICCPR) where the HRC found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences.

- Compare also the South African Constitutional Court case of *Satchwell v Republic of South Africa* (CCT45/01, 25/07/2001) (at: <http://www.concourt.gov.za/files/satchwell/satchwell.pdf>). This case involved a claim that the lesbian partner of a South African judge was entitled to receive a pension. See also the Canadian case of *M v H* [1999] 2 S.C.R. 3 which concerned the break-up of a long-term same-sex relationship. One of the partners challenged the validity of the definition of spouse in the relevant family law regarding claims for support on the grounds that, by including only married couples and long-term cohabiting heterosexual couples, it discriminated against her on grounds of sexual orientation. The Supreme Court of Canada agreed that the impugned legislation violated Section 15(1) of the Canadian Charter of Rights and Freedoms.

2.1.3 The Right to Marry

- In *Joslin v New Zealand* (No. 902/1999, ICCPR) the authors were a cohabiting lesbian couple whose application for a marriage licence was denied by the New Zealand authorities. Article 23 of the ICCPR specifically grants the right to marry but by reference only to “men and women.” The HRC decided that the right to marry under the ICCPR extends only to marriage between a man and a woman. In light of the scope of the right to marry, refusal to provide for marriage between homosexual couples did not constitute discrimination prohibited by Article 26.

2.1.4 Freedom of Expression and Homosexual Speech

- In *S.E.T.A. v Finland* (No. 14/1991, ICCPR) the authors claimed that the Finnish authorities interfered with their right to freedom of expression and information under Article 19(2) of the ICCPR by restricting radio and TV programmes dealing with homosexuality. Under Article 19(3) public morals can be invoked to justify restrictions on the exercise of the rights protected by Article 19(2). The HRC noted the lack of universally applicable common standards of public morals and afforded a margin of discretion to the State regarding the necessity of restrictions. The risk of ‘harmful effects on minors’ and the lack of control over the audience were relevant factors. The HRC found no violation of Article 19. It did not consider Article 26.

2.2 International Covenant for Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD is concerned with discrimination on the specified grounds of “race, colour, descent, or national or ethnic origin.” It does not explicitly address sexual orientation discrimination. However, discrimination on the grounds of sexual orientation may concern ICERD to the extent that it arises together with racial discrimination (or the two overlap), such as in the case of multiple discrimination.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

Like ICERD, CEDAW is limited to specific grounds of discrimination – discrimination against women. It does not explicitly address sexual orientation discrimination. However, discrimination on the grounds of sexual orientation may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination. The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC prohibits discrimination against any child on the grounds of sex. There is no reference to sexual orientation.

2.6 International Labour Organization

On its face, it does not seem that ILO Convention No. 111 on Non-discrimination (Employment and Occupation) prohibits discrimination on the grounds of sexual orientation. The 1996 ILO General Survey on *Equality in Employment and Occupation* discusses in detail the meaning of ‘sex’ as a ground of discrimination under the Convention but does not refer to sexual orientation as an aspect of that ground. However, Article 1(b) of Convention No. 111 provides that “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...] may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations...” The ILO notes in the General Survey that many members have introduced sexual orientation as a prohibited ground in domestic legislation.

2.7 European Convention on Human Rights

Sexual orientation is not mentioned explicitly in any of the provisions of the ECHR. However, the ECtHR was the first international body to find that criminal laws that prohibit homosexual acts violate human rights. It also has the most comprehensive

jurisprudence on sexual orientation issues. Recent ECHR jurisprudence seems to indicate that sexual orientation is now being treated as a ‘suspect’ classification and any different treatment on this ground requires particularly weighty reasons to justify it. Issues considered by the ECtHR in its case law regarding sexual orientation discrimination include (i) the criminalisation of homosexuality, (ii) prosecution for ‘indecent’ acts, (iii) the age of consent, (iii) exclusion from the military, (iv) child custody and adoption and (v) the rights of same-sex partners.

2.7.1 Criminalisation of Homosexuality

In the case of *Dudgeon v the United Kingdom* (No. 7275/76, 22/10/1981), and subsequently in the cases of *Norris v Ireland* (No. 10581/83, 26/10/1988) and *Modinos v Cyprus* (No. 15070/89, 22/04/1993), the ECtHR found that domestic laws criminalising consensual sexual relations in private between adults of the same sex were contrary to the right to respect for private life laid down in Article 8 of the ECHR. In *Dudgeon*, the ECtHR did not consider it necessary to examine the discrimination argument of the applicant under Article 14 in conjunction with Article 8, as it had already determined under Article 8 that the relevant measures were contrary to the Convention. Subsequent cases have followed this method of analysis.

2.7.2 Prosecution for ‘Indecent’ Acts

- In *A.D.T. v the United Kingdom* (No. 35765/97, 31/07/2000), the applicant complained that his conviction for gross indecency constituted a violation of his right to respect for his private life under Article 8 alone and in conjunction with Article 14. Applying the test used by the ECtHR in Article 8 claims, the key issue was whether the measures complained of were “necessary in a democratic society.” The ECtHR felt that the activities of the applicant were genuinely “private.” Therefore, the same narrow margin of appreciation applicable in other cases involving intimate aspects of private life (e.g., *Dudgeon*) was warranted. The reasons submitted by the State were not sufficient to justify the impugned measures. The ECtHR found a violation of Article 8 and so it did not consider it necessary to examine the case under Article 14, in conjunction with Article 8. See also *Laskey, Jaggard and Brown v the United Kingdom* (Nos. 21627/93, 21826/93, etc., 19/02/1997).

2.7.3 The Age of Consent

There have been a number of claims before the ECtHR that a higher age of consent for male homosexual acts than for heterosexual acts constitutes discriminatory treatment contrary to Article 14.

- In the case of *Sutherland v the United Kingdom* (No. 25186/94, 01/07/1997), the European Commission on Human Rights opined that the existence of legislation making it a criminal offence to engage in male homosexual activities unless both

parties had consented and attained the age of 18, while the age of consent for heterosexual activities was set at 16 years of age, violated Article 14 of the ECHR taken in conjunction with Article 8.

- In *S.L. v Austria* (No. 45330/99, 09/01/2003) and *L. and V. v Austria* (Nos. 39392/98 and 39829/98, 09/01/2003), the applicants complained about the maintenance in force of laws that criminalised homosexual acts of adult men with consenting adolescents between 14 and 18 years of age, and about their convictions under that provision. Relying on Article 8 (privacy) of the ECHR, taken alone and in conjunction with Article 14, they alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable. The State argued that the provision at issue was necessary for the protection of male adolescents. The ECHR examined whether there was any objective and reasonable justification for the different treatment. In this regard, it noted that one factor in determining the scope of the margin of appreciation left to the State was the existence or non-existence of common ground between the laws of the contracting States. It cited an ever-growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. It concluded that the State failed to show 'weighty reasons' to justify the interference.
- In *B.B. v the United Kingdom* (No. 53760/00, 10/10/2004), the applicant complained that he was discriminated against on the grounds of his sexual orientation (in violation of Article 8 in conjunction with Article 14) by the existence of, and by his prosecution under, legislation that made it a criminal offence to engage in homosexual activities with men under 18 years of age whereas the age of consent for heterosexual activities was fixed at 16 years of age. The ECtHR followed its judgments in *S.L. v Austria* and *L v Austria* (cited above) and found a violation of Article 14 taken in conjunction with Article 8 of the ECHR.

2.7.4 Exclusion from the Military

- In *Smith and Grady v the United Kingdom* (Nos. 33985/96 and 33986/96, 27/09/1999), the applicants were members of the Royal Air Force who were discharged solely on the basis of their homosexuality pursuant to a Ministry of Defence policy to exclude homosexuals from the armed forces. The applicants claimed that this policy breached their rights to privacy under Article 8 in connection with Article 14 and that the method of investigating the applicant's sexual orientation amounted to a breach of Article 3 in connection with Article 14. The ECtHR did not consider that the treatment reached the minimum level of severity necessary for it to come within the scope of Article 3 and accordingly found no violation of Article 3 in conjunction with Article 14. There was, however, a violation of Article 8(2) as neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified. The Court held that no

separate issue arose under Article 14 and therefore there was no need to ascertain whether there had been a violation or not.

- In *Lustig-Prean and Beckett v the United Kingdom* (Nos. 31417/96 and 32377/96, 27/09/1999), the ECtHR considered that it could not ignore widespread and consistently developing views or the legal changes in the domestic laws of contracting States in favour of the admission of homosexuals into the armed forces of those States. Accordingly, convincing and weighty reasons had not been offered by the UK Government to justify the discharge of the applicants, which was a direct consequence of their homosexuality. The ECtHR held that there was a breach of Article 8 of the ECHR. It did not, therefore, need to consider the complaint under Article 14, together with Article 8. See also *Beck, Copp and Bazeley v the United Kingdom* (Nos. 48535/99, 48536/99 and 48537/99, 22/10/2002) and *Perkins and R v the United Kingdom* (Nos. 43208/98 and 44875/98, 22/10/2002).

2.7.5 Child Custody and Adoption

- In *Salgueiro Da Silva Mouta v Portugal* (No. 33290/96, 21/12/1999), the applicant complained that the Portuguese appeal court based its decision to award parental responsibility for their daughter to his ex-wife rather than to himself exclusively on the ground of his sexual orientation in violation of Article 8 (taken alone and in conjunction with Article 14). The ECtHR found that the consideration by the appeal court of the applicant's homosexuality as a factor in making its decision on custody represented a difference of treatment between the applicant and his ex-wife based on the applicant's sexual orientation. While accepting that the decision of the appeal court pursued a legitimate aim - the protection of the health and rights of the child - the distinction it made based on considerations regarding the applicant's sexual orientation, was not acceptable under the ECHR. No reasonable relationship of proportionality existed between the means employed and the aim pursued. Accordingly there was a violation of Article 8 taken in conjunction with Article 14.
- In *Fretté v France* (No. 36515/97, 26/02/2002), the applicant alleged that the rejection of his application for authorisation to adopt had implicitly been based on his sexual orientation alone. He argued that that decision, taken in a legal system which authorised the adoption of a child by a single, unmarried adoptive parent, effectively ruled out any possibility of adoption for a category of persons defined according to their sexual orientation, namely homosexuals and bisexuals, without taking any account of their individual personal qualities or aptitude for bringing up children. He alleged that he was the victim of discrimination on the ground of his sexual orientation, in breach of Article 14 taken in conjunction with Article 8. The ECtHR agreed that the decision contested by the applicant was based on his homosexuality. However, it felt that the scope of the margin of appreciation for the State here was wide because of the lack of consensus in the contracting States and in the scientific community on the issue of homosexual adoption. The ECtHR

decided that the refusal to authorise adoption did not infringe the principle of proportionality and the justification given by the State was objective and reasonable so that the difference in treatment complained of was not discriminatory within the meaning of Article 14.

2.7.6 The Rights of Same-Sex Partners

The ECtHR has considered the rights of same-sex partners on a number of occasions.

- In *Karner v Austria* (No. 40016/98, 24/07/2003), the applicant claimed to have been a victim of discrimination on the ground of his sexual orientation in that the Austrian Supreme Court had denied him the status of “life companion” of his deceased partner, within the meaning of the relevant Austrian legislation, thereby preventing him from succeeding his partner’s tenancy. He invoked Article 14 taken together with Article 8. The applicant had been living in the flat that had been let to his partner and if it had not been for his sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease under the relevant legislation. The ECtHR accepted the State’s argument that protection of the family in the traditional sense was a weighty and legitimate reason that might justify a difference in treatment. However, in cases of difference in treatment based on sex or sexual orientation, the margin of appreciation afforded to member States is narrow. The State failed to show that the measure in question was necessary to achieve the aim and did not offer convincing and weighty reasons justifying the interpretation of the measure. Thus, there had been a violation of Article 14 of the Convention, taken together with Article 8.

See also *Simpson v the United Kingdom* (No. 11716/85, 14/05/1986); *W.J. and D.P. v the United Kingdom* (No. 12513/86, 13/07/1987); *C and L.M. v the United Kingdom* (No. 14753/89, 09/10/1989); *Z.B. v the United Kingdom* (No. 16106/90, 10/02/1990); *Kerhoven and Hinke v the Netherlands* (No. 15666/89, 19/05/1992); and *Mata Estevez v Spain* (No. 56501/00, 10/05/2001).

2.8 European Union

Prior to the introduction of Article 13 into the EC Treaty, the EU had no explicit power to prohibit discrimination on grounds of sexual orientation.

- In *Case C-249/96, Grant v South West Trains Ltd.* [1998] ECR I-621 (noted above), the ECJ refused to characterise discrimination on the basis of sexual orientation as a subset of sex discrimination because such an interpretation would have had the effect of extending the scope of Article 119 (as it then was) of the EC Treaty beyond the competences of the EC. As is clear from the *Grant* judgment, the consequence of the decision was that legislation regarding equal pay and equal treatment on grounds of sex did not protect individuals against discrimination on grounds of sexual orientation. The decision confirmed that Community law as it stood at that time did not cover discrimination on grounds of sexual orientation.

Contrast *Case C-13/94, P v S and Cornwall County Council* [1996] ECR I-2413, discussed in *Grant*, where the ECJ found that the scope of Article 119 and the Equal Treatment Directive both applied to discrimination arising from gender reassignment. In that case, the ECJ held that the Equal Treatment Directive was “simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.” In *Grant*, however, the ECJ refused to apply this broad proposition to discrimination on grounds of sexual orientation. According to the Court, discrimination on grounds of gender reassignment, unlike sexual orientation, is based “essentially, if not exclusively, on the sex of the person concerned.”

The insertion of Article 13 into the EC Treaty provided specific powers to the EU to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation as regards employment and occupation. Pursuant to Article 13, the Council of the EU passed the Framework Directive to provide a framework for member States to introduce measures to eliminate discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Framework Directive applies to employment, vocational guidance and training, and membership of professional, workers’ and employers’ bodies. It does not apply to social security or social protection schemes. It provides for the prohibition of discrimination related to employment and occupations. Harassment is included in the broad definition of discrimination, and both direct and indirect forms of discrimination are prohibited. Member States are required to implement the Directive in national law.

2.8.1 Rights of Same-Sex Partners

Prior to the introduction of Article 13, there were a number of EC cases regarding inequalities in the granting of benefits between same-sex and heterosexual partnerships.

- In *Case C-2491/96, Grant v South-West Trains Ltd*, the ECJ held that “the refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the EC Treaty” or the Equal Pay Directive. It gave two reasons. First, the unequal treatment was not discrimination directly based on sex because it applied in the same way to both male and female workers. The travel pass would be refused to both a male worker living with a same-sex partner and to a female worker living with a same-sex partner. Second, in the then state of EC law stable same-sex relationships were not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. An employer was not therefore required by EC law to treat the situation of a person who has a stable same-sex relationship as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.

Contrast *El-Al Israel Airlines Ltd. v Danielowitz* (1994) 48(5) P.D. 749, where the Supreme Court of Israel interpreted legislation prohibiting discrimination based on sexual orientation in employment as requiring an airline to provide the same free flight benefits to the unmarried same-sex partners of its employees as to the unmarried different-sex partners of its employees.

- In *Case C-125/99, D v Council* [2001] ECR I-4319, the EU Council had denied benefits to the same-sex spouse of a Swedish employee. By that time, Sweden accorded most legal marital rights to same-sex couples and had an established registry for such partnerships. The EU Court of First Instance rejected the plaintiff's application on all grounds, relying in part on *Grant v South-West Trains Ltd*. An appeal to the ECJ was dismissed with costs awarded against D., thereby maintaining the lower court's position that there was no breach of fundamental rights because homosexual partnerships were not to be afforded the same protections as married couples.

2.9 African Charter on Human and Peoples' Rights

Article 2, the general prohibition of discrimination of the African Charter, contains no explicit reference to sexual orientation. However, it does prohibit discrimination on grounds of 'sex' or 'other status.'

2.10 American Convention on Human Rights

Neither Article 1 nor Article 24 of the AmCHR contains an explicit reference to sexual orientation as a ground of discrimination. However, Article 1 prohibits discrimination on grounds of sex or 'other social condition.' There have been very few cases involving claims of sexual orientation discrimination.

- *Marta Lucía Álvarez Giraldo v Colombia* (Case 11.656, Report 71/99 on admissibility) 4 May 1999, concerned a petitioner in prison who alleged violations of rights protected under Articles 5 (right to humane treatment), 11 (right to privacy), and 24 (right to equal protection) of the AmCHR by the prison authorities' decision not to authorise the exercise of her right to receive intimate visits because of her sexual orientation. The State argued that allowing homosexuals to receive intimate visits would affect the internal disciplinary regime of prison establishments and that Latin American culture has little tolerance towards homosexual practices in general. In support of its position, the State cited considerations regarding prison policy. The IACtHR found that, in principle, the claim of the petitioner referred to facts that could involve, *inter alia*, a violation of Article 11(2) of the AmCHR in so far as they could constitute an arbitrary or abusive interference with her private life. It declared the case admissible. The Article 24 claim was not addressed in the admissibility decision.
- In *José Alberto Pérez Meza v Paraguay* (Petition 19/99, Report 96/01) 10 October 2001, the applicant sought recognition of a *de facto* partnership (or marriage)

against the estate of his deceased homosexual partner. The State prohibited same-sex marriage and only recognised common law marriage between people of the opposite sex. The applicant claimed that this discriminated against him on account of his sexual choices. The IACtHR dismissed the claim because the applicant failed to substantiate it.

3 National Jurisdictions

Many national laws, including the Canadian Charter of Rights and Freedoms, do not list sexual orientation as a prohibited ground of discrimination. Nevertheless, domestic courts in a number of jurisdictions have interpreted those laws to prohibit discrimination on the grounds of sexual orientation. The Canadian Supreme Court has held that such discrimination is prohibited by analogy with listed grounds. According to the Court in the case of *Egan v Canada* [1995] 2 S.C.R. 513 (at paragraph 131), Section 15(1) of the Charter prohibits discrimination “on the basis of a personal characteristic which is either enumerated in Section 15(1) of the Charter or which is analogous to those enumerated.” In *Egan* (at paragraph 176-177) and subsequently in *Vriend v Alberta* [1998] 1 S.C.R. 493 (at paragraph 89-91), the Supreme Court held that sexual orientation is analogous to the other personal characteristics (grounds) enumerated in Section 15(1) and, therefore, discrimination on that ground is prohibited by the Charter.

C RACE, COLOUR, DESCENT AND ETHNIC ORIGIN

Useful links: Race, Colour, Descent and Ethnic Origin

- For ICERD, see: http://www.unhchr.ch/html/menu3/b/d_icerd.htm
- For UN Declaration on Race and Racial Prejudice, see: <http://www.hri.ca/uninfo/treaties/19.shtml>
- For UN Declaration on ERD, see: <http://www.unhchr.ch/html/menu3/b/9.htm>
- For UN Declaration on Rights of Minorities, see: http://www.unhchr.ch/html/menu3/b/d_minori.htm
- For ECRI, see: <http://www.coe.int/ecri>
- For EU Monitoring Centre on Racism and Xenophobia, see: <http://eumc.eu.int>
- For International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, see: http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm
- For World Conference Against Racism, Resolution 2001/11, see: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.2001.11.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.11.En?Opendocument)

Useful references

- For discussion of racism, see: Kevin Boyle and Annelise Baldaccini, 'International Human Rights Approaches to Racism' in Sandra Fredman (ed.), *Discrimination and Human Rights: The Case of Racism*, Oxford University Press, p.144.

1 Introduction

1.1 Definition of 'Racial Discrimination'

ICERD is the only international human rights convention to define 'racial discrimination.' In *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia*, I.C.J. Rep., 1971, the International Court of Justice accepted the ICERD definition as an authoritative interpretation of the non-discrimination clause of Article 1(3) of the UN Charter. Other definitions of racial discrimination can be found in the European Commission against Racism and Intolerance ("ECRI") General Policy Recommendation No. 7, 'Key Elements Of National Legislation Against Racism And Racial Discrimination,' and Article 2 of the EU Race Directive.

According to Article 1(1) of ICERD, 'racial discrimination' is:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

The concept of 'race' in this context thus encompasses a whole range of characteristics arising from biological, economic, social, cultural and historical factors. According to CERD General Recommendation 24, 'descent' "includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status." 'National or ethnic origin' concerns linguistic, cultural and historical differences. CERD has also stated (in General Recommendation 8) that the identification of individuals as members of a particular racial or ethnic group "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned". 'Race' for the purpose of the prohibition of discrimination can therefore be determined by a group's belief in its separate identity. According to CERD General Recommendation 14, States may not "decide at their own discretion which groups constitute ethnic groups or indigenous peoples." There is considerable overlap between discrimination on grounds of race and 'minority rights' in general. For a discussion of the relationship between the two, refer to the section on minority rights in Chapter VI.

International and regional systems of human rights protection have recognised other forms of racial discrimination that are not contained in the ICERD definition. For example, the UN Sub-Commission on Human Rights Resolution 2001/11 refers (in paragraph 12) to “other patterns of discrimination such as contemporary forms of slavery, that are based on, *inter alia*, race, colour, social class, minority status, descent, national or ethnic origin or gender”. Other groups that are particularly subject to racial or ethnic discrimination include migrants, indigenous peoples, victims of trafficking, refugees and asylum-seekers. See, for example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families above. In the form of apartheid, slavery and the caste system, racial discrimination has resulted in some of the grossest examples of inequality in modern times.

1.2 Racism and Racial Discrimination

As in the case of sex discrimination, racial discrimination manifests itself through the denial in various ways of the right to equal participation in society. It also appears in much more blatant forms through differing manifestations of racism such as hate speech, racist organisations, incitement to racial hatred and racially motivated violence. In General Policy Recommendation No. 7, ECRI defines ‘racism’ as “the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.” In international instruments racist activities are often prohibited in and of themselves. Article 4(a) of ICERD requires States parties to penalise four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts. Many racist activities are prohibited by general substantive rights, such as the right to life or freedom from torture. For this reason, much international jurisprudence is not concerned with non-discrimination provisions as such but rather other substantive guarantees.

1.3 Nationality, Language and Race

In its broadest and most loose definition, racial discrimination can include any discrimination against minority groups whose identity is based on language, culture, religion or national or ethnic origin (again note the overlap with minority rights, discussed in Chapter VI below). In practice, there is a fine line between these various grounds of discrimination. An individual may be subject to discrimination based on more than one ground at once and discrimination on one ground may also constitute discrimination on another, regardless of the label applied by a tribunal. There is, therefore, much overlap between the next four sections of the Handbook (race, nationality, language and religion) and many of the cases discussed in one section could equally be discussed in another or under minority rights in Chapter VI.

This covers discrimination on grounds of race, colour and ethnic and social origin. Nationality is discussed separately in Section D below largely because of its ‘legal’ nature, its relationship to citizenship, and the consequent limitations on the operation of international prohibitions against nationality discrimination. (e.g., in Articles 1(2) and 1(3) of ICERD). However, to the extent that ‘national origin’ is part of the definition of racial discrimination under CERD, cases before CERD relevant to nationality are discussed in this section as well. Discrimination on grounds of language too has peculiar features that warrant separate treatment, in this case in Section E below.

1.4 Social Origin

This chapter does not address discrimination on the basis of social origin. This is because it is one of the most difficult grounds to define and, consequently, it has been pleaded in very few cases before international human rights tribunals. The ILO General Survey defined discrimination on the basis of social origin (at paragraph 43) as occurring “when an individual’s membership in a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied certain jobs or activities, or because he or she is only assigned certain jobs.” Discrimination on the basis of social origin is becoming less common and more complex in nature in industrialised States as the rigidity of class systems breaks down and social mobility increases.

2 General Principles under International Instruments

Almost every international human rights instrument prohibits racial discrimination. This prohibition either relates to the exercise of specific rights (e.g., Article 14 of the ECHR and Article 2 of the AfCHPR) or is a freestanding right such as in the case of ICERD. The prohibition of racial discrimination is also a peremptory norm of customary international law (*jus cogens*) and therefore binding on all States independently of any treaty obligations. See, for example, the US (Third) Restatement of the Foreign Relations Law. Of the international and regional mechanisms, those of ICERD and the ECHR have the most developed jurisprudence on racial and ethnic discrimination.

2.1 International Covenant on Civil and Political Rights

Article 2 and Article 26 of the ICCPR prohibit discrimination on the grounds of race, colour, and national or social origin. The ICCPR also contains provisions prohibiting racist acts. See, for example, Article 20, discussed under ‘hate speech’ below. Because of the ‘*lex specialis*’ of ICERD, there are few cases on racial discrimination pleaded before the HRC.

2.1.1 Hate Speech

The prosecution of hate speech demonstrates a tension between equality and freedom of expression. Article 20(2) of the ICCPR provides that “[A]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Against this, Article 19(2) lays down the right to “seek, receive and impart information and ideas of all kinds.” Article 19(3) provides that the right to freedom of expression in Article 19(2) carries “special duties and responsibilities” and may therefore be subject to restrictions necessary for, *inter alia*, “the respect of the rights or reputation of others” or the protection of public morals. The UN treaty bodies have treated forms of racial expression as a special case. See, in particular, HRC General Comment 11 (1983). In addition, at paragraph 12(m) of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Resolution 2001/11, the UN Sub-Commission on Human Rights state that “[T]he incompatibility between freedom of speech and campaigns promoting hate, intolerance and violence on the basis of racism, racial discrimination and xenophobia, particularly in the digital age.”

- In *Faurisson v France* (No. 550/1993, ICCPR) the HRC considered Article 19(3) and held that a statement promoting anti-Semitism could be punished under French national law.

2.1.2 Racist Motivation for Crimes

The existence of racial motivation as an aggravating factor to criminal offences has recently been recognised by the UN Committee against Torture in *Dzemajl* (No. 161/2000, CAT). In that case, mob action by non-Roma nationals of Montenegro destroying a Roma settlement was “committed with a significant level of racial motivation”, which aggravated the violation of Article 16(1) of the UN Convention against Torture. Some national legislation also applies increased penalties for aggravating circumstances of a racist nature. For example, see the French Penal Code (February 2003), Articles 132-76.

2.2 International Covenant on Economic, Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

The definition of ‘racial discrimination’ in Article 1 of ICERD encompasses both direct and indirect discrimination. In [CERD General Recommendation 14](#) (1993), CERD confirmed that ICERD prohibits indirect discrimination on the basis of race. Article 2(1) of ICERD also obliges States parties to take positive measures to eliminate discrimination “by all appropriate means and without delay.” Under Article 2(1)(d), this obligation to eliminate discrimination extends to both the public and the private sphere. Article 2(1) sets out five specific objectives for States parties in order to reach the goal of eliminating race discrimination, including both negative and positive measures. Article 5 provides a non-exhaustive list of rights including civil and political rights, and economic, social and cultural rights, representing key areas in which experience has shown racial discrimination to occur (e.g., employment, the administration of justice, etc.).

Each State party undertakes to prohibit and eliminate discrimination in the enjoyment of these rights under Article 5 but only to the extent that they are guaranteed in the State party’s domestic law. In *Diop v France* (No. 21/1989, ICERD), Mr. Diop, a Senegalese citizen and a lawyer resident in Monaco claimed that France had violated Article 5(e) (discrimination in enjoyment of the right to work on grounds of nationality) by denying him the right to become a member of the Nice Bar on the ground that he was not a French national. CERD rejected the complaint as being outside its mandate. The rights protected by Article 5 were of a “programmatic character subject to progressive implementation”. CERD’s mandate was not to see that Article 5 rights were established, rather to “monitor the implementation of these rights, once they have been granted on equal terms.”

2.3.1 Employment

Racial discrimination in employment is one of the most common forms of racial discrimination that comes before domestic tribunals. Racial discrimination may occur throughout the employment relationship - in the hiring of workers, promotion, job assignment, termination of employment and compensation. Each of the cases cited below are also relevant to discrimination on grounds of nationality.

- *Yilmaz-Dogan v the Netherlands* (No. 1/1984, ICERD) concerned a complaint from a Turkish national living in the Netherlands. She alleged racial discrimination in the enjoyment of the right to work and associated rights under Article 5(e)(i). The alleged act of discrimination was a comment contained in her employer’s request to the authorities to permit the termination of her employment during her pregnancy that compared the behaviour of “foreign women workers” unfavourably to that of a “Netherlands girl”. CERD held that the Dutch court with the ultimate decision on dismissal had not addressed the alleged discrimination and concluded that she had not been afforded protection in respect of her right to work under Article 5.

See also *Z.U.B.S. v Australia* (No. 6/1995, ICERD) where a Pakistani citizen resident in Australia alleged racial discrimination in employment but CERD held that domestic remedies were correctly applied. In *Barbaro v Australia* (No. 12/1998, ICERD) an Australian resident of Italian origin alleged a violation of Article 5(a) and (e)(i) because of the withdrawal of his temporary employment licence and the refusal to permit his permanent employment in a casino. CERD found that he failed to exhaust domestic remedies.

- In *B. M. S. v Australia* (No. 8/1996, ICERD) the author claimed that a quota system and examination for overseas doctors were unlawful and constituted racial discrimination violating his right, under Article 5(e)(i) of the Convention, to work and to free choice of employment. CERD noted that all overseas-trained doctors were subjected to the same quota system and were required to sit the same written and clinical examinations, irrespective of their race or national origin. Further, the evidence submitted did not prove that the system worked to the detriment of persons of a particular race or national origin. Medical students in Australia did not share a single national origin so the measures would not indicate discrimination on those grounds. CERD found no violation of Article 5(e)(i) or any other provision of ICERD. See also *D.S. v Sweden* (No. 9/1997, ICERD) where a Swedish citizen of Czech origin alleged discrimination in his search for employment on basis of national origin and status as an immigrant.

2.3.2 Access to Goods and Services (and Public Accommodation)

Racial or ethnic discrimination in the provision of goods or services to the public is also prohibited by ICERD. Cases involving the denial of services have included, although are not limited to, things such as the denial of financial services and refusal of entry to a public space. In this area, there are many good examples of private sector discrimination.

- In *Habassi v Denmark* (No. 10/1997, ICERD) a Tunisian citizen resident in Denmark was denied a bank loan on the sole ground of his non-Danish nationality. The complainant alleged a violation of Article 2(1)(d) of ICERD, in that neither the police department nor State prosecutor had examined whether a bank's loan policy constituted indirect discrimination on the basis of national origin and race. CERD held that the complainant had been denied the right to an effective remedy (Article 6, ICERD) and recommended that the State party take measures to counteract discrimination in the loan market. In its report, CERD stated that "[F]inancial means are often needed to facilitate integration in society."
- In *B.J. v Denmark* (No. 17/1999, ICERD) a Danish engineer of Iranian origin and his friends were denied entry to a disco by a doorman because they were "foreigners". He claimed that the fine imposed on the doorman by the Danish court was not effective satisfaction and reparation. CERD found no violation of Article 6, but noted that: "[b]eing refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is

a humiliating experience which... may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.”

- *Koptova v Slovak Republic* (No. 13/1998, ICERD) concerned prohibitions on settlement and other restrictions placed on Roma families by local municipalities in the Slovak Republic. The restrictions on freedom of movement and residence were rescinded so that CERD did not find that they represented a violation of Article 5(d)(i), as alleged. However, CERD recommended that the State party take the necessary measures to ensure that practices restricting the freedom of movement and residence of Roma were fully eliminated.
- In *Lacko v Slovakia* (No. 11/1998, ICERD) the author was refused service in a restaurant because he was Roma. After a prolonged investigation, the restaurant owner was prosecuted. CERD held that the prosecution and penalty constituted sanctions compatible with the obligations of the State. However, CERD recommended to the State party that it complete its legislation in order to guarantee the right of access to public places in conformity with Article 5(f) of ICERD and to sanction the refusal of access to such places for reason of racial discrimination.
- In *F.A. v Norway* (No. 18/2000, ICERD) CERD held that commercial activity of housing agencies offer a general service to the public and come within the purview of Article 5(f) of the Convention. States Parties should ensure that persons seeking to rent or purchase apartments and houses are adequately protected against racial discrimination on the part of the private sector.

2.3.3 Hate Speech

Like the HRC, CERD had long recognised the problem of hate speech and racist activities. In its General Recommendation No. 15, CERD stated that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. The citizen's exercise of this right to freedom of expression carries special duties and responsibilities among which the obligation not to disseminate racist ideas is of particular importance. The few cases that have come before CERD concerning racist remarks, threats and public racist insults have been considered under Articles 4(a) and 6.

- In *L. K. v the Netherlands* (No. 4/1991, ICERD) members of the public made racist remarks and threats to the complainant as he was inspecting municipal housing for his family to reside. The HRC held that this constituted incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin, contrary to Article 4(a) of ICERD. Furthermore, the investigation into these incidents by the police and prosecution authorities was incomplete. CERD indicated that when threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition. The mere fact that the State passes laws

criminalising racial discrimination does not in itself represent full compliance with ICERD.

- In *Ahmad v Denmark* (No. 16/1999, ICERD), the author, a Danish citizen of Pakistani origin, was the subject of a public racist insult in a high school. The authorities failed to investigate properly or prosecute the complaint and the author never obtained an apology or sufficient satisfaction or reparation. CERD held that the author was denied effective protection against racial discrimination and an effective remedy in violation of Article 6 of ICERD.

2.3.4 Racism in the Administration of Justice

Article 5 of CERD may be violated when no remedy is provided for a claim of bias in the administration of justice (for example, a racist jury).

- *Narrainen v Norway* (No. 3/1991, ICERD) concerned a Norwegian citizen of Tamil origin during whose trial for a drug-related offence two members of the jury were overheard making racial slurs. He claimed a violation of Article 5(a) (equal treatment before tribunals without distinction as to race, etc.) because the two offending jurors were not excluded even after the trial judge investigated the matter. CERD was not prepared to interfere with Norwegian criminal procedure, but recommended that due attention be given to the impartiality of juries. There has been similar jurisprudence under Article 6 of the ECHR, e.g., *Remli v France* (No. 16839/90, 23/04/1996) and *Sander v United Kingdom* (No. 34129/96, 09/05/2000). These cases are discussed below.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women. It does not explicitly address racial discrimination. However, racial discrimination may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination or where there are aspects of racial discrimination that particularly discriminate against women. The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC provides that the State parties will guarantee the rights in the Convention to each child without discrimination on grounds of the child's or his parents' or legal guardians' race, colour, national, social or ethnic origin. In General Comment No. 1, the CRC highlighted the important role of education (Article 19(1), CRC) in the struggle against racism, racial discrimination, xenophobia and related intolerance.

2.6 International Labour Organization

Article 1 of the Discrimination (Employment and Occupation Convention) (No. 111) prohibits discrimination on the grounds of race, colour, national extraction or social origin in employment or occupation.

2.7 European Convention on Human Rights

Article 14 of the ECHR prohibits discrimination on grounds of race, colour, national or social origins or association with a national minority. As outlined in Chapter II of the Handbook, Protocol No. 12 to the ECHR contains a general non-discrimination clause, Article 1(1), in the same words as Article 14, which will prohibit discrimination in respect of all rights under the laws of contracting parties when it comes into force.

Very “weighty reasons” are required to justify different treatment of a particular racial group. In *East African Asians v the United Kingdom* (Nos. 4403/70, 14/12/1973) the European Commission on Human Rights held (at paragraphs 207 and 208) that “discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3” of the ECHR and that “a special importance should be attached to discrimination based on race.” See below in Chapter VI. In the more recent case of *Cyprus v Turkey* (No. 25781/94, 10/05/2001) the ECtHR (citing *East African Asians* and *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81, etc., 28/05/1985) held that the applicants had suffered widespread and serious discriminatory treatment in violation of Article 3 of the ECHR. It noted (at paragraph 306) that a special importance should be attached to discrimination based on race and that it could amount to degrading treatment prohibited by Article 3. It held that it was not necessary to consider the issue under Article 14.

The ECHR has usually avoided dealing with claims of discrimination on grounds of race, however. Most claims of racial discrimination have been frustrated by lack of proof of *prima facie* discrimination and have, thus, not reached the level of objective justification scrutiny. In the case of *Abdulaziz*, the ECtHR refused to consider evidence of indirect discrimination on the grounds of race.

Abdulaziz, Cabales and Balkandali v the United Kingdom

The applicants were lawfully residing in the UK. Due to immigration rules at that time their husbands were refused permission to join them. The applicants claimed that the immigration legislation, which differentiated between male and female immigrants, discriminated against them on grounds of sex contrary to Article 14 in conjunction with Article 8. They also claimed that the legislation indirectly discriminated against them on the grounds of race.

The State argued that the differences of treatment on the grounds of sex were based on objective and reasonable justifications in proportion with the aim pursued. The immigration policy was designed to protect the domestic labour market at a time of high unemployment. The government emphasised the ‘statistical fact’ that male immigrants would have a greater

impact than female immigrants on the domestic labour market. It claimed that the reduction in the number of male immigrants since the introduction of the Rules had a significant impact on the market (see paragraph 76).

The ECtHR reaffirmed previous rulings that the application of Article 14 does not presuppose the breach of one of the other Articles in the ECHR, however the facts of the case must fall within the ambit of one of the ECHR Articles. The ECtHR also reaffirmed the test for permissible discrimination – that it must be in pursuit of a legitimate aim and have objective and reasonable justifications. There must also be a relationship of proportionality between the means employed and the aim pursued. The ECtHR referred to the cases of *Belgian Linguistics*, *Marckx* and *Rasmussen* in support (see paragraph 72).

On the sex discrimination claim, the ECtHR held that, although the aim of protecting the domestic labour market was legitimate, the difference of the respective impacts of men and women on the labour market did not justify the different treatment of the sexes under the immigration rules. Thus there had been a violation of Article 14 in conjunction with Article 8 on the grounds of sex. The ECtHR espoused the need for “very weighty reasons” in order to justify different treatment on the grounds of sex:

“As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.” (paragraph 78)

Regarding the race discrimination claim, the ECtHR seemed to suggest that indirect discrimination is not prohibited by the ECHR. It ruled that, in this case, there was no discrimination on the grounds of race as the immigration rules made no distinction on those grounds. That it affected one ethnic group more than another was due to the fact that, of those wishing to immigrate, some ethnic groups outnumbered others (see paragraphs 84–86).

However, the ECtHR has considered some cases where racial discrimination or racism has been alleged in relation to (i) serious human rights abuses, (ii) hate speech, (iii) home, privacy and property and (iv) the administration of justice.

2.7.1 Human Rights Abuses Motivated by Racism

There have been a number of cases before the ECtHR of violations of the prohibition against torture and the rights to liberty and security that seemed to be motivated by racism and that might have amounted to a breach of Article 14 as well. However, the ECtHR has been slow to recognise the connection between acts of violence and any associated racist motivation.

- In *Velikova v Bulgaria* (No. 41488/98, 18/05/2000), the applicant and her partner were Roma. The applicant’s partner died after spending 12 hours in police custody following his arrest and detention on charges of cattle theft. The applicant alleged that this amounted to a breach of the right to life under Article 2 and also a violation of Article 14 in that the motive for the ill treatment he suffered in custody was race or ethnic origin. The ECtHR held that the standard of proof required under the Convention is “proof beyond reasonable doubt”. The ECtHR felt that the

material before it did not enable it to conclude beyond reasonable doubt that the victim's death and the lack of a meaningful investigation into it were motivated by racial prejudice. Therefore there was no violation of Article 14. See also *Anguelova v Bulgaria* (No. 38361/97, 13/05/2002).

- *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, 28/02/2004) is discussed above in the 'Indirect Discrimination' section of Chapter III. In that case, the ECtHR for the first time found a violation of the guarantee against race discrimination in Article 14 in conjunction with the right to life (Article 2). The applicants were the relatives of two men of Roma origin shot by the Bulgarian military police who were trying to arrest them. The applicants claimed a violation of Article 2 and that the investigation into the deaths was ineffective and therefore in breach of the 'procedural right' of an effective investigation under Article 2 and the right to a remedy under Article 13. In addition they argued that the killings resulted from race discrimination towards persons of Roma origin and therefore violated Article 14. At paragraph 58 of its judgment, the ECtHR stated that to consider such cases:

"[...] on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see, mutatis mutandis, *Thlimmenos v Greece* (No. 34369/97, 06/04/2000). In order to maintain public confidence in their law enforcement machinery, contracting States must ensure that in the investigation of incidents involving the use of force a distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing."

At the same time, the ECtHR also recognised that in practice proving a racial motivation may be difficult. Thus, a State Party's obligation to investigate possible racist motivation for a violent attack is an obligation to use "best endeavours." At time of writing, *Nachova v Bulgaria* is pending before the Grand Chamber of the ECtHR.

Certain ethnic and minority groups in Europe have also been identified as requiring special protection. For example, ECRI General Policy Recommendation No. 3 recalls the obligations of the member States of the COE to combat racism targeted against Roma communities, General Policy Recommendation No. 5 highlights the specific case of the Muslim community and General Policy Recommendation No. 9 concerns the fight against anti-Semitism.

2.7.2 Hate Speech

Racist, fascist, xenophobic or 'revisionist' expression is likely to be subject to restrictions either under Article 10 (freedom of expression) or Article 17 (prohibition of

abuse of rights) of the ECHR. Under Article 10(2), such speech may be restricted, *inter alia*, if “necessary in a democratic society” or for the “protection of the reputation or rights of others”. Alternatively, racist views might be excluded from the scope of Article 10 altogether by way of Article 17, which prohibits the abuse of rights contained in the ECHR and so prevents those convicted of hate speech from alleging such conviction breached their rights to free expression under the ECHR. See, for example, *Glimmerveen and Hagenbeek v the Netherlands* (Nos. 8348/78 and 8406/78), which concerned a criminal conviction for possession of leaflets advocating removal of non-whites from the Netherlands and a disqualification from municipal elections. The defendants could not rely on Article 10 because Article 17 required the protection of the targeted minority.

- In *Lehideux and Isorni v France* (No. 24662/94, 23/09/1998), the ECtHR stated that expression denying “clearly established historical facts” (e.g. the Holocaust) should be dealt with under Article 17, but where the expression falls more into the category of reasonably disputable historic fact it may fall within the protection of Article 10. The ECtHR stated (at paragraphs 53-57) that “[T]here is no doubt that, like any other remark directed against the Convention’s underlying values the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded by Article 10.” In domestic courts of ECHR States, this line has been followed. In *R (on the Application of Louis Farrakhan) v Secretary of State for the Home Department*, Court of Appeal, 30/04/2002, the exclusion of the leader of the Nation of Islam from the UK was held justified on the ground of presenting a significant threat to public disorder.

Other European organisations have been active in trying to stop racist organisations and racist publicity. ECRI General Policy Recommendation No.1 (CRI (96) 43 rev. ‘Combating Racism, Xenophobia, Anti-Semitism and Intolerance’) provides for member States of the Council of Europe to “take measures, including where necessary legal measures, to combat racist organisations.... including banning such organisations where it is considered that this would contribute to the struggle against racism.” ECRI General Policy Recommendation No. 3, provides that member States of the Council of Europe are “to encourage awareness-raising among media professionals, both in the audiovisual field and in the written press, of the particular responsibility they bear in not transmitting prejudices when practising their profession, and in particular in avoiding reporting incidents involving individuals who happen to be members of the Roma/Gypsy community in a way which blames the Roma/Gypsy community as a whole.” ECRI General Policy Recommendation No. 6 recommends that the member States of the COE take specific measures to combat hate speech and incitement to racial hatred on the Internet.

2.7.3 Home, Privacy and Property

In a number of UK cases involving similar facts (*Beard v the United Kingdom* (No. 24882/94, 18/01/2001); *Chapman v the United Kingdom* (No. 27238/95, 18/01/2001);

Coster v the United Kingdom (No. 24876/94, 18/01/2001); *Jane Smith v the United Kingdom* (No. 25154/92, 18/01/2001); and *Lee v the United Kingdom* (No. 25289/94, 18/01/2001) ‘travellers’ alleged that planning and enforcement measures taken by local authorities in the UK against their occupation of land amounted to racial discrimination. Despite the obvious negative impact of the planning laws on travellers, interference with the applicants’ rights was held to be proportionate to the legitimate aim of preservation of the environment and therefore the measures did not constitute discrimination contrary to Article 14. See also the HRC admissibility decision in *Drobek v Slovakia* (No. 643/1995, ICCPR).

- *Chapman v the United Kingdom* (No. 27238/95, 18/01/2001) concerned applicants who were ‘gypsies’ by birth and had lived a travelling lifestyle. They bought land with the intention of living on it in a caravan. They then moved onto the land and applied for planning permission, which was refused. The applicants argued that the government’s failure to accommodate their traditional way of life, by treating them in the same way as the majority population, or disadvantaging them relative to the general population, amounted to discrimination in the enjoyment of the applicants’ rights under the ECHR. The UK government argued that any difference in treatment pursued had a legitimate aim; it was proportionate to that aim and had reasonable and objective justification. The Court did not find a violation of Article 14, as, in its view, there were reasonable and objective justifications for the measures taken against the applicants. Contrast *Moseneke and others v Master of the High Court* (CCT, 06/12/2000), where a South African Act creating a different regime for administering the intestate estates of black people was held to be discriminatory. Note also the overlap with the discussion of private life in Chapter VI below.
- In the recent case of *Connors v the United Kingdom* (No. 66746/01, 27/05/2004) the Court’s proportionality analysis, this time conducted under Article 8, weighed in favour of the applicant. *Connors* concerned a family evicted from the site where they had lawfully lived for almost 13 years, following accusations that they had caused nuisance on the site in breach of their license conditions. The family were rendered homeless and consequently experienced serious problems regarding their security and well being. Under domestic law, the local authority was not required to establish any substantive justifications for the eviction even though the family disputed the allegations. The applicant sought permission to apply for judicial review of the decision to evict but it was denied because judicial review could not provide any opportunity for an examination of the facts in dispute between the parties. The applicant alleged before the Court that the eviction was unnecessary and disproportionate, in particular due to the failure to provide an opportunity to challenge the allegations of nuisance. The Court emphasised that, unlike in the *Chapman* case, the applicant was living lawfully on the site and was seeking procedural guarantees that were available to other mobile home sites and tenants. Thus the margin of appreciation for the State was significantly narrower. The Court concluded that, as there was no strong support “for the justification of

continuing the current regime,” namely the absence of the requirement to establish the reasons for the eviction, Article 8 had been violated.

2.7.4 Racism in the Administration of Justice

Article 6(1) of the ECHR obliges national courts or tribunals to consider whether it is ‘impartial’ when there is a claim of bias. Failure to take appropriate action against alleged race bias among jury members may amount to a violation of Article 6(1). In *Remli v France* (No. 16831/90), the failure to investigate an alleged racist remark by a juror violated Article 6(1). In *Sander v the United Kingdom* (No. 34129/96, 09/05/2000), Article 6 was violated where during the trial of two Asian defendants there was an allegation of two members of the jury making racist jokes and remarks. Contrast *Gregory v the United Kingdom* (No. 22299/93, 25/02/1997) where the judge’s direction to the jury to put prejudice out of their minds in response to allegations of ‘racial overtones’ to jury deliberations was sufficient to avoid a breach of Article 6. There have been similar cases before the HRC under the ICCPR.

2.8 European Union

The EU Race Directive discussed in Chapter II prohibits direct and indirect racial and ethnic discrimination involving public and private bodies in relation to employment and self-employment (including conditions for access to employment, selection criteria and recruitment conditions and promotion), training, employment and working conditions, membership in organisations relating to the workplace, social protection (including social security and healthcare), social advantages, education, access to and supply of goods and services available to the public (including housing). There are yet to be any cases decided by the ECJ on the basis of the Race Directive.

2.9 African Charter on Human and Peoples’ Rights

Articles 2 and 3 of the African Charter prohibit discrimination on grounds of “race, ethnic group, colour... national and social origin...” Article 19 provides for the equality of all peoples. There have been a number of cases before the African Commission regarding racial discrimination.

- *Association Mauritanienne des Droits de l’Homme / Mauritania* (No. 210/98) (and related cases) concerned the ethnic strife that existed in Mauritania between 1986 and 1992. The applicants who were Black Mauritians claimed that they had suffered discrimination on grounds of race by the State and security forces controlled by people of Beidane or Moorish origin. Nearly 50,000 Black Mauritians had been expelled to Senegal and Mali and others had suffered persecution, loss of property and extra-judicial executions, among many other atrocities. In paragraph 131 of its report, the African Commission stated that:

“[...] for a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory

attitude and a violation of the very spirit of the African Charter and the letter of its Article 2.”

- *OMCT and others / Rwanda* (Nos. 27/89, 46/91, 49/91, 99/93) concerned the mass detention, torture and killing of Tutsi people in Rwanda on the basis of their ethnic origin by Hutu-dominated government forces. The African Commission found (at paragraph 23) that “[T]he denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.”

2.10 American Convention on Human Rights

Article 1 of the AmCHR prohibits discrimination “for reasons of race, color... language... national or social origin.” There are also other relevant instruments produced in the Inter-American system (for example, the Draft Inter-American Declaration on the Rights of Indigenous Peoples, 1995). Again, there is limited jurisprudence on this issue.

In *Celestine*, (Case 10.031) IACHR, the State of Louisiana sentenced an indigent African-American to death for the rape and murder of a European American woman. The petitioner alleged that the U.S. had violated the AmCHR by arbitrarily depriving the petitioner of her right to life and by imposing the death penalty in a racially discriminatory manner. The IACHR found the petition inadmissible for failure to state facts that constituted a violation of any of the rights set forth in the AmCHR. However, the IACHR also accepted in principle that statistics alone could be used to shift the burden of proof, provided that the statistical evidence is “sufficient.”

3 Segregation

Segregation is often categorised as a particularly blatant form of direct racial discrimination under national and international laws. For example, under Section 1(2) of the UK Race Relations Act racial segregation automatically constitutes direct discrimination even if the facilities provided to the segregated group are of equal or better standard. Where segregation results in less favourable treatment, there is an arguable case of direct discrimination on normal principles. Segregation is often treated as direct discrimination in cases of equal treatment because it often excludes a vulnerable minority from opportunities that are available to others. The practice of restricting people to certain circumscribed areas of residence or to separate institutions and facilities based on race or religion has been demonstrated by studies in the U.S. to negatively affect the more vulnerable and less powerful group.

As direct discrimination is generally more easily proven than indirect discrimination, there are also good policy reasons for regarding segregation as direct discrimination even if in real terms there is equal treatment. However, using direct discrimination

analysis it is not always easy either to prove that the acts of the employer or State caused the segregation complained of; segregation can arise through a multitude of different factors. Under the UK Race Relations Act, the courts have found that claims of direct discrimination based on segregation will succeed only where segregation is the result of a deliberate policy. See the case of *F.T.A.T.U. v Modgill; P.E.L. v Modgill* [1980] IRLR 142. As a result, there have been no successful claims of direct discrimination based on segregation in the UK courts.

One of the most well known modern examples of ‘legal’ racial segregation arose in the southern States of the U.S. from the late 19th century into the 1950s. The landmark case on racial segregation is the 1954 decision of the U.S. Supreme Court in *Brown v Board of Education* 347 U.S. 483 (1954) in which the Supreme Court ruled that the “separate but equal” doctrine violated the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution. In Eastern Europe, Roma people often suffer segregation in education, housing and access to public services. Such practices have been criticised by the HRC in its concluding observations to State reports.

In General Recommendation No. 19 (‘Racial Segregation and Apartheid’) CERD observed (in paragraph 3) that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatised and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds. Thus a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities.

4 Apartheid

The operation of the apartheid system in South Africa from the 1950s to the early 1990s was a form of segregation that was given special consideration in international instruments. The International Convention on the Suppression and Punishment of the Crime of Apartheid makes apartheid “a crime against humanity” and declares all inhuman acts caused by the policies and practices of apartheid “crimes violating the principles of international law” (Article I). Apartheid is defined as “by reference to the policies of racial segregation and discrimination being practised in Southern Africa” (Article II). However, the provision is wide enough to be extended to similar policies in other countries. Article 3 of ICERD provides that States undertake to “prevent, prohibit and eradicate” apartheid and racial segregation. See also the International Convention against Apartheid in Sports.

5 Caste and Descent

Useful links: Caste and Descent

- For World Conference against Racism Think Paper on caste-based discrimination, see: <http://www.hrdc.net/wcar/ThinkPaper7.pdf>
- For HRW reports on caste-discrimination, see: <http://www.hrw.org/reports/2001/globalcaste/> and <http://www.hrw.org/press/2001/08/castereport.htm>
- For NGOs dealing with caste-based discrimination, see: <http://www.minorityrights.org/> (Minority Rights Group), www.dalits.org (National Campaign on Dalits Human Rights), <http://www.idsn.org/> (International Dalit Solidarity Network), <http://www.alrc.net> (Asian Legal Resource Centre), and <http://www.ahrchk.net> (Asian Human Rights Commission).

‘Descent’ has been defined by CERD in General Recommendation No. 29 as including “discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status.” Discrimination on grounds of caste or descent arises in specific circumstances and as a result of specific social conditions. It has not yet been considered in a case before any international human rights individual complaints mechanism. For further information, please consult the links listed above.

6 Slavery

Useful links: Slavery

- For World Conference against Racism discussion of compensation for slavery and colonialism, see: <http://www.hrdc.net/wcar/ThinkPaper4.pdf>
- For the oldest anti-slavery NGO, see: www.antislavery.org/ For organisation combating trafficking in women and children, see: <http://www.polarisproject.org/polarisproject/>.
- For the Working Group of UN Sub-Commission on contemporary forms of slavery, see: <http://www.ohchr.org/english/bodies/subcom/groups.htm>
- For the 1927 Slavery Convention, see: <http://www.unhchr.ch/html/menu3/b/f2sc.htm>

A discussion of slavery is beyond the scope of the Handbook. Again the references provided above may be of assistance.

D NATIONALITY

Useful references: Nationality

- Regarding the UN position, see: *The rights of Non-citizens*, Working Paper submitted by David Weissbrodt in accordance with Sub-Commission Decision 1998/103, UN Doc. E/EC.4/Sub.2/1999/7 (31 May 1999). Also the preliminary report, UN Doc. E/CN.4/Sub.2/2001/20/Add.1 (6 June 2001).
- Regarding EC law, see: Dr. Niamh Nic Shuibne, 'Article 13 EC and Non-Discrimination on Grounds of Nationality: Missing or in Action?' in Cathryn Costello and Eilis Barry (eds.) *Equality in Diversity: The New Equality Directives*, Irish Centre for European Law, 2003.

1 Introduction

1.1 Definition of Nationality

Under the rules of public international law, each State may decide who are its own nationals and is free to set down rules on becoming a national or losing nationality (i.e., citizenship and naturalisation rules). A person's nationality guarantees certain rights, not least the right to enter the State of nationality. Nationality, in this context, refers to the legal bond between a person and the State of which he is a national but does not define or indicate ethnic origin; one can be a national of Sweden, without being ethnically or racially a Swede. Thus, racial and ethnic origin implies an aspect of identity; nationality has a more 'legal' character related to citizenship. In most instances it is perfectly appropriate for a State to distinguish between its own nationals and those of other jurisdictions with whom it does not have the same legal bond. However, sometimes rules that provide for different treatment of persons of different nationality unfairly distinguish between foreign nationalities or equal treatment of foreign nationalities has a disproportionate effect on certain groups, either racially or otherwise.

In international human rights instruments, the idea of 'national origin' does not necessarily share the 'legal' character of nationality. In States shared by a number of different 'nations' such as the UK (the Irish, Scots, English, etc.) or Turkey (the Turks, Turkmen, Kurds, etc.), 'nationality' or 'national origin' has a cultural and historical character separate from citizenship. Discrimination on the grounds of 'nationality' or 'national origin' in this context could fall within the definition of racial discrimination (see paragraph 1.2 under the section on 'race'). This is seen most clearly in the 'association with a national minority' ground that is explicitly part of Article 14 of the ECHR. Many victims of discrimination plead both race and national origin together as the relevant grounds. This Section addresses discrimination on grounds of nationality in both its citizenship and racial connotations. Overlapping and closely related issues of discrimination on grounds of nationality, race, language and religion and group rights are also discussed below under 'minority rights' in Chapter VI.

1.2 The Position of Aliens: Permissible Differentiation

Article 1(2) of ICERD states that the Convention “shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party... between citizens and non-citizens.” Article 1(3) provides that the Convention shall not effect the “legal provisions of State Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.” CERD has qualified this provision in its General Recommendation No. 11 on discrimination on the ground of citizenship, specifying that it does not absolve “State Parties from any obligation to report on matters relating to legislation on foreigners.” Moreover, it has stated that Article 1(2) “must not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in other instruments” such as the ICCPR or ICESCR.

Article 1(2) is thus interpreted restrictively to enable States to continue to make historic differentiations between citizens and non-citizens as are reasonable under customary international law, such as in the field of political rights which have been traditionally withheld from non-citizens. Article 1(2) has for instance been applied in this context by CERD in *Diop v France* (No. 21/1989, ICERD) where it held that the refusal to admit a Senegalese national to the Bar on the ground that he was not a French citizen was permissible under ICERD. This approach has also been confirmed in General Recommendation No. 20 on Article 5(3) of the Convention where CERD stated that “[M]any of the rights and freedoms mentioned in article 5, such as the right to equal treatment before tribunals, are to be enjoyed by all persons living in a given State; others such as the right to participate in elections, to vote and to stand for election are the rights of citizens.” However, CERD has also been careful to detect when discrimination on grounds of nationality may mask discrimination on grounds of ethnic or national origin. See *Habassi v Denmark* below.

The HRC has also followed this line of reasoning. In General Comment No. 15 the HRC stated that “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognised in the Covenant are expressly applicable only to citizens (Article 25), while Article 13 applies only to aliens.”

2 General Principles under International Instruments

Most international instruments prohibit discrimination on grounds of national origin. But as already discussed, this is limited by the extent to which States have control over rules on citizenship.

2.1 International Covenant on Civil and Political Rights

Under Article 2(1) of the ICCPR, a State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction.” HRC General Comment No. 15 provides (at paragraph 1) that “[I]n general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.” A number of cases have established that nationality is an ‘other status’ for the purposes of the prohibition of discrimination in the ICCPR (see, *Gueye*; *Adam* and *Karakurt* below).

There are certain limitations on the non-discrimination prohibition however. First, Article 25 guarantees certain political rights, differentiating on grounds of citizenship. Second, HRC General Comment 15 makes clear (at paragraph 5) that: “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide whom it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.” Also Article 13 lays down safeguards against the expulsion of aliens. The question of entry was directly at issue in the [Mauritian Women case](#), where the HRC found that Mauritian immigration law discriminated on grounds of sex (see above). Article 24 of the ICCPR provides that every child has the right to acquire a nationality.

In its concluding observations to State Reports, the HRC has discussed some of the more problematic State practices that discriminate on grounds of nationality, including discriminatory distinctions between citizens by birth and those who are naturalised (Ireland ICCPR A/48/40) and requirements for non-nationals not applicable to nationals (Japan, ICCPR, A/49/40). Stringent criteria for citizenship discriminate against minority or foreign groups who are permanent residents (Latvia, ICCPR, A/50/40) and raise issues under Articles 2 and 26 and Articles 13 and 17. Examples of criteria include a language requirement that no foreigner can meet (e.g., Estonia, ICCPR, A/51/40). Other issues include the failure to confer nationality on stateless persons born in the State, stripping persons of citizenship who are critical of the government, mass expulsions of non-nationals and discriminatory rules that prejudice women in the transmission of nationality to children. Naturalisation, although it is the prerogative of the State, should be granted on the basis of objective criteria and within a reasonable time frame, especially for persons who have lived in the State for many years.

The HRC has examined cases of discrimination on the grounds of nationality or ‘national origin’ in the context of (i) employment, (ii) property, (iii) voting rights, (iv) tax and social security and (v) immigration.

2.1.1 Employment

- *Gueye et al v France* (No. 196/85, ICCPR) the HRC found that differences in pension treatment of former members of the French Army on the basis of

nationality constituted discrimination and confirmed that discrimination based on nationality was prohibited with reference to the ground 'other status' in Article 26. The authors were retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal and enjoyed the same pension entitlements as French nationals until a new law provided for different treatment. The HRC found that only *service* could determine the level of pensions received by the soldiers and not nationality. "[A] subsequent change of nationality [could not] by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided." Furthermore "mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment," nor could differences in economic, social or financial conditions.

2.1.2 Property

- *Adam v Czech Republic* (No. 586/1994, ICCPR) concerned the recovery of property confiscated by the Communist government of Czechoslovakia after the fall of communism. The author was the Australian son of a property-owner who had fled Czechoslovakia. He claimed that the relevant Czech law that limited recovery of property to Czech citizens and permanent residents arbitrarily discriminated against him. The HRC found that any legislation granting restitution must not discriminate among the victims of the prior confiscation and that the requirement of citizenship was unreasonable. See also *Simunek v Czech Republic* (No. 516/1992, ICCPR), and regarding property confiscations *Blazek et al v Czech Republic* (No. 857/1999, ICCPR) and *Des Fours v Czech Republic* (No. 747/1997, ICCPR). See further *Drobek v Slovakia* (No. 643/1995, ICCPR), *Malik v Czechoslovakia* (No. 669/1995, ICCPR), and *Schlosser v Czech Republic* (No. 670/1995, ICCPR).

2.1.3 Voting Rights

- In *Karakurt v Austria* (No. 965/2000, ICCPR) the applicant, a Turkish citizen resident in Austria, was prevented from being a representative on a work council because he was not an Austrian or EEA national. The HRC agreed with him that the distinction in the law regarding eligibility to be elected to a work-council between Austrian/EEC nationals and other nationals had no rational or objective foundation. Thus his treatment constituted discrimination under Article 26.

2.1.4 Tax and Social Security

- In *Van Oord v the Netherlands* (No. 658/1995, ICCPR) the complainant claimed that the different criteria used in determining the pension entitlements of Dutch nationals under bilateral treaties between the Netherlands and other States discriminated against him. The HRC found no violation because the situations of Dutch nationals living in different States are distinguishable.

2.1.5 Immigration

- *Stewart v Canada* (No. 538/1993, ICCPR) concerned Article 12(4) of the Covenant, which provides that: “No one shall be arbitrarily deprived of the right to enter his own country”. The question before CERD was whether a person who enters a given State under that State's immigration laws can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The HRC held that the answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But in the present case, although the State facilitated acquiring its nationality, the applicant refrained from doing so. Because of this failure by the applicant the country of immigration did not become “his own country” within the meaning of Article 12, paragraph 4, of the Covenant. *Canepa v Canada* (No. 558/1993, ICCPR) confirmed the HRC decision in *Stewart*. On Article 12(4) see also *Toala et al v New Zealand* (No. 675/1995, ICCPR).

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights. Article 2(3) states that “developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

In its concluding observations to State reports, the ICESCR has criticised laws preventing a woman from vesting nationality in her child or depriving women of their original nationality when they marry foreign men (for example, Egypt, ICESCR, E/2001/22 (2001) 38, at paragraphs 159 and 175; and Jordan, ICESCR, E/2001/22 (2000) 49, at paragraph 234). Illegal deportation is also a problem, especially for migrant workers who have lived and worked in the State for a long period (for example, Dominican Republic, ICESCR, E/1991/23 (1990) 55 at paragraph 249; and Nigeria, ICESCR, E/1999/22 (1998) 27, at paragraph 105).

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

As noted above, ‘national origin’ or ‘nationality’ (in its racial connotations) may come within the definition of racial discrimination. Article 5 of ICERD prohibits racial discrimination in the enjoyment of the right to nationality. Discrimination on the ground of nationality is also under the purview of ICERD, in spite of Article 1(2) excepting from

the definition of racial discrimination actions by a State party that differentiate between citizens and non-citizens. CERD General Recommendation No. 30 (Discrimination against non-citizens) notes that the exception in Article 1(2) must be interpreted narrowly to avoid undermining the basic prohibition of discrimination. Although some rights under the CERD may be confined to citizens, human rights in principle are to be enjoyed by all persons. In particular legislative guarantees against racial discrimination must apply to non-citizens regardless of their immigration status (see paragraph 7) and immigration and citizenship laws and policies themselves must not have the effect of discriminating on the basis of race, colour, descent or national or ethnic origin. According to General Recommendation No. 30, generally any differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in light of the objectives and purposes of the ICERD are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim (paragraph 4).

Several decisions delivered to date by CERD have concerned complaints by non-citizens: *Yilmaz-Dogan v the Netherlands*, *Diop v France*, *L.K. v the Netherlands*, *B.M.S. v Australia*, and *Habassi v Denmark*. These decisions have emphasised that, although some differential treatment on the basis of lack of citizenship is permitted under ICERD, such differential treatment must be justified as necessary. Furthermore, the fact that an individual is of a particular or a foreign nationality does not provide an excuse for discrimination on other unjustified grounds.

- In *Yilmaz-Dogan v the Netherlands* (No. 1/1984, CERD), an employer attempted to justify the termination of the applicant's employment by distinguishing between Dutch women and "our foreign women workers." CERD found that the Netherlands breached its obligations because the court reviewing her claim never addressed the evidence of discrimination in the employer's letter.
- In *Habassi v Denmark* (No. 10/1997, ICERD), CERD felt that the nationality requirement for the applicant's bank loan was not the most appropriate requisite when investigating a person's will or capacity to reimburse a loan. The applicant's permanent residence or the place where his employment, property or family ties are to be found was more relevant. CERD felt it appropriate to investigate properly the bank's loan policy regarding foreign residents to establish whether or not racial discrimination was involved.

CERD has also expressed its concern about discrimination against non-citizens in its concluding observations to State party reports. The denial of citizenship and residence is a particularly malicious way of discriminating. CERD has criticised the differentiation between nationals and non-nationals in domestic legislation (Greece, CERD, A/47/18) expulsions and similar discriminatory measures against vulnerable groups of foreigners and official discrimination between citizens who possess longstanding nationality and those who have acquired nationality in more recent times. It has also addressed problems relating to statelessness (e.g., administrative and practical difficulties caused by denial of citizenship for refugees) and discrimination in the criteria for and

processing of applications for citizenship against those of certain ethnic origin. (Croatia, CERD, A/48/18 and A/50/18). Other important issues include the denial of access to places or services on grounds of national or ethnic origin (contrary to Article 5(f)), the lack of legal status for certain minority groups and the limitation of human rights protection to nationals and rules.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women. It does not explicitly address discrimination on grounds of nationality. However, discrimination on grounds of nationality may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination. The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

There are also some specific provisions of CEDAW regarding nationality. Article 9 provides that:

- “1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

These same issues have been addressed also in concluding observations to State reports, e.g., the inability to pass on nationality for women (Morocco, CEDAW, A/52/38/Rev.1), and equal rights for men and women re nationality (Turkey, CEDAW, A/52/38/Rev.1).

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC provides that the States parties will guarantee the right in the Convention to each child without discrimination on grounds of the child’s or his parents’ or legal guardians’ race, colour, national, social or ethnic origin.

Regarding nationality, Article 7 of the CRC also provides that:

- “1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

Article 8(1) of CRC states that “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

2.6 International Labour Organization

Article 1 of the Discrimination (Employment and Occupation Convention) (No. 111) prohibits discrimination on the grounds of race, colour, national extraction or social origin in employment or occupation. The concept of ‘national extraction’ “does not refer to the distinctions that may be made between the citizens of the same country and those of another but to distinctions between the citizens of the same country on the basis of a person’s place of birth, ancestry or foreign origin.” Therefore, discrimination based on national extraction for the purposes of Convention No. 111 means “that which may be directed against persons who are nationals of the country in question but who have acquired their citizenship by naturalization or who are descendants of foreign immigrants, or persons belonging to groups of different national extraction living in the same State.” See the ILO General Survey, *Equality in Employment and Occupation*, 1996 at paragraphs 33 and 34.

2.7 European Convention on Human Rights

Article 14 of the ECHR prohibits discrimination on grounds of national or social origin or association with a national minority. The ECtHR has reviewed cases concerning both discrimination against non-nationals and discrimination on the grounds of national origin or association with a national minority. The subject matters covered have included (i) tax and social security, (ii) criminal justice procedures, (iii) immigration and deportation, (iv) serious human rights abuses, and (v) freedom of expression.

2.7.1 Tax and Social Security

- In *Gaygusuz v Austria* (No. 17371/90, 16/09/1996), the applicant was a Turkish national who lived and worked in Austria. He was denied a form of unemployment benefit on the grounds that he was not an Austrian national. The applicant claimed that there was no objective and reasonable justification for this differential treatment. The State argued that the special responsibility a State has for its own nationals justified the differential treatment. It also argued that the relevant act laid

down certain exceptions to the nationality condition. The ECtHR noted that the applicant was legally resident in Austria and while working there paid contributions to the unemployment insurance fund. It was not argued that he failed to meet any of the other conditions for emergency assistance therefore he was in a like situation to an Austrian with regard to his entitlement to this particular benefit. The differential treatment was not based on any reasonable or objective justification. The ECtHR concluded that 'very weighty reasons' would have to be put forward before it would regard differential treatment for reasons of nationality as being in compliance with the ECHR.

- In *Koua Poirrez v France* (No. 40892/98, 30/09/2003), the applicant, who had suffered from a severe physical disability since the age of seven, was denied a disabled adult's allowance on the ground that he was not a French national and there was no reciprocal agreement between France and the Ivory Coast in respect of this benefit. The applicant complained of a violation of Article 14 combined with Article 1 of Protocol No. 1 (protection of property). He also claimed that he had been discriminated against on a basis of his disability, but the ECtHR held that his claim for an allowance was refused solely on the grounds that he was neither a French national nor a national of a country that had signed a reciprocity agreement. The ECtHR held that there was no objective and reasonable justification for the difference in treatment between French nationals or nationals of countries that had signed a reciprocal agreement and other foreigners. Accordingly, the ECtHR concluded that there was a violation of Article 14 combined with Article 1 of Protocol No. 1.

2.7.2 Criminal Justice Procedures

- In *Magee v the United Kingdom* (No. 28135/95, 06/06/2000), the applicant complained that he was discriminated against on grounds of national origin and association with a national minority because, among other things, he was not entitled to a lawyer immediately upon arrest in Northern Ireland under the applicable prevention of terrorism legislation, unlike suspects arrested and detained in England and Wales under similar legislation. The ECtHR felt that the difference in treatment was not to be explained in terms of personal characteristics, such as national origin, but on the geographical location where the individual was arrested and detained. Legislation could take account of regional differences and characteristics of an objective and reasonable nature. Such differences do not amount to discriminatory treatment within the meaning of Article 14. See also *John Murray v the United Kingdom* (No. 18731/91, 08/02/1996).

2.7.3 Immigration / Deportation

- In *Moustaquim v Belgium* (No. 12313/86, 18/02/1991), the applicant, a Moroccan national was deported from Belgium because of his criminal activities. He had lived in Belgium since he was a child and his immediate family all lived there. He claimed to be the victim of discrimination on the ground of nationality (contrary to

Article 14 taken together with Article 8). He argued that he received different treatment compared to juvenile delinquents of two categories: those who possessed Belgian nationality, since they could not be deported; and those who were citizens of another member State of the EC, as a criminal conviction was not sufficient to render them liable to deportation. The ECtHR held that the applicant could not be compared to Belgian juvenile delinquents because they have a right of abode in their own country and cannot be expelled from it. The ECtHR felt that there was objective and reasonable justification for the preferential treatment given to nationals of the other member States of the EU because Belgium belongs, together with those States, to a special legal order. Accordingly, there was no breach of Article 14.

2.7.4 The Right to Life and Forced Disappearances

In a number of cases involving alleged violations of the right to life (Article 2) and the prohibition of torture (Article 3) under the ECHR, applicants have attempted to argue that the disproportionate impact on a certain community of those abuses indicated a discriminatory policy.

- In *Hugh Jordan v the United Kingdom* (No. 24746/94, 4/05/2001), the applicant submitted that the circumstances of the killing of his son disclosed discrimination. He alleged that, between 1969 and March 1994, 357 people had been killed by members of the security forces in Northern Ireland, the overwhelming majority of whom were young men from the Catholic or nationalist community. He argued that the small numbers killed from the Protestant community and the few numbers of prosecutions and convictions showed that there was a discriminatory use of lethal force and a lack of legal protection for the nationalist or Catholic community on grounds of national origin or association with a national minority. The State countered that there was no evidence that any of those deaths in Northern Ireland were analogous or that they disclosed any difference in treatment. Bald statistics were not enough to establish broad allegations of discrimination against Catholics or nationalists. At paragraph 62, the ECtHR stated that:

“Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. There is no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.”

See also *McKerr v the United Kingdom* (No. 28883/95, 04/05/2001); *Shanaghan v the United Kingdom* (No. 37715/97, 04/05/2001); *Kelly and others v the United Kingdom* (No. 30054/96, 04/05/2001), and *McShane v the United Kingdom* (No. 43290/98, 28/05/2002).

- In *Kurt v Turkey* (No. 24276/94, 25/05/1998), the applicant contended that forced disappearances primarily affected persons of Kurdish origin so that the disappearance of her son breached Article 14. The applicant stated that her claim was borne out by the findings contained in the reports published between 1991 and 1995 by the UN Working Group on Enforced or Involuntary Disappearances. The ECtHR found that the evidence presented by the applicant did not substantiate her allegation that her son was the deliberate target of a forced disappearance on account of his ethnic origin. Accordingly, there has been no violation of the Convention under this head of complaint.
- In *Tanli v Turkey* (No. 26129/95, 10/04/2001) the applicant submitted that the death of his son in custody illustrated the discriminatory policy pursued by the authorities against Kurdish citizens and the existence of an authorised practice, in violation of Article 14 taken together with Articles 2, 3, 5, 13 and 18. He relied on the substantial evidence from UN agencies and non-governmental organisations as to the systematic unlawful treatment of the Kurds in south-east Turkey. Further, he relied on the failure by the authorities to keep adequate records of his son's detention and to investigate adequately his death. Again, the ECtHR held that the applicant had not substantiated his allegations that his son was the deliberate target of a discriminatory policy on account of his ethnic origin or that he was the victim of restrictions contrary to the purpose of the ECHR. Other similar discrimination claims that were found to be unsubstantiated are *Tanrikulu v Turkey* (No. 23763/94, 8/07/1999); *Bilgin v Turkey* (No. 23819/94, 16/11/2000); *Onen v Turkey* (14/05/2002); *Ergi v Turkey* (No. 23818/94, 28/07/1998); *Çakici v Turkey* (No. 23657/94, 08/07/1999); *Tekin v Turkey* (No. 22496/93, 09/05/1998); *Mahmut Kaya v Turkey* (No. 22535/93, 28/03/2000); *Akdivar and others v Turkey* (No. 21893/93, 16/09/1996); *Mentes and others v Turkey* (No. 23186/94, 28/11/1997); and *Selçuk and Asker v Turkey* (No. 23184/94, 24/04/1998).

2.7.5 Freedom of Expression

- *Özgür Gündem v Turkey* (No. 23144/93, 16/03/2000) concerned a Kurdish daily newspaper that was forced to close through attacks and harassment for which the Turkish authorities were allegedly responsible. The applicants claimed that the measures imposed on *Özgür Gündem* disclosed discrimination on the grounds of national origin and association with a national minority under Article 14. They argued that any expression of Kurdish identity was treated by the authorities as advocacy of separatism and PKK propaganda. Therefore, in the absence of any justification for the restrictive measures imposed, they could only be explained by prohibited discrimination. The ECtHR found that there was a violation of Article 10 (freedom of expression). However, it felt that there was no reason to believe that

the restrictions on freedom of expression could be attributed to a difference of treatment based on the applicants' national origin or to association with a national minority. Accordingly, the ECtHR concluded that there had been no breach of Article 14.

- In *Arslan v Turkey* (No. 23462/94, 08/07/1999), *Okçuoglu v Turkey* (No. 24246/94, 08/07/1999); and *Ceylan v Turkey* (No. 23556/94, 08/07/1999), each applicant submitted that he had been prosecuted on account of his writings merely because they were the work of a person of Kurdish origin and concerned the Kurdish question. Each argued that on that account he was a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. The State submitted each conviction was based solely on the separatist content and violent tone of the writings concerned. Having found a violation under Article 10 taken separately, the ECtHR did not consider it necessary to examine the complaint under Article 14.

2.8 European Union

Ending discrimination on grounds of nationality is central to the idea of the EU as a whole because the free movement of workers is a necessary condition of a single market. However, the scope of the prohibition is much narrower than in international human rights instruments. It applies only to the member States (and their citizens) and to the fields covered by the EC treaties (i.e., primarily economic activities) and is enforced for reasons stemming from economics rather than human rights concerns. Also the protection of individuals on grounds of nationality under EU law depends on the possession of the nationality of a member State – member States may discriminate against third country nationals.

Article 39 of the EC treaty provides for free movement of workers, the corollary of which is the prohibition of discrimination on grounds of nationality between workers of the member States as regards employment, remuneration and other conditions of work and employment. Regulation 1612/68 was enacted to implement the principles laid down in Article 39. It provides in Article 7(2) that EU migrant workers “shall enjoy the same social and tax advantages as national workers.” As noted in Chapters II and III, Article 39 is directly applicable in the domestic courts of the member States and applies to private persons as well as the member States. In *Case C-281/98, Roman Angonese v Cassa de Risparmio di Bolzano SpA* [2000] ECR I-4139, the ECJ held that Article 39 applied to private as well as public bodies. An Italian national who had studied in Austria for a number of years was indirectly discriminated against when he applied for a position with an Austrian bank. He was refused employment because he didn't have a certificate from a particular State stating that he was bilingual, even though it was accepted that he was bilingual.

As discussed in the first two chapters, Article 39 prohibits both direct and indirect discrimination. For direct discrimination, see, for example, *Case C-187/96, Commission*

v Greece [1998] ECR I-1095, where the ECJ found that a measure granting certain social benefits to Greek families but denying them to EU migrant worker families was contrary to EC law. For indirect discrimination, see, for example, *Case C-278/94, Commission v Belgium* [1996] ECR I-4307, where a social benefit provided by Belgium to young people looking for their first job was made conditional on the recipient having completed education in a State-recognised institution. This placed non-Belgians at a disadvantage. The ECJ recognised that a provision of national law is ‘indirectly discriminatory’ if it is “intrinsically liable to affect migrant workers more than national workers.” See also *Case 379/87, Groener v Minister for Education* [1989] ECR I-3967. The grounds for justifying indirect discrimination are broad. In *Case 152/73, Sotgiu*, the ECJ held that indirect discrimination might be justified on the basis of ‘objective differences.’ Under Article 39(4), the public service is exempt from the prohibition of Article 39.

The EU Race and Framework Directives both exclude discrimination on grounds of nationality.

2.9 African Charter on Human and Peoples’ Rights

Article 2 of the African Charter prohibits discrimination on grounds of national or social origin. Article 12 prohibits the mass expulsion of non-nationals. Mass expulsion is defined as “that which is aimed at national, ethnic or religious groups.”

Discrimination on ground of nationality is a particular problem in Africa, as there are large numbers of migrant workers and refugees. Therefore, there is more jurisprudence on this issue than on others.

2.9.1 Mass Expulsions

- *UIDH, FIDH and others / Angola* (No. 159/96) concerned West African nationals who were rounded up and expelled from Angola. They alleged violations of Articles 2, 7 (access to justice), 12(4) (expulsions of non-nationals) and 12(5) (mass expulsions). The African Commission held that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations “constitute a special violation of human rights.” It stated (at paragraph 15) that “a government action specially directed at a specific national, racial, ethnic or religious group is generally qualified as discriminatory in the sense that none of its characteristics has any legal basis...” The Commission also held that Article 2 “obligates State Parties to ensure that persons living on their territory... nationals or non-nationals, enjoy the rights guaranteed in the Charter. In this case, the victim’s rights to equality before the law were trampled on because of their origin.”
- In *John K. Modise / Botswana* (No. 97/93), the complainant claimed Botswana citizenship by descent and, although he spent almost all of his life there, he was

deported for political reasons. The African Commission held that the deprivation of citizenship by Botswana denied him the right of equal access to the public services of the country guaranteed under Article 13(2) of the Charter.

- *OMCT and others / Rwanda* (Nos. 27/89, 46/91, 49/91, 99/93) is also discussed above under 'race.' It concerned the mass detention, torture and killing of Tutsi people in Rwanda and the expulsion of Burundi nationals from Rwanda who had been refugees there for many years. The African Commission found (at paragraph 23) that "[T]he denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2." It also held that this was a mass expulsion of non-nationals prohibited by Article 12(5) of the AfCHPR.
- *RADDHO / Zambia* (71/92) concerned the expulsion of 500 or more West Africans from Zambia on the grounds of their being in Zambia illegally. They lost all of their material possessions and were separated from their families. The African Commission held that expelling the victims was not in itself wrong but the manner of the expulsions violated the Charter. At paragraph 25, it stated that "simultaneous expulsions of nationals of many countries does not negate the charge of discrimination. Rather the argument that so many aliens received the same treatment is tantamount to an admission of a violation of Article 12(5)."
- *Legal Resources Foundation / Zambia*, (211/98) concerned a proposed new constitution that required anyone who wants to contest the office of the President to prove that both parents were Zambians by birth or descent. The African Commission found that this violated Article 2 of the Charter and the right of the citizens of Zambia to freely choose their representatives. It made clear that any measure which seeks to exclude a section of the citizenry from participating in the democratic process, as this constitutional amendment sought to do, is discriminatory and falls foul of the Charter.

2.10 American Convention on Human Rights

Article 1 of the AmCHR prohibits discrimination "for reasons of national or social origin." In *Advisory Opinion OC-4/84* (Series A No. 4, 19/01/1984), the IACtHR held that Costa Rica's proposed criteria for naturalisation that provided for different treatment of persons of Central-American, Ibero-Spanish or Spanish citizenship than those of other national origin, were permissible.

Advisory Opinion No. 4 – Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica

Costa Rica proposed amendments to its political constitution to make the criteria for naturalisation more restrictive. The proposed conditions were less restrictive for persons of Central-American, Ibero-Spanish or Spanish citizenship than those of other national origin (i.e., shorter time of residence before naturalisation).

The IACtHR found that this treatment was justified because those nationalities had closer

historical, cultural and spiritual bonds with Costa Rica and would therefore be more likely to assimilate quickly. The most important points made by the IACtHR were as follows:

- It confirmed that nationality was primarily a matter for a State's discretion but its law had to conform to the 'genuine link' requirement established by the ICJ in the *Nottebohm* case (at p. 275). The IACtHR could not see any infringement of Article 20 in this case as no Costa Rican citizen would be deprived of citizenship or prevented from acquiring a new nationality.
- The IACtHR noted that, though Articles 1(1) and 24 overlap, they have different conceptual origins. Article 1(1) is a parasitic provision and Article 24 a free standing equality right that mandates equality in the application of any domestic legal norm.
- Article 24 must be interpreted with reference to a list of prohibited grounds under Article 1(1).
- Factual inequalities may give rise to inequalities in legal treatment that do not violate principles of justice (see paragraph 56).
- There is no discrimination "if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences of treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of human kind."
- Differential treatment of a foreign woman who wanted to marry a Costa Rican man and a foreign man who wanted to marry a Costa Rican woman not justified.



- In *Ivcher Bronstein v Peru*, Judgment 6/2/03 (Annual Report of the IACHR, 2001), the applicant was a naturalised Peruvian citizen who was the majority shareholder and director of a television company. He was stripped of his citizenship after denouncing human rights violations. The motive was seemingly to prevent him having editorial control. The IACtHR held that such action breached Article 20 on the right to nationality and also Article 1(1) in relation to the substantive rights violated. It also found a violation of the right to a fair trial, judicial protection, the right to property and freedom of expression.
- In the recent *Advisory Opinion Advisory Opinion OC-18/03 – Juridical Condition and Rights of the Undocumented Migrants* (Series A, No. 18, 17/09/2003), the IACtHR examined the issue of discrimination against migrant workers.

Advisory Opinion OC-18/03 – Juridical Condition and Rights of the Undocumented Migrants

Mexico asked the IACtHR to rule on whether the deprivation of certain labour rights of migrant workers by neighbouring States, was compatible with the principles of equality under the AmCHR.

The most important points made by the court were as follows:

- **Nature of State obligation.** A State's obligations to respect and ensure fundamental rights includes an obligation to take affirmative action, to avoid taking measures that

restrict or infringe a fundamental right, and to eliminate measures and practices that restrict or violate a fundamental right (see paragraph 81).

- **Equality as *jus cogens*.** The principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. The fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence of its universality (paragraph 86).
- **Affirmative action.** “States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons.” (paragraph 104)
- **Non-discrimination against migrants.** The general obligation to respect and ensure the exercise of rights is imposed on States to benefit the persons under their respective jurisdictions, irrespective of the migratory status of the protected persons (paragraph 109).

“States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity.” (paragraph 119)

“The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.” (paragraph 134)

- **Public and private discrimination.** This obligation to respect and ensure the labour rights of all workers, irrespective of their status as nationals or aliens, extends to employment relationships established between individuals. The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

E LANGUAGE

Useful links: Language Rights

- For link to instruments on language rights, see: <http://www.unesco.org/most/ln2int.htm>
- For the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, see: http://www.unhchr.ch/html/menu3/b/d_minori.htm
- For the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, see: http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm
- For the European Charter for Regional or Minority Languages, see: <http://conventions.coe.int/Treaty/en/Treaties/Html/148.htm>

1 Introduction

Discrimination on grounds of language is prohibited by almost all of the main international human rights instruments. It can be distinguished from language rights as an aspect of minority rights in the sense that it applies to all groups, not just minorities. In some instruments (e.g., ILO Convention No. 111), discrimination on the grounds of language is prohibited as a sub-set of discrimination on grounds of race.

The rights of persons belonging to linguistic minorities have been increasingly acknowledged in international human rights law on ‘minority rights’ as both individual and collective human rights. See the section on minority rights in Chapter VI below. Since the official languages embraced by governments are usually the languages of the majority population, and the languages of the majority populations are protected and advanced by the governments, the language rights of minorities has become the most topical issue of linguistic rights. Currently, in the body of norms of international law, the concept of language rights is in an embryonic stage only. The main universally applicable norm of treaty law, Article 27 of the ICCPR, foresees only that individuals belonging to a minority “shall not be denied the right to speak their language.” There are, however, a whole series of other instruments dealing in an ancillary way with the issue of linguistic rights and many ‘soft’ law instruments that explicitly address language rights. Again, like in the case of race, determination of what constitutes a language worthy of protection by international human rights instruments is not the prerogative of the State.

2 General Principles under International Instruments

2.1 International Covenant on Civil and Political Rights

Articles 2(1) and 26 prohibit discrimination on grounds of language. Other relevant provisions include Articles 14(3)(a) and (f) of the ICCPR that grant accused persons in a criminal trial the right to be informed in a language they understand of the nature and cause of the charge against them and the right to the free assistance of an interpreter, if necessary.

- In *Guesdon v France* (No. 219/1986, ICCPR) (the ‘Breton’ case), the HRC held that the notion of fair trial in Article 14(1) of the ICCPR does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speak with a maximum of ease. If a court is certain that the accused is sufficiently proficient in the court's language, it is not required to find out if he would prefer to use another language. In the opinion of the HRC the provision for the use of one official court language by States parties to the Covenant does not violate Article 14. In this case the author did not show that he was unable to address the tribunal in simple but adequate French. The HRC found no violation of Article 14 or 26. See also *Cadoret and Le Bihan v France* (No. 221/1987 and 323/1988, ICCPR) and *Barzhig v France* (No. 327/1988, ICCPR).
- In *Harward v Norway* (No. 451/1991, ICCPR), the HRC stated an essential element of the Article 14 notion of fair trial is to have adequate time and facilities to prepare a defence. However, this does not entail that an accused who does not understand the language used in court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel. In this case, a local lawyer had represented the author and in his meetings with the lawyer had the assistance of an interpreter. His lawyer could have sought a postponement of the trial if he was not ready. In the circumstances of the case, there was no violation of Article 14. See also *Hill v Spain* (No. 526/1993, ICCPR).

Article 27 provides that “[I]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” In ICCPR General Comment No. 28 (68th session, 2000), the HRC stated that the rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. Article 17 provides that the States parties shall “encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.”

The HRC has recognised the importance of language rights and more particularly, non-discrimination on grounds of language to the protection of other rights. For example, the right to participate in public affairs, voting rights and the right of equal access to public service under Article 25 of the ICCPR may be impeded through language barriers, e.g., the lack of materials in minority languages or language requirements in employment (see HRC General Comment No. 25).

- In *Ballantyne et al v Canada* (Nos. 359/1989 and 385/1989, ICCPR) the authors who were English-speaking residents of Quebec, argued that the language law of Quebec, which prohibited commercial shop signs in a language other than French, discriminated against them on the grounds of language in violation of Article 26. The HRC found that the chosen comparator, the French speakers in Quebec, were not in a more advantageous situation than the English speakers. The restriction on the use of the French language applied to both groups, regardless of the language. A French-speaking entrepreneur wishing to appeal to the English speaking population of the province in their language was prohibited from doing so. Therefore, the HRC held that there was no violation of Article 26. Thus, the HRC ignored the disparate impact on English speakers. The HRC held also that because English-speaking citizens represent a majority in Canada the authors could not claim the rights of linguistic minorities under Article 27 of the ICCPR. The HRC also rejected an argument by the State that the measures were necessary to protect the status of the French language (i.e., that they were appropriate affirmative action measures) on because they were disproportionate. The HRC here seems to have failed to take into account that the law's inherent neutrality had a greater potential for adverse effects on an English advertiser with English clientele, as opposed to French advertisers. The HRC found a violation of Article 19 (freedom of expression).
- Contrast *Diergaardt v Namibia* (No. 760/1997, ICCPR) in which the authors claimed that the failure by the Namibian government to introduce legislation to permit the use of official languages other than English denied them the use of their mother tongue in public life in violation of Article 26. The authors showed how the State instructed civil servants not to respond to letters in languages other than English. This suggested that the State party was intentionally targeting the use of other languages, most notably Afrikaans. The HRC felt that the State's action disproportionately affected (i.e., indirect discrimination) Afrikaans speakers and violated Article 26.
- In *Ignatane v Latvia* (No. 884/1999, ICCPR) the author, a member of the Russian-speaking minority in Latvia, had passed a Latvian language test and been awarded a language aptitude certificate stating that she achieved the highest level of proficiency in the language. However, when she stood for local elections, she was struck off the list because of a decision by a different language authority that she did not have the required highest level of language proficiency in Latvian required by law in order to stand for election. CERD noted that Article 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections

without any of the distinctions mentioned in Article 2, including language. CERD felt that the annulment of the author's candidacy pursuant to a review that was not based on objective criteria and which the State party has not demonstrated to be procedurally correct was not compatible with its obligations under Article 25, in conjunction with Article 2 of the Covenant.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter I, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

In its concluding observations to State party reports, the ICESCR has criticised, among other things, the lack of resources being made available to indigenous groups to preserve their languages, the lack of education in minority languages, the failure to use majority languages in official activities, and the imposition of language requirements for access to public sector employment.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

'Language' is not included explicitly in the definition of 'racial discrimination' under Article 1 of ICERD. It seems however to be prohibited to the extent that it is an aspect of race or national origin. In its concluding observations to State reports, ICERD has criticised various forms of language discrimination such as the imposition of restrictions on the use of minority languages (Yugoslavia (*Serbia and Montenegro*), CERD, A/48/18) and the shortage of facilities for members of indigenous communities to use their own language in court or other official procedures (Guatemala, CERD, A/50/18). It has also criticised the lack of education in minority languages (Mexico, CERD, A/50/18), and segregation in the educational system (Croatia, CERD, A/57/18).

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women. The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

There are a number of provisions of the CRC relevant to language discrimination:

- Article 29.1 provides that “States Parties agree that the education of the child shall be directed to... (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own...”
- Article 30 of the CRC provides that “in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”
- Articles 40.1 and 40.2(b)(vi) of the CRC provide a right to interpretation and translation similar to Article 14 of the ICCPR.

2.6 International Labour Organization

Article 1 of the Discrimination (Employment and Occupation Convention) (No. 111) prohibits discrimination on the grounds of race, colour, national extraction or social origin in employment or occupation. In its General Survey, *Equality in Employment and Occupation*, 1996, the ILO suggests that discrimination on grounds of race under Convention No. 111 may include any discrimination against an ethnic group, including discrimination on grounds of language.

2.7 European Convention on Human Rights

Article 14 of the ECHR explicitly prohibits discrimination on grounds of language. However, language discrimination cases have rarely appeared before the ECtHR.

- In the *Belgian Linguistics case*, the ECtHR held that the ECHR does not guarantee a right for parents to have their children educated in the language of their choosing. Such an interpretation of Article 14 would lead to absurd results, for it would be open to anyone to claim any language of instruction in any of the territories of the contracting parties. However, the ECtHR stated that the right to education and the right to respect of family life, guaranteed respectively by Article 2 of the Protocol and Article 8 of the Convention, are to be secured to everyone without discrimination on the ground of language.
- *Association Ekin v France* (No. 39288/98, 17/07/2001), concerned a book published in France giving an account of the historical, cultural, linguistic and socio-political aspects of the Basque cause. The French authorities banned the book alleging that it promoted separatism and vindicated recourse to violence and was likely to constitute a threat to public order. The applicant complained that the

measures banning the book violated Article 10 (freedom of expression) and gave rise to discrimination as regards freedom of expression on the legal basis of language or national origin in breach of Article 14 taken in conjunction with Article 10. The ECtHR analysed the measure for compliance with Article 10. The ECtHR considered that the ban did not meet a pressing social need and was not proportionate to the legitimate aim pursued, therefore it was not 'necessary in a democratic society' and, thus, violated Article 10. The ECtHR did not consider it necessary to examine the Article 14 complaint.

- *Kamasinski v Austria* (No. 9782/82, 19/12/1989), concerned a trial of a non-German speaking defendant in Austria. He claimed that the interpretation and translation facilities made available to him were inadequate and that this violated his rights under Article 6 (fair trial) and Article 14 on the ground that, as a non-German-speaking defendant, he was denied advantages available to a German-speaking defendant. The ECtHR considered it "superfluous to examine the contested facts also under Article 14....since, in the present context the rule of non-discrimination laid down in that provision is already embodied in Article 6." On the facts, the ECtHR found no violation of Article 6.
- In *Mathieu-Mohin and Clerfayt v Belgium* (No. 9267/81, 2/03/1987), French-speaking residents of the Flemish part of Belgium claimed that legislation governing membership of the local governing council did not permit them to use the French language in violation of their rights under Article 14 in conjunction with Article 3 of Protocol 1. The ECtHR held that, in the context of the overall structure of the Belgian State, there was no violation of Article 14.

2.8 European Union

The EU Race Directive discussed in Chapter I above prohibits direct and indirect racial and ethnic discrimination. To the extent that discrimination on grounds of language is 'racial' or ethnic discrimination it comes under the Directive. However, the ECJ has a history of permitting job requirements, such as language skills, as objectively justified exceptions to general principles of non-discrimination. This is the case even when the ECJ is analysing measures that restrict the free movement of workers, one of the most fundamental principles in EU law. See, for example, *Case 279/87, Groener v Minister for Education* [1989] ECR 3967.

2.9 African Charter on Human and Peoples' Rights

Article 2 of the African Charter explicitly prohibits discrimination on grounds of language. In *Association Mauritanienne des Droits de l'Homme / Mauritania* (No. 210/98) discussed above in the 'race' section, the African Commission stated (at paragraph 137) that: "[L]anguage is an integral part of the structure of culture: it in fact constitutes its pillar and means of expression par excellence. Its usage enriches the individual and enables him to take an active part in the community and in its activities. To deprive a man of such participation amounts to depriving him of his identity."

2.10 American Convention on Human Rights

Article 1 of the AmCHR explicitly prohibits discrimination on grounds of language. Article 8 (right to a fair trial) includes a right of an accused to be assisted by an interpreter or translator, if necessary.

F RELIGION AND BELIEF

Useful links: Religion and Belief

- For the UN Declaration on the Elimination of All Forms of Intolerance, see: http://www.unhchr.ch/html/menu3/b/d_intole.htm
- For the International Convention on the Protection of the Rights of Migrant Workers, see: http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm

1 Introduction

Freedom of religion is one of the more important rights in international human rights law. Under both Article 4(2) of the ICCPR and Article 27(2) of the AmCHR, the guarantee of religious freedom is non-derogable (i.e., it cannot be suspended at any time) under any circumstances, including during times of war. In addition to provisions protecting freedom of religion, most international instruments include a prohibition of discrimination on grounds of religion. As in the case of other grounds of discrimination, cases alleging discrimination on grounds of religion usually arise together with allegations of breaches of substantive rights, in this case, the right to freedom of religion, but also the rights to freedom of expression and association and the rights to privacy and family life.

There is no generally accepted definition of 'religion' in international human rights law. This is largely due to the difficulty in defining religion at all but also because of the potential philosophical and ideological controversy if some sect or other is omitted. Instead the most important international human rights law instruments protect a catalogue of rights relevant to religion under the rubric of 'freedom of thought, conscience, and religion.' International instruments also protect manifestations or expressions of religion or belief. Generally, 'religion' followed by the word 'belief' is taken to refer to theistic convictions involving a transcendental view of the universe and a normative code of behaviour as well as atheistic, agnostic, rationalistic, and other views in which such elements are absent. 'Beliefs' in this context always relate to 'religious' beliefs, not political or social beliefs that are protected by other substantive human rights provisions.

Difficulties exist with regard to new religious movements and sects. This issue has sparked debates in many countries and led some to enact special provisions. See

recent reports by the UN Special Rapporteur on freedom of religion or belief. On 22 June 1999, the Council of Europe adopted Recommendation No. 1412, Illegal Activities of Sects. The Council considered it 'undesirable' to enact major legislation on sects and reaffirmed its commitment to freedom of conscience and religion. International human rights law, therefore, protects unconventional beliefs with few adherents as well as traditional, recognised and established religions.

2 General Principles under International Instruments

In addition to the international instruments discussed below, relevant instruments include the 1990 UN International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, which contains provision for the satisfaction of the cultural and religious needs of such migrants. See also the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion adopted by UN General Assembly Resolution No. 36/55 (1981).

2.1 International Covenant on Civil and Political Rights

Article 18 of the ICCPR (freedom of religion) provides that:

- “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

Articles 2 and 26 of the ICCPR prohibit discrimination on grounds of religion.

- In *Bhinder Singh v Canada* (No. 208/1986, ICCPR) the HRC found that the Canadian law requiring workers to wear hard hats in certain jobs for safety reasons

did not *indirectly* discriminate against Sikhs, whose religion requires the wearing of a turban. The requirement was reasonable and directed towards objective purposes (the workers' safety) that are compatible with the ICCPR.

- In *Waldman v Canada* (No. 694/1996, ICCPR) the author complained about educational subsidies in Ontario that were made available for Roman Catholic schools but not for schools of other religious faiths. This required him to meet the full cost of his children's education in a religious school. The HRC felt that neither the fact that the privileged treatment of Catholic schools is enshrined in the Ontario Constitution nor the proclaimed aims of the system justified the discriminatory treatment. The HRC held that where a State party chooses to provide public funding to religious schools, it should make funding available without discrimination. The State cannot discriminate among minority groups in taking affirmative action measures.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD does not explicitly prohibit discrimination on grounds of religion. However, in many instances discrimination on grounds of race, ethnic or national origin may also constitute discrimination on grounds of religion, or racial discrimination may arise together with discrimination on grounds of religion, such as in the case of multiple discrimination. See the section on multiple discrimination in Chapter VI below.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women and does not explicitly address discrimination on grounds of religion. However, discrimination on grounds of religion may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination. The Committee on the Elimination of Discrimination Against Women has not yet considered any individual complaints under CEDAW even though the optional protocol providing

for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC prohibits discrimination against any child on the grounds of religion.

2.6 International Labour Organization

Article 1 of the Discrimination (Employment and Occupation Convention) (No. 111) prohibits discrimination on the grounds of religion in employment or occupation. The quasi-judicial supervisory bodies of the ILO had to deal, on many occasions, with issues regarding religious rights of employees, frequently in connection with holy days and days of rest. In its General Survey, *Equality in Employment and Occupation*, 1996, the ILO notes (at paragraph 41) that “[T]he risk of discrimination also often arises from the absence of religious beliefs or from belief in different ethnical principles, from a lack of religious freedom or from intolerance, in particular where one religion has been established as the religion of the State, where the State is officially anti-religious, or where the dominant political doctrine is hostile to all religions.” It also notes (at paragraph 42) how the freedom to practise a religion can be hindered by the constraints of a trade or occupation.

2.7 European Convention on Human Rights

Article 14 of the ECHR prohibits discrimination on grounds of religion in the enjoyment of the rights under the Convention. Article 9 on freedom of religion provides as follows:

- “1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

The ECtHR has examined a wide variety of cases on discrimination on grounds of religion and freedom of religion in relation to (i) privacy and family life, (ii) employment, (iii) proselytism, (iv) legal personality, (v) property, (vi) education and (vii) religious activities. Many of the allegations of religious discrimination made before the ECtHR or

European Commission have concerned indirect discrimination and have been dismissed on the basis that there was no difference in treatment within the meaning of Article 14.

2.7.1 Privacy and Family Life

- In *Hoffmann v Austria* (No. 12875/87, 23/06/1993), the applicant, a Jehovah's Witness, complained that the Austrian Supreme Court had violated her rights under Articles 8 (privacy, home and family life), 9 (freedom of religion), and 14, as well as under Article 2 of Protocol No. 1. The Supreme Court granted custody of her children to her husband after their divorce, stating that the father would be better able to protect the children's interests since Jehovah's Witnesses refused to authorise blood transfusions, and since the children could be labelled "social outcasts" as Jehovah's Witnesses. The ECtHR held that the court's decision violated Article 8, which protects the right of individuals to a "respect for his private and family life, his home and his correspondence." Considering this right in conjunction with the prohibition on discrimination based on religion found in Article 14, the court found that the distinction based upon religion was not justified by any legitimate State aim, and therefore the applicant had been unjustly deprived of her right of non-interference with family life.
- In *Palau-Martinez v France* (No. 64927/01, 16/12/03), a national court decision granted custody of the applicant's children to their father while granting the applicant access and residence rights. The applicant was a Jehovah's Witness and the national court observed that the rules her religion imposed regarding the upbringing of their members' children were "essentially objectionable on account of their harshness, their intolerance and the obligation for the children to engage in proselytism." The appeal court considered that it was in the children's interest "to escape from the constraints and interdicts imposed by a religion structured as a sect". The ECtHR noted at the outset that when the appeal court ruled that the children should live with their father they had been living with their mother for nearly three and a half years. Consequently, its judgment had constituted an interference with the applicant's right to respect for her family life. By attaching decisive importance to the applicant's religion, the national court had introduced between the parents a difference in treatment grounded on religion. Although the difference in treatment had pursued a legitimate aim, namely protection of the children's interests, the national court had made observations of a general nature about Jehovah's Witnesses, not having practical, direct evidence that the applicant's religion had influenced the children's upbringing or daily life. Although relevant, that reasoning had not been sufficient. Therefore the ECtHR concluded that there had not been a reasonably proportionate relationship between the means employed and the aim pursued.

2.7.2 Employment

- In *Thlimmenos v Greece* (No. 34369/97, 06/04/2000) the Greek authorities refused to appoint the applicant, a Jehovah's Witness, as a chartered accountant, because he had a previous criminal conviction for disobeying an order to wear Greek military uniform. The applicant claimed that he refused to wear military uniform because Jehovah's Witnesses are committed to pacifism and, therefore, he believed his religion prevented him from doing so. He alleged the actions of the State breached Article 9 in conjunction with Article 14 of the ECHR by discriminating against him in the exercise of his freedom of religion. Greek law treated him like any other criminal, whereas his conviction arose from the exercise of his freedom of religious belief. The ECtHR accepted his argument and held that Greek legislation violated the applicant's right not to be discriminated against in the enjoyment of his right under Article 9.

2.7.3 Proselytism

- In *Larissis and others v Greece* (Nos. 23372/94, 26377/94, etc., 24/02/1998), the three applicants were officers in a unit of the Greek air force and all followers of "a Protestant Christian denomination which adheres to the principles that it is the duty of all believers to engage in evangelism." The applicants were convicted on court martial for the offence of proselytism because they evangelised fellow airmen and civilian neighbours in order to convert them to their church. They complained that their convictions breached their freedom of religion (Article 9). The ECtHR held (and it was not disputed by the Greek authorities) that the applicants' convictions amounted to an interference with their Article 9 rights and, therefore, the question was whether that interference was justified and "necessary in a democratic society." The ECtHR stated (at paragraphs 45-46) that:

"... while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion', including the right to try to convince one's neighbour, for example through 'teaching'. Article 9 does not, however, protect every act motivated or inspired by a religion or belief. It does not, for example, protect improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church.

"The Court's task is to determine whether the measures taken against the applicants were justified in principle and proportionate. In order to do this, it must weigh the requirements of the protection of the rights and liberties of others against the conduct of the applicants."

The ECtHR distinguished between the evangelism directed at the airmen and that directed at the civilians. Noting the hierarchical structure of the armed forces, it considered that the interference with Article 9 was proportionate to protect lower ranking airmen from "improper pressure" from their superiors. The ECtHR did, however,

emphasise that “not every discussion about religion or other sensitive matters between individuals of unequal rank will fall into this category” (paragraph 51). However, in the case of the civilians, because there was no evidence of improper pressure, the convictions breached Article 9.

2.7.4 Legal Personality

- In *Canea Catholic Church v Greece* (Nos. 25528/94, 16/12/1997) a civil dispute arose between the Roman Catholic Church in Canea and its next-door neighbour when the neighbour decided to demolish one of the Church’s surrounding walls. The Church was unable to undertake legal proceedings because the Greek courts held that it had no legal personality. It argued that it was the victim of discrimination because the Greek courts’ decision was based exclusively on religious criteria. The ECtHR held that there was a violation of Article 14 (non-discrimination) in conjunction with Article 6(1) (right to a fair hearing). Both the Greek Orthodox Church and the Jewish community had legal personality to protect their property rights under Greek law, so there was no objective and reasonable justification for the Roman Catholic Church to be treated any differently.

2.7.5 Property

- In *The Holy Monasteries v Greece* (Nos. 13092/87, 13984/88, etc. 09/12/1994), the applicants sought a declaration from the ECtHR that Greek laws seeking to transfer to the Greek State ownership of certain of the monasteries’ land violated Article 9 of the Convention. The applicants argued that the Greek legislation deprived the monasteries of the means necessary to pursue their religious objectives and to preserve the treasures of Christendom. The ECtHR held that, whilst the provisions did violate the applicant’s property rights (Article 1, Protocol No. 1), it did not concern the objects intended for the celebration of divine worship and therefore did not interfere with the exercise of freedom of religion.

2.7.6 Education

- In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Nos. 5095/71, 5920/72, 07/12/1976) the applicants were parents who objected to their children receiving compulsory sex education at State school because it was contrary to their Christian beliefs. The applicants invoked Articles 8, 9, 14 and in particular Article 2 of Protocol No.1. The ECtHR addressed at length the scope of the State obligations under Article 2 of Protocol No. 1 (right to education in conformity with religious beliefs). Importantly, the ECtHR found that Article 2 does apply to State as well as private schools, and that the States’ duty is “to respect parent’s convictions, be they religious or philosophical, throughout the entire State education programme”. The ECtHR noted that:

“...the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.

The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded." (paragraph 53)

However, on the facts of the case, the ECtHR concluded that the Danish legislation did not offend the applicants' religious and philosophical convictions to the extent forbidden by Article 2 of Protocol No.1, in particular, as the parents had the choice to entrust their children to private schools or educate them at home. Nor did the ECtHR find any evidence to support a violation of Articles 8, 9 or 14.

2.7.7 Religious Activities

- The case of *Cha'are Shalom Ve Tsedek v France* (No. 27417/95, 07/04/1997), concerned a Jewish liturgical association that was refused the approval necessary by the French authorities to authorise its own ritual slaughters for the preparation of kosher meat. Such ritual slaughter was in accordance with the principles found in the Torah. The applicants alleged a violation of Article 9 alone and in conjunction with Article 14; the latter because the French authorities had in fact granted such approval exclusively to the Jewish Consistorial Association of Paris (ACIP). The ECtHR stated that it was not contested that ritual slaughter constitutes a religious right within the meaning of Article 9. However, the ECtHR held that "there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable," whereas it was accepted that the applicants could in fact obtain such meat elsewhere. The court found that French law pursued a legitimate aim "namely the protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and public order", and Article 9 rights "cannot extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process."

2.8 European Union

As noted in Chapter II, Article 13 of the EC Treaty provides specific powers to the EU to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation as regards employment and occupation. Pursuant to Article 13, the Council of the EU passed the Framework Directive to provide a framework for member States to introduce measures to eliminate discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Framework Directive applies to employment, vocational guidance and training, and membership of professional, workers' and employers' bodies. It does not apply to social security or social protection schemes. It provides for the prohibition of discrimination related to employment and occupations. Harassment is included in the broad definition of

discrimination, and both direct and indirect forms of discrimination are prohibited. Member States are required to implement the Directive in national law.

The Framework Directive provides specific exemptions for genuine occupational requirements, which may include the religious ethos of the establishment. See further the section on genuine occupational requirements above in Chapter III.

2.9 African Charter on Human and Peoples' Rights

Article 2 of the African Charter prohibits discrimination on grounds of religion. Article 8 guarantees freedom of conscience, the profession and practice of religion.

- In *Free Legal Assistance Group, Les Temoins de Jehovah and others / Zaire* (25/89, 47/90, 56/91 and 100/93), Jehovah's witnesses alleged that they were being persecuted by the Zairean State. They suffered arbitrary arrests, appropriation of church property and exclusion from access to education. The African Commission held that the treatment they suffered violated Article 8 of the Charter, since there was no evidence that the practice of their religion threatened law and order. The Commission did not consider the case under Article 2.

2.10 American Convention on Human Rights

Article 1 of the AmCHR prohibits discrimination on grounds of religion. Article 12 provides for freedom of conscience and religion. There has been little relevant case law thus far.

G DISABILITY

Useful links: Disability

- For a discussion of the medical model of disability, see: The Center for an Accessible Society, The Definition of Disability, at <http://www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm>
- For a discussion of the social rights (or human rights) model, see: Theresia Degener and Gerard Quinn, *A Survey of International, Comparative, and Regional Disability Law Reform*.
- For the Council of Europe strategy, see: The European Disability Strategy, Europa, at http://europa.eu.int/comm/employment_social/disability/strategy_en.html
- For the Inter-American Convention on Disability, see: <http://www.oas.org/juridico/english/ga-res99/eres1608.htm>
- For International Classification of Impairments, see: www.who.int/icidh
- For discussion of the draft UN Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, see Landmine Survivors at: http://www.landminesurvivors.org/library_documents.php

Useful references

- Gerard Quinn and Theresia Degener, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, Office of High Commissioner for Human Rights HR/PUB/02/1 2002.
- Jerome E. Bickenbach, 'Disability Human Rights, Law and Policy' in *Handbook of Disability Studies*, 2001.

1 Introduction

1.1 Recognition of Disability Discrimination

It has only recently been acknowledged that disabled persons require protection against discrimination. Traditionally, disabled persons have been depicted not as subjects of legal rights but as objects of welfare, health and charity programmes.

- The *medical* model of disability assumes that the person with an impairment or condition is the problem and what is called for in response is care or a cure.
- The emerging *social rights model* (also known as the *human rights* or *social model*) is gradually replacing the medical model. The social rights model focuses less on the functional impairments of the individual with a disability, and more on the limitations of a society that categorises who is normal and who is not. According to the social rights model, it is the disabling environment, the attitudes of others as well as institutional structures that need to be changed, not the person's disability. This model recognises the inherent equality of all people, regardless of disabilities or differences. It also recognises society's obligation to support the freedom and

equality of all individuals, including those who may need appropriate social supports.

1.2 Definition of Disability

There are a number of possible ways to define 'disability' to determine who qualifies for protection from discrimination based on disability. The UN uses a definition of disability that is based on the World Health Organization International Classification of Impairments, Disabilities and Handicaps (ICIDH) from 1980 (see, www.who.int/icidh). This document had a tangible impact on disability discrimination laws in many countries. The ICIDH provides a conceptual framework for disability with three parts:

- *Impairment*: any loss of abnormality of psychological, or anatomical structure or function.
- *Disability*: any restriction or lack (resulting from an impairment) of an ability to perform an activity in the manner or within the range considered normal for a human being.
- *Handicap*: a disadvantage for a given individual, resulting from an impairment or disability, that limits or prevents the fulfilment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.

Individual State approaches to disability definition are very diverse. Some States emphasise inclusiveness and comprehensiveness, while others rely heavily on strict medical assessments. Many States define disability discrimination in terms of the social model, emphasising the intersection between the individual and the environment, where discrimination derives from the existence of barriers to full participation. Other States focus on the medical model, assessing the extent of functional limitations experienced by the individual, with little consideration of how those limitations interact with the individual's environment. In the first model, the most relevant evidence would measure how a person's environment has artificially limited that person's opportunities to participate fully in the public arena, such as employment, public accommodations and government programmes and services. In the second model, the person alleging discrimination typically must begin with medical evidence of the existence of an impairment and documentation of how that impairment affects functioning.

1.3 Developments in Disability Discrimination Law

The most significant developments in discrimination law with regard to disability have all taken place at the national level, for example, the concept of 'reasonable accommodation' or 'reasonable adjustment' discussed in detail above. The concept of reasonable accommodation has been developed in national jurisdictions such as the U.S., Canada and the United Kingdom and is now being applied by the EU Framework

Directive. Other national law developments include the recognition that a comparator ought not to be used in disability cases.

There are many significant Canadian cases on disability discrimination. Cases to note include *Canadian Odeon Theatres Ltd. v Huck* (1985) 6 C.H.R.R. D/2682; and *Ouimette v Lily Cups Ltd.* (1990) 12 C.H.R.R. D/19.

2 General Principles under International Instruments

None of the main international human rights instruments include disability within the list of protected categories. However, there is a growing body of binding and non-binding international law addressing the rights of people with disabilities. The UN General Assembly has adopted international human rights instruments that protect and advance the human rights of people with disabilities. The UN has also appointed an Ad Hoc Committee of the General Assembly to draft a proposed covenant on the rights of people with disabilities, which will reinforce the view of disability rights as a human rights issue. At the regional level, the Organization of American States (the “OAS”) and the Council of Europe have both taken measures to address disability discrimination. The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, adopted by the OAS in 1999 (see, <http://www.cidh.org/Basicos/disability.htm>), is the first treaty on disability adopted by an inter-governmental organisation. More recently, in January 2003, the Parliamentary Assembly of the Council of Europe adopted a recommendation entitled ‘Towards full social inclusion of persons with disabilities’.

There are a number of UN instruments that address disability issues:

- The UN Declaration on the Rights of Mentally Retarded Persons (1971) is the first international human rights instrument addressing specifically the rights of people with disabilities (see, <http://www1.umn.edu/humanrts/instree/t1drrmp.htm>). The Declaration adopts a medical model that views people with disabilities as dependent and in need of treatment. It does not acknowledge that all people with disabilities are capable of living a “normal life.” The purpose of the Declaration is “. . .to promote the integration of people with disabilities as far as possible, in normal life.”
- In 1975, the Declaration of Rights of Disabled Persons (see, <http://www.unhchr.ch/html/menu3/b/72.htm>) affirmed, for the first time under international law, the right of people with disabilities to have the same civil and political rights as other human beings. Since then, the UN has adopted specialised human rights conventions on behalf of other groups, but again, none specifically address the rights of people with disabilities.

There are also non-binding instruments on disability that provide guidance on the interpretation of more general international law instruments, systematise best practice and suggest how international law may be evolving.

- During the 1980s, the UN passed a series of resolutions culminating in the 1982 World Program on Action Concerning Disabled Persons (see, <http://www.un.org/esa/socdev/enable/diswpa00.htm>). The World Program includes what is likely the first statement on the equalisation of opportunities for people with disabilities by the UN. It provides that “the general system of society, such as the physical, cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational activities are made accessible to all.” The World Program provided the impetus for the UN Decade of the Disabled Person from 1983-1993.
- In 1991, the General Assembly of the UN also adopted the Principles for Protection of Persons with Mental Illness and the Improvement of Mental Health Care (see, <http://www.un.org/esa/socdev/enable/diswpa00.htm>), which provide the standards by which to evaluate the implementation of human rights practices in different countries' mental health systems. They also provide the basis for reports about treatment of people with disabilities and conditions to which they are subjected, particularly in institutions. The Principles have a number of significant limitations, such as the lack of an explicit recognition of the right to refuse treatment and a number of weak protections against involuntary treatment. In addition, the Principles refer only to “patients” rather than people, which suggests that the rights of individuals with disabilities are a product of their medical status rather than their inherent value as human beings. As such, the Principles should not be used as a model for the language of domestic legislation. They are, however, valuable in identifying core minimum standards prohibited by current international human rights law.
- Pursuant to the recommendations of the World Conference on Human Rights, the UN General Assembly adopted the Standard Rules on Equalisation of Opportunities for People with Disabilities (see, <http://www.un.org/esa/socdev/enable/dissre00.htm>). See the Annex to UN General Assembly Resolution No. 48/96, 20/12/1993. The Standard Rules were a revolutionary international instrument because they established citizen participation by people with disabilities as an internationally recognised human right: they promoted the view of equal rights protections for people with disabilities rather than a social welfare approach. To realise this right, governments “must ensure that organisations of persons with disabilities are involved in the development of national legislation concerning the rights of persons with disabilities, as well as in the ongoing evaluation of that legislation.... Any discriminatory provisions against persons with disabilities must be eliminated. National legislation should provide for appropriate sanctions in case of violations of the principles of non-discrimination.”

The Standard Rules (Rule 14(2)) call on every country to engage in a national planning process to bring legislation, policies, and programmes into conformity with international human rights standards. The UN established a monitoring mechanism “to further the effective implementation of the rules,” and provided for the appointment of a Special Rapporteur who is mandated to report to the UN Commission on Social Development on the status of people with disabilities throughout the world. The Standard Rules seek to ensure that people with disabilities are entitled to the same rights and obligations as others within their respective societies. They also clearly identify the right to equality for people with disabilities (see UN General Assembly Resolution No. 48/96, 20/12/1993, p.204):

“The principle of equal rights implies that the needs of each and every individual are of equal importance that those needs must be made the basis for the planning of society and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.”

Although the Standard Rules are not compulsory, they do set the standards by which a country's treatment of people with disabilities may be assessed. They also imply a strong commitment on behalf of member States to promote and protect the rights of persons with disabilities.

2.1 International Covenant on Civil and Political Rights

Disability is not included explicitly in Articles 2 and 26 of the ICCPR as a ground of discrimination prohibited by the ICCPR. It may be prohibited under the ‘other status’ language of Articles 2 and 26, although there has yet to be any jurisprudence to this effect. CESCR General Comment 5 on the ICESCR indicates that the ICESCR and ICCPR both prohibit discrimination on grounds of disability.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

In 1994, the CESCR issued General Comment 5 on how to interpret the ICESCR, as applied to people with disabilities. CESCR General Comment 5 (at paragraph 15) defines disability-based discrimination under the ICESCR as including “any distinction,

exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.” The General Comment adopts a human rights approach by suggesting the need for anti-discrimination legislation on behalf of persons with disabilities:

“In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all states parties.”

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD does not explicitly address discrimination on grounds of disability. However, disability discrimination may concern ICERD to the extent that it arises together with racial discrimination (or the two overlap), such as in the case of multiple discrimination.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women and does not explicitly address disability discrimination. However, disability discrimination may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination. In General Recommendation No. 18 (‘Disabled Women’), CEDAW recommended that States provide information on disabled women in their periodic reports and on the measures taken to deal with their particular situation (see also CEDAW General Recommendation No. 24 (Women and Health). The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC provides that the States parties will guarantee the rights in the Convention to each child without discrimination on grounds of the child’s or his or her parents’ or legal guardians’ disability. See also Article 23. As noted in Chapter II, there is no individual complaint mechanism under the CRC.

2.6 International Labour Organization

ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159) (see, http://www.ilo.org/public/english/employment/skills/recomm/instr/c_159.htm) provides for the vocational rehabilitation and employment of disabled

persons, based on the principle of equal opportunity between disabled workers and workers generally. See paragraphs 55 and 56 of the ILO General Survey, *Equality in Employment and Occupation: Introduction*, 1996 (see, <http://www.ilo.org/ilolex/english/surlist.htm>).

2.7 European Convention on Human Rights

Article 14 of the ECHR does not explicitly prohibit discrimination on grounds of disability. As in the case of the ICCPR, however, the ‘other status’ language of the provision may prohibit discrimination on grounds of disability. The ECHR has considered a number of cases involving disabled persons, although not under Article 14.

- In *Herzcegfalvy v Austria* (No. 10533/83, 24/09/1993), the ECtHR observed that “[t]he position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with.”
- In *Price v the United Kingdom* (No. 33394/96, 10/07/2001), the ECtHR demonstrated the application of the protection against inhuman and degrading treatment to people with disabilities. The ECtHR considered this case under Article 3 of the ECHR, which states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” See also the section on degrading treatment in Chapter VI.

Price v the United Kingdom

Ms. Price was a woman with a physical disability who used a wheelchair. She was described by the ECtHR as “four-limb deficient” and “suffers from problems with her kidneys.” During a civil proceeding she was placed in jail for seven days for contempt of court. The cell in which she was placed was not adapted for a person with a disability, and she was forced to sleep in her wheelchair. Emergency buttons and light switches were out of her reach, and the toilet was not accessible. When she was finally given access to a toilet, she was left there for hours and undressed in front of male guards.

The ECtHR found that this treatment constituted degrading treatment under the ECHR. The ECtHR noted that “ill-treatment must attain a minimum level of severity if it is to fall within the scope of” the Convention. Even though there had been no intent to cause harm to this woman, the failure to accommodate her needs caused her great suffering. As the ECtHR stated:

“In considering whether treatment is ‘degrading’ within the meaning of [the Convention] one of the factors the Court will take into account is the question whether its object was to humiliate or debase the person concerned although the absence of any such purpose cannot conclusively rule out a finding of violation. . . . In this case, the court found degrading treatment in violation of the covenant, even though it found ‘no evidence in this case of any positive intention to humiliate or debase the applicant.’”

- In *Botta v Italy* (No. 21439/93, 24/02/1998), the applicant, a disabled man, was unable to gain access to the beach and the sea at the private bathing establishment due to its failure to provide the disabled facilities needed (lavatories and ramps) as required by Italian law. The applicant claimed that the failure by the Italian State to take measures to remedy the omission by the private resort breached his right to a private life and the development of his personality under Article 8 and constituted discrimination contrary to Article 14 in conjunction with Article 8. The ECtHR examined whether the right asserted by Mr. Botta falls within the scope of the concept of ‘respect for private life’ set forth in Article 8 of the Convention. The ECtHR felt that the right asserted, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerned “interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life.” The ECtHR concluded that Article 8 was not applicable. Consequently, Article 14 was not applicable either. See also the section on ‘Privacy Rights and Non-discrimination’ in Chapter VI below.
- In *Zehnalová and Zehnal v Czech Republic* (No. 3862/97, 14/05/2002), the applicants alleged infringement of the right to respect for their private life without discrimination because many public buildings were not equipped with access facilities for the disabled (even though they were required to do so under Czech laws). Relying on Article 14 of the Convention taken together with Article 8, the applicant submitted that she had been discriminated against, as a person with disabilities, in the enjoyment of fundamental rights secured to all. The ECtHR held that Article 8 was not applicable so Article 14 could not apply either.
- *Pretty v the United Kingdom* (No. 2346/02, 29/04/2002), concerned domestic legislation according to which it was not a crime to commit suicide but it was a crime to assist another to do so. The applicant claimed that such legislation discriminated against those who, like herself, could not because of incapacity take their own lives without assistance. The claim of discrimination was based on the fact that she was treated in the same way as those whose situations were significantly different. She relied on the *Thlimmenos* judgment (discussed above under ‘indirect discrimination’) in claiming that the relevant measure was discriminatory because it prevented the disabled, but not the able-bodied, exercising their right to commit suicide. The ECtHR agreed with the domestic court in holding that, as the relevant legislation did not create a right to commit suicide in domestic law, her claim was misconceived.

On 29 January 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation No. 1592, entitled ‘Towards Full Social Inclusion of Persons with

Disabilities' (Doc. 9632). The Recommendation adopts a social rights model, as it provides:

“The Assembly notes with satisfaction that in certain member states policies concerning people with disabilities have been gradually evolving over the last decade from an institutional approach, considering people with disabilities as ‘patients’, to a more holistic approach viewing them as ‘citizens’, who have a right to individual support and self-determination.”

The Recommendation goes on to state:

“The right to receive support and assistance, although essential to improving the quality of life of people with disabilities, is not enough. Guaranteeing access to equal political, social, economic and cultural rights should be a common political objective for the next decade. Equal status, inclusion, full citizenship, and the right to choose should be further promoted and implemented.”

2.8 European Union

As noted in Chapter II, Article 13 of the EC Treaty provides specific powers to the EU to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation as regards employment and occupation. Pursuant to Article 13, the Council of the EU passed the Framework Directive to provide a framework for member States to introduce measures to eliminate discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Framework Directive applies to employment, vocational guidance and training, and membership of professional, workers' and employers' bodies. It does not apply to social security or social protection schemes. It provides for the prohibition of discrimination related to employment and occupations. Harassment is included in the broad definition of discrimination, and both direct and indirect forms of discrimination are prohibited. Member States are required to implement the Directive in national law.

Article 7(2) of the Framework Directive states that:

“With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of the Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”

Under Article 18 of the Framework Directive, States may, if necessary, have an additional period of three years from 2 December 2003 (a total of six years) for implementation of the provisions on disability discrimination. This is subject to

obligations to inform the European Commission of any such decision and to report annually.

2.9 African Charter on Human and Peoples' Rights

The African Charter does not explicitly address discrimination on grounds of disability. Again, like in the case of the ECHR, discrimination on grounds of disability may be prohibited by the 'or other status' language in Article 2.

2.10 American Convention on Human Rights

The AmCHR does not directly address discrimination on grounds of disability. However, there are a number of cases dealing with disability issues. The first case involving the rights of a person with a disability was decided by the IACHR in March 1999, under the AmCHR.

Victor Rosario Congo case

The case involved a man with a mental disability from Ecuador, who died of "dehydration" in pre-trial detention after he was beaten by a guard, placed in isolation, and denied adequate medical and psychiatric care.

The Commission found that Mr. Congo's mental state degenerated as a result of being held in isolation, and that holding him in seclusion under these circumstances constituted inhuman and degrading treatment in violation of Article 5 of the AmCHR.

The Commission also found that Ecuador's failure to provide appropriate care for Mr. Congo violated its duty to protect his life under Article 4(1) of the AmCHR. The Commission found that detention "under deplorable conditions and without medical treatment" constituted an additional form of inhuman and degrading treatment. As the Commission noted, "the right to physical integrity is even more serious in the case of a person held in preventative detention, suffering a mental disease, and therefore in the custody of the State in a particularly vulnerable position."

The *Congo* decision is important because the IACHR indicated for the first time that it would adopt "special standards to the determination of whether the provisions of the Convention have been complied with in cases involving persons suffering from mental illnesses." In addition, the IACHR relied, also for the first time, on the Principles for the Protection of Persons with Mental Illness as a guide to the interpretation of the American Convention.

In 1999, the OAS adopted the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, the first binding human rights treaty on disability. While it does not contain individual rights, it is the first regional treaty to define disability-based discrimination. Article 1 paragraph 2 states:

“(a) The term ‘discrimination against persons with disabilities’ means any distinction, exclusion, or restriction based on disability, record of disability, condition resulting from a previous disability, or perception of a disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.

“(b) A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the rights of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state's internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well being, such declaration does not constitute discrimination.”

3 National Jurisdictions

The issue of disability discrimination has been addressed increasingly within national jurisdictions.

- In *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R. 624, the Supreme Court of Canada held that deaf persons were entitled to publicly-funded sign-language interpretation to access medical services. Failure to provide access denies deaf persons the equal benefit of the law and discriminates against them in comparison with hearing persons. The court specified that any claim for the provision of an oral language medical interpretation-programme, whether based on national origin or language as an analogous ground, would proceed on markedly different constitutional terrain than a claim grounded on disability.
- In *Granovsky v Minister for Employment and Immigration* [2000] S.C.C. 28, the Canadian Supreme Court held that a pension contribution requirement could be relaxed for a permanently, but not a temporarily disabled person.
- In *X v Y Corp and another*, [1999] 1LRC 688, the High Court of India (Bombay) held that testing employees' HIV status pending recruitment was unconstitutional. Y Corp's rule denied employment to HIV-infected persons merely on the ground of their HIV status, irrespective of the fact that the employee was able to perform the job requirements and that they posed no threat to others.

Useful links: Age

- For the UN Principles of Older Persons, see: <http://www.un.org/esa/socdev/iyop/iyoppop.htm>
- For the US Age Discrimination in Employment Act (1967), see: <http://www.eumc.eu.int>

1 Introduction

In the past, age discrimination has received little attention in international human rights law. There have been initiatives such as the UN Principles for Older Persons adopted by the UN General Assembly in 1991, however, none of the most important international human rights instruments explicitly prohibits discrimination on grounds of age. As noted in CESCR General Comment 6 to the ICESCR (at paragraph 10), this is perhaps “best explained by the fact that, when [these instruments] were adopted, the problem of demographic ageing was not as evident or as pressing as it is now.”

Discrimination on grounds of age substitutes assessment of capability for broad stereotypes about age. It stems in part from the perception that, with age, a person’s physical and mental capabilities are always negatively affected and younger persons are more efficient, have more energy and are less expensive to train. The result is that, in the employment field where much of such discrimination occurs, younger persons are routinely hired over older persons with limited or no comparative assessment of ability. Some employers argue that there are objectively justifiable reasons to treat older persons differently without demonstrating in each individual case that this is the case. Of course, there are limited situations where age can be a genuine occupational requirement for the job. For example, the ILO General Survey, *Equality in Employment and Occupation* 1996, notes (at paragraph 62) that “[T]here is no discrimination where an employer can prove that age is an occupational requirement justified by the nature of the job, although exclusively economic arguments do not constitute justification.” However, as discussed in Chapter III, such genuine occupational requirements represent an exception to the general rule of non-discrimination. Minimum and maximum ages for employment may also be objectively justified in certain circumstances, for example, mandatory retirement ages. Although, the vast majority of age discrimination cases involve older persons, prohibition of age discrimination should also protect younger persons in employment who are denied equal treatment based on age rather than ability.

Age discrimination has been addressed primarily at the national level. Labour codes and legislation in many States expressly prohibits discrimination on the basis of age. See, for example the Age Discrimination in Employment Act (1967) in the U.S. Some of the key issues in age discrimination are the compulsory retirement age, the conditions

of employment of elderly and young workers and age limits for access to tertiary education and public service employment.

- In *McKinney v Board of Governors of the University of Guelph and the Attorney General for Ontario* [1990] 3 S.C.R. 229, the appellants applied for declarations that universities' policies of mandatory retirement at age 65 violated, among other provisions, Section 15 of the Canadian Charter, by not treating persons who attain the age of 65 equally with others. The Supreme Court noted that, assuming the universities' policies were law, they did discriminate within the meaning of Section 15(1) of the Charter because they were based on the enumerated personal characteristic of age (citing *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143). However, the Court felt that the imposition of a mandatory retirement age constituted a reasonable limit under Section 1 of the Charter to the right to equality. Such a measure had the legitimate objective of fostering excellence in higher education and encouraging academic freedom. Furthermore, mandatory retirement was rationally connected to the objectives sought in that it permitted long-term planning by the university and the continuing and necessary infusion of new people. The Supreme Court noted the need for the universities to weigh the competing claims of the individuals affected and their duty to society as a whole and found that mandatory retirement was a proportional measure involving minimal impairment of the right to equality. The pressing and substantial objectives of ensuring broad access to scarce university resources outweighed the negative impact on the applicants.
- In *Gosselin v Quebec* [2002] 4 S.C.R. 429 the Canadian Supreme Court found that under-30 year olds who received a lower level of benefits were not discriminated against under the Canadian Charter taking into account the purpose of constitutional rights and the aims of the government in providing lower level of benefits. See also *Saskatchewan (Human Rights Commission) v Saskatoon (City)* [1989] 2 S.C.R. 1297; and *Dickason v University of Alberta* [1992] 2 S.C.R. 1103.

Age-related practices can amount to indirect discrimination prohibited by international instruments, for example, rules governing entitlement to social security benefits that make unjustified distinctions between men and women (i.e., sex discrimination).

2 General Principles under International Instruments

2.1 International Covenant on Civil and Political Rights

Age discrimination is prohibited as an 'other status' under Articles 2 and 26 of the ICCPR. See CESCR General Comment 6 (at paragraph 12).

- In *Love v Australia* (No. 983/2001, ICCPR), the authors claimed that compulsory dismissal by an airline at the age of 60 constituted impermissible age

discrimination. The HRC held that a distinction related to age, which is not based on reasonable and objective criteria, may amount to discrimination on the ground of 'other status' or to a denial of the equal protection of the law. In this case, the HRC felt that the distinction based on age was in the interests of safety and was objective and reasonable.

- In *Schmitz-de-Jong v the Netherlands* (No. 855/1999, ICCPR) the author was denied a pensioner 'partner' pass on the grounds that he did not fulfil the age requirement (60 years). She claimed that this constituted discrimination based on age and that the age limit was arbitrary. Her partner had a pensioner's pass, so she argued that although she was not yet 60 she should be entitled to a partner's pass. The HRC noted that a distinction does not constitute discrimination if it is based on objective and reasonable criteria. In this case the HRC felt that the age limitation of allowing only partners who have reached the age of 60 years to obtain an entitlement to various rate reductions as a partner to a pensioner above the age of 65 years is an objective criterion of differentiation and that the application of this differentiation in the case of the author was not unreasonable.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights. CESCR General Comment 6 suggests that the 'or other status' language in Article 2(1) prohibits age discrimination.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD does not explicitly address discrimination on grounds of age.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women and does not explicitly address age discrimination. The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

Article 11.1 of CEDAW provides that “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: ...(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.”

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC provides that the State parties will guarantee the rights in the Convention to each child without discrimination on grounds of the child’s or his or her parents’ or legal guardians’ ‘other status.’ Like in the case of the ICCPR and ICESCR, this may include age.

2.6 International Labour Organization

ILO Convention No. 111 on Non-discrimination (Employment and Occupation) does not explicitly prohibit discrimination on the grounds of age. However, Article 1(b) of Convention No. 111 provides that “such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...] may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations.....” The ILO notes in the General Survey that many members have introduced age as a prohibited ground in domestic legislation.

2.7 European Convention on Human Rights

The ECHR does not explicitly address discrimination on grounds of age. Age discrimination may be prohibited as an ‘other status’ under Article 14.

There have been a number of cases before the ECtHR concerning the treatment of children in the criminal justice system. See, for example, *V v the United Kingdom* (No. 24888/94, 16/12/1999) and *T v the United Kingdom* (No. 24724/94, 16/12/1999).

2.8 European Union

As noted in Chapter II, Article 13 of the EC Treaty provides specific powers to the EU to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation as regards employment and occupation. Pursuant to Article 13, the Council of the EU passed the Framework Directive to provide a framework for member States to introduce measures to eliminate discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Framework Directive applies to employment, vocational guidance and training, and membership of professional, workers’ and employers’ bodies. It does not apply to social security or social protection schemes. It provides for the prohibition of discrimination related to

employment and occupations. Harassment is included in the broad definition of discrimination, and both direct and indirect forms of discrimination are prohibited. Member States are required to implement the Directive in national law.

The Framework Directive contains a number of exemptions specific to age discrimination. Article 3 provides that age discrimination provisions shall not apply to the armed forces. Article 6 exempts 'objectively and reasonably justified' measures that discriminate on grounds of age, such as certain minimum or maximum age requirements. For a more complete description, see Chapter II on the EU Directives.

Under Article 18 of the Framework Directive, States may, if necessary, have an additional period of three years from 2 December 2003 (a total of six years) for implementation of the provisions on age discrimination. This is subject to obligations to inform the European Commission of any such decision and to report annually.

2.9 African Charter on Human and Peoples' Rights

The African Charter does not explicitly address discrimination on grounds of age. However, age discrimination may be prohibited as an 'other status' under Article 2.

2.10 American Convention on Human Rights

The AmCHR does not explicitly address discrimination on grounds of age. However, age discrimination may be prohibited as an 'other social condition' under Article 1.

I POLITICAL OR OTHER OPINION

1 Introduction

Like in the case of religion, there is no generally accepted definition of 'opinion' in international human rights law. Again, there is great difficulty in defining opinion at all. Instead, the most important international human rights law instruments protect a catalogue of rights relevant to political opinion through the related rights to freedom of thought, expression, assembly and association and participation in public affairs, together with a prohibition of discrimination on the grounds of opinion. Consideration of discrimination on this ground in the case law is often overlooked in favour of consideration under the related substantive right. The prohibition of discrimination on the basis of 'political or other opinion' suggests that protection will also be given to activities expressing or demonstrating opposition to the established political principles, system or rulers, or simply a different opinion or ideology. The protection of political

opinions does not apply if violent methods are used to express or demonstrate those opinions. See ILO General Survey (at paragraph 45).

Discrimination based on opinion commonly occurs in relation to military or public service or employment. In employment such discrimination occurs when employment decisions, or any terms or conditions of employment, are determined based on political opinion or participation in trade union activities, rather than ability to perform required job functions. This form of discrimination may apply to all aspects of employment, including hiring, assignment, compensation, project assignment, discipline, and termination. Political opinion or trade union discrimination can occur through direct actions (such as the refusal of job applications based on opinion) to indirect actions (such as the routing of job opportunities through informal networks of workers tied to political opinions or trade union activities). Different treatment on the basis of political opinion is sometimes justifiable, however. In its General Survey 1996, the ILO noted (at paragraph 196) that “[R]equirements of a political nature can be set for a particular job, but to ensure that they are not contrary to the Convention it is imperative that they be strictly limited to the characteristics of the post (specific and definable) and be in proportion to its inherent requirements, for example, in the case of some senior posts directly concerned with government policy.”

2 General Principles under International Instruments

2.1 International Covenant on Civil and Political Rights

Articles 2 and 26 of the ICCPR explicitly prohibit discrimination based on ‘political or other opinion.’ The HRC has considered a number of cases on these grounds.

2.1.1 Conscientious Objectors

The HRC has dealt with a number of cases involving conscientious objectors to military service.

- In *Järvinen v Finland* (No. 295/1988, ICCPR) the author claimed that new Finnish legislation requiring conscientious objectors to do 16 months alternative civilian service compared to 8 months for military service discriminated against him on the basis of philosophical opinion. The HRC determined that the prolongation of the term for alternative civilian service was based on reasonable and objective criteria. Regarding military service, see also the *Gueye* case.
- In *Foin v France* (No. 666/1995, ICCPR), the HRC departed from its reasoning in *Järvinen*. It found that the longer term of alternative service for conscientious objectors violated Article 26 on the grounds of opinion. The HRC rejected the State’s argument that doubling the length of service was the only way to test the sincerity of an individual’s convictions as unreasonable. The State did not produce

other objective and reasonable arguments to justify the treatment under scrutiny. This reasoning is consistent with the HRC's assertion in *Gueye* that "mere administrative inconvenience cannot be invoked to justify unequal treatment."

- In *H.A.E.D.J. v the Netherlands* (No. 297/1988, ICCPR) the author was a conscientious objector who was performing alternative civilian service. He claimed he was suffering discrimination in not receiving payment equivalent to private civilian life. The HRC compared the treatment of the applicant not with ordinary civilians but with other persons performing alternative civilian service and found no violation. See also *R.T.Z. v the Netherlands* (No., 245/1987, ICCPR); *M.J.G. v the Netherlands* (No. 267/1987, ICCPR); and *Drake and Julian v New Zealand* (No. 601/1994, ICCPR).

2.1.2 Admission to the Public Service

- In *Stalla Costa v Uruguay* (No. 198/1985, ICCPR) the applicant complained of the preferential treatment in admission to the public service given to former public officials who had previously been unfairly dismissed on ideological, political or trade-union grounds. He complained that this preferential treatment unfairly prejudiced his own chances of gaining a public-service job. The HRC observes that, under the Uruguayan military rule, the latter were victims of violations of right to equal participation in public life of all citizens under Article 25 of the ICCPR and as such entitled to have an effective remedy under Article 2, paragraph 3 (a) of the ICCPR. The enactment of the law, which the author complained was discriminatory by the new democratic government should be looked upon as such a remedy. The HRC found neither a violation of Article 25 (c) nor discrimination within the meaning of Articles 2 and 26 of the Covenant. The alleged discrimination was found to be permissible affirmative action, indeed "a measures of redress" to persons who had previously suffered from discrimination.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD does not explicitly address discrimination on grounds of opinion. However, discrimination on grounds of opinion may concern ICERD to the extent that it arises

together with racial discrimination (or the two overlap), such as in the case of multiple discrimination.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW is concerned with discrimination against women and it does not explicitly address discrimination on grounds of opinion. However, discrimination on grounds of opinion may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination. The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC provides that the States parties will guarantee the rights in the Convention to each child without discrimination on grounds of the child's or his or her parents' or legal guardians' 'political or other opinion.'

2.6 International Labour Organization

ILO Convention No. 111 on Non-discrimination (Employment and Occupation) prohibits discrimination on the grounds of political opinion in employment or occupation.

2.7 European Convention on Human Rights

Article 14 of the ECHR explicitly prohibits discrimination on grounds of 'political or other opinion.' There are no examples in the case law of the ECtHR, however, where the ECtHR found a breach of the prohibition of discrimination based on political or other opinion.

- In *Feldek v Slovakia* (No. 29032/95, 12/07/2001), the applicant, Czech national, distributed a statement which was published by several Slovakian newspapers, in which he made references to the "fascist past" of a Slovakian Government Minister. The national courts declared the statement defamatory. The applicant complained that the Slovakian courts had violated his right to freedom of expression and that the publication of a text declaring his statement defamatory violated his right to freedom of thought. He also complained that he had been discriminated against on the basis of his political opinion. The ECtHR found that it was clear and undisputed that there had been an interference with the applicant's right to freedom of expression. Deciding whether the measures were "necessary in a democratic society", the ECtHR noted that the applicant's statement was made

as part of a political debate on matters of general and public concern and the ECtHR emphasised that the promotion of free political debate was a very important feature in a democratic society. Accordingly, the interference complained of was not “necessary in a democratic society” within the meaning of Article 10(2) and there had therefore been a violation of Article 10. However, the ECtHR found no indication that the measure complained of could be attributed to a difference in treatment based on the applicant's political opinion or any other relevant ground. Accordingly, there had been no violation of Article 14.

In many cases, the ECtHR does not analyse complaints made under Article 14 if it has determined already whether or not there was a breach of the substantive provisions of the ECHR, such as freedom of expression or the right to life. Good examples of this are the cases resulting from the dissolution of the Turkish opposition parties. See *United Communist Party of Turkey and others v Turkey* (No. 19392/92, 30/01/1998); *Incal v Turkey* (No. 22678/63, 09/06/1998); and *Freedom and Democracy Party (ÖZDEP) v Turkey* (No. 23885/94, 08/12/1999). State censorship in Turkey (with accompanying violence) has also given rise to freedom of expression cases, with ancillary (and unconsidered) complaints of discrimination on the grounds of political opinion. See *Yasa v Turkey* (No. 22495/93, 02/09/1998); and *Baskaya and Okçuoglu v Turkey* (No. 23536/94, 24408/94, 08/07/1999). The cases of *Avsar v Turkey* (No. 25657/94, 10/07/2001) and *Kiliç v Turkey* (No. 22492/93, 28/03/2000) involved claims of a breach of the right to life due to political repression. Finally *Sidiropoulos and others v Greece* (No. 26695/95, 10/07/1998) concerned a claimed breach of the freedom of association, together with discrimination on the grounds of political opinion.

Many of the ‘political’ cases in Northern Ireland were taken on the basis of ‘association with a national minority’ rather than political opinion (see *McKerr, Shanaghan, Kelly, McShane*, etc.). Many of these cases concern challenges to ‘security’ measures taken against Republicans, such as internment, or restrictions on freedom of expression.

- In *Ireland v the United Kingdom* (No. 5310/71, 18/01/1978), the applicant State argued that various powers relating to extrajudicial deprivation of liberty used in Northern Ireland between 1971 and 1975 were exercised with discrimination in violation of Article 14 in conjunction with Article 5. Prior to 1973, such powers were employed only regarding IRA terrorism; later they were used also against Loyalist terrorists but to a far lesser extent. The applicant State argued that this indicated a policy or practice of discrimination and that such discrimination had no “objective and reasonable justification.” The Court found that, prior to 1973, there were differences between Loyalist and Republican terrorism – Republicans were responsible for more attacks, their organisations were far more structured and they were more difficult to prosecute. Although Loyalist attacks increased between 1972 and 1973 and this did not result in an immediate increase in internment, the Court felt that given the changing situation the State needed time to adapt. Consequently, the Court felt that the aim pursued until 1973 – the elimination of the most formidable organisation first of all – was legitimate and the means employed

not disproportionate. After February 1973, the Court concluded that there was no significant difference of treatment. Although more Republican terrorists were subject to internment, this was because they were committing the majority of the acts of terrorism and were difficult to bring before the courts.

- In the case of *P.K. and others v the United Kingdom* (No. 19085/91, 09/12/1992), the applicants complained that they were discriminated against on the grounds of political or other opinion, national origin and association with a national minority. They claimed that Irish Republican prisoners were treated less favourably than other prisoners in relation to questions of prison transfer. The European Commission on Human Rights found that the applicant was refused transfer back to Northern Ireland at least partly on security grounds. Given that he had been convicted of very serious terrorist offences, the Commission considered that his position regarding transfer could not be considered analogous to that of other prisoners.
- In *McLaughlin v the United Kingdom* (No. 18759/91, 09/05/1994) the applicant claimed that government orders to the UK broadcast media preventing representatives of Sinn Fein but not of other political parties from contributing to or participating in TV programmes discriminated against him in breach of Article 14 in conjunction with Article 10 (freedom of expression). The European Commission on Human Rights considered whether there was an objective and reasonable justification for the difference in treatment. The Commission felt that the support of Sinn Fein for terrorist violence justified the restriction of access to the media in the circumstances.
- In *John Murray v the United Kingdom* (No. 18731/91, 08/02/1996), the applicant claimed that the practice in Northern Ireland regarding access of solicitors to terrorist suspects was discriminatory, contrary to Article 14 taken in conjunction with Article 6. Solicitors were not permitted to be present at any stage during the interviewing of suspects by the police unlike their counterparts in England and Wales. As the Court had already found that denial to the applicant of access to a solicitor violated Article 6, it did not consider it necessary to examine the Article 14 issue.
- In *Magee v the United Kingdom* (No. 28135/95, 06/06/2000), the applicant complained that he was discriminated against on grounds of national origin and/or association with a national minority. He submitted that suspects arrested and detained in England and Wales under prevention of terrorism legislation could have access to a lawyer immediately and were entitled to his presence during interview, while this did not occur in Northern Ireland. In addition, in England and Wales, at the relevant time, incriminating inferences could not be drawn from an arrested person's silence during the interview in contradistinction to the position in Northern Ireland. The Court held that the difference in treatment was not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual was arrested and detained. Legislation could take account of regional differences and

characteristics of an objective and reasonable nature. Thus, in this case, such a difference did not amount to discriminatory treatment within the meaning of Article 14.

2.8 European Union

EU law does not address directly the issue of discrimination on the grounds of political or other opinion.

2.9 African Charter on Human and Peoples' Rights

Article 2 prohibits discrimination on grounds of 'political or any other opinion.' Article 3 provides for equality before the law and equal protection of the law.

- In *Kazeem Aminu / Nigeria* (205/97) the complainant alleged that his client was arbitrarily arrested, detained and tortured by Nigerian security officials because of his political inclination – he actively campaigned for the validation of elections annulled by the Nigerian military government. The African Commission held that this was a violation of Article 3(2) (equal protection of the law).
- In *Amnesty International / Zambia* (212/98), Zambia deported two prominent political figures to Malawi based on their alleged threat to peace and good order. The State gave them only limited recourse to the Zambian courts and attempted to deny their citizenship. The complainants alleged discrimination on the basis of ethnic group, social origin and political opinion. The African Commission found (at paragraph 51-52) that “by forcibly expelling the two victims from Zambia, the Zambian government failed to secure the rights protected in the African Charter to all persons within their jurisdiction irrespective of political or other opinion.” See also *RADDHO / Zambia* (71/92).

2.10 American Convention on Human Rights

Article 1 prohibits discrimination on grounds of 'political or other opinion.' Article 24 provides for equal protection of the law.

J MARITAL, PARENTAL AND FAMILY STATUS

1 Introduction

Marital status refers to both a person's marital and relationship status. Marital status can include where a person is married, widowed, divorced, separated, single, or unmarried with a same-sex or opposite-sex partner (whether a legally recognised

domestic partner or not). Marital status discrimination may be accompanied by other forms of discrimination, such as discrimination on the grounds of parental status, pregnancy, or sex. Parental status can include foster parents and carers. Family status can include biological parentage or being *in loco parentis*. Discrimination on the basis of marital status may be direct or indirect.

Marital status discrimination is most common in housing accommodation and employment. The prohibition of discrimination can cover recruitment, terms and conditions of employment, promotion and transfer opportunities, leave entitlements, redundancy, dismissal and exiting arrangements, including the provision of references or social security.

None of the major international human rights instruments explicitly prohibit discrimination on the grounds of marital status. Instead it is prohibited as an 'other status' under the ICCPR and other similar instruments.

2 General Principles under International Instruments

2.1 International Covenant on Civil and Political Rights

Discrimination on grounds of marital status is prohibited by Article 2 of the ICCPR under the language 'other status.' The HRC has considered cases of discrimination concerning (i) tax and social security and (ii) foster children.

2.1.1 Tax and Social Security

- In *Danning v the Netherlands* (No. 180/1984, ICCPR), the author claimed that a Dutch law that provided for greater disability insurance payments for a married person compared to an unmarried co-habiting person constituted discrimination prohibited by Article 26. The HRC felt that the differentiation complained of was based on objective and reasonable criteria. Marriage had legal consequences, for example, liability for the other spouse's maintenance that justified the different treatment. At any rate, the author had the choice of assuming the duties and benefits of marriage. Contrast the *Zwaan de Vries* case where differences in social security rights between men and women were found to be unreasonable.
- In *Sprenger v the Netherlands* (No. 395/1990, ICCPR), the HRC found that legislation, which differentiated between married and unmarried couples, was based on reasonable and objective criteria because the legal status of marriage involved certain benefits, responsibilities and duties. Couples who chose not to enter into marriage chose not to assume the full responsibilities and duties incumbent upon married couples and it was therefore reasonable to treat them differently). See also *Hoofdman v the Netherlands* (No. 602/1994, ICCPR) – differences in survivor's benefits between married and unmarried couples.

2.1.2 Foster Children

In *Oulajin and Kaiss v the Netherlands* (Nos. 406, 426/1990, ICCPR), Dutch legislation denied the authors child benefit for their foster children while allowing child benefit for their natural children. As the foster children lived in Morocco, the authors failed to fulfil the requirement of ‘sufficiently close relationship’ required by the legislation. The HRC felt there were objective differences between natural and foster children that justify different treatment and that the treatment in this case was not unreasonable.

2.2 International Covenant on Economic Social and Cultural Rights

The non-discrimination provisions of the ICESCR (Articles 2(2) and 3) are similar to Articles 2(1) and 3 of the ICCPR and were intended in relevant part to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted in Chapter II, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) (discussed above), the HRC held that it had the power under Article 26 of the ICCPR to consider cases of discrimination in the enjoyment of economic, social and cultural rights as well as civil and political rights.

2.3 International Convention on the Elimination of All Forms of Racial Discrimination

ICERD does not explicitly address discrimination on grounds of marital status. However, discrimination on grounds of marital status may concern ICERD to the extent that it arises together with racial discrimination (or the two overlap), such as in the case of multiple discrimination.

2.4 Convention on the Elimination of All Forms of Discrimination Against Women

Under Article 1, the rights guaranteed under the Convention must be guaranteed to women, irrespective of marital status. Discrimination on the grounds of marital status may concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination. CEDAW also contains specific provisions regarding discrimination on grounds of marital status and maternity (see, for example, Article 11(2)). The Committee on the Elimination of Discrimination Against Women has recently considered its first individual complaints under the CEDAW, although the optional protocol providing for individual complaints entered into force on 22 December 2000. See Chapter II above for more information.

2.5 Convention on the Rights of the Child

Article 2(1) of the CRC provides that States parties will guarantee the rights in the Convention to each child without discrimination on grounds of the child’s or his or her

parents' or legal guardians' 'other status.' Like in the case of the ICCPR and ICESCR, this may include marital status. As noted in Chapter II, there is no individual complaint mechanism under the CRC and so there is no CRC jurisprudence to guide interpretation of the Convention.

2.6 International Labour Organization

ILO Convention No. 111 on Non-discrimination (Employment and Occupation) does not explicitly prohibit discrimination on the grounds of marital status. However, Article 1(b) of Convention No. 111 provides that "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation... may be determined by the Member concerned after consultation with representative employers' and workers' organisations."

2.7 European Convention on Human Rights

The ECHR prohibits discrimination on grounds of marital status through the 'other status' language of Article 14.

- *McMichael v the United Kingdom* (No. 16424/90, 24/02/1995) concerned the natural father of a child who had been taken into care and freed for adoption. He claimed that Scot's law, which provided that he had no legal right to custody or to participate in the care proceedings for the child prior to his subsequent marriage to the child's mother, discriminated against him in breach of Article 14 (together with Article 6 or Article 8). The government argued that the law allowed a natural father to seek an order granting him paternal rights. In light of this fact, the ECtHR noted the European Commission's statement that the purpose of the laws in question was to identify meritorious fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother. As the aim of the relevant laws was legitimate and the conditions imposed proportional, the ECtHR held that difference in treatment had a reasonable and objective justification. Accordingly, there was no violation of Article 14.
- In *Sahin v Germany* (No. 30943/96, 11/10/2001), the applicant alleged that German court decisions dismissing his request for access to his child, born out of wedlock, amounted to a breach of his right to respect for his family life under Article 8 and the prohibition of discrimination in Article 14. German legislation (as interpreted by the courts) put fathers of children born out of wedlock in a different, less favourable position than divorced fathers. Unlike the latter, natural fathers had no right of access to their children. Furthermore, a court could only override the mother's refusal of access when access was "in the interest of the child". The ECtHR was not persuaded by the State's arguments that fathers of children born out of wedlock lack interest in contacts with their children and might leave a non-marital relationship at any time. The ECtHR therefore concluded that there was a breach of Article 14 taken together with Article 8. See other cases on similar issues

– *Elsholz v Germany* (No. 25735/94, 13/07/2000); *Hoffmann v Germany* (No. 34045/96, 11/10/ 2001); and *Sommerfeld v Germany* (No. 3187/96, 08/07/2001).

2.8 European Union

Article 2(1) of the Equal Treatment Directive (Council Directive 86/613/EEC), promulgated pursuant to Article 141 of the EC Treaty, provides that “there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.” In other words, discrimination on grounds of marital or family status is only prohibited in so far as it amounts to sex discrimination. This interpretation has been followed by the ECJ in a number of cases involving the similar language in Article 4 of the Social Security Directive. See, for example, *Case 30/85, Teuling v Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 2497, *Case C-229/89, Commission v Belgium* [1991] ECR I-02205 and *Case C-226/91 Molenbroek v Bestuur van de Sociale Verzekeringsbank* [1992] ECR I-05943.

2.9 African Charter on Human and Peoples’ Rights

The African Charter does not explicitly address discrimination on grounds of marital, parental or family status. Discrimination on this ground may, however, be prohibited by the ‘other status’ language of Article 2.

2.10 American Convention on Human Rights

The AmCHR does not explicitly address discrimination on grounds of marital, parental or family status. Discrimination on this ground may, however, be prohibited by the ‘other social condition’ language of Article 1.

INTERSECTIONS IN INTERNATIONAL DISCRIMINATION LAW

The central theme of this chapter is that individuals do not experience discrimination in a vacuum but rather in particular social and political contexts. Equality issues overlap with each other and with other rights and are often pleaded together in claims to national and international tribunals. One of the aims of this Handbook is to facilitate cross-fertilisation of jurisprudence across grounds and ‘themes’ of non-discrimination. With this aim in mind, this chapter first examines how the ‘intersecting’ personal characteristics and identities of victims of discrimination is reflected in the development of principles of multiple or intersectional discrimination. It then looks at the impact that other substantive rights and other themes in international human rights law have on equality jurisprudence and how such rights provide alternative means of redress for victims of discrimination or reflect key concepts in discrimination law. The themes covered include dignity rights; the prohibition of degrading treatment; the notion of violence as discrimination; privacy rights and minority rights.

A MULTIPLE DISCRIMINATION

Academics, human rights lawyers and NGOs have long recognised that people's experience of discrimination may not be captured by an approach focusing on single grounds of discrimination. People have multi-faceted identities composed of sex, race, culture and other characteristics, many of which overlap, and an individual may be the target of discrimination on more than one ground at the same time. The combination of grounds of discrimination that intersect is said to produce together something unique and distinct from any one ground of discrimination standing alone. This phenomenon is known as ‘multiple’ or ‘intersectional’ discrimination (see, generally, *An Intersectional*

Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims, Discussion Paper, Ontario Human Rights Commission available at: www.ohrc.on.ca/english/consultations/intersectionality-discussion-paper.shtml.

Intersectional approaches to discrimination take into account the historical, social and political context in which the discrimination takes place and, in particular, the experience of the individual victim. This form of analysis addresses more subtle, ‘institutionalised’ or systemic discrimination, hardened attitudes and rigid social stereotypes. The intersectional focus is relevant to any combination of grounds of discrimination. For example, minority women often experience different forms of treatment than minority males or women in society at large and may be particularly disadvantaged.

International human rights tribunals have not yet adopted a multiple or intersectional approach. Their approach is to focus on a single ground at a time in the case law to see whether each has been substantiated in turn, without acknowledging multiple simultaneous violations. The *Abdulaziz* case is a good example of the separate consideration of race and sex discrimination by the ECtHR. In the case of *Lovelace v Canada*, the HRC focused on various minority rights of the applicant without focusing on the fact that she was denied her rights as a member of a minority group because she was a woman. In cases where there are allegations of discrimination on a number of grounds, the quality of the evidence may dictate which of several grounds the tribunal considers. The failure of lawyers to plead multiple discrimination, even where supported by the evidence, has also contributed to this lack of jurisprudence.

Some domestic courts and tribunals, for example in Canada, have started to acknowledge multiple discrimination and to recognise the social, economic and historical context in which it takes place. Some recent decisions of the Supreme Court of Canada have included comments on multiple grounds of discrimination and intersecting grounds. See, for example, *Canada (A.G.) v Mossop* [1993] S.C.R. 554, *Egan v Canada* [1995] 2 S.C.R. 513, *Law v Canada* [1999] 1 S.C.R. 497 and *Corbière v Canada* [1999] 2 S.C.R. 203.

In *Egan* the Supreme Court (at 551-2) stated that:

“We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than specific effects. By looking at the grounds for the distinction instead of at the impact of the distinction... we risk undertaking an analysis that is distanced and desensitised from real people's real experiences.... More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals...”

B DIGNITY RIGHTS AND ‘EQUALITY AS DIGNITY’

1 Introduction

The notion of ‘dignity’ in the human rights field is usually associated with the supreme importance, fundamental value and inviolability of the human person. Like the principle of equality, it is based on the idea that people are entitled to rights solely by virtue of their humanity; if human dignity is the same for all, then all human beings are equally entitled to the same basic rights. Dignity is often considered the very wellspring and foundation of all other human rights, a supreme constitutional or ethical value from which others are derived. The preamble to the Universal Declaration of Human Rights (1948) (“[UDHR](#)”) states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

All the main international human rights instruments invoke human dignity as a basic concept; however, the concept has never been defined with precision. Generally speaking, an invasion of, or interference with dignity will result from treatment calculated to demean, humiliate, degrade or dehumanise another person. Even where there is no express reference to a right to respect for dignity, the formulation of many substantive rights such as freedom from torture and various privacy rights reflect this concept.

Chapter II of the [EU Charter of Fundamental Rights](#) deals with the subject of ‘Dignity.’ In addition to a statement in Article 1 regarding the inviolability of human dignity, the chapter protects the right to life (Article 2), the right to the integrity of the person (Article 3), the prohibition of torture (Article 4) and the prohibition of slavery and forced labour (Article 5). Other related rights include the free development of personality and the right to bodily integrity. It is clear that there is the possibility of significant overlap between claims of violations of dignity, privacy and freedom from degrading treatment, in addition to potential equality claims. The ECHR case of *Pretty v the United Kingdom* (No. 2346/02, 29/04/2002) exemplifies the close relationship between certain discrimination claims under Article 14, degrading treatment under Article 3 and violations of the right to respect for private life under Article 8. In this case (as discussed below) claims were made under each of these provisions. The ECtHR also related these claims to ‘the respect for human dignity and freedom’ inherent in the ECHR. See also the cases of *Botta* and *Zehnalová* case discussed below in this chapter.

The following are relevant provisions of international and national instruments to the discussion of dignity rights and approaches that combine equality and dignity arguments:

'Dignity' and 'Equality as Dignity'

Universal Declaration of Human Rights: Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

African Charter: Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

EU Charter

Article 1 (Human dignity)

Human dignity is inviolable. It must be respected and protected.

German Federal Constitution ('Basic Law' or Grundgesetz)

Article 1 (Protection of human dignity)

- (1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.

South African Constitution

Article 9 (Equality)

Everyone is equal before the law and has the right to equal protection and benefit of the law.

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Article 10 (Human dignity)

Everyone has inherent dignity and the right to have their dignity respected and protected.

Canadian Charter of Rights and Freedoms

Section 15 (Equality rights)

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
-

There has been greater focus on the concept of dignity in recent times because of developments in biotechnology, such as genetic research and ‘human engineering,’ which question what it means to be human. International instruments, such as the Universal Declaration of the Human Genome and Human Rights approved by UNESCO in 1997 and the Council of Europe Convention for the Protection of Human Rights and Dignity with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (CETS No. 164) (1997), give a very central role to the principle of human dignity.

2 Dignity Rights

Some national and international instruments contain specific provisions requiring respect for dignity.

- Article 1 of the EU Charter provides that human dignity is inviolable and must be protected and respected. The Explanatory Memorandum to the EU Charter, citing the UDHR, notes that the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. None of the rights laid down in the Charter, therefore, may be used to harm the dignity of another person. The dignity of the human person is part of the substance of the rights laid down in the Charter. As a result, it must be respected even where a right is restricted. This is a relatively broad notion of dignity that infuses all of the rights in the Charter.
- The German Federal Constitution (*Grundgesetz*), approved shortly after the horrors of World War II, bases the whole social and political order on the principle of human dignity and recognises that it is the foundation of all other rights. Article 1.1 imposes a strict duty on State authorities to respect and protect the right to dignity. The German idea of ‘dignity’ is based on the notion of a ‘protected sphere of personality.’ In the case of *30 BVerfGE 173* (1971) the Constitutional Court (*Bundesverfassungsgericht*) found that it would be incompatible with the right to inviolability of human dignity under the Constitution if a human being could be degraded or humiliated even after his death. Hence, the right to dignity of the deceased had to be balanced against the rights to freedom of expression (and freedom of art) of the author of a disparaging work about the deceased. See also *45 BVerfGE 187* (1977) and *90 BVerfGE 255* (1994).

3 Equality as Dignity: South Africa and Canada

In recent years courts in Canada and South Africa have expanded legal standards of equality (based on the idea of non-discrimination) by incorporating into such standards the concept of dignity. The use of concepts of dignity in equality cases stems from attempts to find a reasonable basis of similarity among individuals and groups that differ to a greater or lesser degree. As according to the concept of dignity, a person is entitled to basic rights just by being human; no qualifications or badges or personal characteristics (i.e., grounds of discrimination) are necessary in order to claim a violation of equality rights. As an approach based on dignity does not require any comparison with other individuals or groups, the 'comparator' problem, discussed in Chapter III, is not relevant to an approach based on dignity.

3.1 South Africa

The test to be applied in determining a violation of Article 9 (equality) of the South African Constitution was confirmed and clarified in *Harksen v Lane N.O. and others* 1998 (1) SA 300 (CC).

- The appellant in *Harksen* challenged legislation concerning the management of the estate of an insolvent person because it impacted negatively on her property and affairs as the solvent spouse of such an insolvent person. She claimed that the legislation violated her property rights and her right to equality. The Constitutional Court summarised the stages of enquiry regarding challenges based on the equality clause as follows:

“(a) A provision which differentiates between categories of people breaches the right to equality before the law and equal protection of the law if the differentiation is not rationally connected to a legitimate government purpose. Even if it is rationally connected, it might still amount to unfair discrimination.

(b) This requires a two-stage analysis:

(i) It must first be established that the differentiation amounts to 'discrimination'. If it is on a ground listed in the section (e.g. race, gender, sex), then discrimination will have been established. If it is not on a listed ground, then whether or not there is discrimination will depend upon whether the differentiation is based on attributes and characteristics, which have the potential to impair the fundamental human dignity of persons.

(ii) It must secondly be established that the discrimination is 'unfair'. If the discrimination is on a listed ground, then it will be presumed to be unfair. If the discrimination is on an unlisted ground, the complainant will have to prove unfairness. The test of unfairness focuses primarily

on the impact of the discrimination on the complainant and others in his or her situation.

- (c) If the discrimination is unfair then the provision will be unconstitutional if it cannot be justified under the limitations clause.”

Under part (b) of the test, therefore, if a particular claimed ground is not listed in Article 9, then a claim of discrimination will depend upon whether the differentiation is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons. In *Harksen* the majority found the differentiation between solvent spouses and other persons who had dealings or close relationship with the insolvent constituted discrimination against solvent spouses because it was based on attributes that had the potential to demean persons in their fundamental dignity. Given the history of discrimination against married women, the Court was sensitive to this issue. However, under the circumstances, such discrimination was not unfair. In the previous case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), the Constitutional Court found that denying men the opportunity to be released from prison in order to resume rearing their children (in a situation where female prisoners were released) was based entirely on stereotypical assumptions concerning men’s aptitude and role in child rearing. This constituted an infringement of their rights to equality and dignity.

- The case of *Jordan and others v the State* (CCT31/01, 9 October 2002) concerned a challenge to a law prohibiting prostitution on the grounds, among others, that it breached the human dignity and equality of the applicant commercial sex workers. O’Regan J. and Sachs J. (for the majority) noted that the law in question branded the prostitute a primary offender. In South Africa prostitutes were predominantly women and there was a greater social stigma and impact attached to being a prostitute than to using a prostitute’s services. The law in question accentuated that social stigma. This had the potential to impair the fundamental human dignity and personhood of women in violation of Article 9 of the Constitution. Regarding the alternative claim of a violation of human dignity itself, however, the Court found that to the extent that the dignity of prostitutes is diminished arises from the character of prostitution itself.

Article 10 of the South African Constitution also provides for the right to respect for dignity. This provision has been pleaded on a number of occasions as a separate claim before the South African Constitutional Court. See, for example, *Jordan and National Coalition for Gay and Lesbian Equality and another v Minister for Justice and another* 1991 (1) SA 6 (CC).

3.2 Canada

The approach of the Canadian Supreme Court to equality and dignity is exemplified in the dissent of L’Heureux-Dubé J. in the case of *Egan v Canada* [1995] 2 S.C.R. 513.

- *Egan* concerned appellants who were long-term homosexual partners. The younger partner was denied ‘spousal’ pension allowance on reaching the age of 60 in circumstances in which a married person or long-term cohabiting heterosexual person would have been eligible. They claimed that the relevant legislation discriminated against them on grounds of sexual orientation in breach of Section 15(1) of the Canadian Charter of Rights and Freedoms. Although sexual orientation was not included explicitly as a ground of discrimination in Section 15, the majority of the Court found that “sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.” They concluded that it fell within the ambit of Section 15 protection as being analogous to the enumerated grounds (see ‘Sexual Orientation’ in Chapter V). In the circumstances of the case, the majority found that the legislation pursued the legitimate aims of supporting traditional marriage and that homosexual couples were fundamentally different from married couples in the context of the biological and social realities that underlie traditional marriage.

L’Heureux-Dubé J. (dissenting) noted that more than any other right in the Charter, Section 15 gives effect to the notion of inherent human dignity. She cited the judgment of McIntyre J. in the case of *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143 (at paragraph 171) in support of the proposition that equality as enshrined in Section 15 represents a commitment to recognising each person’s equal worth as a human being, regardless of individual differences. L’Heureux-Dubé J. stated that “[E]quality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.” See also the cases of *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 and *Gosselin v Quebec (Attorney General)* [2002] 4 S.C.R. 429.

C DISCRIMINATION AS ‘DEGRADING TREATMENT’

1 Introduction

In addition to containing prohibitions of discrimination, a number of international human rights instruments prohibit ‘degrading treatment’ as part of a general right to freedom from torture, inhuman or degrading treatment or punishment.

Prohibitions of ‘Degrading Treatment’

ICCPR: Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ECHR: Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

AfCHPR: Article 5

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

AmCHR: Article 5

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

One of the purposes of a prohibition of degrading treatment is to protect the dignity of the person. Hence, there is a certain degree of overlap with equality provisions. Discriminatory treatment also often has the effect (or purpose) of humiliating, degrading, or interfering with the dignity of the person discriminated against, particularly if such treatment occurs in public. Treating someone less favourably based on an inherent characteristic suggests contempt or lack of respect for his or her personality.

2 European Convention on Human Rights

The ECtHR has made clear on a number of occasions that ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the ECHR. In *Ireland v the United Kingdom* (No. 5310/71, 18/01/1978) (at paragraph 162), the Court held that the assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects. In that case, the Court also noted (at paragraph 167) that treatment may also be considered degrading if it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

The European Commission on Human Rights case of *East African Asians v the United Kingdom* (No. 4403/70, 14/12/1973) was the first judgment of an international tribunal to hold that discrimination could constitute one of the forms of ‘degrading treatment’ prohibited as part of the right to freedom from torture.

- *East African Asians* concerned immigration laws that deprived Asians who were citizens of the “United Kingdom and Colonies” living in East Africa of the right to

enter the United Kingdom. The relevant laws were passed at a time when policies of “Africanisation” in east Africa were depriving Asians of their livelihoods. The applicants could not rely on the prohibition of discrimination in Article 14 of the ECHR because the right of entry (the subject of the case) was not protected under the ECHR and Article 14’s prohibition of discrimination is limited to the rights and freedoms under the Convention. The European Commission on Human Rights nevertheless held that the claims were admissible under Article 3 of the ECHR. It held (at paragraphs 188-195) that “quite apart from any consideration of Article 14, discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the Convention.” The Commission noted that “a special importance should be attached to discrimination based on race, and that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity.” Hence, “differential treatment of a group of persons on the basis of race might be capable of constituting degrading treatment in circumstances where differential treatment on some other ground, such as language, would raise no such question.” The Commission thus suggested that racial discrimination was a special case of sufficient severity to constitute ‘degrading treatment’ but that other grounds of discrimination might not be sufficiently serious. The Commission also suggested that the discrimination must be intentional in order to constitute degrading treatment.

Following *East African Asians*, there have been a number of unsuccessful claims before the ECtHR on discrimination as ‘degrading treatment.’ Few other international tribunals have followed this line of cases, however.

- In *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81, 9474/81, 28/05/1985) the applicants who were lawfully settled in the United Kingdom, were unable, due to the operation of immigrations laws, to have their alien husbands join them. They argued that the discrimination against them based on their nationality constituted an affront to human dignity and amounted to degrading treatment. The ECtHR found that the intention of the laws was crucial in deciding whether the laws violated Article 3. It concluded that the difference of treatment complained of indicated no contempt or lack of respect for the personality of the applicants and that it was not designed to, and did not, humiliate or debase. The law was intended solely to achieve legitimate immigration measures. Therefore, there was no violation of Article 3. The judgment does suggest that if the difference of treatment did indicate contempt or lack of respect for the personality of the applicants it may meet the level of severity necessary to constitute degrading treatment. The Court also indicated that Article 3 could be applicable regardless of the relevance or applicability of Article 14. See also *Patel v the United Kingdom* (No. 35693/97, 22/10/1998).
- In *Smith and Grady v the United Kingdom* (Nos. 33985/96 and 33986/96, 27/09/1999), the applicants complained that the UK policy excluding homosexuals from the armed forces and consequent investigations and discharges constituted

degrading treatment under Article 3 of the ECHR. The State argued the policy could not be regarded as degrading because of its aims (fighting power and operational effectiveness) and the absence of any intention to degrade or humiliate. They argued that East African Asians case was not relevant as it dealt with racial discrimination. The Court seemed to accept in principle that discrimination on the grounds of sexual orientation could constitute degrading treatment under Article 3, stating that it:

“would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3.”

However, the Court did not consider that the treatment in this case reached the minimum level of severity that would bring it within the scope of Article 3 of the Convention. Following the decision in *Smith and Grady*, it is certainly arguable that any form of discrimination prohibited under Article 14 of the ECHR that is clearly intended to exclude such a group from benefits accorded to the rest of society could be deemed by the Court an “affront to human dignity.”

- In *Cyprus v Turkey* (No. 25781/94, 10/05/2001), the ECtHR held that Greek Cypriots living in Northern (Turkish) Cyprus, were the object of very severe restrictions which curtailed the exercise of basic freedoms and had the effect of ensuring that, with the passage of time, the community would cease to exist. The Greek Cypriots were not permitted by the authorities to bequeath immovable property to a relative, even the next-of-kin, unless the latter also lived in the north; there were no secondary-school facilities in the north and Greek-Cypriot children who opted to attend secondary schools in the south were denied the right to reside in the north once they reached the age of 16 in the case of males and 18 in the case of females. Greek Cypriots lived and were compelled to live in conditions that were isolated, in which their movements were restricted, controlled and with no prospect of renewing or developing their community. The Court concluded that the treatment to which they were subjected was based on the features that distinguished them from the Turkish-Cypriot population, namely their ethnic origin, race and religion. The conditions under which that population was condemned to live were debasing and violated the very notion of respect for human dignity. In this case, the discriminatory treatment attained a level of severity that amounted to degrading treatment under Article 3. Having found a violation of Article 3, the Court did not go on to consider whether there had been a violation of Article 14.

3 Other Jurisdictions

As noted above, the ECtHR has developed the notion of discriminatory treatment as degrading treatment. In other tribunals, applicants have relied on ECHR jurisprudence in making similar arguments.

- In *Koptova v Slovak Republic* (No. 13/1998, ICERD) the applicant argued before ICERD that, “by publicly and formally using the term ‘Roma’ to refer to certain unspecified persons and by singling out such persons for special and invidious treatment, measures taken by the State subject her, as a person of Romany ethnicity, to degrading treatment.” She relied on the *East African Asians* decision. However, the measures challenged were withdrawn before CERD had opportunity to consider the argument.
- In the Botswana case of *Attorney General v Unity Dow* (124/1990) (CA No. 4/91), the respondent argued that the Botswana Citizenship Act, by discriminating against her and treating her less favourably than males in situations similar to hers, subjected her to degrading treatment in violation of the Botswana Constitution. The respondent found support in the UN Declaration on the Elimination of Discrimination against Women (07/11/1967), which provides that “discrimination against women, denying or limiting as it does their equality of rights with men is fundamentally unjust and constitutes an offence against human dignity.” She also cited ECHR jurisprudence including *Abdulaziz*. Both the High Court and the Court of Appeal accepted this argument.

D VIOLENCE AS DISCRIMINATION

1 Introduction

The role of violence in creating and sustaining inequality has been recognised by both national and international tribunals and courts. Violence may damage the physical and mental integrity of its victims and deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. It may also help maintain the subordinate position of victims in society and contribute to low levels of public participation, education and higher levels of relative poverty. This section looks at violence against women as an example of the phenomenon of violence as discrimination.

Gender-based violence is widespread throughout both developed and developing societies; it occurs in a variety of forms and often arises in the context of the ‘private’ relationship of the family or the home. CEDAW General Recommendation No. 19 on violence against women (at paragraph 1) recognises that “gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and

freedoms on a basis of equality with men.” The Committee on the Elimination of Discrimination Against Women notes the “close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.” Gender-based violence thus constitutes both a direct violation of women’s human rights and contributes to their inability to enjoy the full range of civil, political, economic, social and cultural rights. Gender-based violence includes sexual assault, commercial exploitation of women as sex objects, and trafficking in women. Perhaps the most prevalent forms of gender-based violence are those perpetuated by traditional practices and attitudes, including cultural practices such as female genital mutilation and forced marriage, compulsory sterilisation or abortion, and domestic violence.

Violence against women committed by the State may breach its negative obligations under international law to respect human rights. In this regard, there are an increasing number of international standards prohibiting violence against women. However, the perpetrators of much gender-based violence are individuals and not the State. Many State legal systems have regarded acts of violence between men and women, such as in the case of domestic violence, as family disputes rather than crimes, which should be resolved privately without the interference of the State. A number of international instruments have established that violence against women (including domestic violence) is not always a private matter but may entail State responsibility under international law. International law has increasingly recognised the positive obligations of the State to intervene to prevent violence against women, to investigate and prosecute incidents of violence and adopt rules of procedure (and evidentiary rules that give effect to these rules) that protect victims of violence, including by countering discriminatory attitudes and stereotypes (see the case of *M.C. v Bulgaria* below).

2 UN System

General Recommendation No. 19 (at paragraph 6) notes that the definition of discrimination against women in Article 1 of CEDAW includes gender-based violence, defined as “violence that is directed against a woman because she is a woman or that affects women disproportionately.” It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Further it notes that gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. See also, the UN Declaration on the Elimination of Violence against Women (1993).

General Recommendation No. 19 states that the duty of States not to engage in acts of gender-based violence extends to the liability for failure to act with due diligence to prevent, investigate and punish acts of violence. International instruments that are concerned with racial violence have imposed similar due diligence obligations on States. The CERD has applied a standard of due diligence with regard to the State’s

positive obligation to address private racially motivated violence. In the case of *L.K. v the Netherlands* (No. 4/1991, CERD), the CERD held that when threats of violence were made, it was incumbent on the State to investigate such threats with due diligence and expedition.

3 European Convention on Human Rights

The ECtHR has recognised the positive obligations of the State under Article 3 (prohibition of torture) and Article 8 (right to privacy) to protect individuals within its jurisdictions from sexual abuse and violence.

- *M.C. v Bulgaria* (No. 39272/98, 04/12/2003) concerned the alleged rape of a 14-year-old Bulgarian girl that was not prosecuted by the authorities due to the lack of evidence of the use of force or threats. The applicant claimed that Bulgarian law did not provide effective protection against rape and sexual abuse as only cases where the victim resisted actively were prosecuted and, in this particular case, the authorities failed to investigate the rape effectively. The ECtHR held that States have a positive obligation under Articles 3 (prohibition of torture) and 8 (the right to privacy) of the ECHR to enact criminal laws effectively punishing rape and to apply them in practice through effective investigation and prosecution. Requiring proof of physical resistance in all cases of alleged rape risks leaving certain rapes unpunished and jeopardised the effective protection of an individual's sexual autonomy – this was reflected in the international trend towards regarding lack of consent rather than force as the essential element of rape and sexual abuse. The ECtHR concluded that the positive obligations of the State under Articles 3 and 8 required the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim. In this case, the Bulgarian authorities' approach failed to comply with such obligation. See the *amicus curiae* brief submitted by INTERIGHTS in the case at www.interights.org See also the domestic court cases of *S v J* [1998] (4) BCLR 424 (South Africa); *State v Bechu* [1999] Criminal Case No. 79/94 (Fiji); and *Addara Aratchige Gunendra v the Republic* [1997] Case No. 77 10/96 (Sri Lanka).
- In the case of *Osman v the United Kingdom* (No. 23452/94, 28/10/1998), a man was killed after the police failed to respond when threats of violence were brought to their attention. The applicants claimed that this represented a violation of the positive obligation of the State under Article 2 (the right to life) to safeguard the lives of those within its jurisdiction. The ECtHR found that the State would be in breach of this obligation if “the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.” In other words, in the context of threats to the right to life, the State must use due diligence to investigate and if necessary intervene to prevent such threats from being carried out. See also the case of *Aydin v Turkey*

(No. 23178/94, 25/09/1997) with regard to the duty to investigate and prosecute in the context of a claim under Article 6 (the right to a fair trial) and Article 13 (the right to an effective remedy).

4 African Charter on Human and Peoples' Rights

The Protocol on the Rights of Women in Africa (discussed in Chapter II above) explicitly provides for women's rights to freedom from gender-based violence (Article 4), including female genital mutilation (Article 5).

5 Inter-American System

The Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belem do Pará") was approved by the General Assembly of the Organization of American States on 9 June 1994 and entered into force on 5 March 1995. It has been widely ratified in the region (see, <http://www.cidh.org/Basicos/basic13.htm>).

The Convention of Belem do Pará addresses the inter-relationship between gender violence and discrimination. Article 6 establishes that the right of women to be free from violence includes the right to be free from discrimination. The Convention also protects the right of women to be valued and educated free of social and cultural practices of inferiority or subordination.

- In *Maria Da Penha Maia Fernandes v Brazil*, Report No. 54/01, IACHR 2001, the Inter-American system for the first time applied the Convention of Belem do Pará to decide a case. The applicant was physically and mentally abused by her husband who, in 1983, also tried to kill her. By 1998, the judicial investigation of the facts was still not completed and Srha Da Penha took a case against Brazil to the IACHR. The IACHR held that the ineffective judicial action, impunity and the inability of the victims to obtain compensation showed lack of commitment on the part of the State to address domestic violence and violated the right of equal protection of the law guaranteed under Article 24 of the AmCHR. Further it represented a violation by the State of its commitments under Article 7 of the Convention of Belem do Pará to adopt by all means necessary, and without delay, a series of measures for the prevention and eradication of violence against women. As a result of the case, the victim's ex-husband was finally prosecuted.

6 Other International Law

There have been a number of international criminal law developments relevant to the field of sexual violence. Sexual crimes against women were included in the jurisdiction

of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”) and in the Rome Statute on the foundation of the International Criminal Court. This has led to the ‘ad hoc’ tribunals recognising sexual violence against women as constituting war crimes, breaches of the Geneva Conventions, crimes against humanity, torture and also genocide. The ICTY and the ICTR have also introduced specific procedural rules to protect victims of sexual violence. Rape is also considered a war crime or crime against humanity under customary international law.

- The judgment in *The Prosecutor v Alfred Musema* (ICTR, Judgment of the Trial Chamber, 27 January 2000, and Judgment of the Appeals Chamber, 16 November 2001) indicated that an individual can incur individual criminal responsibility under international law for rape, ordering rape, abetment of rape and serious violence against women. It also recognised rape as a crime against humanity.
- In *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (ICTY, Judgment of the Trial Chambers, 22 February 2001 and Judgment of the Appeals Chamber, 12 June 2002) the accused were found guilty of rape as a crime against humanity and as a violation of the laws or customs of war. The Trial Chamber found (and the Appeals Chamber confirmed) that the central element of rape is the victim’s lack of consent. The coercive circumstances present in this case made the victim’s alleged consent to sexual acts impossible. See also *The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (ICTY, Judgment of the Trial Chamber, 16 November 1998, and Judgment of the Appeals Chamber, 20 February 2001).
- In *The Prosecutor v Jean-Paul Akayesu* (ICTR, Judgment of the Trial Chamber, 2 September 1998, and Judgment of the Appeals Chamber, 1 June 2001) the accused was judged criminally responsible for several incidents of rape. He was also judged criminally responsible for a crime against humanity for various inhumane acts including the forced undressing of a woman. For the first time in history, rape and sexual violence were recognised in international law as constituting genocide if they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.

E PRIVACY RIGHTS AND NON-DISCRIMINATION

1 Introduction

Victims of discrimination have often argued their claims before both national and international tribunals by framing them in terms of personal or privacy rights such as respect for bodily integrity, private and family life and the home. Discrimination by its nature is extremely personal, as it is often based on personal characteristics. For that

reason, many privacy and discrimination claims intersect, particularly, in cases affecting inherent aspects of personality and intimate behaviour. The ‘privacy’ approach has been most evident in the battle to overturn prohibitions of homosexual conduct and in the treatment of trans-sexuals, but it has also been used to combat discrimination on grounds of disability, illegitimacy and paternity and language (see again, the *Belgian Linguistics case*).

International tribunals under the UN system and the ECHR have interpreted their respective privacy provisions to incorporate strong positive obligations on the State to provide protection against violations by private citizens as well as the State. This is a key benefit to basing equality-related claims on privacy rights.

Relevant formulations of privacy or privacy-related rights in international instruments are as follows:

Privacy Rights

ICCPR: Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

CRC: Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

ECHR: Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

American Declaration: Article V

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

AmCHR: Article 11

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

The AfCHPR does not contain an explicit right to privacy. However, it has been suggested that Article 4 ('Every human being shall be entitled to respect for his life and the integrity of his person') may be construed as a form of privacy right. Furthermore, Article 5 concerning the 'dignity inherent in a human being' (see above under 'Dignity Rights') reflects a different conceptual approach again to dealing with broader equality issues.

2 The UN System

There have been a number of cases before the HRC in which privacy arguments have been made as alternatives to, or in conjunction with, allegations of discrimination. The two examples below make use of the concepts of private life and family life, respectively.

- In *Toonen v Australia* (No. 488/1992, ICCPR) (discussed above in Chapter V), the HRC confirmed that adult consensual sexual activity in private (including homosexual activity) is covered by the concept of 'privacy' under Article 17 of the ICCPR. The HRC accepted the argument of the applicant that laws prohibiting homosexual conduct interfered with his right to privacy, even if they were not enforced, and such interference was not justified in the circumstances of the case. The HRC did not go on to consider the applicant's non-discrimination argument.
- *Hopu et al v France* (No. 549/1993, ICCPR) (discussed below under 'Minority Rights') concerned ethnic Polynesian applicants who claimed that the construction of a hotel complex would destroy their ancestral burial grounds in violation of their rights to privacy (Article 17) and family life (Article 23). Such burial grounds represented an important place in their history, culture and life. The HRC observed (at paragraph 10.3) that the objectives of the ICCPR require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It noted that the applicants considered their relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. It concluded that construction of a hotel interfered with the applicants' rights to family and privacy and that the State failed to show that such interference was reasonable.

With regard to positive obligations, in General Comment No. 16 the HRC made clear (in paragraph 1) that Article 17 rights are "required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons." Thus States are required to "adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."

3 European Convention on Human Rights

Breaches of both the concepts of ‘private life’ and ‘family life’ (Article 8) have been pleaded before the ECHR institutions as an alternative to, or in conjunction with, claims based on Article 14 (non-discrimination). Key issues before the ECtHR have included the scope of privacy rights and the extent of the State’s positive obligations under Article 8. Discrimination claims by Irish travellers and Roma have been based on the protection of the home under Article 8. A discussion of the Article 8 aspects of these cases is beyond the scope of this Handbook, although some cases such as *Chapman* are dealt with in Chapter V under ‘Race’ and in Chapter III under ‘Indirect Discrimination.’

3.1 The Concept of Private Life

The ECtHR has not attempted an exhaustive definition of the notion of respect for ‘private life,’ however it is clear that it includes respect for moral and physical integrity, personal identity, personal information, sexuality or sexual orientation and personal space. In the case of *Mikulic v Croatia* (No. 53176/99, 07/02/2002), the Court made clear that ‘private life’ can sometimes embrace aspects of an individual’s physical and social identity. The ECtHR found that the concept of private life extends beyond the right to privacy to the “right to establish and develop relationships with other human beings especially in the emotional field, for the development and fulfilment of one’s own personality.” The case of *Pretty v the United Kingdom* (discussed above) also established that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees. For more on the concept of private life, see *X v Iceland* (No. 6825/74, 18/05/1976), *Passannante v Italy* (No. 32647/96, 01/07/1998), *Burghartz v Switzerland* (No. 16213/90, 22/02/1994), *Dudgeon v the United Kingdom* (No. 7275/76, 22/10/1981), *Laskey, Jaggard and Brown v the United Kingdom* (Nos. 21627/93, 21826/93, etc., 19/02/1997) and *Smith and Grady v the United Kingdom* (Nos. 33985/96 and 33986/96, 27/09/1999).

The notion of private life has been used to challenge laws criminalising homosexual acts under the ECHR. The key cases of *Dudgeon*, *Norris* and *Modinos* are discussed in the section on ‘Sexual Orientation’ in Chapter V. It has also been used in the battle for trans-sexual rights, as the following case illustrates:

- In *Van Kück v Germany* (No.35968/97, 12/06/2003), the applicant claimed that the failure of a German court to give due regard to her trans-sexuality in assessing on a dispute with her insurance company over reimbursement for gender reassignment surgery violated her right to respect for her private life within the meaning of Article 8. The ECtHR noted that in order to balance the competing interests of the individual and the community as a whole, particular importance must be given to matters relating to the most intimate part of an individual’s life. The relevant court proceedings touched upon the applicant’s freedom to define herself as a female person, one of the most basic essentials of self-determination.

The ECtHR took account of the fact that the proceedings took place at a time when the condition of trans-sexualism was generally known. It felt that the domestic court placed a disproportionate burden on the applicant to prove the medical necessity of treatment, including irreversible surgery, in the field of one of the most intimate private-life matters. It found that the German courts overstepped the margin of appreciation afforded to them under Article 8. In light of their determination under Article 8, the ECtHR did not consider it necessary to consider Article 14.

3.2 The Concept of Family Life

The concept of family life extends to married couples and their dependent children (whether illegitimate, legitimate or adopted), to brothers and sisters. It also applies to other *de facto* family ties where sufficient constancy is present (see, for example, *Johnston and others v Ireland* (No. 9697/82, 18/12/1986) and *Kroon and others v the Netherlands* (27/09/1994)). The relationship between homosexual couples has been held to fall within private life rather than family life under the ECHR (see, for example, *X and Y v the United Kingdom* (No. 9369/81, 03/05/1983)). The notion of family life has been used as the basis for paternity and identity claims, among others.

3.3 Positive Obligations under Article 8 of the ECHR

A key element in ECtHR jurisprudence on Article 8 is the notion of the positive obligations of the State to ‘respect’ the private life and family life of individuals.

The following cases illustrate the approach of the ECtHR in this area:

- In *X and Y v the Netherlands* (No. 8978/80, 26/03/1985) the first applicant’s mentally handicapped daughter was raped while in the care of a privately run home. The State failed to criminally prosecute the man responsible for the rape and the applicants claimed that such failure breached Articles 8 and 14 of the ECHR. The ECtHR noted (at paragraph 22) that the case concerned “a matter of ‘private life,’ a concept which covers the physical and moral integrity of the person, including his or her sexual life.” Citing the judgment in *Airey v Ireland* (No. 6289/73, 09/10/1979) (paragraph 32), it reiterated that under Article 8 there may be positive as well as negative obligations inherent in an effective respect for private or family life. Such obligations may require the State to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The applicants argued that the requisite degree of protection for the victim could only be provided by the criminal law. While acknowledging that the means to secure compliance with Article 8 were within the State’s margin of appreciation, the ECtHR noted that the nature of the State’s obligation depends on the aspect of private life at issue. In this case, because fundamental values and essential aspects of private life were at issue, compliance could only be secured through criminal prosecution. As the criminal code at issue did not provide

practical and effective protection, the State was in breach of Article 8. Having found a violation of Article 8, the ECtHR did not go on to consider the Article 14 claim.

- In *Rees v the United Kingdom* (No. 9532/81, 17/10/1986) the applicant, a post-operative trans-sexual, claimed that the failure by the State to recognise his new sexual identity on his birth certificate violated his right to respect for his private life under Article 8. He complained primarily of the constraints such failure placed on his integration into social life. The ECtHR again noted the positive obligations of the State under Article 8. However, it pointed out that the notion of 'respect' was not clear-cut, especially with regard to positive obligations. The ECtHR reiterated (at paragraph 37) that "in determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual." As there was no common ground among contracting States on this particular issue, they enjoyed a wide margin of appreciation. As the changes required by the applicant's claim were complex and there were other relevant conflicting interests, the ECtHR felt that under the circumstances, there was no violation of any positive obligation under Article 8. However, the ECtHR suggested that the situation be kept under review because the ECHR is always to be interpreted and applied in the light of current circumstances.

3.4 The 'Botta' Case and Subsequent Jurisprudence

The case of *Botta v Italy* (No. 21439/93, 24/02/1998) discussed above under 'Disability' in Chapter V has provided the impetus for disability (and analogous) claims based on the positive obligations of the State under Article 8. Under *Botta* applicants capable of establishing a "direct and immediate" link between the measures sought and their private and or family life could have a valid claim of breach of positive obligations under Article 8.

- In *Botta* the applicant complained of impairment of his private life and the development of his personality under Article 8 of the ECHR. He claimed that the State had failed to discharge its positive obligations under Article 8 to adopt measures and to monitor compliance with existing domestic measures. As the concept of 'respect' under Article 8 is not precisely defined, the ECtHR concluded that in order to determine if positive obligations exist, it would have to strike a balance between the general interest and the interest of the individual, with regard to the State's margin of appreciation. It noted (in paragraph 34) that "the State has obligations of this type where it has found a direct and immediate link between the measures sought by an applicant and the latter's private and/or family life." In the immediate case, the Court concluded that the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays "concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was

urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life.'

- In *Zehnalová and Zehnal v Czech Republic* (No. 3862/97, 14/05/2002) the applicants were disabled persons who claimed that the inaccessibility of a large number of public buildings in their home town violated their rights to respect for their private life under Article 8. They also made claims under Articles 3 and 14. Again, the complaint was not of interference by the State but its failure to discharge its positive obligations to adopt measures and to monitor compliance with domestic legislation on public buildings. The applicants considered that the desire to lead an active life while retaining independence and dignity was one of the main aims of Article 8. The ECtHR reiterated its key principles regarding the determination of the scope of the State's positive obligations under Article 8. Citing *Botta*, the ECtHR noted that the constant changes taking place in European society call for increasingly serious effort and commitment on the part of national governments in order to remedy certain shortcomings, and that the State is therefore intervening more and more in individuals' private lives. However, it noted that the sphere of State intervention and the evolutive concept of private life do not always coincide with the more limited scope of the State's positive obligations. The Court considered that Article 8 cannot be taken to be generally applicable each time an applicant's everyday life is disrupted. Article 8 applies only in exceptional cases where the failure by the State affects life in such a way as to interfere with the right to personal development and the right to establish and develop relationships with other human beings and the outside world. In the instant case, the rights relied on were too broad and indeterminate as the applicants failed to give precise details of the alleged obstacles and did not adduce persuasive evidence of any interference with their private life. The applicant failed to demonstrate the existence of a special link between the lack of access to the buildings in question and the particular needs of her private life. The ECtHR ruled that Article 8 was not applicable. As the ECtHR held that the facts of the case fell outside the ambit of Article 8, Article 14 was not applicable either.
- In the case of *Sentges v the Netherlands* (No. 27677/02, 08/07/2003), the applicant complained that the denial by the State of his request to be provided with a robotic arm violated the right to respect for his private life under Article 8. He argued that the concept of private life encompassed notions pertaining to the quality of life, including personal autonomy, self-determination, as well as the right to establish and develop relationships with other human beings. The ECtHR noted its previous findings that private life includes a person's physical and psychological integrity and that the guarantee afforded by Article 8 is primarily intended to ensure the development, without outside interference of the personality of each individual in his relations with other human beings. Citing the cases of *Botta* and *Zehnalová*, the Court felt that the applicant failed to establish a special link between the situation complained of and the particular needs of his or her private life. Even if such a link was found to exist, the Court considered that the State did not exceed its wide

margin of appreciation in determining the steps to be taken to ensure compliance with the ECHR.

- In *Mikulic v Croatia* (No. 53176/99, 07/02/2002) the applicant complained that her right to respect for her private and family life had been violated because the domestic courts had been inefficient in deciding her paternity claim and had therefore left her uncertain as to her personal identity. The Court confirmed previous jurisprudence that paternity proceedings fell within the scope of Article 8. In this case, however, no family tie had been established between the applicant and her alleged father. As respect for 'private life' under the ECHR comprises the right to establish relationships with other human beings, the ECtHR felt that there was no reason why it should exclude the determination of the legal relationship between a child born out of wedlock and her natural father. Furthermore, the Court noted that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. As the applicant was trying to establish who her natural father is, there was a direct link between the establishment of paternity and the applicant's private life. In this case the only way the applicant could establish paternity was through court proceedings. The failings of the Croatian court system left the applicant in a state of prolonged uncertainty as to her identity. The Croatian authorities therefore failed to secure to the applicant the 'respect' for her private life to which she is entitled under the Convention. Regarding paternity claims and Article 8, see also the case of *Nylund v Finland* (No. 27110/95, 29/06/1999).

See also the cases of *Pretty v the United Kingdom* (No. 2346/02, 29/04/2002) and *Marzari v Italy* (No. 36448/97, 04/05/1999).

4 Other Jurisdictions

In the U.S., arguments based on privacy rights have been used in cases claiming that State prohibitions of homosexual conduct were unconstitutional. Activists for gay and lesbian rights have consistently argued for the freedom of consenting adults to engage in private homosexual conduct in the exercise of their right to liberty under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Their arguments were successful in the recent case of *Lawrence v Texas* 539 U.S. (2003).

See also the South African Constitutional Court case of *National Coalition for Gay and Lesbian Equality and another v Minister for Justice and another* 1999 (1) SA 6 (CC). There are also a number of UK cases in which *Botta* has been pleaded including *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 (16 October 2003).

F MINORITY OR GROUP RIGHTS APPROACHES

Useful links: Minority Rights

- For NGO information on minority rights at the international level, see: Minority Rights Group International at <http://www.minorityrights.org>

Useful references

- For a general overview of minority rights, see: Patrick Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, 1991; Patrick Thornberry, *Minorities and Human Rights Law*, Minority Rights Group, 1991; and Gaetano Pentassuglia, *Minorities in International Law*, Council of Europe Publishing, 2002.
- For minority rights in Europe, see: Patrick Thornberry and María Amor Martín Estébanez, *Minority Rights in Europe*, Council of Europe Publishing, 2004.

1 Introduction

Many human rights instruments, particularly those that concern civil and political rights, focus on the rights of individuals. ‘Minority rights’ provisions either protect the rights of a collective or group, or the rights of an individual as part of a group. The former are ‘individual’ rights while the latter are ‘group’ rights. There are two aspects to the legal protection of minority rights: (i) traditional equality or non-discrimination formulations, and (ii) specific ‘minority rights’ provisions that are designed as a means for preserving traditions and national characteristics. Non-discrimination on grounds of race, sex, language or religion is a central principle in the protection of minorities.

The dual aspect of minority rights was recognised even before the development of modern human rights law. In the Permanent Court of International Justice (“PCIJ”) case of the minority schools in Albania (*Advisory Opinion of 1935*, PCIJ Series A/B No. 64, p. 17) the PCIJ stated that:

“the object of any system of minority protection is to secure for certain elements incorporation in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside the population and co-operating amicably with it while preserving its characteristics and satisfying the special needs.”

It is also implicit in the mandate of the UN Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities), which includes:

- The prevention of discrimination, i.e., the prevention of any action that denies to individuals or groups of people equality of treatment; and

- The protection of minorities – protection of non-dominant groups which, while seeking equality of treatment with the majority, also require a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.

Thus, minority rights approaches incorporate an element of substantive equality in addition to formal equality and recognise the need for special measures to remedy the disadvantages of minority groups and preserve their characteristics. Such approaches represent an expansion of traditional notions of equality for the benefit of national minorities and other vulnerable groups.

Minority rights is a broad area much of which falls outside the scope of this Handbook. There is significant overlap between minority rights, and linguistic rights and also discrimination on grounds of race, religion and language (see the relevant sections in Chapter V). The purpose of this Section is to highlight some of the sources of minority rights and their relevance for international discrimination law.

1.1 Definition or Recognition of ‘Minorities’ and the Scope of Minority Rights

There are many different types of group that attract the name ‘minority.’ They include racial or ethnic groups, nomads, migrants and others. Such groups may be called ‘minorities,’ ‘nationalities,’ ‘ethnic groups,’ or sometimes ‘national communities.’ However, the term ‘minority’ in this context is more limited than the meaning of minority in popular understanding, as it does not include sexual minorities, women or persons with disabilities. Minority group characteristics include race, religion, language and traditions and control over upbringing of children. The ECHR and its protocols provide some guidance on the meaning of ‘national minority.’ Also, the UN Special Rapporteur on the rights of persons belonging to ethnic, religious and linguistic minorities, F. Capotorti, formulated the following definition of the meaning of ‘minority’ under Article 27 of the ICCPR (see *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/384, 1979):

“a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguishes them from the rest of the population.”

According to HRC General Comment No. 23 (at paragraph 5.2) whether a minority ‘exists’ or not and is thus entitled to the protection of Article 27 does not depend on a decision by a State party. Rather it is established by ‘objective criteria.’ Under international law, the existence of minorities is a question of fact and not law. It is not up to a State to decide whether a minority exists.

1.2 Balancing Minority Rights and Other Rights

A common objection against minorities is that they engage in practices that are inconsistent with human rights. In some situations, there may be a need to balance minority rights against the rights of others. For example, the *Ch'are Shalom* case discussed in Chapter V involved the practices of minorities in violation of domestic law or international standards. For States, the presence and activities of minorities may also raise the fear of secession and self-determination. Much ECtHR jurisprudence, particularly on Turkey and the States of south eastern Europe, has been concerned with restrictions on the political freedoms of minorities with the purported aim of preserving territorial integrity.

2 Minority Rights in the UN System

Minority Rights Provisions

ICCPR: Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

CRC: Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with the other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

2.1 International Covenant on Civil and Political Rights

Article 27 protects individual and not group rights. HRC General Comment No. 23 makes clear (at paragraph 1) that Article 27 does not establish collective rights (or the rights of a 'collective') but rather establishes and "recognises a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant." In other words, they are collective rights of an individual as part of a group. However, the rights protected under Article 27 depend on the ability of minority groups to maintain their culture, language or religion and to this extent go beyond individual rights.

Article 27 of the ICCPR is limited to those States where minorities exist. However, Article 27 does not provide a definition of a minority and neither does General

Comment No. 23. Unlike Article 26 and Article 2 of the ICCPR, which guarantee equality for all individuals, Article 27 only grants rights to members of a minority group. The persons protected are those who belong to a group and who share a common culture, a religion and a language, whether they are citizens of a State or not.

- *Kitok v Sweden* (No. 197/1985, ICCPR) concerned a Swedish citizen of Sami ethnic origin who was denied immemorial rights granted to the Sami community, in particular the right to membership of community and the right to carry out reindeer husbandry, due to the fact that he left his community for a period. The applicant claimed that the relevant legislation, although designed to protect Sami culture, infringed his right to ‘enjoy his own culture’ under Article 27. In resolving the apparent conflict between the legislation which aimed to protect the rights of the minority as a whole and its application to a single member of that minority, the HRC applied the test laid down in the case of *Lovelace v Canada* (No. 24/1977, ICCPR) – that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. In this case, there was no violation of Article 27.
- In *Ballantyne et al v Canada* (Nos. 359/1989 and 385/1989, ICCPR), the HRC found (at paragraph 11.2) that the minorities protected by Article 27 are minorities within a State and not minorities within a province. Hence, a group could be a majority in a province and still be a minority in the State for the purposes of Article 27. The applicant’s Article 27 claim in this case depended on English speaking citizens of Canada being a linguistic minority. Although they were a linguistic minority in Quebec, the HRC felt that they did not qualify as a linguistic minority within a State under Article 27.

General Comment No. 23 makes clear that positive measures by States may be necessary to protect the identity of a minority and the rights of its members. Any such measures must comply with Articles 2 and 26 in their treatment of minorities and the majority population (i.e., they must not discriminate). However, as long as such measures are aimed at “correcting conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27,” they may constitute a legitimate differentiation provided that they are based on reasonable and objective criteria.

Article 30 of the CRC adapts Article 27 to the context of children’s rights.

2.2 UN Declaration on the Rights of Persons Belonging to Minorities

Inspired by the provisions of Article 27 of the ICCPR, the UN General Assembly passed Resolution No. 47/135 of 18 December 1992 on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Again, the Declaration focuses on individual rights for persons belonging to minorities. Although the Declaration is not a legally binding convention, it expresses the international community’s understanding of minority rights protection.

- Article 1 obliges States to protect the existence and identity (national or ethnic, cultural, religious and linguistic) of minorities.
- Article 2 grants minorities the right to enjoy their culture, profess and practice their religions and languages freely and without interference and without any form of discrimination. It also grants minority groups the right to participate effectively in cultural, religious, social, economic and public life.
- Article 3 provides that those rights may be exercised individually and in community with other members of the group and without discrimination.
- Article 4 obliges States to take positive measures to protect minority culture, language, etc.
- Article 8 provides that measures taken to further the aims of the Declaration shall not be considered *prima facie* contrary to the principle of equality.
- Article 8(4) provides that nothing in the Declaration shall permit any activity contrary to the purposes and principles of the UN, including sovereign equality, territorial integrity and political independence of States.

The Commentary to the UN Declaration notes that minority protection is based on four requirements: protection of its existence, non-exclusion, non-discrimination and non-assimilation of the groups concerned. The corollary of non-assimilation is to promote and protect conditions for the group identity of minorities.

2.3 International Labour Organization

Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) provides protection for indigenous groups concerning land rights, recruitment and conditions of employment.

3 Minority Rights in Europe

The Council of Europe's Framework Convention for the Protection of National Minorities was the first multilateral treaty on the protection of national minorities. It entered into force on 1 February 1998. It sets out a framework of principles to be achieved at a national level through legislation and government policy. Hence, its provisions are not directly applicable in the legal systems of States parties. The Framework Convention provides a range of guarantees in favour of national minorities, including general guarantees of political freedoms and specific minority rights guarantees regarding matters such as the preservation of cultural identity, use of languages and participation in society.

Under Article 4 of the Framework Convention, States parties "undertake to guarantee to persons belonging to national minorities the right of equality before the law and of

equal protection of the law.” Article 4 also prohibits “any discrimination based on belonging to a national minority” and establishes a duty to take special measures (i.e., positive action) where necessary to achieve “full and effective equality.” Under Article 5 the States parties “undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity.” States also agree to refrain from any policy aimed at assimilation of persons belonging to national minorities against their will.

The Committee of Ministers is responsible for ensuring implementation of the Convention. There is no inter-State or individual complaints procedure; supervision is by way of periodic State reporting. In the case of *Chapman v the United Kingdom* (No. 27238/95, 18/01/2001) the ECtHR refused to use the Framework Convention as support for a consensus on the issue of minority rights in Europe. In doing so, it noted the general nature of the principles and goals set forth in the Convention and the failure of the signatory States to agree on a means of implementation.

The ECHR does not contain any specific minority rights provisions. However, Article 14 prohibits discrimination on the grounds of race, language, religion and ‘association with a national minority.’ Many of the substantive rights guaranteed by the ECHR, such as the right to freedom of expression, are also relevant to minority rights. In fact, the jurisprudence of the ECtHR has addressed a number of minority rights issues concerning self-determination, identity (including private life or ways of life, e.g., travellers’ cases), and political freedoms.

CONCLUSION

The notion of equality is central to the protection of human rights. The failure to accord 'equality' of rights, without sufficient reason, is a failure to guarantee human rights. In this sense, the right to equality or 'equal rights' forms a part of every other human right. The preamble of the Universal Declaration of Human Rights heralded the importance of equality in noting that: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Equality is not just a theoretical idea; the denial of equal rights has serious practical effects on the well being of people. Discrimination affects every aspect of people's lives – it leads to exclusion, marginalisation and dehumanisation. We have seen, for example, the horrific effects of inequality on the black African population of South Africa during the apartheid era and on Roma in Central and Eastern Europe: higher rates of illness, malnutrition and poverty, lower life expectancy and lower standards of education.

Legal protection of the right to equality is found in both international instruments and national law. Although the scope and content of the legal protection varies from jurisdiction to jurisdiction, the underlying principle of equality remains constant. Case law has played a vital role in strengthening and expanding the protection of the right to equality both in national and international jurisdictions. Discrimination cases help to develop understanding of how discrimination is experienced and how the ills caused by it may be put right. Increasingly, efforts at combating discrimination have also highlighted the difficulties of proving certain forms of more covert discrimination, such as indirect discrimination. Strategic litigation has helped to mould new rules of evidence and create new evidentiary tools, such as the use of statistics.

Lawyers and NGOs have an important role to play in helping to reinforce the legal protection of the right to equality. They are often the first port of call for victims of discrimination and, as such, must be in a position to recognise discrimination and take the appropriate steps to seek a remedy. It is hoped that this Handbook may contribute to the development of well-reasoned and strongly argued discrimination cases that push forward the protection of equality. The cross-fertilisation of jurisprudence from

one jurisdiction to another may also contribute to an improvement in the understanding and protection of human rights and equality worldwide.

Equality is a central issue for INTERIGHTS: approximately 15-20% of INTERIGHTS' caseload concerns issues of non-discrimination and equality. INTERIGHTS' Equality Programme addresses discrimination in many forms, based on gender, race, ethnicity, religion, sexual orientation and disability at national and regional level. Its recent activities have included the submission of 'friend of the court' briefs to the ECtHR in the cases of *Nachova v Bulgaria* (concerning discrimination against Roma) and *D.H. and others v the Czech Republic* (concerning the education of Roma children in 'special schools' for the intellectually disabled) and to the U.S. Supreme Court in the case of *Lawrence v Texas* (concerning gay rights). It has also recently provided legal advice to lawyers representing the applicant in the ECtHR case of *Asmundsson v Iceland* (concerning disability discrimination), and to the Fijian Department of Public Prosecutions in the Fijian Court of Appeal case of *Seremaia Balelala v the State* (concerning the necessity for corroboration of evidence in rape trials). INTERIGHTS' work in the field has emphasised the potential to strengthen protection by use of comparative jurisprudence and strategic litigation. This Handbook represents a central part of that effort. For more information on INTERIGHTS, see our website at www.interights.org.

APPENDIX A

COMPARISON OF INTERNATIONAL AND REGIONAL INSTRUMENTS ON EQUALITY

	Open-ended or Specified Group	Free-Standing or Dependent	Direct and Indirect	Positive Action	Group Rights
ECHR European Convention	OPEN-ENDED 14(1): “or other status”	DEPENDENT 14(1): “set forth in this convention” (Compare Protocol 12: “any right set forth by law”)	BOTH Protection against indirect discrimination clarified in case law: see <i>Hugh Jordan v the United Kingdom</i> , etc.	YES Positive action permissible clarified in case law. See, for example, <i>Belgian Linguistics</i> ; and <i>Thlimmenos v Greece</i> .	N/A
EU EC Treaty and EC Directives	SPECIFIED EC Treaty 141 and 39: sex and nationality Framework Dir. 1: “religion or belief, disability, age, or sexual orientation” Race Dir. 1: “racial or ethnic origin” Revised Equal Treatment Dir.: sex/gender	DEPENDENT EC Treaty 141(1) and 39(2): work conditions, employment, and remuneration. Framework, Race, and Revised Equal Treatment Dirs.: employment and occupation, vocational training, etc.	BOTH Framework and Race Dirs. 2(2)(b): “indirect discrimination” Revised Equal Treatment Dir. 1: “either directly or indirectly”	YES TA 141(4): positive action regarding sex acceptable Framework Dir. 7(1); Race Dir. 5: accepts positive action measures. Also Equal Treatment Dir.: 4	N/A
AfCHPR African Charter	OPEN-ENDED 2: “or other status”	FREE-STANDING 3: “equal protection of the law and equality before the law” 2: “guaranteed in the present Charter” [Dependent]	(DIRECT) [unclear from the case law whether indirect discrimination covered]	(Not addressed in the case law)	YES 19: “Nothing shall justify the domination of a people by another.” 22: “peoples shall have the right to their economic, social and cultural development”
AmCHR American Convention	OPEN-ENDED 1(1): “or other social conditions”	FREE-STANDING 24: “equal protection of the law” - as interpreted by <i>Advisory Opinion No. 4</i> . 1(1): “recognised herein”	BOTH See <i>Advisory Opinion OC-18/03</i> at paragraph 103.	YES See <i>Advisory Opinion OC-18/03</i> at paragraph 104.	

	Open-ended or Specified Group	Free-Standing or Dependent	Direct and Indirect	Positive Action	Group Rights
ICCPR	OPEN-ENDED 26 and 2(1): "or other status" 3: Special provision prohibiting sex discrimination	FREE-STANDING 26: "equal protection before the law" 2(1): "in the present covenant"	BOTH HRC General Comment 18(7): "purpose or effect"	YES HRC General Comment 18(10): "equality sometimes requires states to take affirmative action."	YES 1: Peoples' right to self-determination and means of subsistence
ICESCR	OPEN-ENDED 2(2): "or other status" 3: sex discrimination 2(3): non-nationals (distinction allowed)	DEPENDENT 2(2): "rights enunciated in the present convention"	(SEE ICCPR)	N/A	YES 1: Peoples' right to self-determination and means of subsistence
CERD	SPECIFIED 1(1): "race, colour, descent, or national or ethnic origin"	FREE-STANDING 1(1): "any other field" 5: "equality before the law"	BOTH 1(1): "purpose or effect" 2(c): "which have the effect"	YES 1(4) and 2(2): Special measures do not constitute discrimination	N/A
CEDAW	SPECIFIED 1(1): "discrimination against women"	FREE-STANDING 1(1): "or any other field"	BOTH 1(1): "purpose or effect"	YES 4: Promotes positive action	N/A
CRC	OPEN-ENDED, but applies only to children 2(1): All children, regardless of "other status"	DEPENDENT 2(1): "rights set forth in the present Convention"	BOTH 2(1): "discrimination of any kind"	N/A	YES 30: Indigenous/minority children have right to own community, culture, religion, and language
ILO Convention No. 111	SPECIFIED 1(1)(a): "race, colour, sex,..." but pursuant to 1(1)(b), members may add further grounds	DEPENDENT 2: equality of opportunity and treatment in respect of employment and occupation	BOTH 1: any distinction with 'effect' of nullifying or impairing equality of opportunity or treatment	YES 5: special measures permitted	N/A

GLOSSARY

Useful links: Glossary

- For online legal dictionaries, see: www.publiclawproject.org.uk/cases/glossary.html

affirmative action	Proactive measures taken by a government or private institution to remedy the effects of past and present discrimination by providing reverse preferences favouring members of classes traditionally disadvantaged. Also known as positive action.
African Charter on Human and Peoples' Rights (AfCHPR)	A multilateral convention adopted by the Organization of African Unity in 1981. It entered into force in 1986. It defines and protects individual and peoples' rights and defines and imposes individual duties.
African Commission on Human and Peoples' Rights	Organ of the African Union responsible for promoting human rights, making recommendations to member States, holding public hearings on inter-State complaints of human rights violations, and undertaking confidential investigations of individual complaints.
African Court on Human and Peoples' Rights	Organ of the African Union established pursuant to the Protocol on the Establishment of an African Court on Human and Peoples' Rights adopted in 1998 and in force in 2004. Its function is to complement the protective mandate of the African Commission as an oversight mechanism for the African Charter. It may consider individual complaints of violations of the Charter upon a special declaration by each State recognising its competence in this regard.
African Union (AU)	Organisation that succeeded the Organization of African Unity in 2002 and assumed its powers and functions. It is the chief pan-African international organisation and is the sponsor of the African Charter and related instruments.
alien	Any person not a citizen or national of the State concerned.
American Convention on Human Rights (AmCHR)	A multilateral convention adopted by the Organization of American States in 1969. It entered into force in 1978. It guarantees basic civil and political rights.
American Declaration of the Rights and Duties of Man	Statement issued on 2 May 1948 by the Ninth International Conference of American States. It is a list of political rights and duties.
amicus curiae	(From the Latin for 'friend of the court'). Refers to persons seeking permission to intervene in a case in which they are neither plaintiff or defendant, usually to present their point of view (or that of their organisation) where the case has the potential of setting a legal precedent in their area of activity. In many instances intervention by amicus curiae is subject to permission of the parties or the court.
burden of proof	A rule of evidence that requires a person to prove a certain fact or the contrary will be assumed by the court. More generally, it is the responsibility of proving a disputed charge or allegation.
case law	Law based upon judicial decision or precedent rather than statute.
Committee on the Elimination of Racial Discrimination (CERD)	Committee established by the International Convention on the Elimination of All Forms of Racial Discrimination.
comparator	A similarly situated person of the opposite status, whose treatment can be compared against that of the claimant to establish the presence of discrimination.
convention	Legally binding agreement between States sponsored by an international organisation.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	A multilateral convention adopted by the United Nations General Assembly in 1984. It entered into force in 1987. It requires States to prohibit torture and other ill-treatment.
Convention of Belem do Pará (or the Convention on the Prevention, Punishment and Eradication of Violence Against Women)	Multilateral convention approved by the General Assembly of the Organization of American States in 1994. It entered into force in 1995. It addresses the inter-relationship between gender violence and discrimination.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	A multilateral convention adopted by the United Nations General Assembly in 1979. It entered into force in 1981. It requires States parties to treat women equally with men.
Convention on the Rights of the Child (CRC)	A multilateral convention adopted by the United Nations General Assembly in 1989. It entered into force in 1990. It requires States parties to protect and, to the extent they have the resources, to aid in the development of children.
Council of Europe	An intergovernmental organisation founded in 1949 and composed of 45 member States on the continent of Europe. The Council was set up to defend human rights, parliamentary democracy and the rule of law, to standardise member States' legal and social practices and promote awareness of an European identity based on shared values and cutting across different cultures. It is the sponsor of the European Convention on Human Rights and the European Social Charter.
Court of Justice of the European Communities (ECJ)	The supreme tribunal of the European Union.
de facto	(From the Latin for 'in fact') In reality, in fact, existing.
de jure	(From the Latin for: 'by right' or 'by law') According to law.
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities	Declaration by the United Nations General Assembly on 18 December 1992, asserting that all States have an obligation to allow minority peoples to enjoy their culture, practise their religion, and use their language.
dependent provision	A legal provision prohibiting discrimination with respect only to certain specified rights or benefits. For example, Article 2 of the International Covenant on Civil and Political Rights prohibits discrimination only with respect to the rights set forth in the Covenant. Contrast 'free-standing' provision.
direct discrimination	Less favourable or detrimental treatment of an individual or group of individuals on the basis of a prohibited characteristic or ground such as race, sex, or disability.
direct effect	Of a treaty that may be invoked by a private person in domestic courts to challenge the actions of a State that is a party to the treaty.
Directive	A form of legislation used by the EU that specifies the key principles or framework that is to be incorporated into domestic law but leaves to each member State both a time period for implementation and discretion as to the form of any implementing measure.
European Commission against Racism and Intolerance (ECRI)	A body of the Council of Europe entrusted with the task of combating racism, racial discrimination, xenophobia, anti-Semitism and intolerance in Europe.
European Commission on Human Rights	Organ created by the European Convention on Human Rights to examine inter-State and individual complaints of violations of the Convention. All of its former functions have now been assumed by the European Court of Human Rights.
European Community (EC)	Intergovernmental organisation founded in 1957, predecessor of the European Union, which had as its goal the establishment of an economic common market.
European Community Treaty (EC Treaty)	One of the constituent treaties creating the European Union. In 1993 it succeeded the original European Economic Community Treaty adopted in Rome in 1957.
European Convention on Human Rights and Fundamental Freedoms (ECHR)	Formally the Convention for the Protection of Human Rights and Fundamental Freedoms. A multilateral treaty, sponsored by the Council of Europe, signed in 1950. It entered into force in 1953. It establishes and guarantees civil and political rights and some economic, social and cultural rights for persons within the jurisdiction of the contracting States.
European Court of Human Rights (ECtHR)	Organ created by the European Convention on Human Rights to examine inter-State and individual complaints of violations of the Convention. It is now the sole adjudicatory body under the Convention.
European Union (EU)	An intergovernmental organisation (with 'supranational' characteristics) that has as its goals the elimination of internal frontiers and the establishment of an economic, monetary, and political union among its member States.
free-standing provision	A legal provision prohibiting discrimination with respect to any rights under domestic or international law. Free-standing provisions, such as Article 26 of the International Covenant on Civil and Political Rights, are often framed in terms of 'equality before the law' and 'equal protection of the law.' Contrast dependent provision.

General Assembly	Organ of the United Nations composed of representatives of each of the member States of the United Nations. Its resolutions and declarations have considerable influence on the evolution of international law.
genuine occupational requirement	In some jurisdictions, discrimination laws provide an exception to the general prohibition of discrimination whereby a job may be restricted to people of a particular group (e.g., a race, or sex, or national origin) if the characteristic defining that group is a 'genuine occupational requirement' or 'genuine occupational qualification' for the job.
harassment	Harassment may be defined as occurring where unwanted conduct takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.
Human Rights Committee (HRC)	Committee established by the International Covenant on Civil and Political Rights to hear inter-state and individual complaints of violations of the Covenant.
indirect discrimination	When a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon particular groups, unless that practice, rule, requirement or condition is justified.
Inter-American Commission on Human Rights (IACHR)	Organ created by the Charter of the Organization of American States and granted further powers and functions by the American Convention on Human Rights. It conducts country studies and considers individual complaints of human rights violations. Under the Convention, it investigates individual and inter-State complaints.
Inter-American Court of Human Rights (IACtHR)	International human rights tribunal located in Costa Rica, that (a) hears disputes referred to it by the Inter-American Commission on Human Rights or contracting States to the American Convention on Human Rights and (b) issues advisory opinions interpreting American human rights treaties and determining if domestic laws comply with those treaties.
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	A multilateral convention adopted by the United Nations General Assembly in 1965. It entered into force in 1969. It requires States parties to prohibit racial discrimination.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migration Convention)	A multilateral convention adopted by the United Nations General Assembly in 1990. It entered into force on 1 July 2003. It addresses the treatment, welfare and human rights of migrants.
International Court of Justice (ICJ)	The ICJ is the judicial organ of the United Nations with the power to adjudicate on cases between States and those referred by the specialised agencies of the United Nations. The ICJ's functions are to settle international legal disputes and to give advisory opinions regarding international law. The ICJ replaced the Permanent Court of International Justice in 1945 and operates under a Statute largely similar to this predecessor.
International Covenant on Civil and Political Rights (ICCPR)	A multilateral treaty adopted by the United Nations General Assembly in 1966. It entered into force in 1976. It defines and guarantees basic civil and political rights.
International Covenant on Economic Social and Cultural Rights (ICESCR)	A multilateral treaty adopted by the United Nations General Assembly in 1966. It entered into force in 1976. It commits States parties to work toward the granting of economic, social, and cultural rights to individuals.
International Labour Organization (ILO)	A specialised agency of the United Nations responsible for promoting international efforts to improve working conditions, living standards and the equitable treatment of workers.
intersectional or 'multiple' discrimination	The combination of grounds of discrimination that intersect to produce something unique or distinct from any one ground of discrimination standing alone.
jurisdiction	The authority or power of a court or tribunal to hear a particular case or dispute.
migrant	A person who leaves his/her country of origin to seek residence in another country.
OAS Charter	Multilateral treaty that establishes the Organization of American States and outlines its principles, functions and organisation.

open-ended provision	A legal provision prohibiting discrimination on the basis of certain specified characteristics or 'grounds,' such as race or sex, but allowing for claims on additional grounds as well (i.e., a non-exhaustive list). Such provisions usually contain catch-all language that permits additional grounds to be read in by the relevant supervisory tribunal. See, for example, the 'other status' language of Article 26 of the ICCPR.
Organization of American States (OAS)	Intergovernmental organisation established in its present form in 1948. Its purposes are to strengthen the peace and security of the American continent; to promote and consolidate representative democracy; to ensure the pacific settlement of disputes; to provide for common action on the part of its member States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote, by co-operative action, its member States' economic, social and cultural development, and to achieve an effective limitation of conventional weapons. The OAS has 35 member States.
Organization of African Unity (OAU)	Intergovernmental organisation established in 1963. Its goals are to eradicate all forms of colonialism in Africa and to promote the independence, sovereignty, and territorial integrity of its member States. In 2002 the African Union replaced the OAU and assumed all of its powers and functions.
prima facie case	A legal presumption taken from the Latin for 'on the face of it' or 'at first sight.' It describes a showing of sufficient evidence to initially establish a petitioner's case. If such a case is made out, the opposing party is then required to respond; if not, the case will be dismissed.
protocol	A supplementary agreement to a convention that adds to or changes some provision of the convention only for the states parties who adopt the protocol.
racism	The belief that a characteristic such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or group of persons.
reasonable accommodation	Reasonable accommodation is any modification of, or adjustment to a job, an employment practice, the work environment, or the manner or circumstances under which a position is held or customarily performed that makes it possible for a qualified individual to apply for, perform the essential functions of, and enjoy the equal benefits and privileges of employment.
standard of proof	A rule of evidence that determines the level of proof required by courts to find that a claim has been established. There are two standards of proof commonly used in international and domestic tribunals: the 'beyond reasonable doubt' standard and the 'balance of probabilities' standard
third party intervention	See amicus curiae.
treaty	(From the Latin tractare: 'to treat'). A formal agreement between States signed by official representatives of each State. A treaty may be 'law-making' in that it is the declared intention of the signatories to make or amend their internal laws to give effect to the treaty. Other treaties are just contracts between the signatories to conduct themselves in a certain way or to do a certain thing. These latter types of treaties are usually private to two or a limited number of States and may be binding only through the International Court of Justice.
United Nations (UN)	Intergovernmental organisation established in 1945 as the successor to the League of Nations. It is concerned with the maintenance of international peace and security. The UN's principal organs are the General Assembly, the Security Council, its Secretariat, the International Court of Justice and the Economic and Social Council. Its headquarters is in New York City.
United Nations Charter	A multilateral treaty that entered into force in 1945. It is the Constitution of the United Nations. The Charter defines the organisation's structure, its authority, and its goals.
United Nations Educational, Scientific and Cultural Organization (UNESCO)	A specialised agency of the United Nations. UNESCO promotes international co-operation among its member States in the fields of education, science, culture and communication.
Universal Declaration of Human Rights	Declaration by the UN General Assembly of 10 December 1948, defining the civil, political, economic, social and cultural rights of human beings.
victimisation	Any adverse measure taken by an organisation or an individual in retaliation for efforts to enforce legal principles, including those of equality and non-discrimination.

INDEX OF CASES

United Nations

Adam v Czech Republic (No. 586/1994, ICCPR)	186
Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, I.C.J. Rep., 1971	166
Ahmad v Denmark (No. 16/1999, ICERD)	173
Althammer v Austria (No. 998/2001, ICCPR)	83, 119
Avellanal v Peru (No. 202/1986, ICCPR)	74, 141
B. M. S. v Australia (No. 8/1996, ICERD)	171, 188
B.d.b. v the Netherlands (273/1988, ICCPR)	23
B.J. v Denmark (No. 17/1999, ICERD)	136, 171
Ballantyne et al v Canada (Nos. 359/1989 and 385/1989, ICCPR)	201, 266
Barbaro v Australia (No. 12/1998, ICERD)	171
Barzhig v France (No. 327/1988, ICCPR)	200
Bhinder Singh v Canada (No. 208/1986, ICCPR)	82, 112, 120, 131, 206
Blazek et al v Czech Republic (No. 857/1999, ICCPR)	186
Blom v Sweden (No. 191/1985, ICCPR)	129
Broeks v the Netherlands (No. 172/1984, ICCPR)	31, 74, 119, 129, 140, 142, 157, 169, 187, 202, 207, 218, 227, 231, 237
Cadore and Le Bihan v France (No. 221/1987 and 323/1988, ICCPR)	200
Canepa v Canada (No. 558/1993, ICCPR)	187
Cavalcanti Araujo-Jongen v the Netherlands (No. 418/1990, ICCPR)	141
Chedi Ben Ahmed Karoui v Sweden (No. 185/2001, ICCPR)	120
D.S. v Sweden (No. 9/1997, ICERD)	171
Danning v the Netherlands (No. 180/1984, ICCPR)	31, 156, 236
Des Fours v Czech Republic (No. 747/1997, ICCPR)	186
Diergaardt v Namibia (No. 760/1997, ICCPR)	201
Diop v France (No. 21/1989, ICERD)	170, 184, 188
Drake and Julian v New Zealand (No. 601/1994, ICCPR)	231
Drobek v Slovakia (No. 643/1995, ICCPR)	178, 186
Dzemajl (No. 161/2000, CAT)	169
F.A. v Norway (No. 18/2000, ICERD)	172
Faurisson v France (No. 550/1993, ICCPR)	169
Foin v France (No. 666/1995, ICCPR)	230
Guesdon v France (No. 219/1986, ICCPR)	200

Gueye v France (No. 196/1983, ICCPR)	.32, 185
H.A.E.D.J. v the Netherlands (No. 297/1988, ICCPR)	.231
Habassi v Denmark (No. 10/1997, ICERD)	.171, 184, 188
Hagan v Australia (No. 26/2002, ICCPR)	.93
Hamilton v Jamaica (No. 333/1988, ICCPR)	.112
Harward v Norway (No. 451/1991, ICCPR)	.200
Hill v Spain (No. 526/1993, ICCPR)	.200
Hoofdman v the Netherlands (No. 602/1994, ICCPR)	.236
Hopu et al v France (No. 549/1993, ICCPR)	.257
Ignatane v Latvia (No. 884/1999, ICCPR)	.201
J.H.W. v the Netherlands (No. 501/1992, ICCPR)	.141
Järvinen v Finland (No. 295/1988, ICCPR)	.230
Johannes Vos v the Netherlands (No. 786/1997, ICCPR)	.141
Joslin v New Zealand (No. 902/1999, ICCPR)	.157
Karakurt v Austria (No. 965/2000, ICCPR)	.186
Kitok v Sweden (No. 197/1985, ICCPR)	.266
Koptova v Slovak Republic (No. 13/1998, ICERD)	.172, 251
L. K. v the Netherlands (No. 4/1991, ICERD)	.172, 188, 253
L.A. v Uruguay (No. 128/1982, ICCPR)	.30
Lacko v Slovak Republic (No. 11/1998, ICERD)	.24, 172
Lindgren v Sweden (No. 198-99/1988, ICCPR)	.129
Love v Australia (No. 983/2001, ICCPR)	.226
Lovelace v Canada (No. 24/1977, ICCPR)	.73, 140, 241, 266
M.J.G. v the Netherlands (No. 267/1987, ICCPR)	.231
Malik v Czechoslovakia (No. 669/1995, ICCPR)	.186
Mauritian Women case (No. 35/1978, ICCPR)	.74, 139, 185
Müller and Engelhard v Namibia (No. 919/2000, ICCPR)	.140
Narrainen v Norway (No. 3/1991, ICERD)	.173
Oulajin and Kaiss v the Netherlands (Nos. 406, 426/1990, ICCPR)	.129, 140, 237
Pauger v Austria (No. 415/1990, ICCPR) and Johannes Vos v Netherlands (No. 786/1997, ICCPR)	.74, 141
R.T.Z. v the Netherlands (No., 245/1987, ICCPR)	.231
S.E.T.A. v Finland (No. 14/1991, ICCPR)	.157
Schlosser v Czech Republic (No. 670/1995, ICCPR)	.186
Schmitz-de-Jong v the Netherlands (No. 855/1999, ICCPR)	.227
Simunek v Czech Republic (No. 516/1992, ICCPR)	.83, 119, 186
Sprenger v the Netherlands (No. 395/1990, ICCPR)	.140, 236
Stalla Costa v Uruguay (No. 198/1995, ICCPR)	.97, 136, 231
Stewart v Canada (No. 538/1993, ICCPR)	.187
Toala et al v New Zealand (No. 675/1995, ICCPR)	.187
Toonen v Australia (No. 488/1992, ICCPR)	.154, 156, 257
Van Oord v the Netherlands (No. 658/1995, ICCPR)	.186
Vos v the Netherlands (No. 218/1986, ICCPR)	.140
Waldman v Canada (No. 694/1996, ICCPR)	.129, 207
Yilmaz-Dogan v The Netherlands (No. 1/1984, ICERD)	.24, 170, 188
Young v Australia (No. 941/2000, ICCPR)	.74, 155, 156
Z.U.B.S. v Australia (No. 6/1995, ICERD)	.171
Zwaan de Vries v the Netherlands (No. 182/1984, ICCPR)	.74, 129, 140

European Convention on Human Rights

A.D.T. v the United Kingdom (No. 35765/97, 31/07/2000)	159
Abdulaziz, Cabales and Balkandali v the United Kingdom (Nos. 9214/80; 9473/81; 9474/81, 28/05/1985)	84, 129, 143, 174, 241, 249
Airey v Ireland (No. 6289/73, 09/10/1979)	259
Akdivar and others v Turkey (No. 21893/93, 16/09/1996)	193
Anguelova v Bulgaria (No. 38361/97, 13/06/2002)	84, 85, 123, 176
Arslan v Turkey (No. 23462/94, 08/07/1999)	194
Assenov and others v Bulgaria (No. 24760/94, 28/10/1998)	25
Association Ekin v France (No. 39288/98, 17/07/2001)	203
Attorney General (Botswana) v Unity Dow (124/1990) (CA No. 4/1991)	251
Avsar v Turkey (No. 25657/94, 10/07/2001)	233
Aydin v Turkey (No. 23178/94, 25/09/1997)	253
B.B. v the United Kingdom (No. 53760/00, 10/10/2004)	160
Baskaya and Okçuoglu v Turkey (No. 23536/94, 24408/94, 08/07/1999)	233
Beard v the United Kingdom (No. 24882/94, 18/01/2001)	177
Beck, Copp and Bazeley v the United Kingdom (Nos. 48535/99, 48536/99 and 48537/99, 22/10/2002)	161
Belgian Linguistics case (Nos. 1474/62, etc., 23/07/1968)	46, 50, 70, 74, 79, 83, 99, 116, 129, 203, 256
Bilgin v Turkey (No. 23819/94, 16/11/2000)	193
Botta v Italy (No. 21439/93, 24/02/1998)	45, 75, 221, 242, 260
Burghartz v Switzerland (No. 16213/90, 22/02/1994)	144, 258
C and L.M. v the United Kingdom (No. 14753/89, 09/10/1989)	162
Çakici v Turkey (No. 23657/94, 08/07/1999)	193
Canea Catholic Church v Greece (Nos. 25528/94, 16/12/1997)	211
Ceylan v Turkey (No. 23556/94, 08/07/1999)	194
Cha'are Shalom Ve Tsedek v France (No. 27417/95, 07/04/1997)	212, 265
Chapman v the United Kingdom (No. 27238/95, 18/01/2001)	177, 178, 268
Chassagnou and others v France (Nos. 25088/94, 28331/95 and 28443/95, 29/04/1999)	46, 75
Connors v the United Kingdom (No. 66746/01, 27/05/2004)	178
Coster v the United Kingdom (No. 24876/94, 18/01/2001)	178
Cyprus v Turkey (No. 25781/94, 10/05/2001)	174, 250
D.H. v Czech Republic (No. 73907/01)	81, 128
Dudgeon v the United Kingdom (No. 7275/76, 22/10/1981)	159, 258
East African Asians v the United Kingdom (Nos. 4403/70, 14/12/1973)	174, 248
Elsholz v Germany (No. 25735/94, 13/07/2000)	239
Ergi v Turkey (No. 23818/94, 28/07/1998)	193
Feldek v Slovakia (No. 29032/95, 12/07/2001)	232
Fogarty v the United Kingdom (No. 3711/97, 21/11/2001)	95
Freedom and Democracy Party (ÖZDEP) v Turkey (No. 23885/94, 08/12/1999)	233
Fretté v France (No. 36515/97, 26/02/2002)	161
Gaygusuz v Austria (No. 17371/90, 16/09/1996)	190
Glimmerveen and Hagenbeek v the Netherlands (Nos. 8348/78 and 8406/78)	177
Gregory v the United Kingdom (No. 22299/93, 25/02/1997)	179
Herzcegfalvy v Austria (No. 10533/83, 24/09/1993)	220
Hoffmann v Austria (No. 12875/87, 23/06/1993)	209
Hoffmann v Germany (No. 34045/96, 11/10/2001)	239
Hugh Jordan v the United Kingdom (No. 24746/94, 04/05/2001)	47, 84, 119, 192

Incal v Turkey (No. 22678/63, 09/06/1998)	233
Inze v Austria (No. 8695/79, 28/10/1987)	131
Ireland v the United Kingdom (No. 5310/71, 18/01/1978)	233, 248
Jane Smith v the United Kingdom (No. 25154/92, 18/01/2001)	178
John Murray v the United Kingdom (No. 18731/91, 08/02/1996)	191, 234
Johnston and others v Ireland (No. 9697/82, 18/12/1986)	259
Kamasinski v Austria (No. 9782/82, 19/12/1989)	204
Karlheinz Schmidt v Germany (No. 13580/88, 18/07/1994)	76, 145
Karner v Austria (No. 40016/98, 24/07/2003)	162
Kelly and others v the United Kingdom (No. 30054/96, 04/05/2001)	84, 193
Kerhoven and Hinke v the Netherlands (No. 15666/89, 19/05/1992)	162
Kiliç v Turkey (No. 22492/93, 28/03/2000)	233
Kjeldsen, Busk Madsen and Pedersen v Denmark (Nos. 5095/71, 5920/72, 07/12/1976)	211
Koua Poirrez v France (No. 40892/98, 30/09/2003)	191
Kroon and others v the Netherlands (27/09/1994)	259
Kurt v Turkey (No. 24276/94, 25/05/1998)	84, 193
L. and V. v Austria (Nos. 39392/98 and 39829/98, 09/01/2003)	160
Larissis and others v Greece (Nos. 23372/94, 26377/94, etc., 24/02/1998)	210
Laskey, Jaggard and Brown v the United Kingdom (Nos. 21627/93, 21826/93, etc., 19/02/1997)	159, 258
Lee v the United Kingdom (No. 25289/94, 18/01/2001)	178
Lehideux and Isorni v France (No. 24662/94, 23/09/1998)	177
Lithgow and others v the United Kingdom (No. 9006/80, 08/07/1996)	76, 129
Lustig-Prean and Beckett v the United Kingdom (Nos. 31417/96 and 32377/96, 27/09/1999)	161
M.C. v Bulgaria (No. 39272/98, 04/12/2003)	25, 135, 253
Magee v the United Kingdom (No. 28135/95, 06/06/2000)	191, 234
Mahmut Kaya v Turkey (No. 22535/93, 28/03/2000)	193
Marckx v Belgium (No. 6833/74, 13/06/1979)	129
Marzari v Italy (No. 36448/97, 04/05/1999)	262
Mata Estevez v Spain (No. 56501/00, 10/05/2001)	162
Mathieu-Mohin and Clerfayt v Belgium (No. 9267/81, 2/03/1987)	204
McKerr v the United Kingdom (No. 28883/95, 04/05/2001)	84, 193
McLaughlin v the United Kingdom (No. 18759/91, 09/05/1994)	234
McMichael v the United Kingdom (No. 16424/90, 24/02/1995)	238
McShane v the United Kingdom (No. 43290/98, 28/05/2002)	84, 193
Mentes and others v Turkey (No. 23186/94, 28/11/1997)	193
Mikulic v Croatia (No. 53176/99, 07/02/2002)	258, 262
Modinos v Cyprus (No. 15070/89, 22/04/1993)	159
Moustaquim v Belgium (No. 12313/86, 18/02/1991)	191
Nachova v Bulgaria (Nos. 43577/98 and 43579/98, 28/02/2004)	24, 25, 84, 85, 99, 120, 123, 176
National Union of Belgian Police v Belgium (No. 4464/70, 21/10/1975)	116, 129
Norris v Ireland (No. 10581/83, 26/10/1988)	159
Nylund v Finland (No. 27110/95, 29/06/1999)	262
Okçuoglu v Turkey (No. 24246/94, 08/07/1999)	194
Onen v Turkey (14/05/2002)	193
Osman v the United Kingdom (No. 23452/94, 28/10/1998)	253
Özgür Gündem v Turkey (No. 23144/93, 16/03/2000)	193

P.K. and others v the United Kingdom (No. 19085/91, 09/12/1992)	.234
Palau-Martinez v France (No. 64927/01, 16/12/03)	.209
Passannante v Italy (No. 32647/96, 01/07/1998)	.258
Patel v the United Kingdom (No. 35693/97, 22/10/1998)	.249
Perkins and R v the United Kingdom (Nos. 43208/98 and 44875/98, 22/10/2002)	.161
Petrovic v Austria (No. 20458/92, 27/03/1998)	.145
Pretty v the United Kingdom (No. 2346/02, 29/04/2002)	.25, 221, 242, 258, 262
Price v the United Kingdom (No. 33394/96, 10/07/2001)	.112, 220
Rasmussen v Denmark (No. 8777/79, 28/11/1984)	.45, 118, 129
Rees v the United Kingdom (No. 9532/81, 17/10/1986)	.260
Remli v France (No. 16839/90, 23/04/1996)	.173, 179
S.L. v Austria (No. 45330/99, 09/01/2003)	.160
Sahin v Germany (No. 30943/96, 11/10/2001)	.238
Salgueiro Da Silva Mouta v Portugal (No. 33290/96, 21/12/1999)	.76, 161
Sander v United Kingdom (No. 34129/96, 09/05/2000)	.173, 179
Schuler-Zgraggen v Switzerland (No. 14518/89, 24/06/1993)	.76, 144
Selçuk and Asker v Turkey (No. 23184/94, 24/04/1998)	.193
Sentges v the Netherlands (No. 27677/02, 08/07/2003)	.261
Shanaghan v the United Kingdom (No. 37715/97, 04/05/2001)	.25, 84, 193
Sheffield and Horsham v the United Kingdom (No. 22985/93 and 23390/94, 04/05/2001)	.154
Sidiropoulos and others v Greece (No. 26695/95, 10/07/1998)	.233
Simpson v the United Kingdom (No. 11716/85, 14/05/1986)	.162
Smith and Grady v the United Kingdom (Nos. 33985/96 and 33986/96, 27/09/1999)	.160, 249, 258
Sommerfeld v Germany (No. 3187/96, 08/07/2001)	.239
Sutherland v the United Kingdom (No. 25186/94, 01/07/1997)	.159
T v the United Kingdom (No. 24724/94, 16/12/1999)	.228
Tanli v Turkey (No. 26129/95, 10/04/2001)	.193
Tanrikulu v Turkey (No. 23763/94, 8/07/1999)	.193
Tekin v Turkey (No. 22496/93, 09/05/1998)	.193
The Holy Monasteries v Greece (Nos. 13092/87, 13984/88, etc. 09/12/1994)	.211
Thlimmenos v Greece (No. 34369/97, 06/04/2000)	.47, 85, 86, 99, 112, 129, 176, 210
United Communist Party of Turkey and others v Turkey (No. 19392/92, 30/01/1998)	.233
V v the United Kingdom (No. 24888/94, 16/12/1999)	.228
Van Kück v Germany (No.35968/97, 12/06/2003)	.258
Van Raalte v the Netherlands (No. 20060/92, 21/02/1997)	.76, 144
Velikova v Bulgaria (No. 41488/98, 18/05/2000)	.85, 123, 175
Vezenardoglu v Turkey (No. 342357/96, 11/04/2000)	.123
W.J. and D.P. v the United Kingdom (No. 12513/86, 13/07/1987)	.162
Willis v the United Kingdom (No. 36042/97, 11/05/1999)	.76, 144
X and Y v the Netherlands (No. 8978/80, 26/03/1985)	.25, 259
X and Y v the United Kingdom (No. 9369/81, 03/05/1983)	.259
X v Iceland (No. 6825/74, 18/05/1976)	.258
Yasa v Turkey (No. 22495/93, 02/09/1998)	.233
Z.B. v the United Kingdom (No. 16106/90, 10/02/1990)	.162
Zehnalová and Zehnal v Czech Republic (No. 3862/97, 14/05/2002)	.221, 242, 261

European Union

Case 109/88 Danfoss [1989] ECR 3199	121
Case 109/88, Handels-og Kontofunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting on behalf of Danfoss) [1989] ECR 3199	127
Case 11/70, International Handelgesellschaft [1970] ECR 1125	61
Case 127/92, Enderby [1993] ECR 673	121, 132
Case 132/92, Roberts v Birds Eye Walls Ltd. [1993] ECR I-5579	77
Case 149/77, Defrenne v Sabena (No. 3) [1978] ECR 1365	78
Case 152/73, Sotgiu v Deutsche Bundespost [1974] ECR 153	87, 195
Case 165/82, Commission v the United Kingdom [1983] ECR 3431	78
Case 167/73, Commission v French Republic [1974] ECR 359)	57
Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz [1986] ECR 1607	87, 119, 130, 145, 149
Case 171/88, Rinner-Kühn [1989] ECR 2743	88, 130, 150
Case 184/99, Nimz v Freie und Hansestadt Hamburg [1991] ECR I-297	132, 150
Case 222/84, Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651	131
Case 26/62, Van Gend en Loos [1963] ECR 1	52
Case 262/88, Barber v Guardian Royal Exchange [1990] ECR I-1889	150
Case 279/87, Groener v Minister for Education [1989] ECR 3967	204
Case 29/69, Stauder v City of Ulm [1969] ECR 419	61
Case 30/85, Teuling v Bedrijfsvereniging voor de Chemische Industrie [1987] ECR 2497	239
Case 309/97, Angestelltenbetriebsrat der Wiener Gebietskrankenkasse [1999] ECR I-2865	117
Case 32/93, Webb v EMO Cargo (UK) Ltd. [1994] ECR I-3567	110, 117, 148, 149
Case 320/00, Lawrence and others v Regent Office Care Ltd. and others	117
Case 342/93, Gillespie and others v Northern Health and Social Services Board [1996] ECR I-0475	148
Case 35/97 Commission v Belgium [1998] ECR I-5325)	57
Case 36/74 Walrave and Koch v Association Union Cycliste Internationale [1974] ECR 1405	57
Case 379/87, Groener v Minister for Education [1989] ECR I-3967	195
Case 4/73, Nold v Commission [1974] ECR 491	61
Case 43/75, Defrenne v Sabena [1976] ECR 455	59, 132, 146
Case 438/99, Jiménez Melgar v Ayuntamiento de los Barrios [2001] ECR I-6915	147
Case 44/79, Hauer v Land Rheinland-Pfalz [1979] ECR 3727	61
Case 96/80, Jenkins v Kingsgate (Clothing Productions) Ltd. [1981] ECR 911	86, 150
Case C-109/00, Teledanmark v Handels og Kontorfunktionaerernes Forbund i Danmark [2001] ECR I-6993	148
Case C-109/91, Ten Oever [1993] ECR I-4879	150
Case C-125/99, D v Council [2001] ECR I-4319	164
Case C-13/94, P v S and Cornwall County Council [1996] ECR I-2143	154, 163
Case C-136/95, Thibault [1998] ECR I-2011	149
Case C-158/97, Badeck [2000] ECR I-1875	101
Case C-167/97, Seymour-Smith and Perez [1999] ECR I-623	88, 128
Case C-177/88, Dekker v Stichting VJV [1990] ECR I-3941	147
Case C-179/88, Handels-og Kontorfunktion-aerernes Forbund i Danmark [1990] ECR I-3979	149
Case C-184/89 Nimz [1991] ECR I-297	121
Case C-187/96, Commission v Greece [1998] ECR I-1095	194
Case C-212/99, Commission v Italy	77

Case C-218/98, Abdoulaye and Others [1999] ECR I-5723	78
Case C-226/91 Molenbroek v Bestuur van de Sociale Verzekeringsbank [1992] ECR I-05943	239
Case C-229/89, Commission v Belgium [1991] ECR I-02205	239
Case C-237/94, O'Flynn v Adjudication Officer [1996] ECR I-2617	87
Case C-243/95, Hill and Stapleton v Revenue Commissioners [1998] ECR I-3739	87, 150
Case C-249/96, Grant v Southwest Trains [1998] ECR I-621	117, 155, 162, 163
Case C-271/91, Marshall v Southampton and South West Area Health Authority [1986] ECR 723	134
Case C-273/97 Sirdar v Secretary of State for Defense [1999] ECR I-7403	78, 131, 147
Case C-278/94, Commission v Belgium [1996] ECR I-4307	195
Case C-281/98, Roman Angonese v Cassa de Risparmio di Bolzano SpA [2000] ECR I-4139	26, 57, 194
Case C-285/98, Kreil v Bundesrepublik Deutschland [2000] ECR I-69	78, 131
Case C-312/86, Commission v France [1998] ECR 3559	78
Case C-312/86, Commission v France [1998] ECR 6315	102
Case C-33/89 Kowalska [1990] ECR I-2591	121
Case C-333/97, Lewen v Denda [1999] ECR I-7243	149
Case C-356/98, Arben Kaba v Home Secretary [2000] ECR I2623	87
Case C-391/97, Frans Gschwind v Finanzamt Aachen-Aussenstadt [1999] ECR I-5451	77
Case C-407/98, Abrahamsson v Fogelqvist [2000] ECR I-5539	101, 151
Case C-409/95, Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363	100
Case C-411/96, Boyle and others v Equal Opportunities Commission [1998] ECR I-6401	149
Case C-415/93 Union Royale Belge des Sociétés de Football Association and others v Bosman [1995] ECR I-4921)	57
Case C-450/93, Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051	100
Case C-476/99, Lommers v Minister van Landbouw [2002] ECR 1289	101
Case C-57/96, Meints v Minister van Landbouw [1997] ECR I-6689	87
Case C-6/90, Francovich [1991] ECR I-5357	55
Case C-66/96, HK (for Hoj Pedersen) v Faellesforeningen for Danmarks Brugsforeninger (for Kvickly Skive) [1998] ECR I-7327	149
Case C-78/98, Preston and others v Wolverhampton Healthcare NHS Trust [1999] ECR I-3201	135

African System

Amnesty International / Zambia (212/98)	235
Association Mauritanienne des Droits de l'Homme / Mauritania (No. 210/98)	65, 78, 179, 204
Free Legal Assistance Group, Les Temoins de Jehovah and others / Zaire (25/89, 47/90, 56/91 and 100/93)	213
Ivcher Bronstein v Peru, Judgment 6/2/03 (Annual Report of the IACHR, 2001)	197
John K. Modise / Botswana (No. 97/93)	195
Kazeem Aminu / Nigeria (205/97)	235
Legal Resources Foundation / Zambia (No. 211/98)	65, 78, 196
OMCT and others / Rwanda (Nos. 27/89, 46/91, 49/91, 99/93)	78, 180, 196
RADDHO / Zambia (71/92)	196, 235
UIDH, FIDH and others / Angola (No. 159/96)	195

Inter-American System

Advisory Opinion OC-18/03	.26, 69, 70, 80, 119, 197, 271
Advisory Opinion OC-4/84	.69, 79, 153, 196
Carabantes v Chile (No. 33/02)	.80
Carlos Garcia Saccone v Argentina (No. 8/98)	.79
Celestine, (Case 10.031)	.180
Haitian Boat People v United States, Report N° 51/96, Case 10.675 (13 March 1997)	.68
José Alberto Pérez Meza v Paraguay (Petition 19/99, Report 96/01)	.164
Marcelino Hanríquez et al v Argentina (No. 73/00)	.79
Maria Da Penha Maia Fernandes v Brazil, Report No. 54/01, IACHR 2001	.254
María Eugenia Morales de Sierra v Guatemala (No. 4/01)	.79, 80, 153
Marta Lucía Álvarez Giraldo v Colombia (Case 11.656, Report 71/99 on admissibility) 4 May 1999	.164
Marzoni v Argentina (No. 39/96)	.80
Velasquez Rodriguez	.124
Velásquez-Rodríguez v Honduras (Series C., No. 4, 29 July 1988)	.26

Canada .89

Andrews v Law Society of British Columbia [1989] 1 S.C.R. 143	.89, 226, 247
British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union [1999] 3 S.C.R. 3	.89
British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) [1999] 3 S.C.R. 868	.89, 122
Canada (A.G.) v Mossop [1993] S.C.R. 554	.241
Canada (Human Rights Commission) v Canada (Department of National Health and Welfare) (1998), 32 C.H.R.R. D/168 (F.C.T.D.)	.126
Canadian National Railway Co. v Canada (Human Rights Commission) and Bhinder (1985), 7 C.H.R.R. D/3093 (S.C.C)	.113
Canadian Odeon Theatres Ltd. v Huck (1985) 6 C.H.R.R. D/2682	.216
Central Alberta Dairy Pool v Alberta (Human Rights Commission) [1990] 2 S.C.R. 489	.113
Corbière v Canada [1999] 2 S.C.R. 203	.241
Dickason v University of Alberta [1992] 2 S.C.R. 1103	.226
Egan v Canada [1995] 2 S.C.R. 513	.165, 241, 246
Eldridge v British Columbia (Attorney General) [1997] 3 S.C.R. 624	.90, 224
Gosselin v Quebec [2002] 4 S.C.R. 429	.226, 247
Granovsky v Minister for Employment and Immigration [2000] S.C.C. 28	.224
Large v Stratford (City) [1995] 3 S.C.R. 733	.92
Law v Canada (Minister of Employment and Immigration [1999] 1 S.C.R. 497	.89, 241, 247
M v H [1999] 2 S.C.R. 3	.157
McKinney v Board of Governors of the University of Guelph and the Attorney General for Ontario [1990] 3 S.C.R. 229	.226
Ontario (Human Rights Commission) v Simpson-Sears Ltd. [1985] 2 S.C.R. 536	.89, 113
Ouimette v Lily Cups Ltd. (1990) 12 C.H.R.R. D/19	.216
Re Blainey and Ontario Hockey Association et al., 1986 A.C.W.S.J	.124
Saskatchewan (Human Rights Commission) v Saskatoon (City) [1989] 2 S.C.R. 1297	.92, 226
Vriend v Alberta [1998] 1 S.C.R. 493	.165

United States

Adarand Constructors, Inc. v Peña, 515 U.S. 200	105
Alaska Chapter, Associated General Contractors of America v Pierce 694 F.2d 1162 (1982)	106
Barth v Gelb, 2 F. 3d 1180, 1187 (CADDC 1993)	114
Borkowski v Valley Central School Dist., 63 F. 3d 131, 138 (CA2 1995)	114
Brown v Board of Education 347 U.S. 483 (1954)	181
Carson v American Brands, Inc. 450 U.S. 79 (1981)	136
Desert Palace, Inc. v Costa, 539 U.S. 90, 99 (2003)	124
Fullilove v Klutznick 448 U.S. 448 (1980)	96, 106
Garcia-Ayala v Lederle Parenterals, Inc., 212 F. 3d 638, 648 (CA1 2000)	114
Griggs v Duke Power Co. 401 U.S. 424 (1971)	90, 118, 121
Grutter v Bollinger (No. 02-241, U.S. Supreme Court, 23 June 2003)	106
Hendricks-Robinson v Excel Corp., 154 F. 3d 685, 699 (CA7 1998)	114
Hunter v Underwood 471 U.S. 222 (1985)	90
Lawrence v Texas 539 U.S. (2003)	262, 270
McDonnell Douglas Corp. v Green, 411 U.S. 792, 802 (1973)	121
Morton v Mancari 417 U.S. 535 (1974)	105
Reed v LePage Bakeries, Inc., 244 F. 3d 254, 259 (CA1 2001)	114
Robinson v Jacksonville Shipyards, Inc (No. 86-927-Civ-J-12, 760 F. Supp. 1486; 1991 U.S. Dist. LEXIS 4678; 136 L.R.R.M.	94
St. Mary's Honor Centre v Hicks, 509 U.S. 502 (1993) at 507	122
Texas Dept. of Cmty. Affairs v Burdine, 450 U.S. 248, 253 (1981)	126
U.S. Airways Inc v Barnett (U.S. Court of Appeals, 9th Circuit, No. 00-1250, 29 April 2002)	114
United Steelworkers v Weber 443 U.S. 193 (1979)	104
University of California Regents v Bakke, 438 U.S. 265 (1978)	106
Village of Arlington Heights v Metropolitan Housing Development Corp., 429 U.S. Reports 252	82

United Kingdom

Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406 (16 October 2003)	262
Anya v Oxford University [2001] IRLR 377	127
Barton and Rhule v De Vere Hotels [1996] IRLR 596	134
Chief Constable of the Lincolnshire Police v Stubbs [1999] IRLR 81	134
Clark v TDG Limited (t/a Novacold) [1999] ICR 951	110, 114
F.T.A.T.U. v Modgill; P.E.L. v Modgill [1980] IRLR 142	181
Glasgow City Council v Zafar (1998) ICR 120	122, 124
Jones v Post Office [2001] IRLR 384	114
Kells v Pilkington [2002] 2 CMLR 63	127
King v Great British-China Centre (1992) ICR 516 at 528	122, 124, 127
London Underground v Edwards [1999] ICR 494	90, 125
Mandla v Dowell Lee [1983] 2 AC 548	90
Morse v Wiltshire County Council [1998] IRLR 352	114
Nagarajan v London Regional Transport [2000] 1 AC 501	126
Perera v Civil Service Commission [1983] ICR 428	90
R (on the Application of Louis Farrakhan) v Secretary of State for the Home Department, Court of Appeal, 30/04/2002	177

R v Secretary of State for Employment, ex parte Seymour-Smith [1999] ECR I-623	90
Rowden v Dutton Gregory [2002] ICR 971	127
Sidhu v Aerospace Composite Technology [2000] IRLR 602	134
Stewart v Cleveland (Engineering) Ltd. [1999] IRLR 440	60, 94
Strathclyde Regional Council v Porcelli [1986] IRLR 134	60
Thompson v Black Country Housing Association Ltd (1999) DCLD 39	134

South Africa

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others (CCT27/03, 12 March 2004)	108
Beukes v Krugersdorp Transitional Local Council and another 1996 (3) SA 467 (W)	90
Brink v Kitshoff N.O. 1996 (4) SA 107 (CC)	90
Harksen v Lane N.O. and others 1998 (1) SA 300 (CC)	90, 122, 124, 126, 245
Jordan and others v the State (CCT31/01, 9 October 2002)	246
Minister of Finance and others v Van Heerden (CCT63/03, 29 July 2004)	107
Moseneke and others v Master of the High Court (CCT, 06/12/2000)	178
National Coalition for Gay and Lesbian Equality and another v Minister for Justice and another 1991 (1) SA 6 (CC)	246, 262
President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)	90, 246
Pretoria City Council v Walker 1998 (2) SA 363 (CC)	90
S v J [1998] (4) BCLR 424	253
Satchwell v Republic of South Africa (CCT45/01, 25/07/2001)	157

Other Jurisdictions

30 BVerfGE 173 (1971)	244
45 BVerfGE 187 (1977)	244
90 BVerfGE 255 (1994)	244
A Garage Proprietor v A Worker (EE 02/1985)	60, 92
A Limited Company v One Female Employee (EE 10/1998)	134
A Worker v A Company (EE 3/1991)	134
Addara Aratchige Gunendra v the Republic [1997] Case No. 77 10/96 (Sri Lanka)	253
Apparel Export Promotion Council v A K Chopra AIR [1999] SC 625	138
Attorney General (Botswana) v Unity Dow (124/1990) (CA No. 4/1991)	151
Auckland City Council v Hapimana [1976] 1 NZLR 731	126
Autisme-Europe v France (No. 13/2002, ESC)	50
El-Al Israel Airlines Ltd. v Danielowitz (1994) 48(5) P.D. 749	164
European Roma Rights Center v Greece (No. 15/2003, ESC)	51
Government of Andhra Pradesh v P B Vijayakumar & Anor AIR 1995 SC 1648	107
International Federation for Human Rights v France (No. 14/2003, ESC)	51
Mayer v Australian Nuclear Science and Technology Organisation (2003) EOC 93-285	125
Mojekwu v Mojekwu [1997] 7 NWLR 283	151
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd, (1992) ALR 449, 449-450)	124

Northern Regional Health Authority v Human Rights Commission, [1998] 2 NZLR 218, 242	.126
State v Bechu [1999] Criminal Case No. 79/94 (Fiji)	.253
Syndicat national des professions du tourisme v France (No. 6/1999, ESC)	.50
The Prosecutor v Alfred Musema (ICTR, Judgment of the Trial Chamber, 27 January 2000, and Judgment of the Appeals Chamber, 16 November 2001)	.255
The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (ICTY, Judgment of the Trial Chambers, 22 February 2001 and Judgment of the Appeals Chamber, 12 June 2002)	.255
The Prosecutor v Jean-Paul Akayesu (ICTR, Judgment of the Trial Chamber, 2 September 1998, and Judgment of the Appeals Chamber, 1 June 2001)	.255
The Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (ICTY, Judgment of the Trial Chamber, 16 November 1998, and Judgment of the Appeals Chamber, 20 February 2001)	.255
Vishaka v State of Rajahstan [1997] VII AD SC53	.138
Waters v Public Transport Corporation (1991) 173 CLR 349	.126
X v Y Corp and another, [1999] 1LRC 688	.224

Also from INTERIGHTS

Access to Justice in Central and Eastern Europe: Source Book, Country Reports and Forum Report

(2003) Produced with the Public Interest Law Initiative, the Bulgarian Helsinki Committee and the Polish Helsinki Foundation for Human Rights.

Access to Justice in a Changing World: Collection of Papers and Suva Statement on the Principles of Judicial Independence and Access to Justice

(2004) Produced with the Fiji Human Rights Commission and the Fiji Judiciary.

Anti-Discrimination Legal Reports (Europe)

(2003) Produced with Migration Policy Group.

Building Bridges for Rights: Inter-African Initiatives in the Field of Human Rights

(2001) Compiled by Marguerite Garling and Chidi Anselm Odinkalu, £25.

Commonwealth Human Rights Law Digest

Produced with the Commonwealth Secretariat. Thrice-yearly collection of summaries of human rights related cases from senior Commonwealth domestic courts. Subscription is £45 / US\$90 per volume of three.

Developing Human Rights Jurisprudence: The Domestic Application of Human Rights Norms – Volumes 5, 7 and 8

(1992, 1996, 1998) Produced with the Commonwealth Secretariat, £18 - £25.

Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights

(2004) Edited by Yash Ghai and Jill Cottrell, £20 / US\$38.

INTERIGHTS Bulletin: The Review of the International Centre for the Legal Protection of Human Rights

Quarterly law review: a four-issue subscription is £48 / US\$82 for organisations; £36 / US\$64 for individuals; and £24 / US\$46 for students.

Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights

(2003) Available in English and French.

Right to Fair Trial under the European Convention on Human Rights (ECHR) and the Compatibility of Russian Law and Practice with ECHR Standards

(2004) Produced by Sutyajnik.

Strategic Litigation of Race Discrimination in Europe: From Principles to Practice (A manual on the theory and practice of strategic litigation with particular reference to the EC Race Directive)

(2004) Produced with European Roma Rights Center and Migration Policy Group.

Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa

(1999) Produced with AFRONET and GTZ. Edited by Abdullahi Ahmed An-Na'im, £18 / US\$30. Available in English, French and Arabic.

**To order or request further information on any of these publications,
please send an email with the title 'Publications' to INTERIGHTS at:
ir@interights.org**

INTERIGHTS

INTERIGHTS, the International Centre for the Legal Protection of Human Rights, is an international human rights law centre established in 1982 to provide leadership in the development of legal protection for human rights and freedoms worldwide through the effective use of international and comparative human rights law.

INTERIGHTS assists lawyers, judges, non-governmental organisations and victims in the preparation of cases before national, regional and international tribunals; submits amicus curiae briefs in cases raising important issues concerning the interpretation of fundamental rights; offers representation before regional and international tribunals; conducts workshops and seminars on the techniques associated with the use and interpretation of human rights law; and publishes materials to ensure that developments in human rights law are widely known.

INTERIGHTS holds Consultative Status with the United Nations' Economic and Social Council, with the Council of Europe and with the African Commission for Human and Peoples' Rights and is authorised to present collective complaints under the European Social Charter.

A registered charity, INTERIGHTS is dependent on grants from foundations and on donations from individual supporters.

INTERIGHTS
The International Centre for the Legal
Protection of Human Rights
Lancaster House
33 Islington High Street
London N1 9LH
UK

Tel: +44 (0)20 7278 3230
Fax: +44 (0)20 7278 4334
Email: ir@interights.org
Website: www.interights.org