



Non- Discrimination in International Law

A HANDBOOK FOR
PRACTITIONERS

2011
EDITION

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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.

ABBREVIATIONS

AfCHPR	African (Banjul) Charter on Human and Peoples' Rights
AmCHR	American Convention on Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
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
CRPD	Convention on the Rights of Persons with Disabilities
EC	European Community
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
ESC	European Social Charter
ESC (Revised)	European Social Charter (Revised)
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
MWC	International Convention on the Protection of Rights of All Migrant Workers and Members of Their Families
OAS	Organization of American States
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization

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 format (with links between relevant points in the text and to external websites) so that it can be updated periodically on INTERIGHTS' [website](#). 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 October 2010. 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.

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The first edition was published in 2005. Kevin Kitching, then Legal Officer of INTERIGHTS' Central and Eastern European Programme, was the chief editor, researcher and author. Colm O'Conneide, Lecturer in Law at University College London, was the external editor. Helen Duffy, then Legal Director of INTERIGHTS, reviewed the Handbook on behalf of INTERIGHTS. Andrea Coomber, then 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 first edition, in particular, Barbora Bukovska, David Murphy, Maya de Souza, Odette Lienau and Paul Green. Erica Ffrench, then Information/Programme Assistant for INTERIGHTS' Commonwealth Programme, was instrumental in the production and design of the Handbook.

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The 2011 edition was updated by Pádraig Hughes, Equality Lawyer at INTERIGHTS, and Roisin Murphy, an intern with INTERIGHTS, and edited by Rachel Fleetwood, Information and Publications Officer at INTERIGHTS.

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INTRODUCTION TO INTERNATIONAL DISCRIMINATION LAW

A CONCEPTS OF EQUALITY

Useful references: Equality Concepts

- For an analysis of equality concepts, see: Sandra Fredman, *Discrimination Law*, Second Edition, Oxford University Press, 2011.

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 the basic idea that individuals in like situations should be treated alike. Formal equality focuses on equal treatment based on the appearance of similarity, without regard to the broader context within which such treatment occurs. According to this approach, laws or practices with the purpose of treating individuals in similar situations differently may result in direct discrimination. Formal equality ignores the structural factors that result in certain groups falling behind the rest of society. Therefore, where the concept of formal equality is applied and differences between individuals are not taken into account, consistency of treatment often fails 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 on-going 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 all individuals must have an equal opportunity to gain access to the desired benefit, taking into consideration their different starting positions. Equal opportunity aims to provide equal chances but not equal results.

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 on 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 under 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 instituting preferences that favour members of previously disadvantaged societal groups. Such preferential treatment runs counter to the strictly formal notion of equality but may be essential to ensure substantive equality. Many international instruments explicitly permit positive action without imposing an obligation on States to take such measures.
- **Reasonable accommodation** This concept was initially developed in the context of employment conditions and referred to any adjustment to a job, employment practice, work environment, or the manner or circumstances under which a position is held or customarily performed, which 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 and with the latest developments in this area introduced by the [Convention on the](#)

Rights of Persons with Disabilities (CRPD), the concept has been broadened to cover not only equality in access to employment but also to the enjoyment of all human rights and fundamental freedoms.

Not all differences in 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 permitted under international law, such a distinction must have an ‘objective and reasonable justification.’ This means that 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 to achieve it. In other words, the difference in treatment made in order to achieve the legitimate aim must be appropriate, necessary and relevant to the aim sought to be achieved.

- For example, in some jurisdictions, the legislation provides an exception to the general prohibition of discrimination so that 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.

Another concept that has a central role in equality law is that of the **comparator**. A comparator is the group or individual in a similar situation against which the person who is complaining of discriminatory treatment must be compared in order to determine whether there is different treatment. As will be discussed later in the Handbook, the use of a comparator to determine discriminatory treatment can be problematic because comparisons may vary greatly 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. Similarly, the requirement of a comparator has effectively had to be dispensed with in certain contexts such as for pregnant women or the disabled because there is no group in a similar situation and their different status must be accommodated.

C STATE OBLIGATIONS: PUBLIC AND PRIVATE DISCRIMINATION

Useful references: State Obligations

- For an analysis of positive obligations under the European Convention on Human Rights, see for example, Oddný 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.
- For a state duty to combat discrimination by private actors see M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl, Second Edition, 2005.

1 Negative Obligations of the State

Traditional human rights jurisprudence has focused primarily on protecting private individuals from abuse by public authorities. This is because, in practice, as a result of the power to make laws, and to tax and spend

the State budget, governments and various State agencies have the greatest effect on the level of equality in society. International non-discrimination law is therefore primarily addressed to States and refers to this protection as the ‘negative obligation’ of the State. In the context of discrimination, States must fulfil the obligations laid down by international human rights treaties and they are liable if those legal obligations are breached. Consequently, international human rights bodies have largely focused on cases involving discrimination by the State itself or agencies and individuals that act on its behalf.

This negative obligation not to discriminate also applies to the introduction of legislation or the application of such legislation. In its [General Comment No. 18](#), the [Human Rights Committee](#) (HRC) stated that:

Article 26 [of the International Covenant on Civil and Political Rights (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 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* (No. 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 States to further the equality of vulnerable groups may be limited if society in general discriminates against them. Therefore, case law from 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 guarantee or to respect rights. These obligations are rarely explicitly set out in such instruments. Nevertheless, international tribunals have been active in developing positive obligations in cases where there would be no practical and effective guarantee of rights or remedy if they did not exist. In order to do this, they have relied on provisions such as [Article 2](#) of the 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 from 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 the private and public realms. Some examples of the positive obligations of the State under international equality provisions would be to prevent discrimination by banning it, to extend existing measures to similar groups, to accommodate difference or 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 No. 28](#), the HRC stated that:

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

The HRC also affirmed the positive obligations of States to combat private sector discrimination in the admissibility decision of *Nahlik v Austria* (No. 608/95, ICCPR, paragraph 8.2), where they stated:

Under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of the States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties in the quasi-public sector of, for example employment.

Equally, Article 2(e) of the [Convention on the Elimination of All Forms of Discrimination Against Women](#) (CEDAW) requires States to ‘take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.’ See also *A.T. v Hungary* (No. 2/2003, CEDAW) at paragraph 9.2.

The [Committee on the Elimination of Racial Discrimination](#) (CERD), set up under the International Convention on the Elimination of All Forms of Racial Discrimination (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 (see CERD [General Comment No. 20](#)). [Article 2\(1\)\(d\)](#) of ICERD provides that States must prohibit and prevent racial discrimination ‘by any person, group or organisation.’ In the case of *Lacko v Slovak Republic* (No. 11/1998, ICERD), the Committee found that the State was under a positive obligation to criminally investigate a private individual when he discriminated against another private individual on the basis of race.

***Lacko v Slovak Republic* (ICERD)**

Miroslav Lacko, a Slovak Romani man, was denied access to a restaurant on the basis of his race because the owner of the restaurant refused to serve Roma people after several Roma had previously destroyed equipment in the restaurant.

Mr Lacko first filed a domestic 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.

In declaring the case admissible, CERD 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.

However, the Committee found no violation on the merits because, following the submission of the communication to CERD, the Slovak authorities indicted the restaurant owner for incitement to racial hatred and he was found guilty and fined. Thus, redress had ultimately been afforded at the time CERD considered the case, even though the restaurant owner was convicted of a crime that was clearly not applicable to the violation at issue.

CERD did recommend, however, that the State party amend its legislation in order to guarantee the right of access to public places and to appropriately sanction the refusal of access to such places on the basis of racial discrimination.

2.2 The European Convention on Human Rights

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

Firstly, 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 October 1998), *Shanaghan v the United Kingdom* (No. 37715/97, 04 May 2001), *Pretty v the United Kingdom* (No. 2346/02, 29 April 2002) and *M.C. v Bulgaria* (No. 39272/98, 04 December 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 March 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 relations between private individuals. The positive obligations under Article 8 are 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 landmark case of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) the ECtHR found that, under Article 14, where there is a suspicion that racial attitudes induced a violent act, the State has an obligation to use its best endeavours to investigate the racist elements of the crime. In its Chamber judgment, the Court specifically 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,’ thus endorsing a substantive equality approach under the Article. The Grand Chamber approved the Chamber’s analysis and added that ‘the authorities’ duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.’

2.3 The European Union

The application of [European Union](#) (EU) law must be contrasted to that of the other instruments outlined in the Handbook. As also discussed in Chapter II [below](#), the EU legal system is of a ‘supranational’ character and its laws may be directly invoked by individuals in domestic courts or have ‘[direct effect](#)’ against the State. Therefore, there is usually no need to appeal to an international instrument in order to enforce EU norms, however, applications are made to the [European Court of Justice](#) (ECJ) if a State fails to implement an EU directive or the domestic court refers a matter to the ECJ for an interpretation of EU law.

The ECJ has made it clear that EU member States must apply the non-discrimination provisions in the Treaty of Amsterdam in both the public and private realms. See, for example, *Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, in which the ECJ held that [Article 39](#), concerning 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 Commission 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 [Juridical Condition and Rights of Undocumented Migrants \(Advisory Opinion OC-18/03\)](#) 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 provisions 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 on specific procedures for making complaints.

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, provided the inspiration for many subsequent human rights instruments and, in particular, those at the ‘universal level’, which are sponsored by the UN and its specialised agencies. Although intended as a non-binding declaration (rather than a treaty), it is 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 Elimination of All Forms of Discrimination Against Women (CEDAW), the [Convention on the Rights of the Child](#) (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD). The Handbook discusses these six 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](#) (MWC).

In addition, the [International Labour Organization](#) (ILO) has sponsored a number of conventions dealing with non-discrimination in the workplace.

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 the ICERD;
 - The Committee on the Elimination of Discrimination against Women established under the CEDAW;
 - The [Committee on the Rights of Persons with Disabilities](#) established under the CRPD; and
 - The [Committee against Torture](#) established under the CAT.

An individual complaints procedure for the ICESCR was established on 10 December 2008 when the UN General Assembly adopted the [Optional Protocol](#) to the Covenant, which gives the [Committee on Economic, Social and Cultural Rights](#) (CESCR) – the Covenant’s supervisory body – the power to consider individual complaints. However, the Optional Protocol will not come into effect until at least ten States ratify it and as of April 2011, three States have done so.

The five established UN committees have the power to receive submissions (called communications) from individuals regarding alleged human rights violations by State parties. The relevant committee then reviews each communication and presents its opinions to the State party and the individual concerned but they have no powers of enforcement. The committees are not traditional courts of law with compulsory jurisdiction and lack the necessary powers to enforce compliance.

The committees’ jurisdiction to consider communications is not automatic as States have a choice whether or not to allow individual complaints against them. In the cases of the ICCPR, CEDAW and CRPD, individual complaint mechanisms were established under separate optional protocols. In the cases of ICERD and 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 agreeing to the relevant ‘opt-in’ 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 have been 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 website of the relevant treaty body.

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

Useful links: ICCPR

- [Text of the ICCPR](#)
- [Website of the HRC](#)
- [Status of ratification of UN instruments](#)
- [Links to instruments and ratifications](#)
- www.bayefsky.com (website specialising in UN treaty bodies)
- [University of Minnesota Human Rights Library](#)

The UN General Assembly adopted the ICCPR in 1966 and it entered into force in 1976. The HRC monitors implementation of the ICCPR by State parties. As of April 2011 167 States are party to the ICCPR and 13 States have 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, colour, 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. Subsequent case law has extended that protection by elaborating on the meaning of the phrase 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). Article 2, by contrast, is a ‘dependent’ provision, as it guarantees non-discrimination only with respect to the rights guaranteed by the 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 concerning these rights 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 there was 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. 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 additional prohibited grounds of discrimination that have been recognised by the HRC are described in more detail in Chapter V [below](#).

The ICCPR does not explicitly mention direct and indirect discrimination. However, HRC [General Comment No. 18](#) makes clear that both the *purpose* and *effect* of any measure must comply with Articles 2 and 26, which suggests that both forms of discrimination are prohibited.

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 No. 29](#) for more information.

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

Useful links: ICESCR

- [Text of the ICESCR](#)
- [Materials of the CESCR](#)
- [Status of ratification of UN instruments](#)
- [Links to instruments and ratifications](#)

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’, in Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context. Law, Politics, Morals*, Oxford University Press, 2008.
- For a discussion of the unofficial petition procedure, see: Matthew Craven, *Towards and unofficial petition procedure: A review of the role of the UN Committee on Economic, Social and Cultural Rights, Social Rights as Human Rights: A European Challenge*, K. Drzewicki, C. Krause and A. Rosas eds., Abo Akademi University, Institute for Human Rights, 1994.

The ICESCR entered into force in 1976 and, as of April 2011, it had 160 State parties to it. The CESCR, established in 1985 under the Economic and Social Council, monitors the implementation of the ICESCR through the review of reports submitted by States and, once the Optional Protocol to the ICESCR comes into force, the CESCR will also be able to monitor implementation through the individual complaints procedure. In addition, if a State party to the Optional Protocol makes a declaration under Article 11 to recognise the CESCR’s competence, the CESCR can conduct an inquiry into grave and systematic violations of the ICESCR in that State.

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, colour, 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. In its [General Comment No. 20](#), the CESCR clarified the content of the prohibition of discrimination under Article 2(2) and affirmed that the provision prohibits direct and indirect discrimination (paragraph 10) and that States are required to ensure formal and substantive equality, which means that they are permitted to take positive action and may be required to do so in order to prevent discrimination (paragraph 9). Furthermore, Article 1(1) uses identical language to that of the ICCPR to endorse the group right to self-determination.

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

Useful links: ICERD

- [Text of ICERD](#)
- [ICERD jurisprudence](#)
- [Website of the CERD](#)
- [Status of ratification of UN instruments](#)
- [Links to instruments and ratifications](#)

The ICERD was adopted by the [General Assembly](#) in 1965 and entered into force in 1969. As of April 2011, it had 174 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 April 2011, 54 State parties had recognised the competence of CERD to consider individual communications under Article 14.

The provisions of ICERD that most directly address equality issues are:

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, 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.

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, colour, descent, or national or ethnic origin.' Article 5 provides for 'equality before the law' (see the section on 'race' in Chapter V [below](#)) and the general wording of Article 1(1) suggests that the Convention is free standing in that it covers all forms of discrimination in 'any field.' This 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 No. 14](#)). 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

- [Text of CEDAW](#)
- [Materials of the Committee on the Elimination of Discrimination against Women](#)
- Information on CEDAW from women's rights organisations: www.equalitynow.org and <http://www.iwraw-ap.org/>
- [Status of ratification of UN instruments](#)
- [Links to instruments and ratifications](#)
- [Text of the Optional Protocol](#)
- [Status of ratification of the Optional Protocol](#)

CEDAW was adopted in 1979 and entered into force in 1981. As of April 2011, it has 186 State parties and 102 States have 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 on 22 December 2000. The Optional Protocol establishes an individual complaints procedure as well as an inquiry procedure through which the CEDAW Committee can launch an inquiry into grave or systematic violations on its own initiative. The Committee's jurisprudence has been actively evolving throughout the past two years in areas such as States' positive obligations to protect in cases of domestic violence (see *A.T. v Hungary* (No. 2/2003, CEDAW)) and women's reproductive rights involving forced sterilisation (*A.S. v Hungary* (No. 4/2004, CEDAW)). In July 2004, the Committee also concluded its first inquiry under Article 8 of the Optional Protocol in July 2004 regarding the abduction, rape and murder of women in the Ciudad Juarez area of Chihuahua in Mexico (see the [full text](#) of the report produced by the CEDAW Committee).

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

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 to only 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.’ Furthermore, by reference to HRC [General Comment No. 18](#) and CERD [General Recommendation No. 14](#), 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 States to take positive measures to facilitate equality.

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

Useful links: CRC

- [Text of the CRC](#)
- [Materials of the CRC](#)
- [Status of ratification of UN instruments](#)
- [Links to instruments and ratifications](#)

The CRC was adopted in 1989 and entered into force in 1990. As of April 2011, it had 193 State parties to it. 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:

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, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

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,' which suggests that it is a [dependent](#) provision. Protection against discrimination under the CRC is limited to children. 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 Convention on the Rights of Persons with Disabilities (CRPD)

Useful links: CRPD

- [Text of the CRPD and its Optional Protocol](#)
- [Information on the CRPD](#)
- [Status of ratification of the CRPD and its Optional Protocol](#)

The CRPD and its Optional Protocol were both adopted on 13 December 2006 and came into force on 3 May 2008. As of April 2011, 100 States have ratified the CRPD and 61 have ratified the Optional Protocol, which gives competence to the Committee on the Rights of Persons with Disabilities to receive individual complaints about violations of the Convention. The Committee is comprised of a maximum of 18 independent experts and under Article 6 of the Optional Protocol, where there is evidence of grave and systematic violations of the CRPD, the Committee can launch its own inquiry into a State party's compliance. The Conference of States parties made up of signatories to the CRPD will have the authority to consider any matter regarding implementation.

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

Convention on the Rights of Persons with Disabilities

Article 2: Definitions

For the Purposes of the Convention:

...“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

...“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

Article 3: General principles

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4: General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

- (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
- (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- (d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
- (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;...

Article 5: Equality and non-discrimination

(1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

(2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

(3) In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

(4) Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 12: Equal recognition before the law

(1) States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 2 introduces a novel principle stating that the denial of **reasonable accommodation** is a form of discrimination on the basis of disability. The Article also broadens the scope of the concept of reasonable accommodation by not limiting it to employment matters.

Article 3 outlines different aspects of discrimination, such as respect for inherent dignity and full and effective participation in society. It also addresses issues of multiple discrimination in relation to vulnerable groups such as women and children. As part of the general obligations of States, Article 4 imposes a negative obligation not to discriminate and requires that positive measures be taken to protect persons with disabilities from actions by private actors. In addition, Article 5 requires positive action by taking specific measures to achieve *de facto* equality and states that such measures will not be considered a form of discrimination.

Article 12 addresses equality of legal status and ensures that people with disabilities have equal rights and opportunities to be actors in the legal system. This applies to many areas of life; from conducting financial affairs, to participating in court proceedings, to making decisions about medical treatment, where and with whom to live and generally exercising autonomy in everyday affairs. There is both a positive and a negative obligation on States. The negative obligation is to respect the decisions made by people with

disabilities, and the positive obligation is to provide access to supported decision-making where needed. Supported decision-making is a model for allowing people with disabilities to exercise legal capacity by assisting communication, understanding and other aspects of a decision-making process. It is based on a relationship of trust among individuals, and is a complete alternative to the old model of substituted decision-making (e.g. guardianship) that put another person in place of the person with a disability for the purposes of making decisions.

7 The International Labour Organization (ILO) Conventions

Useful links: Universal Instruments

- [ILO website](#)
- [ILO conventions](#)
- [ILO documents](#)
- [ILO general surveys](#)
- [ILO membership](#)

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 April 2011, 183 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 that set minimum standards of basic labour rights, including equality of opportunity and treatment. Under [Article 22](#) of the ILO Constitution, each State agrees to submit 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 to a commission of inquiry for investigation, although this has occurred infrequently in practice and never in the case of equality claims. A concerned State also has the option of referring the complaint to the International Court of Justice for a 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:

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 like [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 the extension of those grounds by way of 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.' This use of the term 'effect' reflects language used by HRC General Comment No. 18 in relation to the ICCPR. 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 and Tribal 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](#).

8 Other Relevant UN Conventions

8.1 The Convention Against Torture (CAT) and the Migrant Workers Convention (MWC)

Useful links: CAT and the MWC

- [Text of the CAT](#)
- [Materials of the CAT](#)
- [Status of ratification of UN instruments](#)
- [Links to instruments and ratifications](#)
- [Text of the MWC](#)
- [Materials of the MWC](#)
- [Status of ratification](#)

The CAT was adopted by the UN General Assembly on 10 December 1984 and entered into force on 26 June 1987. As of April 2011, 147 States are parties to the CAT. 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 but it may only receive and consider communications from individuals if the State party makes a declaration under Article 22 recognising its competency to do so.

The MWC was adopted by the UN General Assembly on 18 December 1990 and entered into force on 1 July 2003. As of April 2011, 44 States were parties to the Convention and only two States had recognised the competence of the Committee to receive individual complaints. 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.

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

8.2 The UNESCO Convention against Discrimination in Education

The [United Nations Educational, Scientific and Cultural Organization](#) (UNESCO) is a specialised UN 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 April 2011, 193 States were members of UNESCO and seven States were associate members.

One of the chief functions of UNESCO (as 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 April 2011, 97 States have 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 perpetuate 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, State 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 The European Convention on Human Rights (ECHR)

Useful links: ECHR

- [Text of the ECHR](#)
- [The website of the ECtHR](#)
- [ECtHR jurisprudence](#)
- [The Council of Europe](#)
- [The European Commission against Racism and Intolerance](#)

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 April 2011, 47 States are 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 ECtHR judges (see [a historical background on the ECHR](#) for more information). Individuals automatically 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:

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 No. 7, Article 5 (Equality between spouses) [adopted 22 November 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 No. 12, Article 1 (General prohibition of discrimination) [adopted 4 November 2000; in force from 1 April 2005]

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 Articles 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 another Convention right, 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 cannot be invoked on its own, 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 February 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 November 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.

- However, as stated in the above judgment, there does not need to be a violation of the substantive right itself for Article 14 to be applicable. A measure, which alone does not violate a particular substantive right under the ECHR, may breach that right in conjunction with Article 14 if it is of a discriminatory nature. In the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968), the ECtHR 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. Therefore, there is no violation of the Convention if such a system is not established in a member State. However, the 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 permitted limitation on a substantive right under the ECHR (for example under the second paragraphs of Articles 8 to 11) must also not be applied in a discriminatory manner; otherwise it may infringe the 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. In contrast with Article 4(1) of the ICCPR, which explicitly prohibits discrimination in times of emergency on the grounds of race, colour, sex, language, religion or social origin, there has been no ECHR jurisprudence dealing with the question of whether a 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 ‘strictly 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 and if that inequality constitutes 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 April 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.’ An ‘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, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) at paragraph 10).

Initially, the ECtHR was reluctant to acknowledge a prohibition of **indirect discrimination** under the Convention. This was partly because there is no explicit reference to such discrimination in the Convention but mostly because of the difficulties in proving discrimination when there is no evidence of intent. However, in *Hugh Jordan v the United Kingdom* (No. 24746/94, 04 May 2001) the Court acknowledged,

although it did not find a violation, that discrimination could occur where the policy or legislation has just a discriminatory effect and no discriminatory purpose. It stated (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.

More recently, the Court reaffirmed this principle in *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007) and expressly acknowledged that ‘such a situation may amount to ‘indirect discrimination’, which does not necessarily require a discriminatory intent’ (at paragraph 184). In that case, the ECtHR found a violation of Article 14 of the Convention in conjunction with Article 2 of Protocol No. 1 concerning the right to education, on the basis of ethnic origin, where statistical evidence showed that a disproportionate number of Roma children were placed in special schools. The Court also cited the case of *Zarb Adami v Malta* (No. 17209/02, 20 June 2006) where it was stated that discrimination does not need to arise from a particular policy or law but can result from a *de facto* situation (at paragraph 175), which further acknowledges indirect discrimination as a prohibited form of discrimination under the Convention. See also *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) and *Cobzaru v Romania* (No. 48254/99, 26 July 2007).

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 April 2000), discussed [below](#) in Chapter V. In that case (at paragraph 44), the ECtHR held that ‘Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.’ See also *Stec and Others v the United Kingdom* (Nos. 65731/01 and 65900/01, 12 April 2006, paragraph 51) and *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007). ECHR jurisprudence on positive action is further discussed in Chapter III [below](#).

1.1.2 Protocol No. 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 No. 12 was signed on 4 November 2000 and entered into force on 1 April 2005. The Explanatory Report to Protocol No. 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 in order 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 No. 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 No. 12 to all persons being equal before the law and being entitled to equal protection of the law.

The Protocol is intended to complement Article 14, not replace it. The language used in Protocol No. 12 is identical to that used in Article 14, except it does not limit its scope to the rights set forth in the ECHR. As a result, in the first case in which the ECtHR found a violation of Article 1 of Protocol No. 12, it found that because the same language was used in both provisions, in particular the term ‘discrimination’, the *meaning* of the term is identical in both provisions, notwithstanding their difference in scope (see *Sejdić and Finci v Bosnia and Herzegovina* (Nos. 27996/06 and 34836/06, 22 December 2009) at paragraph 55).

***Sejdić and Finci v Bosnia and Herzegovina* (ECHR)**

The applicants in this case were of Roma and Jewish origin, respectively, and they claimed they had been discriminated against on the basis of ethnicity because the Constitution provided for a power-sharing legislature and Presidency between ethnic Bosniacs, Croats and Serbs exclusively, thus prohibiting the applicants from running for office in the House of Peoples or running for a position in the Presidency, unless they made a declaration of affiliation to one of the official ethnicities.

In particular, they claimed the prohibition on running for office in the House of Peoples violated Article 14 in conjunction with Article 3 of Protocol No. 1 to the Convention, which concerns the obligation on member States to hold free elections, whereas they claimed that the obstacles to running for the Presidency violated the free-standing discrimination provision under Article 1, Protocol No. 12 because there was no right to run for president upon which an Article 14 complaint could depend.

Although the Court found a violation under both provisions, it is regrettable that, instead of elaborating on the distinct requirements of Article 1, Protocol No. 12, it simply stated that because a similar constitutional requirement had already been found to be discriminatory under Article 14, the State had also violated the non-discrimination provision under Protocol No. 12.

However, Protocol No. 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. Furthermore, the preamble to Protocol No. 12 reaffirms that the principle of non-discrimination does not prevent States from taking positive action, provided that it is objectively and reasonably justified. As of April 2011, 17 States have ratified Protocol No. 12.

1.2 The European Social Charter (ESC)

The Council of Europe adopted the Revised [European Social Charter](#) (Revised ESC) on 3 May 1996 and it entered into force on 1 July 1999. As of April 2011, 30 States have ratified the Revised ESC and 15 other States have signed but not yet ratified it.

The Revised ESC incorporates the rights set out in the European Social Charter of 1961 (ESC), 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 ESC was drawn up. The ESC and the Revised ESC both aim to facilitate economic and social progress by promoting the protection of ‘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 ESC (at paragraph 7), its amendments to the ESC were intended to increase the scope of protection and not ‘represent a lowering of the level of protection provided.’ The ESC will remain in force until the Revised ESC eventually replaces it. However, the Explanatory Report makes it clear that the provisions of the ESC no longer apply to any State that has ratified the Revised ESC (see paragraph 10). The ESC came into force on 26 February 1965 and, as of April 2011, 27 States have ratified it. Out of those 27 States, 13 had also ratified the Revised ESC.

Article C of the Revised ESC provides that it is to have the ‘same supervision’ as the ESC, which consists of an appointed Committee of Experts (see Part IV of the Social Charter) examining the periodic reports of States. In addition, Article D provides that the system of collective complaints established by the Additional Protocol to the ESC Providing for a System of Collective Complaints of 1995 (Collective Complaints Protocol) may apply also to States’ obligations under the Revised ESC. Any State that has ratified the Collective Complaints Protocol prior to ratifying the Revised ESC automatically submits to the collective complaints procedure in respect of its Revised ESC obligations. A 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 ESC. The Collective Complaints Protocol entered into force on 1 July 1998. As of April 2011 12 States have ratified the Protocol (ten of those had also ratified the Revised ESC).

Under Article 1 of the Collective Complaints Protocol, organisations such as trade unions and employers’ bodies have the right to submit complaints alleging unsatisfactory application of the ESC. International NGOs that have consultative status with the Council of Europe may also be placed on the list of permitted organisations by the Charter bodies. However, they may only submit complaints in respect of matters ‘regarding which they have been recognised as having particular competence.’ In addition, a State party may recognise the right to submit complaints of any other representative national NGO within its jurisdiction that has particular competence in Charter matters.

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 party concerned. Under Article 10 of the Protocol, a 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 ESC and Revised ESC that most directly address equality issues are:

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 extraction or social origin, health, association with a national minority, birth or other status.

The ESC 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 to apply to all the provisions of the ESC. In addition, the Committee has indicated in its case law that non-discrimination grounds other than those listed in the preamble apply to the rights guaranteed under the ESC.

Article E is the principal non-discrimination provision of the Revised ESC. It confirms the case law of the European Committee on Social Rights in respect of the ESC contains a more extensive enumeration of grounds. The words ‘such as’ indicate that it is an [open-ended](#) prohibition of discrimination. This 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 and, 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.

Similarly, 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](#) (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) discussed above. Also 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 it to prohibit both forms of discrimination. In *International Association Autism-Europe (IAAE) v France* (No. 13/2002, ESC), the Committee found a violation of the Article on the basis on indirect discrimination where ‘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, by their nature, many social rights require positive measures on the part of the State for their implementation. The European Committee of Social Rights have also made it clear in their jurisprudence 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 *International Association Autism-Europe (IAAE) v France* (No. 13/2002, ESC)). Moreover, the provisions of the Revised ESC that express substantive equality, rather than just a prohibition of discrimination, support the requirement for State parties to take affirmative measures. 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 ESC include Article 4 (equal pay for work of equal value), which is identical to the corresponding provision (also Article 4) in the ESC (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 to accommodate for workers with family responsibilities, such as the provision of day care and parental leave, in order to enable them to enter and remain in employment.

2 The European Union (EU)

Useful links: EU

- [Website of the EU](#)
- [Legal materials of the EU](#)
- [Text of the Treaty on European Union and Treaty on the Functioning of the European Union, as consolidated by the Lisbon Treaty](#)
- [EU Human Rights activities](#)
- [Portal to EU law](#)
- [EU anti-discrimination legislation](#)
- [Text of the EU Charter of Fundamental Rights](#)

Useful references: EU

- Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, Fourth Edition, Oxford University Press, 2007.

The 27 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 through treaties voluntarily limiting their sovereign rights. Such areas of competence have expanded over the years from 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. Therefore, national courts are required to set aside domestic measures that are inconsistent with EU law in that sphere. The EU legal system has thus been described as ‘supranational’ in character. Although the core of the EU system is the distinct European Community (EC) pillar of the EU, for the sake of convenience, 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 have been amended and supplemented on a number of occasions. The most drastic change in this respect was the adoption of the Lisbon Treaty, which was signed on 13 December 2007 and entered into force on 1 December 2009. The Lisbon Treaty consolidated the core documents of the EU and renamed the [Treaty Establishing the European Community](#) (TEC) to the [Treaty on the Functioning of the European Union](#) (TFEU). Any changes in the numbering of Articles that occurred as a result of the Lisbon Treaty shall be referred to below.

The primary legislating body of the EU is the Council, while 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 the state and individuals (i.e., in both the public and private spheres). The EU legislates also by way of ‘directives’, which specify the key principles to be incorporated in domestic law but gives States discretion in deciding on a time-period for implementation and the form of any implementing measure. It must be noted however, that 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 invoked by individuals against the member State before national courts, even if a domestic implementing measure has not yet taken force.

The primary EU provisions in the field of equality and non-discrimination are found in Articles 19 and 157 of the TFEU (former Articles 13 and 141 of the TEC). Article 6 of the Treaty on European Union is also relevant. Article 45 of the TFEU (former Article 39 of the TEC) only prohibits discrimination on grounds of nationality to the extent that it inhibits the achievement of the single internal market, a primary objective of the European Union. However, the provision has significance in combating discrimination against migrant workers within the EU.

Treaty on European Union

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Treaty on the Functioning of the European Union

Article 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 18 (ex Article 12 TEC)

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of 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, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union 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.

Article 45 (ex Article 39 TEC)

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 157 (ex Article 141 TEC)

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 underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

2.1 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 Handelsgesellschaft* [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 Handelsgesellschaft* 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. Initially, a statement of the ‘sources’ of fundamental rights recognised by EC law was incorporated into EU basic law through Article 6 of the Treaty on European Union. These sources included (i) fundamental rights as guaranteed in the European Convention on Human Rights, (ii) rights that result from the constitutional traditions common to member States and (iii) general principles of Community law (i.e. EC law).

As there is no definition in EU law itself, it is unclear what constitutes a ‘general principle of Community law’, although the jurisprudence of the ECJ suggests they are constitutional principles of fundamental value to the EU legal order. However, as will be described in more detail below, in the cases of *Case C-144/04, Mangold v Rüdiger Helm* and *Case C-555/07, Küçükdeveci v Swedex GmbH & Co. KG*, the ECJ confirmed that the prohibition of age discrimination is a general principle of Community law and there is a possibility that this will extend to the other grounds for non-discrimination under the Charter of Fundamental Rights of the European Union (the Charter). If that is the case, because of the constitutional value of such principles, the prohibition of discrimination under the Charter could have a broad impact on the EU institutions, EU legislation and the domestic acts of member States that implement EU provisions.

In an attempt to clarify and expand the scope of EU human rights law, the Charter 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’). Then, with the consolidation of the Treaty on European Union by the Lisbon Treaty, the status of the Charter within the European Union legal order was formalised. Even though Article 6 emphasises that its provisions do not create extra competencies for the EU, Article 6(1) gives the Charter ‘the same legal value’ as the EU Treaties. Therefore, the ECJ can review the acts of the EU institutions, the EU legislation and the acts and legislation of member States when implementing EU measures, in accordance with the provisions of the Charter. This is particularly significant for guaranteeing greater equality within the EU because the Charter contains a section dedicated to the fundamental right to non-discrimination.

Furthermore, whereas under the former Article 6 of the TEU there was just an obligation for the EU to ‘respect’ the fundamental rights of the ECHR, the Lisbon Treaty amendments envisage the EU formally acceding to the European Convention on Human Rights and it would therefore be bound as an institution by its provisions. Although this has not yet occurred, in conjunction with Article 6(3) of the new Treaty on European Union, it is clear that the fundamental rights contained in the ECHR must also be given great weight in assessing the compliance of EU-related measures with human rights.

The provisions of the Charter in particular that are relevant to equality are as follows:

European Union 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. Indirect discrimination is implicitly prohibited through the phrase ‘any discrimination’ in Article 21. However, the Charter only operates within the scope of EU law and therefore, the prohibition of discrimination will not apply to all measures adopted pursuant to national law but it will apply to national measures designed to implement directives, as they fall within the scope of EU law. This may prove to be the most significant field of application for the Charter on the national level.

2.2 Article 19 of the TFEU

Article 19 of the TFEU 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 19 powers, which provide a framework for member States to introduce domestic measures to eliminate discrimination. These are:

- [Council Directive 2000/43/EC](#) of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Directive); and
- [Council Directive 2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (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 disadvantages 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 scope of the Race Directive is limited 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' were previously 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' and 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. According to Articles 2(1) and 5, respectively, indirect and direct discrimination are prohibited and positive action to ensure equality is required to be permitted in the member State.

The Race Directive specifies a deadline of 19 July 2003 for implementation by member States. However, 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 the Directive satisfies the conditions for direct effect of directives laid down in *Case 26/62, Van Gend en Loos* [1963] ECR 1 (i.e., the directive is considered to be sufficiently precise and unconditional). If it is directly effective, it can be asserted by an individual against the member State in domestic courts, regardless of whether implementation measures have been introduced on the national level.

Another point to note is that in *Case C-6/90, Francovich* [1991] ECR I-5357, the ECJ held that individuals can bring claims against a member State to enforce a right protected by the EU, even if the violation in question is in fact being caused by a third party. Thus, 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).

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 to 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.

Article 11 (Victimisation)

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 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; and it expressly prohibits both indirect and direct discrimination, as well as permitting special measures (see Articles 2(1) and 7 respectively). In addition, it contains identical provisions to the Race Directive regarding the burden of proof (Article 10) and victimisation (Article 11).

The deadline for implementation of the Framework Directive was 2 December 2003, however, like the Race Directive, the Framework Directive may have direct effect after the passing of the deadline for implementation and must be enforced in both the public and private spheres. For the method of transposition of the Directive 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. First, Article 2 provides an important general 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 3 then provides that the Framework Directive does not apply to State social security or social protection schemes and that the provisions of the Directive regarding disability and age discrimination shall not apply to the armed forces. Similar to Article 2, Article 6 specifies 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 permits an age to be fixed to avail of occupational social security schemes, provided that the use of age criteria does not constitute discrimination on grounds of sex.

- In the case of *Case C-144/04, Mangold v Rüdiger Helm* the ECJ gave an important interpretation of the equality protection under the Framework Directive, which may lead to a broad application of the principle of non-discrimination under EU law. The case concerned a complaint that a German law, which provided that employers did not have to give an objective justification if they did not give fixed-term contracts to employees over 52, was discriminatory on the basis of age. An important issue in this case was whether the legislation was required to be in compliance with the Directive because the period for transposition of the Directive had not yet expired. In finding the relevant legislation in violation, the ECJ stated that ‘Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation’ (paragraph 74), instead, they stated that the Directive is an expression of a Community law general principle of non-discrimination, which is sourced in international instruments and the constitutional traditions of EU member States. As a result, it was irrelevant whether the period for transposition of the Directive had expired; the national courts have the duty to read domestic law in compliance with a general principle of Community law.
- In *Case C-555/07, Küçükdeveci v Swedex GmbH & Co. KG*, which was also a case concerning age discrimination, the ECJ reaffirmed that the Directive merely lays down a framework for equal treatment, which is an expression of a general principle of European Union law (paragraphs 20-21). To support this principle, the Court cited the prohibition of age discrimination under Article 21(1) of the Charter of Fundamental Rights of the European Union and the fact that Article 6(1) of the TEU after Lisbon gives the Charter the same legal value as the EU Treaties. Therefore, although these cases specifically involved age discrimination, because the Charter was invoked as a supporting document to assert that age discrimination is a general principle of Community law, it is possible that all of the grounds for non-discrimination listed in Article 21(1) may be invoked as general principles, capable of invalidating domestic legislation. It is also interesting to note that in this case, the Framework Directive was applicable because the period for transposition had expired but the Court still relied on the general principle to prohibit age discrimination, which suggests that the non-discrimination principle has a meaning autonomous of the Directive and that the Court regards the Directive as a general principle of EU law that the Framework Directive gives expression to.

Some common characteristics of the Race and Framework Directives are that: they only provide for the prohibition of discrimination in relation to employment and occupations (Article 3 of each directive); they both exclude discrimination on grounds of nationality and immigration matters (Article 3(2) of both); they contemplate the prohibition of both direct and indirect discrimination (Article 2); they permit positive action (Article 5 and Article 7 of the Race and Framework Directives respectively); and they both explicitly provide for protection against harassment and victimisation (Article 2 of both and Articles 9 and 11 of the Race and Framework Directives respectively). In particular, 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.

2.3 Article 45 of the TFEU (Free movement of workers)

Article 45 (formerly Article 39 TEC) of the TFEU is one of the most fundamental provisions of EU law because 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). Furthermore, 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 also 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 C-464/05, Maria Geurts and Dennis Vogten v Administratie van de BTW, registratie en domeinen, Belgische Staat*) on grounds of nationality are prohibited.

2.4 Article 157 of the TFEU (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 157 (formerly Article 141 TEC) of the TFEU establishes the principle of equal pay between the sexes. Following the Treaty of Amsterdam, the former TEC 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 this provision has direct effect in national law. Much of the jurisprudence of the ECJ on indirect discrimination is based on this Article. The section on indirect discrimination in Chapter III [below](#) discusses a number of the most important cases. Others are discussed under particular grounds of discrimination in Chapter V below. The prohibition of discrimination in Article 157 relates only to work conditions, employment and remuneration and the ground of sex but it expressly allows for positive action for the advancement of women in employment.

The EU has passed a number of directives under Article 157 with regard to sex discrimination in the workplace, including the following:

- Council Directive 75/117/EEC concerns the harmonisation of the laws of the member States relating to the application of the principle of equal pay for men and women (Equal Pay Directive).
- Council Directive 76/207/EEC provides for equal treatment with regard to access to employment, vocational training, promotion and working conditions (Equal Treatment Directive). It specifically prohibits indirect as well as direct sex discrimination (Article 2(1)). It also provides 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), to provide a much more comprehensive non-discrimination instrument and codify 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 discrimination](#) and [indirect discrimination](#), prohibited instructions to discriminate, provided an expanded definition of [victimisation](#) and made explicit reference in Article 2(8) to positive measures permitted under Article 157(4) of the TFEU.

The Directive also introduced the concept of sexual [harassment](#), noting that it is a form of discrimination in violation of the equal treatment principle (Article 2(3)). However, prior to the introduction of the Revised Directive, 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 United Kingdom cases of *Strathclyde Regional Council v Porcelli* [1986] IRLR 134 and *Stewart v Cleveland (Engineering) Ltd.* [1994] 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, it is important to note that the introduction of the concept of sexual harassment through the Revised Directive represented less of a breakthrough and more of a codification of existing domestic practice at European level.

- Council Directive 79/7/EEC (Social Security Directive) requires the progressive implementation of equal treatment with regard to statutory social security schemes. 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 (Burden of Proof Directive). The Race and Framework Directives also contain provisions regarding the burden of proof in discrimination cases. As discussed in Chapter IV, 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 or indirect discrimination.

3 The African Charter on Human and Peoples' Rights (AfCHPR)

Useful links: AfCHPR

- [Text of the African Charter](#)
- [The African Commission on Human and Peoples' Rights](#)
- [Protocol on the Establishment of an African Court](#)
- [Protocol on the Rights of Women](#)
- [Status of ratification](#)
- [The African Union](#)

The AfCHPR was adopted by the Organisation of African Unity (OAU) in 1981 and entered into force in 1986. In 2002, the African Union (AU) succeeded the OAU as the chief pan-African organisation and as

the sponsor of the AfCHPR and related instruments. All 53 members of the AU have 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 AfCHPR. However, its recommendations are not binding and its proceedings take place in private. The African Commission also has the power to interpret the AfCHPR and it reviews periodic reports from State parties regarding their implementation of its provisions.

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 April 2011, the Protocol has been signed by 49 of the 53 AU members and ratified by 25 of them. The Protocol entered into force on 25 January 2004. This 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 by the State party not only of the African Charter, but also any other international human rights instruments ratified by the State concerned (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 such a declaration, the African Court is only permitted to consider cases submitted to it by the African Commission, other State parties and African intergovernmental organisations (Article 5 of the Protocol).

At the July 2008 African Union Summit, Justice Ministers formally adopted a single legal instrument to create an African Court of Justice and Human Rights. The Protocol on the Statute of the African Court of Justice and Human Rights (the single Protocol) will result in the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union. The decision to merge the two courts at the Assembly of Heads of State and Government of the African Union in June 2004 was designed to ensure adequate resources to fund a single effective continental court. For the time being, the African Court remains the court of the region.

The provisions of the AfCHPR that most directly address equality are:

African Charter on Human and Peoples' Rights

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, colour, 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 also 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 v 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 do 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 v Mauritanie* (No. 210/98), the African Commission stated at paragraph 131 that:

Article 2 of the Charter lays down a principle 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

focus on group rights extends to Article 22, which promotes the right of a people to economic, social and cultural development. Article 12(5) also 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 and entered into force on 25 November, 2005. As of April 2011, 46 States have signed the Protocol and 27 States have ratified it. 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 (Article 1). It also promotes positive action (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.

4 The American Convention on Human Rights (AmCHR)

Useful links: AmCHR

- [Text of the AmCHR](#)
- [Materials on the AmCHR](#)
- [Website of the IACtHR](#)
- [Website of the IACHR](#)
- [Center for Justice and International Law \(CEJIL\)](#), the most prominent specialist NGO in the Inter-American human rights system
- [The Organization of American States](#)

The American Convention on Human Rights (AmCHR) was adopted by the [Organization of American States](#) (OAS) in 1969 and entered into force on 18 July 1978. As of April 2011, 25 States (of the 35 OAS members) have ratified it. 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. 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 April 2011, 15 States have ratified the Protocol. It 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. In addition, on 9 June 1994, the OAS adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), which, although primarily aimed at addressing the problem of violence against women, emphasises the role that discrimination against women plays in exacerbating violence. The Convention of Belem do Para has been widely adopted by member States of the OAS, with 32 State parties as of April 2011.

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 (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;

Inter-American Convention On The Elimination Of All Forms Of Discrimination Against Persons With Disabilities

Article II

The objectives of this Convention are to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.

After the publication of the American Declaration, the OAS created the Inter-American Commission on Human Rights (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 (IACtHR) as a supplementary enforcement organ. 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, for those members of the OAS that are not party to the AmCHR (such as the United States of America), the IACHR is empowered to consider individual complaints concerning the American Declaration even though such complaints are not within the jurisdiction of the IACtHR. See, for example, the case of *Haitian Boat People v United States* (Case 10.675, Report No. 51/96, 13 March 1997).

The IACHR and the IACtHR are the enforcement organs of the AmCHR. Pursuant to Articles 42-51 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. Then, if the IACHR has investigated the matter and failed to reach a friendly settlement, State parties or the IACHR may submit a case to the IACtHR under Article 61. Unlike in the case of the IACHR, States must make a declaration recognising the IACtHR's judgments as binding in order for the jurisdiction of the Court to be invoked.

The provisions of the AmCHR (including the Protocol of San Salvador and the Convention of Belém do Pará) that most directly address equality are:

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)

Every person has the right to a nationality

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

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.

Convention of Belém do Pará

Article 6 (Non-discrimination)

The right of every woman to be free from violence includes, among others:

The right of women to be free from all forms of discrimination; and

The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

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. 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 thereby ruling out some claimants (e.g., gay, lesbian or trans-gendered

claimants). In *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (A No. 4 (1984) 5 HRLJ 161) (Advisory Opinion OC-4/84), the IACtHR held that the scope of the equality right in Article 24 of the AmCHR is 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. This was confirmed by the IACtHR in *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (A No. 4 (1984) 5 HRLJ 161) (Advisory Opinion OC-4/84), in which the Court 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 *Juridical Condition and Rights of Undocumented Migrants* (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.’ However, the distinction between indirect discrimination and direct discrimination is not explicitly/expressly stated in the case law because, like the ECHR, the IACHR uses a legal test similar to that of the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) rather than definitions of the various types of discrimination. It is worth noting that the reference to ‘all forms of discrimination’ in the Convention of Belém do Pará suggests there is a prohibition on both direct and indirect discrimination against women under that Convention.

In *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion OC-18/03) the IACtHR 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.

Under Article 8(b) of the Convention of Belém do Pará parties to the Convention agree to take special measures to adjust the ‘social and cultural patterns of conduct of men and women...to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes.’ According to this provision, States must go beyond remedying discrimination against women that occurs in specific cases and must actively promote the equality of women in society in order to prevent discriminatory practices and modify such practices that are already occurring.

The AmCHR does not address group or collective rights in the same way as the African Charter. For example, Article 26, on the 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.

Like Article 4 of the ICCPR, Article 27 of the AmCHR 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](#), as well as imposing 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 – [genuine occupational requirements](#). Further examples are provided in the discussion of specific grounds of discrimination in Chapter V [below](#).

A DIRECT DISCRIMINATION

Useful links: Direct Discrimination

- For the UN HRC approach to discrimination see its [General Comment No. 18](#)
- [EU Race Directive](#)
- [EU Framework Directive](#)

The prohibition of direct discrimination provides 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.

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 of 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 amenities. 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 to succeed. In most jurisdictions, with the exception of the US federal laws on indirect discrimination, intention is irrelevant in either direct or indirect discrimination cases. See further the section on ‘Relevance of Intent’ [below](#).

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

1 The 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 No. 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 term “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) or the *effect* (indirect discrimination) of interfering with a person’s rights on a prohibited ground. The other UN treaty bodies use the same formula. See also CERD General Recommendation No. 14.

A number of cases of direct discrimination have come before UN treaty bodies. Although the HRC decided the case on other grounds, in *Lovelace v Canada* (No. 24/1977, ICCPR) the Committee regarded a provision that created a distinction between men and women in their ability to retain their ‘Indian’ status, was direct discrimination on the basis of sex in violation of the Covenant.

Lovelace v Canada (ICCPR)

In accordance with the Canadian Indian Act, Sandra Lovelace lost her status and rights as a ‘Maliseet Indian’ because she married a non-Indian. Under the same Act, an Indian man would not have lost his status if he married a non-Indian woman. Lovelace claimed that the Indian Act discriminated against her on the grounds of sex and was therefore contrary to Articles 2(1), 3 and 26 of the ICCPR. In addition, she 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 her family. 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.

Chapter V [below](#) contains other examples of explicit distinctions in legislation made on the basis of prohibited grounds, such as sex and sexual orientation, which were subsequently 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 the 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 denial of benefits to same-sex partners while granting the same benefits to unmarried heterosexual partners was based on ‘reasonable and objective’ criteria.
- In *Aumeeruddy-Cziffra v Mauritius (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 The European Convention on Human Rights

As noted in Chapter II above, the ECtHR was initially reluctant to draw a clear distinction between direct and indirect discrimination. Instead, the ECtHR applied the general test for discrimination it set out in the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968).

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

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; the maternal language in bilingual areas; and an option of languages 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 determine 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 an Article in conjunction with Article 14, even when there was no violation of the Article by itself. 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 No. 1 and Articles 8 and 14 of the ECHR.

Following on from *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968), 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 ECtHR cannot examine a claim under Article 14. See, for example, the case of *Botta v Italy* (No. 21439/93, 24 February 1998), discussed [below](#) under 'Disability' in Chapter V, where the ECtHR 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 ECtHR 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 April 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 treatment 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 July 1996).
- Fourth, the State may show that the difference in treatment is justified under the circumstances. A difference in treatment may not be discriminatory under Article 14 if it has an objective and reasonable justification. To fulfil this requirement, the distinction must pursue a 'legitimate aim' and the means employed must be proportionate to that aim.

In the application of this test many equality cases before the ECtHR have been decided on the basis of whether the measures are objective and reasonable, rather than focusing on the impact of the differential

treatment on vulnerable groups. The 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 ECHR to amount to (direct) discrimination, including:

- In *Schuler-Zgraggen v Switzerland* (No. 14518/89, 24 June 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 June 2002), *Van Raalte v the Netherlands* (No. 20060/92, 21 February 1997) and *Karlheinz Schmidt v Germany* (No. 13580/88, 18 July 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 December 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 The 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 45 of the TFEU and Nationality

Article 45 of the TFEU (ex. Article 39 of the TEC) prohibits rules that directly discriminate on grounds of nationality. For example, in *Case C-212/99, Commission v Italy* [2001] ECR I-4923 the ECJ held that Article 39 of the TEC 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 157 of the TFEU 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 157 of the TFEU (ex Article 141 of the TEC) 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 is fundamental to EU law. Article 2 of the Equal Treatment Directive defines the equal treatment principle as a prohibition of 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 Social Security Directive uses the same definition of discrimination used in the Equal Treatment Directive.

4 The 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 v 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 v 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 The 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 the old approach of the ECHR, in particular, it does not focus on the distinction between direct and indirect discrimination in its jurisprudence. In fact, the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) has been cited frequently in reports of the IACHR and IACtHR in discrimination cases.

In the case of *Carlos Garcia Saccone v Argentina* (Case 11.671, Report No. 8/98, 02 March 1998), 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 *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (A No. 4 (1984) 5 HRLJ 161) (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 what discrimination is permissible under [Article 24](#) of the AmCHR. At paragraph 10, they held 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* (Case 11.625, Report No. 4/01, 19 January 2001) (discussed [below](#) in Chapter V) and again in *Marcelino Hanríquez et al v Argentina* (Case 11.784, Report No 73/00, 3 October 2000), the IACHR described the test in *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (A No. 4 (1984) 5 HRLJ 161) (Advisory Opinion OC-4/84) as being consistent with the [Belgian Linguistics case](#) (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) 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 need for stronger justification for different treatment on certain grounds, such as sex. In *María Eugenia Morales de Sierra v Guatemala* (Case 11.625, Report No. 4/01, 19 January 2001), 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* (No. 13580/88, 18 July 1994), *Schuler-Zgraggen v Switzerland* (No. 14518/89, 24 June 1993) and *Burghartz v Switzerland* (No. 16213/90, 22 February 1994)].*

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* (Case 11.673, Report No. 39/96, 15 October 1996). The [María Eugenia Morales de Sierra v Guatemala](#) (Case 11.625, Report No. 4/01, 19 January 2001) case discussed below in Chapter III 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* (Petition 12.046, Report No 33/02). See also *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion OC-18/03).

B INDIRECT DISCRIMINATION

Useful links: Indirect Discrimination

- For the UN HRC approach to discrimination see its [General Comment No 18](#)
- [EU Race Directive](#)
- [EU Framework Directive](#)

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, Oxford, 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:

- **Apparently neutral with 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.** However, because the provision or condition is *prima facie* neutral, 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 justification for differential treatment that would otherwise amount to indirect discrimination and the difficulties in proving a *prima facie* case appears [below](#) in Chapter IV.

The first step in proving an indirect discrimination claim involves establishing that facially neutral criteria have a 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. For example, facially neutral criteria are often imposed as requirements or qualifications in order to receive a 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 on a certain group, etc.). Such matters are relatively difficult to prove in indirect discrimination cases and statistics have often been the best way to establish a *prima facie* case, as they provide the best means of identifying the varying impact of measures on different segments of society. In the EU legal system, 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 EU Race Directive and [Article 10](#) of the Framework Directive.

For an in-depth 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. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007).

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 (‘disparate impact’) to constitute prohibited discrimination. See, for example, *Village of Arlington Heights v Metropolitan Housing Development Corp.*, 429 US Reports 252.

1 The UN Treaty Bodies

As discussed under [direct discrimination](#) above, paragraph 7 of [HRC General Comment No. 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. CERD General Recommendation No. 14 clarifies that discrimination 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.

Paragraph 2 of the General Comment then 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 mandatory minimum sentencing schemes for minor property offences contravened the Convention due to their indirect discriminatory effect on aborigines.

The case *L.R. et al v Slovak Republic* (No. 31/2003, 10 March 2005) concerned the construction of so called ‘low-cost housing’ for Roma inhabitants in the town of Dobsina. In that case, the local authorities adopted a resolution that approved the construction. Certain inhabitants of Dobsina and surrounding villages established a ‘petition committee’, which contested the resolution, claiming that new construction would lead to an influx of inadaptable citizens of Gypsy origin from the surrounding villages. After considering the petition, the municipal authorities cancelled the earlier resolution, explicitly referring to the reasoning of the petition. The State party argued that the resolutions of the municipal council being challenged made no reference to Roma and must be distinguished from other cases, which are discriminatory on their face. In reply to this argument, the Committee stated that ‘the definition of racial discrimination in Article 1 expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and in effect, that is, if they amount to indirect discrimination.’

ICESCR refers to indirect discrimination in the context of sex discrimination in its General Comment No. 16 on equal rights of men and women to the enjoyment of all economic, social and cultural rights (at paragraph 13):

Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.

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

***Bhinder Singh v Canada* (ICCPR)**

The author of the complaint, Karnel Singh Bhinder, a Sikh by religion, was dismissed from his post with the Canadian National Railway Company for refusing 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, he asserted that the restriction was not justified under Article 18, paragraph 3 because 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 found a violation of the Canadian Human Rights Act on the grounds that the hard hat regulation denied him access to employment on the basis of his religion. However, 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 therefore, 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 targeting 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 had previously held 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 Committee examined the case under Articles 18 and 26 of the ICCPR and 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.' Furthermore, the HRC felt that, if it was seen as discrimination *de facto* against persons of the Sikh religion under Article 26, it was a measure that was justified under Article 18, paragraph 3 because 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'. In the circumstances of that case, the authors had 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 The European Convention on Human Rights

As noted [above](#) in Chapter II, instead of acknowledging the distinction between direct and indirect discrimination, the ECtHR initially applied the general test for discrimination, which was first laid down in the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) discussed [above](#). The reason the Court was reluctant to recognise that indirect discrimination is prohibited by the ECHR was the difficulty in proving disproportionate impact, rather than intent to discriminate. This was aggravated by the fact that the ECtHR has been hesitant to permit the use of purely statistical evidence to prove discriminatory impact. Also, the ECtHR has imposed a high standard of proof on claimants and, until recently, did not permit a shifting of the burden of proof. This is discussed below in more detail in Chapter IV.

As discussed in Chapter II [above](#), the ECtHR has only recently expressly adopted the term ‘[indirect discrimination](#)’ and developed a clear definition. This progress occurred alongside a more relaxed approach to accepting evidence that suggests the existence of indirect discrimination, such as statistics. The approach of the Court in this regard was consolidated in the Grand Chamber case of *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007).

- The judgment of the ECtHR in the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 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 specifically restricting immigration by people from the Indian sub-continent, constituted a prohibited distinction on grounds of race. The ECtHR focused only on the intent of the measures in question – the protection of the labour market in the UK – which was not discriminatory in itself.
- In the case of *Hugh Jordan v the United Kingdom* (No. 24746/94, 04 May 2001) discussed in Chapter IV [below](#) under ‘nationality’, the ECtHR held that, although there was no violation in that case, 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.

In that case, the applicant claimed that the fact that the majority of those killed by the UK security forces were members of the nationalist or Catholic community indicated that there was a discriminatory use of lethal force and a lack of access to legal remedies for a particular group in society. Regarding the evidentiary standard, the ECtHR held that it did ‘not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14’ (paragraph 154).

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

- In *Zarb Adami v Malta* (No. 17209/02, 20 June 2006), in which the applicants claimed that a disproportionate number of men as opposed to women were obliged to carry out jury service, the ECtHR finally departed from its earlier rulings and made a finding of discriminatory treatment based on statistical figures. It noted that ‘a discrimination potentially contrary to the Convention may result not only from a

legislative measure, but also from a *de facto* situation' (paragraph 76). Thus, while the relevant law did not make any distinction on the basis of sex, the *de facto* statistical pattern proved that the civic obligation of jury service had been placed predominantly on males, creating differentiated treatment between men and women in violation of Article 14 and Article 4(3)(d) of the Convention.

***D.H. and Others v the Czech Republic* (ECHR)**

Chamber judgment

The case concerned claims brought by children of Romani origin that a disproportionate number of Roma children were placed in 'special schools', intended for children with disabilities, rather than being placed in ordinary schools. As a result, Roma children were later denied access to secondary education other than taking part in vocational training centres. The applicants alleged that they were discriminated against in their right to education under Article 2 of Protocol No. 1 in conjunction with Article 14 of the ECHR, on account of their Roma origin.

Although the ECtHR acknowledged that the Czech Republic policy on schools was not intended to create racial distinctions but rather to achieve the legitimate aim of providing schooling that is appropriate to each child's needs and disabilities, they reiterated the principle laid down in *Hugh Jordan v the United Kingdom* (No. 24746/94, 04 May 2001) that a policy or general measure could be considered discriminatory because of its disproportionately prejudicial effects on a group of people even if it is not specifically aimed or directed at that group. However, it held again that statistics are not sufficient by themselves to disclose a discriminatory practice. The ECtHR considered that, while the statistics submitted by the applicants indicating that Roma children were overrepresented in 'special schools' were worrying, the particular facts of the cases of the applicants did not indicate that their placement in these schools was the result of racial prejudice.

Grand Chamber judgment

The Grand Chamber found that, in light of recent developments in admissible evidence, such as laid down in *Zarb Adami v Malta* (No. 17209/02, 20 June 2006), statistics that suggest there is discriminatory treatment could shift the burden of proof onto the Government to provide an explanation for the *de facto* discrimination. In addition, the ECtHR expressly acknowledged that a measure which has disproportionately prejudicial effects on a particular group 'may amount to "indirect discrimination", which does not necessarily require a discriminatory intent' (paragraph 184). Ultimately, the ECtHR found a violation of the right to education under Protocol No. 1, Article 2, in conjunction with Article 14.

In a number of previous cases involving serious abuses of human rights by the State, applicants had attempted to argue that the disproportionate impact on a certain community of those abuses indicated a discriminatory policy. None of these earlier 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 June 2002) (particularly the dissenting judgment of Judge Bonello) and the judgments in case of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005).

In *Kurt v Turkey* (No. 24276/94, 25 May 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.

The denial of civil rights to Roma, in particular the failure to investigate allegations of police brutality and excessive force, has been raised frequently before the ECtHR. In previous cases, such as *Anguelova v Bulgaria* (No. 38361/97, 13 June 2002) and *Velikova v Bulgaria* (No. 41488/98, 18 May 2000), which were on similar grounds, 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 (in this connection see partly dissenting opinion of Judge Bonello in *Anguelova*). In spite of evidence of racial motivation for such treatment, it was only with the ground-breaking case of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) that the violation of a right under the ECHR has been linked to a corresponding violation of the prohibition against discrimination.

***Nachova v Bulgaria* (ECHR)**

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.

Chamber judgment

The ECtHR in *Nachova*, following Judge Bonello's argument in the case of *Anguelova v Bulgaria* (No. 38361/97, 13 June 2002), 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 v Greece* (No. 34369/97, 06 April 2000) judgment was referred to 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 [GC], no. 34369/97, § 44, ECHR 2000-IV).

Grand Chamber judgment

The Grand Chamber endorsed the Chamber's approach to Article 14 in conjunction with Article 2 regarding the procedural obligation to investigate crimes with racist overtones, adding that 'the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination.' Applying these principles in this case the Grand Chamber found that the authorities failed in their duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the events.

However the Grand Chamber, departing from the Chamber's approach in relation to the substantive aspect of Article 2 in conjunction with Article 14, did not find that the evidence of racist comments by the Bulgarian police and the general treatment of Roma in Bulgaria led to a causal link in establishing racist motives in the killings. The Grand Chamber further noted that it departed from the Chamber's approach in that the burden of proof should not be shifted to the respondent Government to 'prove the absence of a particular subjective attitude on the part' of the officers concerned. It is worth noting, in this regard, the dissenting opinions to the judgment questioning the issue of shifting the burden of proof in similar cases.

The judgment of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) established the landmark precedent in the ECtHR case-law in finding a violation of Article 14 in cases of racial violence. See the subsequent cases of *Bekos and Koutropoulos v Greece* (No. 15250/02, 13 December 2005), *Secic v Croatia* (No. 40116/02, 13 May 2007), *Angelova and Iliev v Bulgaria* (No. 55523/00, 26 July 2007) and *Cobzaru v Romania* (No. 48254/99, 26 July 2007).

In *Cobzaru v Romania* (No. 48254/99, 26 July 2007) the Court went even further; in previous cases it had rejected consideration of the overall context of racial hatred and discrimination in the States in question, however in this case the ECtHR found that, while the case did not disclose evidence of the incident being racially motivated, the failure of the authorities to ascertain whether such a motivation existed, in light of the prevailing discriminatory climate towards Roma, amounted to a violation of Article 3 in conjunction with Article 14.

3 The European Union

EU law has played a leading role in developing and defining the concept of [indirect discrimination](#), as well as indicating how it may be enforced. The concept was originally defined in the context of sex discrimination under the Burden of Proof Directive (Council Directive 97/80/EC) and subsequently enshrined in the Race and Framework Directives. 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 19 of the TFEU Legislation

While Article 19 of the TFEU does not provide enforceable rights for individuals, as stated above the Council passed two directives pursuant to its Article 19 powers, which provide a framework for member States to introduce domestic measures to eliminate discrimination including indirect discrimination. Article 2(2) of both the EU Race and Framework Directives 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...

3.2 Article 45 of the TFEU and Nationality

Indirect discrimination on grounds of nationality is also prohibited by Article 45 of the TFEU (ex Article 39 of the TEC). In *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 has repeatedly stated 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 *Case C-57/96, Meints v Minister van Landbouw* [1997] ECR I-6689, 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 157 of the TFEU and Sex Discrimination

As previously stated, the first definition of indirect discrimination in EU legislation was in the Burden of Proof Directive (Council Directive 97/80/EC) in 1997, which provides under 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.

Article 2(2) of the Revised Equal Treatment Directive contains the same definition of indirect discrimination as the Race and Framework Directives but placed in the context of sex discrimination.

In *Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 the ECJ suggested that a 'far greater number of individuals' of the protected group must be affected to constitute a legally significant differential impact for the purposes of proving indirect discrimination. In *Case C-243/95, Hill and Stapleton v Revenue Commissioners* [1998] ECR I-3739, the ECJ held that it is for the national courts to determine whether the practice affects 'a greater number of individuals' belonging to 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 women 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.' In that case, both the statistics available at the time the Act was adopted and the statistics compiled subsequently, which were likely to provide an indication of the impact of the Act, could be taken into account.

Seymour-Smith also laid down the legal criteria for establishing a permissible objective justification for indirect discrimination, which is usually prohibited by this provision of the TFEU (former EC Treaty). The ECJ first 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 Court then 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 such an 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. Bilka argued that 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 Bilka's justification for the indirectly discriminatory policy. 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 equivalent to 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 disadvantage full-time workers who previously job-shared in 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 per cent 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.

C GENUINE OCCUPATIONAL REQUIREMENTS

In many jurisdictions, a job may be restricted to people of a particular group (e.g., a race, a disability, a sex or a 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 therefore 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 play or for an artists’ 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 usually have to show 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.

A similar provision is contained in Article 4 of the EU Race Directive and in Article 2(6) of the Revised Equal Treatment Directive in the context of sex discrimination.

In *Case C-229/08, Colin Wolf v Stadt Frankfurt am Main* (12 January 2010) the ECJ held that, for a difference of treatment to be a genuine occupational requirement, it must be based on a characteristic related to a ground of discrimination and not on the ground itself (at paragraph 35). For example, in that case, the Court held that setting 30 as the maximum age of hiring persons to intermediate career positions in the fire service was permissible because it was a genuine occupational requirement for those positions. The Court found that physical fitness is a characteristic related to age, capable of being a genuine occupational requirement for positions requiring a lot of physical activity and a high degree of fitness. The ECJ reaffirmed

that for the discrimination to be permissible, the legislation must pursue a legitimate aim and the genuine occupational requirement must be proportionate to the objective pursued (at paragraph 36). In that case, the aim of ensuring the occupational capacity and full functioning of the fire service was legitimate and setting an age requirement for intermediate positions was not disproportionate because of the degree of physical fitness required and the length of time a person was expected to spend in such a position before they can move on to higher positions that are less physical in nature.

Article 4(2) of the Framework Directive permits member States to retain or provide for future legislation and practices regarding occupational requirements for religious institutions. Under this provision, 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, 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 under Article 4 are interpreted like the similar exemptions in the Equal Treatment Directive (see the discussion below), 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 preference 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 'general principles of Community law' (including fundamental rights).

Regarding sex discrimination, the ECJ has permitted exceptions in a number of cases to the general prohibition of sex discrimination under the Equal Treatment Directive and the Revised Equal Treatment Directive in the context of the genuine occupational requirements of the 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 Ms 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) of the Equal Treatment Directive because, as the frontline of the armed forces, all Marines were required to be capable of fighting in the commando unit. 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. However, the ECJ has interpreted such requirements narrowly and will not accept a blanket refusal to hire women. In the earlier *Case 318/86, Commission of the European Communities v France* [1988] ECR 3559, the ECJ laid down three criteria for genuine occupational requirement exceptions under Article 2(2) of the Equal Treatment Directive to be legitimate. They 'may relate only to specific activities, that they must be sufficiently transparent so as to permit effective supervision by the Commission and that in principle they must be capable of being adapted to social developments' (para. 25). In that case, the Court found that a blanket system of separate recruitment for men and women into the police force was not permissible under Article 2(2) because it did not take account of the specific functions of different positions and the system of derogating from the Directive was not transparent. Furthermore, the narrow scope of the exceptions was reaffirmed by the Court in stating that 'The principle of proportionality makes it necessary to reconcile, as far as possible, equal treatment of men and women with requirements which are decisive for the carrying out of the specific activity in question' (at paragraph 28).

2 Examples of Genuine Occupational Requirement Exceptions under Domestic Law

In the UK, under section 7 of the [Sex Discrimination Act 1975](#) and section 5 of the [Race Relations Act 1976](#), 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 also *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 HARASSMENT

Useful references: Harassment

- For more detail on harassment, see: *Harassment at the Workplace*, a 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 a 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.

Another notable feature of harassment is that, like with reasonable accommodation, the applicant is not usually required to prove that they have been treated less favourably than a person in a similar situation. Proof that the applicant was harassed on the basis of a certain characteristic is considered *de facto* discrimination.

1 The UN Treaty Bodies

There have been few international cases on harassment. However, as the following case demonstrates, harassment does not need to be directed at the complainant personally.

Hagan v Australia (ICERD)

The applicant in this case, who was of indigenous Australian origin, lodged a complaint of harassment to CERD. In particular, he claimed that retaining the name of the grandstand of an important sporting ground in the town where he lived, which was called the 'E.S. 'Nigger' Brown Stand' in 1960 in honour of a well-known sporting and civic personality, amounted to harassment. As a result of this name, the word 'nigger' appeared on a large sign on the stand and the term was repeated orally in public announcements relating to facilities at the ground and in match commentaries.

Despite lodging a complaint with the sports ground's trustees, no action was taken to remove the name because the local Aboriginal community raised no objection to it when the trustees consulted them on the matter. The applicant's legal action was unsuccessful in the domestic federal courts. Before the CERD he alleged that the use of the term 'nigger' 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.' Due to the offense he and his family felt by the use of the term at the ground, they were unable to attend functions at what was the most important football venue in the area. He further argued that, whatever may have been the position in 1960, contemporary display and use of the 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 subsequently held that, in present times, the use and maintenance of the term could be considered offensive and insulting.

2 The European Union

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

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.

The definition above notes that the unwanted conduct 'takes place with the purpose or effect of violating dignity.' This suggests that even if there is no intention to harass, establishing that there is a degrading effect to the behaviour should be 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 to the detriment of values held by minority communities. For example, an individual of a minority religion wearing a head covering out of religious duty or feeling may be affronted at the requirement to remove such covering. On the other hand, if a member of the majority population were wearing such a head covering, they may not consider it offensive to be required to remove it.

3 National Jurisdictions

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 confronted by nude and partially nude pictures posted by her male co-workers not only in common areas, but also in places where the victim would have to encounter them, including her toolbox. The men also referred to her as ‘baby’, ‘sugar’ and ‘dear’ and wrote obscene graffiti directed at the victim all over the workplace. In addition, they 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 United Kingdom case of *Stewart v Cleveland (Engineering) Ltd.* [1994] 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. As a result, 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. On appeal, 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.

1 The European Union

[Article 7](#) of the EU Revised Equal Treatment Directive requires member States to introduce measures to prohibit victimisation. Similarly, the EU Race and Framework Directives contain almost identical provisions that define victimisation as a 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.

2 The European Convention on Human Rights

The ECtHR also seems to accept victimisation as grounds for a case. *Fogarty v the United Kingdom* (No. 37112/97, 21 November 2001) concerned an applicant who had taken a case under the United Kingdom 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 in proceedings against the discriminator. Although the ECtHR ultimately held against the applicant on procedural grounds, it 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. CERD goes further by actually *requiring* States to take positive measures. Positive action refers to all measures taken by the State that go beyond the prohibition of discrimination in order to actively 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 aimed at achieving substantive equality, which seeks to address the underlying structures, such as historical or cultural prejudice, that perpetuate discrimination even when formal equality measures are introduced. Positive action acknowledges that treating individuals in exactly the same manner, which is what formal equality requires, is sometimes insufficient to address discrimination against particular groups because they are subjected to latent or traditional discrimination. Those groups therefore need a degree of preferential treatment in specific circumstances.

By its very nature, positive action requires that a distinction must be made between groups of people, which runs counter to a strictly formal notion of equality. Due to this, it is sometimes considered a controversial concept. In theory, formal equality prohibits even remedial forms of discrimination.

In addition, positive action usually requires privileging group rights over individual rights. The right to equal treatment is an individual right; preferential treatment concerns group rights. This also makes positive measures controversial because individual rights are considered paramount in most legal systems. For example, positive action employment policies may be implemented to increase the numbers of ethnic minorities in employment, which benefits the ethnic minority group because they were inhibited from

entering employment but it discriminates against persons trying to enter employment who are part of the majority social group because they have less chance of getting hired as a result.

Therefore, a key legal issue that has arisen with regard to 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 US Supreme Court found that a 'sharing of the burden' by innocent parties was not prohibited under US federal equality laws. In many systems, inflexible forms of positive action (such as strict quotas) are impermissible because they take less account of the rights of the individual. Positive discrimination measures must always strike an appropriate balance between group and individual rights.

Limitations are often placed on positive action measures to ensure that the discrimination they impose in order to benefit a particular group is not unjustified discrimination. For example, both national and international tribunals have clarified that all forms of positive action should be reasonable and objective, and operate proportionately to the equality goals they seek to achieve. In this regard, positive action is often limited in time and scope to only address the specific disadvantage suffered by a group. The particular safeguards imposed on special measures by each international and regional instrument will be discussed in detail below.

There is a lack of consensus about whether reasonable accommodation is a form of positive action because it also requires preferential treatment in order to address pre-existing discrimination. However, a major distinction between the two concepts is that reasonable accommodation is an individual right whereas positive action is implemented to give preference to groups of individuals with a common characteristic. Further contrasts are drawn between the two concepts in the section on reasonable accommodation below.

Positive action must also be distinguished from the general obligation of States to take positive measures in order to secure equality. In the first case, States take active measures that give preference to specific groups. The latter concept just refers to the fact that full equality protection not only requires the State to abstain from discriminatory activities but it must also take positive measures, such as implementing anti-discrimination legislation, in order to secure equality.

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 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) mainstreaming, (iv) the setting of targets, (v) targeted recruitment, (vi) preferential treatment and (vii) quotas. Such measures are often undertaken as part of an overall positive action programme.

2.1 Training and Support

Several national human rights instruments explicitly mention training and support as one method of addressing problems of inequality of certain groups. Providing training facilitates equality of opportunity but it 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 requirement or other defence applies.

2.2 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 whether such policies have an adverse impact, and a duty to make public those 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 public authority listed 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.

2.3 Mainstreaming

The concept of 'mainstreaming', whereby securing the equality of a certain group is made central to the whole range of public policy decision-making, is closely related to policy impact assessment. 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.

The CRPD incorporated this concept in both its preambular dispositions and in the main body of text. Paragraph g) of the preamble reads '*Emphasizing the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development.*' Also Article 4(1)(c) states that parties are obliged 'To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes.'

2.4 Setting of Targets

Positive action programmes sometimes require that employers aim to hire certain percentages of under-represented groups for their workforce. In many jurisdictions, it is unlawful to use a target as the sole 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 such as providing extra training to them.

The US 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 50 per cent of the openings in training programmes for black employees until the percentage of black workers in a plant was commensurate with the percentage of blacks 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 US 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 because the purpose of Congress in enacting the Civil Rights Act was to open opportunities to black people in occupations traditionally closed to them. Therefore, the Court held that the action taken in this case was permissible because its purpose was to break down old patterns of racial segregation and hierarchy. At the same time, the plan in this case was a temporary measure and did not unnecessarily restrict the interests of white employees.

2.5 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 job applications from them; 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.

2.6 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, may be prohibited because of its negative discriminatory effect on other individuals. This may be the case even where the personal characteristic, such as race or sex, is merely used as a deciding factor to distinguish between two equally qualified candidates. See, for example, cases taken 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. See further discussion of these cases in the European Union section below.

It is useful to compare the EU approach to the US approach to preferential treatment as the latter 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. However, not all affirmative action measures are invalidated after such scrutiny.

For example, race-based action, which is necessary to further a compelling governmental interest, does not violate the Equal Protection Clause of the US Constitution so long as it is narrowly tailored to further that interest. In this regard, the context in which the action is taken is relevant in assessing its admissibility. Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the government's reasons for using race in a particular context.

- *Fullilove v Klutznick* 448 U.S. 448 (1980) concerned federal legislation that required at least 10 per cent per cent 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. It was held that under the Equal Protection Clause of the US Constitution, Congress was not required to act in a wholly 'colour-blind' fashion in legislating for affirmative action. When implementing 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 other minority groups was not discriminatory. It 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 US case on preferential treatment is *University of California Regents v Bakke* 438 U.S. 265 (1978). It concerned the special admissions programmes for 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 US Constitution. Justice Powell, in the leading judgment of the Court, noted that, under the US 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, 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 US 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 but could not be 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.

Cases on preferential treatment can also 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 the 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 per cent of the posts in any category.
- The South African case of *Minister of Finance and others v Van Heerden* [2004] ZACC 3 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](#). Judge Moseneke, writing 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 the Constitution. It found that the evidence demonstrated a clear connection between the membership differentiations, the scheme 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 needs 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 Justice Ngcobo in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15.

2.7 Quotas

Quotas are a form of preferential treatment and are subject to a similar form of analysis. Although they 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 thus they are unsuitable where there is persisting disadvantage, such as in the case of a 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.

2.8 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 opportunities 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.

3 The UN Treaty Bodies

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

3.1 The International Covenant on Civil and Political Rights

In its [General Comment No. 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 No. 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.' In [General Comment No. 23](#), the HRC specifically addressed the issue of positive action with regard to minority rights protected under [Article 27](#) of the ICCPR. The Committee acknowledged that the rights under the Article are individual rights but 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 group.'

The HRC has also supported preferential treatment for disadvantaged groups applying for educational, public service, or other positions. It has even upheld positive discrimination policies when other individuals have felt disadvantaged or discriminated by them. For example, in *Stalla Costa v Uruguay* (No. 198/1985, ICCPR) the applicant complained that preference was given to certain public officials in getting admitted to the public service. Those officials were given preference because they had previously been unfairly dismissed on ideological, political or trade-union grounds. The HRC found that, in light of the previous discrimination against these individuals, the alleged discrimination was permissible affirmative action.

The HRC has also approved the use of quotas in several of its country reports. In its [Concluding Observations on India](#) in 1997, it approved a constitutional amendment that reserves one third of seats in elected local bodies for women. It also approved the State's practice of reserving positions on elected bodies for members of certain tribes and castes (paragraph 10).

3.2 The International Convention on the Elimination of All Forms of Racial Discrimination

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

In their [General Comment No. 32](#), the Committee on the Elimination of Racial Discrimination clarified the obligation of States to implement special measures under the Convention. In particular, the Committee emphasised the distinction between this obligation and the general positive obligation on States to secure the rights contained in the Convention (paragraph 14). Furthermore, they highlighted the distinction between specific, permanent rights that are given to ethnic and racial groups, such as the protection of the rights of indigenous peoples, and the right to temporary special measures, stating that the relevant groups should be entitled to both sets of rights.

CERD then laid down criteria that the special measures must meet in order to be permissible under the Convention. They must only be implemented for the purpose of ensuring the equal enjoyment of human rights and fundamental freedoms for a particular group and they must be 'appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary' (paragraphs 21 and 16). Moreover, the measures must only be implemented on the basis of need, after prior consultation with active members of the relevant community (paragraphs 16 and 18). Another limitation on the implementation of temporary special measures under Article 1(4) of the Convention, which the Committee highlighted, is that they should not lead to the maintenance of a separate system of rights for a particular racial group (paragraph 26).

Regarding Article 2(2), which requires States to implement special measures to secure the enjoyment of rights for specific groups, the Committee affirmed that the explicit mention of 'social, economic, cultural and other fields' as the scope of the requirement to implement temporary special measures, means that it is not a closed list and special measures can be implemented in any area where there has been a deprivation of human rights.

In [General Comment No. 29](#), the Committee on the Elimination of Racial Discrimination specifically endorsed the adoption of 'special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education' (at paragraph 6). They also explicitly recommended adopting special measures for descent-based groups in employment and participation in elections (at paragraphs 36 and 28 respectively).

CERD also 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 paragraph 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 paragraph 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.

An on-going area of interest in the affirmative action debate is the condition of the Roma population in Europe. The CERD devoted a special session to Roma issues that ended in the passage of [General Recommendation No. 27](#) on Discrimination against Roma (2000). The General Comment recognises Roma communities as among the most disadvantaged and most subject to discrimination in the contemporary world and calls on States to adopt affirmative action on behalf of the Roma in a number of fields, including education, public and private employment, public contracting and the media.

3.3 The International Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW permits 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. The Convention also indicates that such measures should be of limited duration, but it does not suggest a specific time frame.

In [General Recommendation No.25](#), the CEDAW Committee expanded on the content of [General Recommendation No. 5](#), which concerned temporary special measures. At paragraph 17, the General Comment provides clarification of terminology and presents alternative terms to describe affirmative action, such as: ‘special measures’, ‘positive action’, ‘positive measures’, ‘reverse discrimination’ and ‘positive discrimination’. Another ‘key element’ of Article 4(1) that the Committee outlined is that temporary special measures are part of a ‘necessary strategy’ to achieve substantive equality, rather than an exception to a prohibition of discrimination (at paragraph 18). The General Comment also clarifies that the term ‘temporary’ suggests the measure should not be designed to last forever, but that the ‘duration of a temporary special measure should be determined by its functional result in response to a concrete problem and not by a predetermined passage of time. Temporary special measures must be discontinued when their desired results have been achieved and sustained for a period of time’ (paragraph 20). In addition, the Committee held that the word ‘special’ denotes that ‘the measures are designed to serve a specific goal’ (paragraph 21). Furthermore, the CEDAW Committee highlights the distinction between temporary special measures and the implementation of other measures, such as a general social policy aimed at the elimination of discrimination against women and an improvement to the position of women and girl children in society. The Committee then goes on to say that the obligation to implement special measures applies to all of the substantive rights in the Convention, from Article 6 to 16 (at paragraph 24). This encompasses a range of rights from equality of men and women before the law to equality in economic and social life (Articles 15 and 13 respectively). In [General Recommendation No. 23](#), CEDAW also explicitly advocates the imposition of quotas to achieve gender balance in public and political bodies.

3.4 The International Covenant on Economic, Social and Cultural Rights

The ICESCR has issued a number of general comments in which it addresses temporary special measures in a number of contexts. In [General Comment No. 16](#) on the equal rights of men and women to the enjoyment of all economic, social and cultural rights, the Committee expressly states (at paragraph 15):

The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others. Temporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or

suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate.

In [General Comment No. 5](#) on the rights of persons with disabilities, the ICESCR endorses positive action special measures to address structural disadvantages suffered by disabled persons in order to guarantee their full and effective participation in society (paragraph 9). There is no mention of the requirement for these measures to be temporary or limited in scope, in fact the Committee specifically states that a ‘wide range of specially tailored measures will be required.’ In contrast, [General Comment No. 13](#) permits only *temporary* special measures to guarantee *de facto* equality between men and women and for disadvantaged groups in education (paragraph 32). The fact that these measures must be temporary is emphasised by the familiar warning that they must not lead to the maintenance of separate standards for different groups and they cannot continue after the objective for which they were implemented has been achieved.

More recently, in their general comment addressing the general prohibition of discrimination under the CESCR ([General Comment No. 20](#)), the Committee acknowledged that, in order to achieve substantive discrimination, ‘State parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination’ (see paragraph 9 of General Comment No. 20). Also, similar to General Comment No. 13, the Committee emphasised the temporary nature of the measures and that they are only legitimate as long as they are a ‘reasonable, objective and proportional means to redress *de facto* discrimination.’

3.5 The Convention on the Rights of Persons with Disabilities

In Article 5(4), the Convention on the Rights of Persons with Disabilities provides that ‘specific measures necessary to accelerate or achieve *de facto* equality of persons with disabilities’ should not be considered as discrimination against persons belonging to other groups. In the [handbook to parliamentarians](#) on the implementation of the Convention, it is envisaged that this provision encompasses both *permanent* positive action measures, such as a travel subsidy for disabled persons to get taxis, and *temporary* special measures like quotas for the employment of disabled persons. As the Committee on the Rights of Persons with Disabilities has not yet clarified any provisions of the Convention, it remains to be seen whether the provision will be interpreted in such a unique way.

Article 27(1)(h) of the Convention, on the right of disabled persons to work, envisages affirmative action programmes being implemented as a means for a State to fulfil its obligation to promote the employment of disabled persons in the private sector, however they are not required to implement such programmes.

3.6 The International Labour Organization

Article 5 of ILO Convention No. 111 indicates that special affirmative action measures do not constitute impermissible discrimination. Paragraph 1 of the Article provides that positive action required by ILO Conventions and Recommendations are not discriminatory and paragraph 2 permits States to implement special measures not required by the ILO Conventions, after consulting with representative employers’ and workers’ organisations, where it has identified other areas in which specific groups require special protection.

Convention No. 169 (Indigenous and Tribal People’s Convention, 1989), provides an example of ILO positive measures that the member States are required to implement. Under Article 20(1) of the Convention, special measures must be implemented to protect the recruitment and working conditions of indigenous and tribal peoples, where they are not already provided for under existing workers’ legislation.

4 The 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 a negative obligation not to discriminate in its official acts. Recital 3 of the Preamble to Protocol No. 12 to the ECHR explicitly emphasises 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.

Although the requirement to implement positive action in order to obtain substantive equality has not been clarified under ECtHR jurisprudence, in the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968) discussed [above](#) under ‘direct discrimination’, the ECtHR made it clear that, to the extent that positive action constitutes a form of discrimination, it is not incompatible with Article 14. The Court explicitly acknowledged that ‘certain legal inequalities tend only to correct factual inequalities’ (paragraph I(B)(10)). Furthermore, in the case of *Thlimmenos v Greece* (No. 34369/97, 06 April 2000), the ECtHR held that States violate the right not to be discriminated against if they ‘without objective and reasonable justification fail to treat differently persons whose situations are significantly different’ (paragraph 44). This is an implicit endorsement of adopting positive measures in order to ensure substantive equality. In particular, they stated that:

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. [...] the word “secured” implies the existence of obligations upon the Contracting States to take action and not simply a duty to abstain from action.

Like other international and regional human rights systems, the ECtHR ensures that ‘positive action’ for a minority will not result in discrimination against the majority by requiring any measures adopted to be proportionate to the legitimate aim to be achieved (i.e., the ‘objectively justified’ test).

For example, the case of *Zeman v Austria* (No. 23960/02, 29 June 2006), which concerned a differentiation in the percentage of survivor’s pension between widows and widowers, echoed earlier ECtHR rulings on permissible positive action. The Court reiterated that ‘Article 14 does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article’ (paragraph 32). In the instant case, the Court held that because there was no objective and reasonable justification for the different treatment of widows and widowers as regards entitlement to a survivor’s pension, there was a violation of Article 1 of Protocol No. 1 in conjunction with Article 14.

5 The European Union

The EU has implemented a number of measures over the years to provide for positive action, which have been influenced by the development of EU jurisprudence on positive action in the field of sex discrimination, particularly under the original Equal Treatment Directive (76/207/EC) and Article 157 of the TFEU (formerly Article 141 of the TEC).

Before the Revised Equal Treatment Directive was introduced, Article 2(4) of the Equal Treatment Directive provided that ‘measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities,’ would not be considered discrimination. The Revised Equal Treatment Directive amended this provision to permit measures to be taken under Article

157(4) of the TFEU to ensure full equality between men and women. Article 157(4) of the TFEU permits, rather than requires, the member States to take positive action to ensure full equality where the underrepresented sex has difficulty entering a profession or to remedy or prevent disadvantages suffered by them. Council Recommendation 84/35/EEC, which also addresses sex discrimination, highlighted the 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.’

In sex discrimination in employment cases, the ECJ has held that automatic preference for the underrepresented sex is allowed in limited circumstances where candidates, after individual assessment, are deemed to have equivalent merit. This was laid down in a number of cases, the effects of which have been to limit the scope of positive action.

- In *Case C-450/93, Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, the ECJ prohibited national rules that allowed the *automatic* promotion of women in sectors in which they were underrepresented 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. Such measures were considered to overstep the limits of Article 2(4) because unconditional priority went beyond promoting equal opportunities.
- 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 national laws that provided priority for women where they were underrepresented were permissible under the Equal Treatment Directive. However, for such provisions to be permissible, 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 was 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 held that the Equal Treatment Directive did not prohibit national rules, which imposed targets of a minimum percentage of women equivalent to their percentage of graduates and students to be appointed to temporary posts in the academic service. The Court 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 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 situations of all candidates. The ECJ reiterated the test laid down in *Badeck* [and held that the scheme 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 12891 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 firstly found that the situations of a male and female employee were comparable, thus there was a clear discriminatory treatment because the female candidates were given preference in employment. Then, the Court examined whether the measure was nevertheless permissible as positive action under Article 2(4) of the Equal Treatment Directive. It held that, although 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, it observed that any derogation from the individual right to equal treatment must comply with the principle of proportionality. In assessing the proportionality of the measure, the Court noted key facts such as 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 therefore concluded that the scheme at issue complied with Article 2(4); however, this was conditional upon the 'emergency' exception being 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 Framework and Race Directives also permit, rather than require, member States to take positive action measures. Article 7(1) of the Framework Directive states that '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 disadvantages linked' to any of the prohibited grounds of discrimination listed under Article 1 of the Directive. Article 7(2) of the Framework Directive also contains a specific provision permitting positive action to secure equality for disabled persons. Article 5 of the Race Directive is similarly worded to Article 7(1) of the Framework Directive, but it concerns disadvantages linked to racial or ethnic origin.

So far, the ECJ has not ruled on positive action taken according to these Directives. However, the positive action provisions of the Race and Framework Directive mirror Article 157(4) of the TFEU regarding positive action in gender cases. Therefore, although there has been no case law yet, it is likely that the same proportionality approach to the positive action provisions will be taken as under Article 157 TFEU and the Equal Treatment Directives.

6 The 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 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.

In its Report of 1993, the IACHR also stated that the broad principles of Articles 1 and 24 require action to address inequalities in the internal distribution of opportunities. In addition, it has recognised the need for affirmative action with regard to economic rights and cultural and group rights. In its 1984 Human Rights Report on the situation of a segment of the Nicaraguan population of Miskito Origin, the Commission invoked Article 27 of the ICCPR to extend individual rights protection to group rights. In doing so, it suggested that true equality requires the education of a child in his native language in order to safeguard a distinctive language and culture.

G REASONABLE ACCOMMODATION

1 Introduction

The essence of the concept of **reasonable accommodation** is that there is an obligation to make reasonable adjustments to the physical or social environment in order to facilitate a particular disadvantaged person in performing the ‘essential tasks’ of the job or accessing essential services. A failure to do so is generally deemed discriminatory.

Until the adoption of the Convention on the Rights of Persons with Disabilities, the concept of reasonable accommodation was largely considered only in the context of employment and the EU Framework Directive, which guarantees equality in employment, was the only international provision explicitly requiring reasonable accommodation to be implemented.

The Convention on the Rights of Persons with Disabilities expanded the scope of reasonable accommodation by placing an obligation on States to guarantee the rights of persons with disabilities in *all* spheres. The Convention also explicitly states that the denial of reasonable accommodation constitutes a form of discrimination on the ground of disability (Article 2).

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, persons with disabilities or religious groups. It is a form of substantive equality, which recognises that the identical treatment of individuals and groups does not always eliminate discrimination. In particular, it is a measure that addresses indirect discrimination because it acknowledges that certain individuals are specifically disadvantaged by, for example, neutral work policies or environments.

However, reasonable accommodation is unlike positive action in the sense that the policies are not intended to give a *preference* to a specific group but rather provide measures that give them equality of access to employment or services with other individuals who are not disadvantaged in that way. It is not equivalent to adopting a targeted policy in order to ensure disabled persons are more represented in the workforce. That would be a positive action measure to address historical or societal disadvantage.

Another way in which reasonable accommodation differs from positive action, which is evident from the above examples, is that it is a requirement to facilitate the needs of a particular individual. Positive action, on the other hand, is usually a general policy implemented to address traditional disadvantage experienced by a *group* of people or sector of society, such as women.

A unique feature of reasonable accommodation is that it will only be required to be implemented to the extent that it does not impose a disproportionate burden on the employer or person responsible for

providing access to services. This burden usually refers to the financial cost of reasonably accommodating the individual, however some national jurisdictions have elaborated that this also refers to, for example, the health and safety of other employees.

Due to the fact that the requirement to reasonably accommodate an individual was largely implicit until the introduction of the CRPD, aspects of reasonable accommodation were usually acknowledged in judgments of international tribunals regarding positive action or indirect discrimination. Some of these cases are noted below. There have also been developments in the understanding of reasonable accommodation and its requirements on the domestic level, partly due to the requirement for EU member States to implement the Framework Directive. Therefore, national jurisdictions may also be referred to in order to interpret the requirements of reasonable accommodation. The following are the most important international legal formulations of reasonable accommodation:

Accommodation Provisions

Convention on the Rights of Persons with Disabilities

Article 2 (Definitions)

...“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;...

Discrimination on the basis of disability

...It includes all forms of discrimination, including the denial of reasonable accommodation.

Article 5 – Equality and non-discrimination

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

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.'

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 *Case C-32/93, Webb v EMO Air Cargo (UK) Ltd.* [1994] ECR I-3567 discussed above in Chapter III.

2 'Reasonable Accommodation' in International Law

2.1 The Convention on the Rights of Persons with Disabilities

As seen above, Article 5(3) of the Convention on the Rights of Persons with Disabilities places a general obligation on States to take all appropriate measures to ensure that reasonable accommodation is provided in order to promote equality and eliminate discrimination of persons with disabilities.

In the definition of reasonable accommodation given under Article 2 of the Convention, the right to accommodation is limited by whether implementing the appropriate measures would impose a 'disproportionate or undue burden.' As there has not yet been any jurisprudence by the Committee on the Rights of Persons with Disabilities, it is unclear how this limitation would work in practice. However, in a [handbook](#) the UN issued to give parliamentarians guidance on the implementation of the CRPD, the factors that were given to determine whether a measure would impose an undue burden were: the practicability of the changes; cost of the accommodation measures; whether the entity required to implement the measures had recourse to financial support in order to do so; the nature, size and resources of that entity; the requirements of occupational health and safety regulations; and the impact on the operations of the entity that is required to reasonably accommodate and individual (see page 62). In the same handbook, the reference to making sure reasonable accommodation is provided in an employment environment on a 'case-by-case basis', supports the suggestion that the accommodation should be provided to a specific individual rather than implemented to accommodate all future persons with disabilities who may need access to the entity's workplace or services (see page 87).

Under Article 14 of the CRPD, echoing jurisprudence developed by international and regional tribunals in the context of reasonable accommodation for persons with disabilities who are deprived of their liberty, there is a specific requirement that a disabled person must be treated in compliance with the objectives of the Convention and the requirement of reasonable accommodation in particular, if they are deprived of their liberty (see developments in reasonable accommodation principles in other international mechanisms and Chapter 5 below). Article 24(2)(c) requires States to ensure reasonable accommodation is provided in order to guarantee the right to education for disabled persons and section (5) of the same Article places a similar obligation in order to guarantee such persons access to 'tertiary education, vocational training, adult education and life-long learning.' Article 27 then refers to the well-established obligations to provide accommodation in the workplace in order to ensure disabled persons have the right to work.

2.2 Other International Instruments

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 (humane treatment of detained persons) to disabled prisoners. The case involved the treatment and confinement conditions of a disabled prisoner on death row. In particular, 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 Committee 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 explicitly at paragraph 10 that the State is under an obligation to place the applicant in conditions that take full account of his disability.

- Similarly, in *Bhinder Singh v Canada* (No. 208/1986, ICCPR) (discussed previously in this chapter) it was 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.

More recently, the Committee on Economic, Social and Cultural Rights, acknowledged that the general requirement under Article 2(2) of CESCR to ‘guarantee’ non-discrimination in the rights listed under the Covenant, not only encompasses both formal and substantive equality, but may oblige States to provide reasonable accommodation (see [General Comment No. 20](#), paragraph 9). In doing so, the Committee assumed reasonable accommodation is a form of positive action and referred to it as an exception to ordinary positive action because it is permanent, rather than temporary, in nature. It is also important to note that the accommodation they gave as an example was to ensure access to health care facilities, and thus was not limited to the employment context like traditional reasonable accommodation. In addition, in finding that reasonable accommodation is required under Article 2(2) of the Covenant, it is suggested that individuals belonging to other groups protected by the guarantee to equality under that provision – such as women, those belonging to a particular religion, and linguistic groups – could also claim a right to reasonable accommodation.

Earlier, the Committee had stated in [General Comment No. 5](#), that the denial of reasonable accommodation to persons with disabilities constituted a form of ‘disability-based discrimination’ (see paragraph 15). In [General Comment No. 20](#), the Committee clarified their position by stating that States should implement legislation explicitly classifying the denial of reasonable accommodation as a form of discrimination (see paragraph 28). In addition, they stated that the obligation to prohibit this form of discrimination applies to public and private places.

This last point made by the Committee on Economic, Social and Cultural Rights is a little unclear. The obligation to provide reasonable accommodation in public places encompasses the well-established principle that individuals should be facilitated in accessing employment and services, such as public health facilities. However, the requirement to provide reasonable accommodation in private places is wider. In this regard, the Committee gave as an example that ‘as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work’ (paragraph 28). This obligation appears to address what has been referred to as ‘anticipatory accommodation’, which is the obligation to adapt work and social environments to accommodate the needs of a general group of persons, rather than a specific individual, in case they want to have access at some point in the future. As mentioned previously, this has traditionally been regulated by national and EU legislation rather than international human rights treaties. It remains to be seen how this requirement will be interpreted by the Committee when it is empowered to receive individual communications after the adoption of the Optional Protocol to the Covenant.

3 The European Convention on Human Rights

The ECHR does not refer to reasonable accommodation in its text. However, in the first case in which the Court explicitly acknowledged that discrimination on the basis of disability is prohibited under Article 14, it found a violation on the ground, *inter alia*, that reasonable accommodation was not provided.

- In *Glor v Switzerland* (No. 13444/04, 30 April 2009), the applicant claimed that he was subject to discriminatory treatment because he was required to pay a military service-exemption tax when he could not serve in the military as a result of his partial disability (see further details of this case in [Chapter V below](#)). The applicant had diabetes and had to take insulin injections four times a day. Among other reasons, the Court found a violation of Article 14 because the State did not take any reasonable steps to accommodate the applicant’s disability so he could fulfil his legal obligation to provide military service.

For example, the Court suggested that he could have been given a less physical role in the army or he could have been permitted to partake in alternative civil service, an option given to conscientious objectors.

In acknowledging that disability is a prohibited ground of discrimination by virtue of the ‘other status’ phrase in Article 14, the Court cited the recently introduced Convention on the Rights of Persons with Disabilities (CRPD). In particular, they asserted that the adoption of the Convention indicated an international legal consensus on the prohibition of disability discrimination. Therefore, although the ECtHR acknowledged that Article 14 requires reasonable accommodation, this may be limited to disabled persons due to the Court’s reliance on the CRPD.

- Clear evidence of an emerging ‘substantive’ equality approach to discrimination by the ECtHR occurred in the case of *Thlimmenos v Greece* (No. 34369/97, 06 April 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 approach of the ECtHR to indirect discrimination cases, which was outlined in *Thlimmenos v Greece* (No. 34369/97, 06 April 2000) (i.e., different treatment must be given to individuals in different situations unless objective justification can be given), can, in practice, also result in reasonably accommodating an individual. The disadvantage of reasonable accommodation being considered as a measure required to address indirect discrimination rather than a right in itself, is that the denial of the accommodation could be allowed if an ‘objective and reasonable justification’ for doing so can be given. However, arguably, this limitation is similar to the proviso that reasonable accommodation does not have to be implemented where it would impose an undue burden on the person responsible for the workplace or social environment.

Below are some cases in which the ECtHR found that the State had an obligation to reasonably accommodate individuals in cases where, to do otherwise, would cause indirect discrimination in conjunction with various Articles of the Convention.

- In *Price v the United Kingdom* (No. 33394/96, 10 July 2001), the Court held 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 April 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.’
- Similarly, in the case of *Vincent v France* (No. 6253/03, 24 October 2006) the Court held that detaining a person with a disability in a prison where he had no possibility to move around, and was not able to leave his cell independently, amounted to ‘degrading treatment’ within the meaning of Article 3.
- In a number of cases with similar facts, traveller and gypsy communities argued that the failure to accommodate their nomadic lifestyle in planning legislation and the subsequent enforcement proceedings brought under such legislation to remove them from the land they settled in was discriminatory under Article 14. Despite acknowledging that persons in different situations should be treated differently, the Court has never found a violation in these cases because they found the protection of the environment to be an objective and reasonable justification for imposing the distinction.

4 The European Union

As seen above, 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. This provision follows national

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

Recital 17 in the preamble to the Directive also emphasises the importance of providing reasonable accommodation because it provides an exception to the prohibition of discrimination in recruiting, promoting and employing persons with disabilities on the basis that they are ‘not competent, capable or available to perform the essential functions of the post’, but this is subject to the obligation to provide reasonable accommodation. Thus, in *Case C-13/05, Sonia Chacón Navas v Eurest Colectividades SA* (11 July 2006), although the ECJ found no violation of the Framework Directive in the case, they held that a person could not be dismissed on the basis that they cannot fulfil the essential functions of the post if they had not been provided with reasonable accommodation.

There has been no case law of the ECJ that has directly dealt with the requirements of Article 5 of the Framework Directive so it is unclear, for example, what constitutes a ‘disproportionate burden’ on an employer for the purposes of the Directive or what measures of accommodation will be deemed ‘reasonable.’

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 of discrimination 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 belonging to a prohibited group.
- If the complainant succeeds in proving a *prima facie* case of discrimination, 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., one that is reasonable and non-discriminatory);
 - ii) An objective link between this goal or goals and the discriminatory treatment or practices that led to the discriminatory 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 *prima facie* case of discrimination is to compare the position of the complainant or complainants against that of a comparative individual or group. For example, in the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968), the ECtHR held that different treatment is improper only if it exists between individuals in relatively similar situations. See also *National Union of Belgian Police v Belgium* (No. 4464/70, 21 October 1975) at paragraph 44.

The complainant (e.g., a woman) must demonstrate how the comparator, a similarly situated person or group of different 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 of 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 a neutral policy or practice has had a disproportionately 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 the ‘majority’ or dominant group as a reference group against which treatment is judged (i.e., the group of the different 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 between groups based on one ground also ignores the overlapping and intersecting identities of an individual, which may impact the way in which they are discriminated against (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 of 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 Air Cargo (UK) Ltd.* [1994] ECR I-3567 [below](#) in the ‘Sex Discrimination’ section of Chapter V. In such cases, an employer could argue that there was no discrimination because another person would have been treated in a similar way if they were unavailable for work, which may not account for the particular characteristics of pregnancy, such as an inability to work for a certain mandatory length of time.

Other issues that raise difficulty in dealing with comparators include the breadth of the comparison made 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. Therefore, 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 no provable case of discrimination. However, if the comparator selected is another majority-male company or the sector as a whole, the company’s wages may be considered discriminatory on the basis of gender. In *Case 320/00, Lawrence & Others v Regent Office Care Ltd and Others* [2002] ECR I-7325, the ECJ held that differences in pay must be attributable to a single source – such as having the same employer, a collective pay agreement, or a piece of legislation – in order to be prohibited under the EU equal pay legislation. Without sharing a single source between the comparator groups, the Court held that there is no particular body responsible for the inequality and therefore there is no means to restore equal treatment. If this narrow approach to discrimination comparators is followed more widely, which is suggested by the ruling in *Case C-256/01, Allonby v Accrington & Rossendale College*, it 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 November 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 the grounds of racial or ethnic origin or any of the prohibited grounds listed, under Article 2(a) of both the Race and Framework Directives, respectively. The ‘would be’ language of this clause indicates that a court may consider the treatment in light of theoretical standards rather than in comparison with concrete individuals.

Appealing to substantive ideals has several advantages over other methods of establishing a *prima facie* case. It eliminates the need to find a similarly situated individual or group for individual or statistical comparison. As previously discussed, 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 ideal standards of human rights attainment rather than relative standards of compliance.

The use of substantive ideals is also useful in harassment cases. As noted in the section on harassment above, it can be difficult to compare the victims of harassment against other groups or individuals to judge

whether discrimination has occurred. This is partly because the same discriminatory treatment or effect on members of other groups may not be considered as serious to them as it is to the victim. An approach based on the substantive ideals of human dignity looks more closely at the subjective understandings of the victim.

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 proven 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 US Supreme Court. In *Griggs*, Chief Justice Berger stated (at page 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.

- 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. As she was a woman and married the law deprived her of unemployment benefits; if she were a man, whether 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 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. 998/2001, ICCPR); HRC General Comment No. 18 (at paragraph 2) and [CERD General Recommendation No. 19](#).
- See also the ECtHR cases of *Hugh Jordan v the United Kingdom* (No. 24746/94, 04 May 2001) (at paragraph 154) and *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007) (at paragraph 184 of the Grand Chamber judgment); the ECJ case of *Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 discussed above and the IACtHR *Juridical Condition and Rights of Undocumented Migrants* (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 then 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 The UN System

The shifting of the 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 objective and non-discriminatory purpose of the protection of workers’ safety, which was the motivation for requiring safety helmets to be worn, was a justified and proportional reason for the indirect discrimination.
- 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 The European Convention on Human Rights

The ECtHR has drawn extensively on the approach of the EU Race and Framework Directives, as well as the Burden of Proof Directive, to support the general principle that the burden of proof shifts to the respondent when the applicant presents evidence from which it may be presumed that there has been discriminatory treatment. See the case of *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007), paragraphs 82-84, discussed under ‘indirect discrimination’ in Chapter III. In particular, the Court stated that ‘once the applicant has shown a difference in treatment, it is for the Government to show that it is justified’ (paragraph 177). See also the cases of *Chassagnou and others v France* (Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999) at paragraphs 91-92 and *Timishev v Russia* (Nos. 55762/00 and 55974/00, 13 December 2005) at paragraph 57.

In the Chamber judgment of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005), the ECtHR held that, particularly in cases 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 for the events, which is not shaped by a discriminatory attitude. It is 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. In the Grand Chamber, the ECtHR endorsed this approach, but in this case, where it was alleged that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent government to 'prove the absence of a particular subjective attitude on the part of the person concerned' (paragraph 157). The Court continued by stating that: 'While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated' (paragraph 157). Therefore the Grand Chamber, in contrast with the Chamber's approach, did not consider that proving the alleged failure of the authorities to carry out an effective investigation into the alleged racist motive for the killing was sufficient to shift the burden of proof to the respondent government.

More recently, the ECtHR has held that whether the burden of proof will be shifted will be determined on a case-by-case basis. In *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007), the Court stated that the allocation of the burden of proof is 'intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake' (paragraph 178). Moreover, the ECtHR held that in cases where there is some evidence to suggest that the State has infringed a right but a lot of the evidence is in the State's possession, such as police internal investigation reports, the State will bear the burden of proving that the evident infringement did not occur. In particular, it stated that 'where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation' (paragraph 179).

3 The 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 the burden of proof to be shifted.

- The [Burden of Proof Directive](#) establishes the rationale for the mechanism for shifting the burden, 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 *Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 at paragraph 31; *Case C-33/89, Kowalska* [1990] ECR I-2591 at paragraph 16; *Case 184/89, Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297 at paragraph 15; and *Case 109/88, Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening* (acting on behalf of Danfoss) [1989] ECR 3199 at paragraph 16.
- The EU Framework Directive (Article 10) and Race Directive (Article 8) lay out the following instructions for discrimination cases concerning the burden of proof:
 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 v Frenchay Health Authority* [1993] ECR 5535 (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 was sufficient to shift the burden of proof in that case.

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:

- ‘Beyond reasonable doubt’ is the highest standard of proof. It is used as the criminal law standard in certain common law jurisdictions because it is appropriate to prove the worst offences that hold the most serious consequences for alleged perpetrators.
- The ‘balance of probabilities’ lowers the threshold. It requires the court 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, to do otherwise, would undermine the protection of substantive rights. A human rights court is permitted this flexibility because it 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 The 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 the Chamber’s *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) case (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 June 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 a 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 cases pre-dating *Anguelova*, such as *Velikova v Bulgaria* (No. 41488/98, 18 May 2000), the Court found itself

unable to find a violation of Article 14 because the supporting evidence for what the Court acknowledged were ‘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 of proof. 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 should rather be assessed on the ‘balance of probabilities’. See also Judge Bonello’s partly dissenting opinion in *Vežnedaroglu v Turkey* (No. 32357/96, 11 April 2000).

Subsequently, in the Chamber judgment of *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005), the ECtHR held that the standard of proof required was not the criminal standard. The Grand Chamber judgment also discussed the standard of proof, mentioning in particular that:

In assessing evidence, the Court has adopted the standard of proof “beyond reasonable doubt.” However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States’ responsibility under the Convention. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. (paragraph 147)

In *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007), discussed in the previous section with regard to the burden of proof, the Court reaffirmed this principle and stated that the same principle for establishing the standard of proof exists as for distributing the burden of proof, namely that it will vary according to ‘the specificity of the facts, the nature of the allegation made, and the Convention right at stake’ (paragraph 178). According to this approach, the standard of proof that must be reached will depend on the particular circumstances of each case.

For detail on the arguments before the ECtHR regarding the standard of proof, see the [amicus brief submitted by INTERIGHTS](#) for the *Nachova v Bulgaria* Grand Chamber hearing.

2 The 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 Judgement)* (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.

D ESTABLISHING A PRIMA FACIE CASE

In order to establish direct discrimination, the complainant must prove they have received different treatment. Similarly, proving indirect discrimination is dependent on showing that there has been a differential impact across groups. This section addresses the different ways of proving treatment or impact, which is 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 the disproportionate impact of neutral treatment. In many instances, statistics that support a claim of indirect discrimination are not available or are inadmissible as evidence. Frequently, problems in 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 evidential difficulties inevitably have an impact on the effective protection of equality rights. For instance, until its judgment in *Nachova*, 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 an inability to satisfy the evidential requirements of the ECtHR to prove that discrimination had actually occurred.

2 Overcoming Problems of Proof

After 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 particular approaches, the use of both 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 to establish 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) [1998] 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.

- In Australia, discriminatory 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 NO & others* [1997] ZACC 12. 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 may also 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 US Supreme Court, for example, 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. Such 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 their race. However, after a careful and thorough investigation of a claim, the 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, the race of the applicant formed the basis of his decision. See the Canadian case of *Meiorin* and the UK case of *Nagarajan* cited above.

The ECtHR is flexible in admitting evidence that may be used to draw inferences of discrimination. It has stated that a *prima facie* case of discrimination can be established ‘through a free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the ‘coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.’ See *Nachova v Bulgaria* (paragraph 147) and *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007), discussed above in the section on the ‘Burden of Proof’ (paragraph 178).

This approach has been used extensively in UK case law.

- In *King v Great Britain-China Centre* [1992] ICR 516, the Court of Appeals 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 make a finding of discrimination.
- *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 a formal expression of discrimination.

- In *Anya v Oxford University* [2001] IRLR 377 (at paragraph 9) the English 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 be background facts and may pre-date or post-date 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 for which evidence may not be readily available. If an applicant can demonstrate statistical 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 that the policy or practice is discriminatory. The burden then shifts to the allegedly discriminatory actor to prove that the statistical difference is insignificant or objectively justified. However, statistics are not available in many cases.

In the ECHR admissibility decision of *Hoogendijk v the Netherlands* (No. 58641/00, 06 January 2005), the ECtHR emphasised the importance of statistical inference for applicants to prove the existence of indirect discrimination. First, it established that ‘where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule’ is indirectly discriminatory, the State must give a justification, unrelated to discrimination, for taking those measures. As this case concerned sex discrimination, the ECtHR held that ‘If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for the applicants to prove indirect discrimination.’ In the case of *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007), the Court developed this approach and held that ‘statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce’ (paragraph 188).

Although a comparator group must still be selected, the use of statistics helps to shift the 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 the problems of broader legislation, as well as for deciding particular cases. Some domestic jurisdictions, such as the US, New Zealand, the United Kingdom and Germany, have moved away from the use of individual comparators towards the use of statistics. The EU has also adopted this approach in a number of cases:

- In *Case 109/88, Handels-og Kontorfunktionaerernes 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 per cent higher than women doing the same work. As a result, 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 in accordance with Article 6 of the Equal Pay Directive, which 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 it to national courts to clarify the statistical ranges that should be deemed legally significant. The ECJ suggested that the conditions imposed in order to

receive 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 particular 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 programs to make opportunities equally available for individuals of all statuses.

In its [General Comment No. 31](#), devoted to the prevention of racial discrimination in the administration and functioning of the criminal justice system CERD stressed the importance of factual and legislative indicators in order to identify the occurrence of racial discrimination and support cases of indirect discrimination.

For a discussion of the use of statistics in indirect discrimination cases, see also [D.H. and Others v the Czech Republic](#) (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007) and [Zarb Adami v Malta](#) (No. 17209/02, 20 June 2006) in the ECHR section on indirect discrimination.

E JUSTIFICATION

1 Objective Justification and Proportionality

Some international instruments permit discrimination to be justified in certain limited 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 discriminatory policy or practice, which 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 The UN System

In paragraph 13 of General Comment No. 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 No. 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’ justification test in a wide range of cases, but its 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](#) (Nos. 298/1988 and 299/1988, ICCPR) and in the distinction between foster and natural children for the granting of child benefits in [Oulajin and Kaiss v the Netherlands](#) (Nos. 406/1990 and 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 between men and women not to be reasonable and objective (see [Zwaan de Vries v the Netherlands](#) (No. 182/1984, ICCPR) and [Broeks v the Netherlands](#) (No. 172/1984, ICCPR)) but justified distinctions made between such rights for married and unmarried couples (see [Danning v the Netherlands](#) (No. 180/1984, ICCPR) and [Sprenger](#)).

1.2 The European Convention on Human Rights

In the seminal *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968), the ECtHR emphasised the importance of justifying discrimination according to 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, 21 October 1975), at paragraph 46; *Marckx v Belgium* (No. 6833/74, 13 June 1979) at paragraph 33; *Rasmussen v Denmark* (No. 8777/79, 28 November 1984) at paragraph 38; *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985) at paragraph 72; *Lithgow and others v the United Kingdom* (No. 9006/80, 08 July 1996) at paragraph 177; and *Thlimmenos v Greece* (No. 34369/97, 06 April 2000) at paragraph 46.

1.3 The European Union

Both the EU Race and Framework Directives permit indirect discrimination if ‘that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’ (Article 2 in both documents). The Framework Directive also permits an exception to indirect discrimination under Article 2 if the discriminatory policy is aimed at providing reasonable accommodation, in accordance with Article 5 of the Directive, for a person with a particular disability.

In *Case 170/84, Bilka Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607, 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 consist of broad generalisations about groups, but should be based on identifiable and objective non-discriminatory criteria. In *Case 171/88, Rinner-Kühn* [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 generalisation.

However it should be mentioned that direct discrimination cannot be justified in any circumstances according to both Directives, with exception in cases where a characteristic related to race, ethnic origin, or another prohibited ground of discrimination constitutes ‘a genuine and determining occupational requirement’ and as long as the objective of the discriminatory treatment ‘is legitimate and the requirement is proportionate’ (see preambular paragraphs 18 and 25 of the Race and Framework Directives respectively).

1.4 The 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 OC-4/84). It 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

The 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’ grounds of discrimination a higher degree of judicial scrutiny than ‘regular’ discrimination cases, which requires States to provide a more compelling justification for discrimination on one of these grounds.

- Article 4(1) of the ICCPR, which delimits the extent to which the Covenant can be derogated from in times of public emergency, appears to give a more fundamental status to the grounds of race, colour, sex, language, religion or social origin. It provides that, even when States take measures to derogate from the Covenant in times of national emergency, those measures may not cause discrimination solely on the basis of any the aforementioned grounds.
- The ECHR also seems to grant discrimination claims based on race, nationality, birth and sex a higher degree of judicial scrutiny. The language usually used by the ECtHR to indicate that a higher degree of scrutiny is required is the ‘very weighty reasons’ test laid down in the *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985) (discussed [below](#) in Chapter V). This test imposes a narrower margin of appreciation on States when introducing measures that distinguish on such grounds. See further the ECHR cases of *Gaygusuz v Austria* (No. 17371/90, 16 September 1996) (nationality), *Hoffmann v Austria* (No. 12875/87, 23 June 1993) (religion) in the relevant sections of Chapter V, *East African Asians v the United Kingdom* (Nos. 4403/70, 14 December 1973) (race) in the section on degrading treatment in Chapter VI [below](#) and *Inze v Austria* (No. 8695/79, 28 October 1987) in respect of birth.

3 Common Justifications

The following section presents some of the most common justifications in defence of discriminatory treatment, which 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 no other more reasonable or non-discriminatory measures that would meet such goals.

The HRC accepted physical safety as a justification for indirect discrimination on the basis of religion in *Bhinder Singh v Canada* (No. 208/1986, ICCPR), discussed in the ‘direct discrimination’ section at the start of Chapter II. In that case, the HRC held that the motivation of protecting the workers’ safety was an objectively reasonable justification for discriminatory treatment, which was 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, which led to the non-renewal of the contracts of Ms Johnston and other women, and denied them 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 Army Board* [1999] ECR I-7403, the ECJ found that a ban on women performing combat roles did not abuse the principle of proportionality and was capable of justification. Following *Sirdar*, in *Case C-285/98, Kreil v Bundesrepublik Deutschland* [2000] ECR I-69, the ECJ accepted that prohibiting women from occupying combat roles 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 objective 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 to governments, national economies, or private enterprises, of ensuring equal pay between men and women. See *Case 43/75, Defrenne v Sabena* [1976] ECR 455.

If the discriminatory effect arises from objectively justified economic factors unrelated to any discrimination and proportional to the desired goal, the ECJ may allow the practice to continue. *Case 109/88, Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting on behalf of Danfoss)* [1989] ECR 3199, discussed above, established several specific possible justifications in the area of employment relations. In particular, it indicated that an employer might justify a requirement only if they demonstrate its importance to the performance of specific tasks. The Court also held that mobility could not be used independently as an indicator or proxy for quality of work and difference in pay based on different training could be justified by showing its importance for the performance of specific tasks. Also, *Danfoss* suggested that pay differentials based on length of service required no particular justifications. However, in the later case of *Case 184/89, 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, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985), the aim of protecting the domestic labour market was legitimate, however the difference in impact on the labour market between men and women 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, employers argue that 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 has held that EU equal pay provisions override freedom of contract, therefore 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 *Case 184/89, Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, 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 No. 18 stated with regard to affirmative action that '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 III above.

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. This is because the supervisor has the power and the authority to both monitor and end discriminatory practices. When such practices continue, there is a suggestion that the supervisor is complicit in the discrimination and an indication that they 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. Furthermore, liability may still be vicariously assigned where the supervisory individual or organisation did not, but should have, known of the discrimination, particularly in light of the difficulty of proving they had knowledge of the discrimination. 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.'

As is evident from the examples above, a common context in which vicarious liability is assigned for discrimination is in employment. Although an employer may not be personally responsible for discrimination, they 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, for which her fellow employees had been responsible. The Equality Officer considered that the employer was responsible for the discriminatory treatment, 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 her work 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 the 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 & South West Area Health Authority* (‘*Marshall II*’) [1986] ECR 723.

For all procedures, several important requirements must be kept in mind with regard to discrimination and 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 the 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 that incite discriminatory violence (‘hate speech’) often involve criminal sanctions. Criminal sanctions are also used for acts with widespread detrimental impact and those acts that may lead individuals to fear retaliation if they bring claims against mistreatment.

However, 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, which may be 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 December 2003). Also, in *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) case, the ECtHR held that State authorities have a positive duty to investigate any racist motives for the use of lethal force. The Grand Chamber later endorsed the Chamber’s approach and reaffirmed the States’ obligation to investigate possible racist motives behind acts of violence.

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 & Ors v Wolverhampton Healthcare NHS Trust* [1999] ECR I-3201. It 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. In addition, 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 No. 26, which elaborates on Article 6 of ICERD, they suggested that the right under that article 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.

In *Blaga v Romania* (No. 1158/2003, ICCPR), which concerned the expropriation of the applicants' property due to their residence abroad, the HRC found a violation of Article 26 in conjunction with Article 2 paragraph 3 and held (at paragraph 12) that the obligation to provide effective remedies set out in Article 2, paragraph 3(a) of the Convention includes, *inter alia*, 'prompt restitution of their property or compensation thereof.' This reflects the HRC's general interpretation of compensation outlined in its General Comment No. 31 (at paragraph 16), which asserts that reparation measures, including the allocation of appropriate compensation, is central to the efficacy of Article 2, paragraph 3 in order to provide an effective remedy to individuals whose Covenant rights have been violated.

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 measure or granting preferential treatment to previously disadvantaged groups. For example, in *Stalla Costa v Uruguay* (No. 198/1985, ICCPR) the HRC held that, although they had not ordered the measure, preferential treatment of citizens wrongfully dismissed by the military government, relative to other public servants, was a permissible 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 which, in the context of discrimination law, often involves an agreement by a jurisdiction or company to end discriminatory practices and to implement affirmative action programs.

The Department of Justice in the US 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 US see the US 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 later reversed this decision, finding that the failure of the trial court to order a consent

decree might have the consequence of denying ‘the parties their right to compromise their dispute on mutually agreeable terms.’

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. Similarly, 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.

GROUNDS 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 other 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 oppression 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. We will use these terms 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) of the rights that others enjoy such as civil and political rights, employment rights and property rights. However, sex discrimination also includes matters specific to the status of women, such as pregnancy-related issues (like maternity leave).

2 General Principles under International Instruments

2.1 The 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 No. 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 ICCPR (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. Article 3 of the ICCPR stipulates State parties' obligation to ensure the equal rights of men and women in enjoying rights set forth in the Covenant.

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 (the Mauritian Women case)* (No. 35/1978, ICCPR), 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.

***Aumeeruddy-Cziffra v Mauritius (the Mauritian Women case)* (ICCPR)**

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 in 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. 406/1990 and 426/1990, ICCPR).

- The landmark case of *Zwaan de Vries v the 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 the '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 v the Netherlands* (No. 172/1984, ICCPR). 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 and *J.H.W. v the Netherlands* (No. 501/1992, ICCPR) which 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 The 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 the relevant parts to have the same meaning. There is no equivalent of Article 26 in the ICESCR. As noted [above](#) in Chapter II, at present, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. Currently, three States have ratified the Optional Protocol to the ICESCR, which does establish a system for lodging individual complaints under the Covenant. The Protocol will come into force when

it has been ratified by ten States. 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.

The Committee has published its interpretation of Articles 2(2) and 3 in ensuring the equal rights of men and women in its [General Comment No. 16](#). The Committee reiterated that unlike other rights enshrined in the Covenant the right to non-discrimination entails States immediate and mandatory obligation of States to ensure equal rights of men and women in enjoying economic, social and cultural rights (paragraphs 16 and 17). It suggests that the wording in Article 3 referring to equal enjoyment of the rights enshrined, implies on States not only guarantee of formal, but also substantive equality (paragraph 7).

2.3 The 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 The 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 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.

In addition to the provisions expressly mentioning prohibition of discrimination against women in all spheres the CEDAW Committee has asserted in its [General Recommendation No. 19](#) on Violence against Women that ‘[G]ender-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’ (at paragraph 1). It further notes (at paragraph 9) that ‘States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation’.

A.T. v Hungary (CEDAW)

In the case of *A. T. v Hungary* the applicant was a woman who had been subjected to severe domestic violence and constant threats by her common law husband. The couple had two children, one of whom required special care because of disability. Although two criminal proceedings had been initiated against her husband he had not been detained at any time and no action had been taken to protect A. T. and her children. By the time A.T. submitted her communication to the CEDAW she had ten medical certificates which demonstrated that she had been subjected to severe physical abuse by her husband. The applicant alleged that Hungary's failure to effectively protect her from her husband breached positive obligations set forth in CEDAW. The Committee concluded that Hungary had failed to fulfil its obligations and had thereby violated the rights of A.T. under Articles 2(a), (b) and (e), and Article 5(a) in conjunction with Article 16. In reaching this conclusion the CEDAW Committee recalled General Recommendation No. 19 in that under international law, a State that fails to act with due diligence to prevent, investigate, punish or provide remedies for violations of women's rights may be held responsible in relation to acts committed by private actors. Committee found Hungary had not been able to provide the applicant with effective protection in four years. None of the steps were taken by the government to address violence within the family had benefited or improved the immediate situation of A.T. and thus, the obligations on the State set out in Article 2 of the CEDAW Convention remained unfulfilled.

- In the case of *A.S. v Hungary* (No. 4/2004, CEDAW) the applicant was a Hungarian Roma woman who had been subjected to sterilisation without her or her husband's consent performed during her child's delivery in the hospital. The Committee found that Hungary was in violation of the applicant's rights under Article 10(h) on providing health education in area of family planning, Article 12 on the right to health of women by the harm caused to her reproductive capabilities and performed coerced sterilisation and Article 16(1)(e) in that the State had interfered to applicant's family life and depriving her of her natural reproductive capacity.
- In the case of *Vertido v the Philippines* (No. 18/2008, CEDAW) the author was a Filipino woman who brought a rape claim against a colleague. Within 24 hours of being raped the author underwent a medical and legal examination for the rape. She reported the case to police within 48 hours of the incident and filed charges against the accused. The case was initially dismissed after the lower court found a lack of probable cause. The author filed an appeal and secured an order that the accused be charged with rape. The proceedings were delayed and case remained in the trial court from 1997 until 2005.

The trial court ultimately issued a verdict acquitting the accused, holding there was reasonable doubt to convict the accused based on evidence presented by the prosecution and the testimony of the author which indicated she consented to sexual relations. The author subsequently filed a complaint to the CEDAW Committee in which she argued *inter alia* that the State failed in its obligation to ensure that women are protected against discrimination by public authorities, including the judiciary. The author alleged the court relied on gender-based myths in its judgment. She further claimed the acquittal was evidence of the failure of the State to exercise due diligence in punishing acts of violence against women. The Committee found the State violated its obligations under Articles 2(f) and 5(a) which require State parties to take appropriate measures to modify or abolish existing State laws, regulations and practices that constitute discrimination against women. Article 5(a) in particular requires State parties 'to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and custom...or the stereotyped roles for men and women'.

2.5 The 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 The Convention on the Rights of Persons with Disabilities

The CRPD incorporated the so called ‘twin track approach’ on gender issues, by establishing an specific Article on women with disabilities (Article 6) which has to be read in combination with all the Articles in the Convention, but also by including specific references to gender, women and girls with disabilities in several other Articles.

Article 6 recognises the existence of multiple discrimination and commits States parties to take measures (the reference to empowerment seems especially relevant) to ensure the full and effective enjoyment of all human rights and fundamental freedoms set out in this Convention by women with disabilities.

2.7 The 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.

2.8 The 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, Cabales and Balkandali v the United Kingdom](#) (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985), [Schuler-Zraggen v Switzerland](#) (No. 14518/89, 24 June 1993), [Karlheinz Schmidt v Germany](#) (No. 13580/88, 18 July 1994), [Willis v the United Kingdom](#) (No. 36042/97, 11 June 2002) and [Burghartz v Switzerland](#) (No. 16213/90, 22 February 1994).

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.

2.8.1 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 and 9474/81, 28 May 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-Zraggen v Switzerland](#) (No. 14518/89, 24 June 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.

2.8.2 Identity

The ECtHR has shown that it is also strict regarding distinctions that function against men. In *Burghartz v Switzerland* (No. 16213/90, 22 February 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.

2.8.3 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 the United Kingdom* (No. 36042/97, 11 June 2002) 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 February 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 No. 1.
- *Petrovic v Austria* (No. 20458/92, 27 March 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 an 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 July 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.

- In *Hobbs, Richard, Walsh and Green v the United Kingdom* (Nos. 63684/00, 63475/00, 63484/00 and 63468/00, 14 September 2006) the applicants were widowed in the mid to late nineties. They complained about the United Kingdom authorities' refusal to grant them Widow's Bereavement Allowance (WBA) or equivalent on the grounds of their sex and relied on Article 14 and Article 1 of Protocol No. 1 on the right to property. WBA granted widowed women to an income tax reduction for the year of assessment. At the time when WBA was introduced, married couples were taxed as a single entity with a tax allowance available to the man in respect of his wife's earnings, whereas a widow would receive only a single person's allowance. The WBA was abolished in April 2000 as it did not serve the purpose of its introduction to rectify the inequalities existing between widowed man and women at the time. The Court considered that during the time when the applicants were denied the allowance the difference in treatment between men and women as regards the WBA was not reasonably and objectively justified and unanimously found UK in violation of Convention rights.

2.9 The 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.

2.9.1 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 *Case 109/88, Handels-og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening* (acting on behalf of Danfoss) [1989] ECR 3199.

***Defrenne v Sabena* (TEC)**

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 Ms Defrenne were ultimately brought to the ECJ.

Importantly, the ECJ ruled that Article 119 of the TEC (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 Army Board* [1999] 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.

2.9.2 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 (Equal Treatment Directive)

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 C-32/93, Webb v EMO Air 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 & Ors v Northern Health & 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 Brugsforeninger (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 look 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 C-32/93, Webb v EMO Air 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.

2.9.3 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 Weber von Hartz* [1986] ECR 1607, the ECJ interpreted Article 119 (now Article 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 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, 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 C-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* [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., *Case 170/84, Bilka Kaufhaus GmbH v Karin*

Weber von Hartz [1986] ECR 1607 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 911, 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.

2.9.4 Benefits

A number of cases have come before the ECJ with similar facts to the HRC cases of *Broeks v the Netherlands* (No. 172/1984, ICCPR) and *Pauger v Austria* (No. 415/1990, ICCPR).

- 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.

2.9.5 Positive Action

In *Case C-407/98, Abrahamsson 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.

2.10 The 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 form of 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.

There is limited jurisprudence of the African Commission in the area of discrimination on the grounds of sex. Only recently the ACHPR declared admissible the first case on such a ground involving discrimination against women. The case of *Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS (on behalf of Al-Kheir & Others) / Egypt* (No. 323/2006) concerns assault and sexual harassment of demonstrators and journalists at a protest in Cairo in May 2005. The applicants are four women journalists who were attacked, assaulted and sexually abused in the presence of police, who failed to intervene to protect these women. The applicants allege that the State of Egypt failed its positive obligations to prevent the attacks and to effectively investigate and prosecute the perpetrators thus failing to act with due diligence.

The case is due to be considered by the ACHPR. If successful, it will establish a ground-breaking precedent in development of jurisprudence in cases of discrimination against women through use of sexual violence and in general.

There have been more developments in this area 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.

2.11 The 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 (ii) status, and (iii) workplace.

2.11.1 Citizenship

- In *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (A No. 4 (1984) 5 HRLJ 161) (Advisory Opinion OC-4/84), the IACtHR looked at the compatibility with the AmCHR of proposed amendments to the Costa Rican Constitution. The opinion concerned a provision in the 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.

2.11.2 Status

In *María Eugenia Morales de Sierra v Guatemala* (Case 11.625, Report No. 4/01, 19 January 2001), the IACHR 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* (AmCHR)**

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 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 Netherlands]. It may, in fact, be required to achieve justice or to protect persons requiring the application of special measures [citing Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica A No. 4 (1984) 5 HRLJ 161 (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 'statutory 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.

2.11.3 Workplace

- In the case of *Elena Tellez Blanco v Costa Rica* (Petition 712-03, Report No. 29/07, 26 April 2007), the petitioners alleged that the victim suffered 'discrimination in the workplace for reasons of gender' at a National Centre for Child Protection (*Patronato Nacional de la Infancia*), where she worked as a so-called 'substitute aunt'. They claimed that it is the stereotyped notion of women that results in such a discriminatory practice as the 'substitute aunts' in the role of a mother are expected to perform household chores and look after children without time off. As a result the victim faced the situation of working excessive hours, extending up to 24 hours a day, for 11 consecutive days. In consideration of the admissibility of the case the IACHR noted that the facts could well establish the violation of the applicant's right to humane treatment as well as discrimination as she was imposed to extensive working hours that

harm her both physically and psychologically, thus undermining her personal integrity. Furthermore the facts may give rise to violation to the victim's right to equal protection if it is proven that the work she performed as an 'aunt' has a disproportionate impact on women, the position being only occupied by women.

3 Discrimination against Transgender Persons

Throughout the world people are subject to serious and flagrant human rights violations because of their gender identity. Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. Violations can include the denial of the right to life, torture, arbitrary detention and discrimination in accessing economic and social rights such as housing, health, education and the right to work. There is also severe pressure to remain silent and invisible. This brief section will examine discrimination and transgender persons, a broad term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers and other gender-variant people.

The EU addresses discrimination against transgendered and transsexual 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 transsexual 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.

The ECJ in *Case C-423/04, Richards v Secretary of State for Work and Pensions* [2006] ECR I-03585 was asked to determine the scope of Directive 79/7/EEC pertaining to the implementation of the principle of equal treatment in the field of social security where a male-to-female transsexual underwent surgery in 2000 and in 2002 was denied the payment of her retirement pension on the grounds that she was not eligible to receive the payment until the age of 65 (the male eligible age for retirement pensions). She was therefore still legally considered as a man even after her sex reassignment. The ECJ ruled that the directive applied to discrimination arising from gender reassignment and held that 'the national legislation which precludes a Trans in the absence of recognition of his new gender from fulfilling a requirement which must be met in order to be entitled to a right protected by EC law must be regarded as, in principle, incompatible with EC Law'.

The ECtHR has considered a number of cases relating to transgender persons and discrimination. In the case of *Christine Goodwin v the United Kingdom* (No. 28957/95, Grand Chamber judgment 11 July 2002) the applicant complained of the lack of legal recognition of her changed gender and in particular of her treatment in terms of employment and her social security and pension rights and of her inability to marry. The Court found a violation of Article 8 (right to respect for private and family life) owing to a clear and continuing international trend towards increased social acceptance of transsexuals and towards legal recognition of the new sexual identity of post-operative transsexuals and stated that 'Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, the Court reaches the conclusion that the notion of fair balance inherent in the Convention now tilts decisively in favour of the applicant.' The Court also found a

violation of Article 12 (right to marry and found a family) and said that it was not persuaded the terms of that Article can still be assumed to ‘refer to a determination of gender by purely biological criteria’ (paragraph 100). The Court held that it was for the State to determine the conditions and formalities of transsexual marriages but that it ‘finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.’ See also *Sheffield and Horsham v the United Kingdom* (Nos. 22985/93 and 23390/94, 30 July 1998) and *Van Kück v Germany* (No. 35968/97, 12 June 2003).

In *Schlumpf v Switzerland* (No. 29002/06, 08 January 2009), the applicant, a male-to-female transsexual who had experienced gender identity disorder since childhood, decided to live as a woman following the death of her wife in 2002. In 2003, the applicant began hormonal therapy and psychiatric and other treatment. She was issued with a medical certificate confirming the diagnosis of gender dysphoria stating that the conditions for gender-reassignment surgery were satisfied. Her health insurer refused to reimburse the cost of her operation. The applicant decided to proceed with the operation and appealed to the insurer to reverse its previous decision. The appeal was rejected. The applicant then initiated administrative proceedings against the insurer which she lost following a perfunctory analysis of the case by the court, including a refusal to hear expert evidence or to hear the case in public.

The ECtHR found the decision not to hear expert opinions and not to allow the hearing take place in public amounted to violations of Article 6. The ECtHR recalled that the Convention guaranteed the right to personal self-fulfillment and reiterated that the concept of ‘private life’ could include aspects of gender identity. It noted that the State benefited from a narrow margin of appreciation considering that the issues involved in the case concerned one of the most intimate aspects of the applicant’s private life. It therefore found a violation of Article 8 of the ECHR.

B SEXUAL ORIENTATION

Useful links: Sexual Orientation

- [International Gay and Lesbian Human Rights Commission](#)
- [International Lesbian and Gay Association](#)
- [Stonewall](#)

1 Introduction

‘Sexual orientation’ refers to feelings of romantic or sexual attraction for another person, whether a member of the opposite sex (‘heterosexual’), of the same sex (‘homosexual’) or of either sex (‘bisexual’). This section focuses on the protection of human rights for people having a same-sex or bisexual orientation who may be considered as ‘gay’, ‘bisexual’ or ‘lesbian’. The term LGB will be used throughout this section, as it is the preferred word to use when referring to gay, lesbian and bisexual people as a distinct group in a legal context. Though transgendered persons are included in the LGB group, the transgender and transsexual communities face a unique set of legal hurdles and therefore it should be mentioned that the legal principles discussed in this section do not necessarily apply to them.

Stigma over homosexuality exists in many parts of the world and discrimination, violence, harassment and criminalisation of homosexual acts threaten the rights of LGB people. In addition, interference with

the private lives of LGB people is a common occurrence. ‘Homophobia’ has had the effect of marginalising people from society on the basis of their sexual orientation, increasing the likelihood for discrimination or ‘hate crimes’ to occur. The lack of adequate legal protection and support from State institutions to prevent discrimination and violence against people on the basis of their sexual orientation is therefore another issue that concerns the protection afforded under international human rights law. Discrimination against gay, lesbian and bisexual people can take the form of:

- Criminalisation of homosexuality and consensual sexual acts between persons of the same sex;
- Restrictions on the right to marry;
- Restrictions on freedom of expression;
- A higher minimum age for consensual sex between partners of the same sex;
- Differential treatment in matters of adoption and child custody;
- Differential treatment concerning access to social welfare and pensions, or
- The lack of an effective remedy at the national level to seek redress for abuses.

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 Southwest Trains* [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 Southwest Trains* [1998] ECR I-621 (at paragraphs 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 The 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 this ground. The main non-discrimination clauses in the ICCPR are [Article 2](#) and [Article 26](#). Article 2 must be read together with all other rights in the Covenant while Article 26 provides a stand-alone prohibition on discrimination generally. While neither

explicitly mentions sexual orientation, they both contain a generally inclusive 'other status' clause which has come to be interpreted by the HRC as including sexual orientation. Also, Article 17 prohibits arbitrary interference with privacy or family life and again, the HRC, in absence of direct protection for LGB people under the Convention has come to interpret this clause as prohibiting the criminalisation of homosexuality and discrimination against LGB people in matters such as welfare and pensions. Also, Article 23 provides for the right to marry and to found a family and is relevant to the situation of LGB families. The following subjects have been addressed in the case law of the HRC thus far: (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 enforces direct discrimination against LGB people and usually takes the form of a prohibition on sexual activity between consenting partners of the same sex, often termed 'sodomy laws'. The question of whether or not the protection against discrimination covered sexual orientation was unresolved for many years. The landmark case *Toonen v Australia* (No. 488/1992, ICCPR) was the first case from the HRC to affirm the prohibition on direct discrimination against sexual minorities through a total ban on same-sex sexual acts between consenting adults.

- In *Toonen*, the HRC found that Tasmanian laws criminalising homosexual acts between consenting adults constituted an unlawful and arbitrary interference with the privacy of the applicant, contrary to [Article 17\(1\)](#) of the ICCPR. The State submitted that criminalisation of homosexual acts was necessary for the protection of public health and morals. The HRC found that criminalisation was not a reasonable and proportionate measure to prevent 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.' Having found a violation of Article 17, the HRC did not go on to consider whether there had been a violation of Article 26.

Since the *Toonen* judgment, the HRC has expressed concern over sodomy laws that continue to be enforced in several States. In its concluding observations for States under the reporting mechanism the HRC has expressed concern over sodomy laws in the United States (1995), Sudan (1998), Chile (1999), Romania (1999) and Cameroon (2006), among others, and the HRC has drawn attention to the discriminatory effect of criminal prohibitions of homosexual activity.

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.'
- Similarly, in the case of *X v Colombia* (No. 1361/2005, ICCPR), the applicant complained of being discriminated against based on his sexual orientation as he was denied his cohabiting partner's pension transfer after the latter's death. This case concerned not the distinction between married and unmarried

couples but between homosexual and heterosexual couples. The HRC found the difference in treatment between same-sex partners who are not entitled to pension benefits, and unmarried heterosexual partners who are so entitled, was neither reasonable nor objective, concluding violation of Article 26 of the Covenant.

- Compare the earlier cases with *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* [2003] ZACC 2. 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 license 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 The 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 the relevant parts to have the same meaning. There is no equivalent of Article 26 in the ICESCR. There has not yet been an individual complaint under the new Optional Protocol to the Covenant. However, the CESCR has occasionally expressed concern over sexual orientation discrimination in its concluding observations on State reports. The CESCR has further considered the extension of rights in the Covenant to sexual minorities in its General Comments [No. 18 \(on the right to work\)](#), [No. 15 \(on the right to water\)](#), [No. 14 \(on the right to health\)](#) and most notably [No. 20 \(on non-discrimination\)](#):

“Other status” as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor’s pension rights...

2.3 The 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. The Committee has addressed sexual orientation discrimination in its concluding observations when it overlaps with the grounds of discrimination covered in the convention. See for example [Concluding Observations: Czech Republic \(2007\)](#) where the Committee expressed concern over a law which would require at least one person to be a Czech citizen in order for two people of the same sex to marry.

2.4 The 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 not yet considered cases concerning sexual orientation. However, the Committee has stated in its General Recommendation No. 28 on ‘The Core Obligations of States Parties under Article 2 of the [ICEDAW]’ that that sex discrimination is often linked with other factors such as sexual orientation and gender identity and that ‘States parties must legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned.’ The Committee has also adopted several concluding observations to States’ reports dealing with sexual orientation. For example, in its Concluding Observations for [Panama \(2010\)](#), the Committee expressed concern over how stereotypical views of women in the household and in public life may cause women to ‘face multiple forms of discrimination as well as violence on grounds such as sexual orientation...’ See also Concluding Observations [Netherlands \(2010\)](#), [Ukraine \(2010\)](#) and [Guatemala \(2009\)](#).

2.5 The 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. The Committee on the Rights of the Child, in its General Comments have, however, included reference to sexual orientation in its General Comments [No. 3 \(HIV/AIDS and the rights of the child\)](#) and [No. 4 \(Adolescent health and development in the context of the Convention on the Rights of the Child\)](#). In its Concluding Observations on States’ reports, the Committee has also expressed concern that LGBT children face ‘discrimination and social stigmatization’ in several countries. See Concluding Observations on [The United Kingdom \(2008\)](#), [Chile \(2007\)](#) and [Slovakia \(2007\)](#).

2.6 The 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. In a further report, the ILO Global Report on Equality at Work 2007, it notes that discrimination based on sexual orientation can manifest itself in a number of ways including:

- Refusal of employment, dismissal, denial of promotion;
- Harassment: innuendo, verbal abuse, malicious gossip, name calling, bullying and victimization, false accusations of child abuse, graffiti, abusive phone calls, anonymous mail, damage to property, blackmail, violence and even death threats;
- Benefits denied to the same-sex partner (e.g. extra days off for a variety of reasons such as relocation, childbirth, parental leave, caring for a sick partner or bereavement; educational facilities for employees and their families; provision of the employer's goods or services free of charge or at a discount; survivor's benefit in occupational pension schemes or for the purposes of life insurance; health-care insurance for employees and their families); or
- Self-exclusion (e.g. when homosexual persons avoid certain jobs, careers or employers for fear of being discriminated against on the basis of their sexual orientation).

The Committee of Experts on the Application of Conventions and Recommendations have requested a new protocol that would include sexual orientation as a prohibited ground of discrimination under Convention No. 111.

2.7 The 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. 7525/76, 22 October 1981), and subsequently in the cases of *Norris v Ireland* (No. 10581/83, 26 October 1988) and *Modinos v Cyprus* (No. 15070/89, 22 April 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 July 2000), the applicant complained that his conviction for gross indecency constituted a violation of his right to respect for 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 and 21974/93, 19 February 1997).

2.7.3 The Age of Consent

There have been a number of claims before the ECHR 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 July 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 the case of *H.G. and G.B. v Austria* (Nos. 11084/02 and 15306/02, 02 June 2005) the Court found a violation of Article 14 in conjunction with Article 8 (right to family and private life). The case concerned Austrian nationals who were both convicted under a section of the Austrian Criminal Code criminalising homosexual acts of adult men with consenting adolescents between the ages of 14 and 18. The applicants 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 Court held that there had been a violation of Article 14 taken in conjunction with Article 8, on the ground that the Government had not offered convincing and weighty reasons justifying the maintenance in force of the provision and consequently, the applicants' convictions under that provision.
- Similarly, in *S.L. v Austria* (No. 45330/99, 09 February 2003) and *L. and V. v Austria* (Nos. 39392/98 and 39829/98, 09 February 2003), the applicants complained about the maintenance in force of laws that criminalised homosexual acts of adult men with consenting adolescents between fourteen and eighteen 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. See also *R.H. v Austria* (No. 7336/03, 19 January 2006).
- In *B.B. v the United Kingdom* (No. 53760/00, 10 February 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. and V. 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 September 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 September 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 were 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 October 2002) and *Perkins and R. v the United Kingdom* (Nos. 43208/98 and 44875/98, 22 October 2002).

2.7.5 Child Custody and Adoption

- In *Salgueiro Da Silva Mouta v Portugal* (No. 33290/96, 21 December 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 February 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.
- The Grand Chamber in *E.B. v France* (No. 43546/02, 22 January 2008) set aside the decision of the Court in *Fretté v France*. The applicant was a lesbian nursery school teacher who was cohabitating with another woman. Her application to be considered as an adoptive parent was rejected because of her sexual orientation. The Court referred to the ECtHR as a living instrument and stated that there would be discrimination if the reasons given for differential treatment were 'based solely on considerations regarding the applicant's sexual orientation.' The Court determined that because French law provided for adoption by a single parent, the rejection of an applicant purely on his/her sexual orientation would

amount to discrimination prohibited under Article 14. The Court found a violation of Article 8 in conjunction with 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 July 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 was been a violation of Article 14 of the Convention, taken together with Article 8.
- In *P.B. and J.S. v Austria* (No. 18984/02, 22 July 2010), the Court found that restricting access for same sex-couples to benefits such as insurance coverage that were afforded to heterosexual couples violated Article 14 in conjunction with Article 8. The judgment was based on the conclusion in *Shalk and Kopf* where the Court found that same-sex couples were protected under the ‘family life’ clause in Article 8. Unjustified distinctions that disadvantage same-sex couples that did not pursue a legitimate aim would not be permissible.
- In *Kozak v Poland* (No. 13102/02, 02 March 2010), the applicant had alleged a violation of Article 14 after being denied the right to succeed the tenancy for the flat rented by his deceased same-sex partner. The Court acknowledged that the State has a margin of appreciation to determine the right balance between protecting the family and ‘secure[ing] respect for family life and the prohibition on discrimination against sexual minorities’. However, because the denial of tenancy succession made a distinction between people purely on the basis of their sexual orientation, the margin was smaller. The Court did not consider the denial of a tenancy succession application solely on the basis of sexual orientation to be a necessary action to protect the institution of family. Because of the lack of an objective and reasonable justification for the distinction, the Court considered that the denial of tenancy succession to same-sex couples did not fulfil a legitimate aim and found a violation of Article 14 in conjunction with Article 8.

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

2.7.7 The Right to Marry

The ECtHR has considered discrimination on the grounds of sexual orientation in exercising the right to marry:

- In *Schalk and Kopf v Austria* (No. 30141/04, 24 June 2010) the Court found that Austria had not breached Article 12 of the ECHR by precluding a same-sex couple from marrying. However, in this case, the Court held for the first time that an unmarried same-sex couple without children constituted a family for the purposes of Article 8. The Court also found that Article 12 did not oblige States to marry same-sex couples or provide a marriage-like equivalent, but said that it would not consider Article 12 to apply only to

heterosexual marriages. The Court also found no violation of Article 14 taken in conjunction with Article 8. While the Court reiterated that differences based on sexual orientation require ‘particularly serious reasons by way of justification,’ the case was ultimately decided on the basis of the margin of appreciation. When examining whether Austria should have provided an alternative means of legal recognition of the applicants’ partnership at an earlier stage, the Court stated that ‘[t]here is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.’

2.7.8 Freedom of Assembly

The ECtHR has also considered a case of discrimination on the grounds of sexual orientation in exercising the right to freedom of assembly:

- In *Baczkowski and Others v Poland* (No. 1543/06, 03 May 2007) the applicants were members of an NGO campaigning for persons of homosexual orientation. They complained of violation of their right to peaceful assembly under Article 11 together with Article 14 as they were banned to organise a march on raising the awareness of minority issues, including the rights of homosexuals. Subsequent to their submission for permission a national newspaper had published an interview with the Mayor of Warsaw, where the latter had explicitly expressed that propaganda of homosexuality was not falling within the ambit of one’s right to freedom of assembly. Although various reasonings were brought to applicants for banning their march, namely failure to submit the road map and prevention of further clashes with other groups holding opposing ideas, the applicants claimed that the main reason for refusal was based on the grounds of their sexual orientation. While acknowledging statutory grounds for refusal of the permission to hold the rallies, the Court noted that the authorities gave permission to hold demonstration to other groups. Most importantly the Court noted that the statement made by the Mayor referring to banning the demonstration requested by the applicants’ in order to prevent them from propagating homosexuality was made while the applicants’ request for permission was pending at the time. Based on its previous case-law the Court found that it may be reasonably presumed that the Mayor’s statement as an exercise of his right to freedom of expression could be regarded as instructions to those employees whose career depended on him. Thus the Court held that there was a violation of Article 14 together with Article 11 as the interference with the applicants’ right to freedom of assembly was done in a discriminatory manner.
- *Alekseyev v Russia* (Nos. 4916/07, 25924/08 and 14599/09, 21 October 2010) upheld the previous judgment in *Baczkowski*. Russia had banned LGBT pride parades in Moscow due to public safety reasons. The applicant is a well-known LGBT rights activist who had applied each year for four years to hold a march and was denied each time. The Russian Government maintained that this action was necessary to protect public safety as the event may have caused a disturbance. The Court did not consider the mere risk of a disturbance to be a sufficiently weighty reason to institute a ban on such demonstrations as if every instance that could provoke a disturbance were banned, then the public would be ‘deprived of hearing differing views on questions which offended the sensitivity of the majority opinion.’ The actions were, therefore, not necessary in a democratic society and a violation of Article 11 was found. The Court cited the growing consensus among Council of Europe member States affirming the prohibition on discrimination against LGB people also noting the growing consensus among member States that sexual minorities have the right to identify themselves publicly as gay, lesbian, bisexual etc. Since the purpose of the protest was to promote understanding of LGB people and prompt public debate on the subject, to deny the applicant with the right to hold the demonstration because of the wishes of the majority in the Country would breach Article 11 and since the ban was instituted solely on the basis of sexual orientation, a violation of Article 14 was found as well.

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 Southwest Trains* [1998] ECR I-621, 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.

The EU [Charter of Fundamental Rights](#) is the first international treaty to explicitly include the term ‘sexual orientation’ and with the entry into force of the Treaty of Lisbon, the Charter now has full legal effect.

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-249/96, Grant v Southwest Trains* [1998] ECR I-621, 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.

- 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.
- *Case C-267/06, Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* saw the application of the Framework Directive in a way that guarantees same-sex partners' access to the same benefits available to heterosexual couples in the same situation.
- In *Tadao Maruko*, the plaintiff had been in a same-sex relationship with his partner for a number of years. When his partner died, he applied to his partner's pension fund for a widower's pension and was denied. The ECJ held that the Framework Directive insofar as it grants survivor's pensions to widow(er)s of a heterosexual couple, must also do so for a life partner. It noted that because Germany had a civil partnership system for same-sex couples and that this institution places persons of the same sex in a situation comparable to that of spouses. Therefore life partners are treated 'less favourably' when they are denied benefits like the widower's pension that is afforded to married couples. The Court found that the Directive precludes legislation limiting access to these benefits for life partners. Also, it presumably applies to long-term cohabitating couples as well.

2.9 The 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 The 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 however the case of *Karen Atala v Chile*, referred to below, and currently pending before the Court, will be the first case that will consider sexual orientation under Article 24.

- *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 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 IACHR 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 IACHR dismissed the claim because the applicant failed to substantiate it.

The case of *Karen Atala v Chile* (Case 12.502, Petition 139/09) has been referred by the Commission to the IACtHR. It is the first time the Inter-American Court will decide whether discrimination on the basis of sexual orientation is permissible under the Convention. The petitioner alleges that she was discriminated against on the basis of her sexual orientation in the course of judicial proceedings in which she lost custody of her three daughters to their father. The petitioner alleged that the best interests of the children was not considered by the Chilean Court alleged a violation of Article 24. The case is pending before the Court.

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 paragraphs 176-177) and subsequently in *Vriend v Alberta* [1998] 1 S.C.R. 493 (at paragraphs 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

- [ICERD](#)
- [UN Declaration on Race and Racial Prejudice](#)
- [UN Declaration on the Elimination of All Forms of Racial Discrimination](#)
- [UN Declaration on Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities](#)
- [ECRI](#)
- [EU Monitoring Centre on Racism and Xenophobia](#)
- [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#)
- [World Conference Against Racism Resolution 2001/11](#)

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*, 2001, Oxford University Press, at p.144.

1 Introduction

1.1 Definition of 'Racial Discrimination'

Although almost every international human rights instrument prohibits racial discrimination, ICERD is the only international convention to define 'racial discrimination.' Article 1(1) states that it 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.

In its *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.

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 No. 24, 'descent' 'includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status' and 'national or ethnic origin' concerns linguistic, cultural and historical differences. CERD has also stated (in [General Recommendation No. 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. Similarly, according to CERD [General Recommendation No. 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 also 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. 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 various ways of denying the right to equal participation in society. It also appears in much more blatant forms such as hate speech, the formation of 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 State parties to penalise four categories of misconduct in particular: (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 of the international jurisprudence involving issues of racial discrimination has not been concerned with non-discrimination provisions as such but rather other substantive human rights 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. Therefore, there is 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 section 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 and so it will be dealt with in section E below.

1.4 Social Origin

Due to the fact that it is one of the most difficult grounds to define, discrimination on the basis of ‘social origin’ has been pleaded in very few cases before international human rights tribunals. For this reason, it will not be dealt with substantively in this chapter.

Although only three States have so far ratified the Optional Protocol to the ICESCR that establishes a procedure for individual complaints, the CESCR has given some guidance on the definition of ‘social origin’ in their General Comment No. 20, regarding the non-discrimination provisions of the Convention. They stated that it ‘refers to a person’s inherited social status’, which is related to three different aspects (paragraph 24). The first is the property belonging to the person, or their lack of it (paragraph 25). The second is their descent by birth, such as being considered to belong to a specific caste. In particular, the CESCR condemned the ‘dissemination of ideas of superiority and inferiority on the basis of descent’ and made reference to General Comment No. 29 of the CERD, which suggested measures for member States of the ICERD to adopt in order to prevent such discrimination (paragraph 26). Finally, the CESCR found that ‘social origin’ relates to a person’s ‘economic and social situation’, which may place them in a ‘certain...strata within society’ (paragraph 35). The Committee specifically highlighted the fact that ‘living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping which can lead to the refusal of or unequal access to the same quality of education and health care as others, as well as the denial of or unequal access to public places.’

In the case of *Gennadi Sipin v Estonia* (No. 1423/2005, ICCPR) the HRC considered the case of a former Russian soldier who was refused Estonian citizenship on the basis that he had been a former member of the armed forces of a foreign State. In the complaint, the State did not contest whether the complainant’s status as a soldier constituted a social origin for the purposes of Article 26 of the Covenant. Similarly, the HRC did not deliberate on this issue. Rather, they accepted that there was a difference in treatment in violation of the ICCPR but found that such treatment was objectively and reasonably justified on the basis of national security.

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.’

2 General Principles under International Instruments

As mentioned previously, almost every international human rights instrument prohibits racial discrimination. This prohibition either relates to discrimination in the exercise of specific rights (e.g., Article 14 of the ECHR and Article 2 of the AfCHPR) or is a freestanding right not to be discriminated against, 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 is binding on all States independently of any treaty obligations. See, for example, the US (Third) Restatement of the Foreign Relations Law. Of all the international and regional mechanisms, the CERD and the ECtHR have the most developed jurisprudence on racial and ethnic discrimination.

2.1 The 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. However, considering the ICERD is the *lex specialis* in this area, there are few cases on racial discrimination pleaded before the HRC. See however the HRC admissibility decision in *Drobek v Slovakia* (No. 643/1995, ICCPR) with regard to discrimination on the grounds of race concerning the right to property.

2.1.1 Hate Speech

The prosecution of hate speech creates 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’. However, Article 19(2) states that the right to ‘seek, receive and impart information and ideas of all kinds’ must also be taken into account. Article 19(3) therefore provides that the right to freedom of expression in Article 19(2) carries ‘special duties and responsibilities’ and may consequently be subject to restrictions necessary for, *inter alia*, ‘the respect of the rights or reputation of others’ or the protection of public morals. In particular, the UN treaty bodies have treated the expression of racial discrimination as a justified restriction to freedom of expression in order to protect the rights of minority groups. See, for example, HRC General Comment No. 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 acknowledged ‘[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.

2.2 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

2.2.1 Racist motivation for crimes

The UN Committee against Torture in *Dzemajl* (No. 161/2000, CAT) has recognised that the existence of a racist motivation can be an aggravating factor when a criminal offence is committed. In that case, mob action by non-Roma nationals of Montenegro, which destroyed a Roma settlement, was ‘committed with

a significant level of racial motivation' to aggravate the violation of Article 16(1) of the UN Convention against Torture. In some national jurisdictions, legislation also applies increased penalties for crimes where a racist motivation for the crime is evident. For example, see the French Penal Code (February 2003), Articles 132-76.

2.3 The 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. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR), 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 addition, three States have ratified the Optional Protocol to the ICESCR, which does establish an individual complaint mechanism for the Covenant. The Optional Protocol will come into force when ten States have ratified it.

2.4 The 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, as subsequently confirmed in [CERD General Recommendation No. 14](#) (1993). Article 2(1) of ICERD obliges State parties to take both positive and negative measures to eliminate discrimination 'by all appropriate means and without delay,' setting out five specific objectives in particular. Article 2(1)(d) clarifies that this obligation to eliminate discrimination extends to both the public and the private sphere.

Article 5 provides a non-exhaustive list of rights, including civil and political, economic, social and cultural rights, which represent key areas where experience has shown that racial discrimination most frequently occurs (e.g., employment, the administration of justice, etc.). Each State party undertakes to prohibit and eliminate discrimination in the enjoyment of the rights under Article 5 but only to the extent that those rights are already guaranteed in the State party's domestic law. In *Diop v France* (No. 2/1989, 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, stating that the rights protected by Article 5 were of a 'programmatic character subject to progressive implementation' and that their mandate was not to see that Article 5 rights were established but rather to 'monitor the implementation of these rights, once they have been granted on equal terms.'

2.4.1 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. The comment at issue 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 adequate protection in respect of her right to work under Article 5.

- See also the cases of *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 and *Barbaro v Australia* (No. 12/1998, ICERD) where an Australian resident of Italian origin alleged a violation of Articles 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. However 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. Furthermore, the evidence submitted did not prove that the system operated 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 did not indicate discrimination on that basis. CERD accordingly 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 the basis of his national origin and status as an immigrant.

2.4.2 Access to Goods, 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, among other issues, 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 that he was not a Danish national. The complainant alleged a violation of Article 2(1)(d) of ICERD because 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 highlighted the importance of this issue in preventing racial discrimination, stating 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.' The applicant 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 the prohibition of settlements and other restrictions placed on Roma families by local municipalities in the Slovak Republic. CERD ultimately did not find a violation of Article 5(d)(i) because the restrictions on the freedom of movement and residence of the Roma had been withdrawn at time of their hearing. However, it 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 Slovak Republic* (No. 11/1998, ICERD) the author was refused service in a restaurant because he was of Roma origin. After a prolonged domestic investigation, the restaurant owner was prosecuted. CERD held that the prosecution and penalty constituted sanctions compatible with the obligations of the State. However, it recommended the State party amend 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 on the basis of racial discrimination.

- In *F.A. v Norway* (No. 18/2000, ICERD), CERD held that the commercial activity of housing agencies is a general service to the public and thus comes within the purview of Article 5(f) of the Convention. State parties should therefore ensure that persons seeking to rent or purchase apartments and houses are adequately protected against racial discrimination by the private sector in this area.

2.4.3 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. In particular, they found that the citizen's exercise of their right to freedom of expression carries with it special duties and responsibilities of 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 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 legislation 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.
- In the case of *Jewish community of Oslo et al v Norway* (No. 30/2003, ICERD), the Committee dealt with a case of hate speech by Nazi extremists. In considering the merits, the Committee concluded that the statements were not protected by the 'due regard clause' because they were of a manifestly offensive nature and therefore, the acquittal by the Supreme Court of Norway gave rise to a violation of Article 4 (prohibition of promotion of racial hatred and propaganda of racial superiority), and consequently Article 6 of the Convention (right to remedies and redress in racial discrimination cases). The Committee further noted that Article 6 provides effective protection against any acts of racial discrimination, including private actors, thus affirming State parties' positive obligations under the ICERD (paragraph 10.6).

2.4.4 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, by a racist jury).

- *Narrainen v Norway* (No. 3/1991, ICERD) concerned racial slurs that were made by two members of a jury, which were overheard during the trial of a Norwegian citizen of Tamil origin for a drug-related offence. 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. Similar jurisprudence has developed under Article 6

of the ECHR, e.g., *Remli v France* (No. 16839/90, 23 April 1996) and *Sander v the United Kingdom* (No. 34129/96, 09 May 2000), which are discussed below

2.5 The 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.

- In *A.S. v Hungary* (No. 4/2004, CEDAW), the applicant was a Hungarian Roma woman subjected to coerced sterilisation. In that case, the CEDAW Committee disregarded the link between the applicant's Roma origin and the sterilisation, considering instead only the allegations concerning discrimination against women, which are within the scope of the CEDAW provisions. The Committee found that Hungary was in violation of the applicant's rights under Article 10(h) on providing health education in the area of family planning, Article 12 on the right to health of women because of the harm caused to her reproductive capabilities and the coerced sterilisation and Article 16(1)(e) because the State had interfered in the applicant's family life and deprived her of her natural reproductive capacity.

2.6 The Convention on the Rights of the Child

Article 2(1) of the CRC provides that 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 (guaranteed under Article 19(1)) in the struggle against racism, racial discrimination, xenophobia and related intolerance.

2.7 The Convention on the Rights of Persons with Disabilities

The CRPD is largely aimed at securing the rights of persons with disabilities and therefore does not deal directly with racial discrimination. However, preamble paragraph (p) to the Convention emphasises the concern of States parties about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of several grounds, including race. Furthermore, [Article 5\(2\)](#) includes a reference to the prohibition of all discrimination against persons with a disability and guarantees such persons equal and effective legal protection against discrimination on all grounds.

2.8 The 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.

2.9 The European Convention on Human Rights

Article 14 of the ECHR prohibits discrimination, *inter alia*, on grounds of race, colour, national or social origin, or association with a national minority. As outlined in Chapter II of the Handbook [above](#), Protocol No 12 to the ECHR contains a general non-discrimination clause, Article 1(1), in the same words as Article 14, which prohibits discrimination in respect of all rights under the laws of contracting parties when it comes into force.

According to ECtHR jurisprudence, very 'weighty reasons' are required to justify different treatment of a group on the basis of race. In *East African Asians v the United Kingdom* (Nos. 4403/70, 14 December 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 Chapter VI below. In the case of *Cyprus v Turkey* (No. 25781/94, 10 May 2001) the ECtHR (citing *East African Asians* and *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 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, however, it held that it was not necessary to consider the issue under Article 14.

The ECtHR has usually avoided dealing with claims of discrimination on grounds of race. Most claims of racial discrimination have been frustrated by lack of proof of *prima facie* discrimination and thus, have not reached the next level of scrutiny where the State is required to provide an objective justification for discriminatory treatment. In the case of *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985) the ECtHR refused to consider evidence of indirect discrimination on the grounds of race.

***Abdulaziz, Cabales and Balkandali v the United Kingdom* (ECHR)**

The applicants were lawfully residing in the UK but, due to the immigration rules in force at that time, their husbands were refused permission to join them. They claimed that the legislation, which differentiated between male and female immigrants, was sex discrimination 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 difference in treatment on the grounds of sex was based on objective and reasonable justifications proportional to the aim pursued. In particular, 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 Court referred to the cases of *Belgian Linguistics* case (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968), *Marckx and Rasmussen v Denmark* (No. 8777/79, 28 November 1984) 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 in 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.

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 deliberate distinction on those grounds. The only reason 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, there are some cases in which the ECtHR has considered claims of racial discrimination or racism in relation to: (i) serious human rights abuses; (ii) hate speech; (iii) home, privacy and property; and (iv) the administration of justice.

2.9.1 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, which appeared to be sufficiently motivated by racism that they might have constituted a breach of Article 14. 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 May 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 because the ill treatment he suffered in custody was motivated by the victim's racial or ethnic origin. The ECtHR held that the standard of proof required under the Convention is 'beyond reasonable doubt' and it 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, was motivated by racial prejudice. Therefore, there was no violation of Article 14. See also *Anguelova v Bulgaria* (No. 38361/97, 13 June 2002).
- *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005) is discussed above in the 'Indirect Discrimination' section of Chapter III. In that case, the Chamber for the first time found a violation of the guarantee against racial 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. They claimed there was a violation of Article 2 and that the ineffective investigation into the deaths was in breach of the 'procedural right' to an effective investigation under Article 2 and the right to a remedy under Article 13 of the ECHR. In addition, the applicants argued that the killings were a product of racial discrimination towards persons of Roma origin and therefore violated Article 14. At paragraph 58 of its judgment, the ECtHR stated that, to assess 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 [GC], no. 34369/97, § 44, ECHR 2000-IV). 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.

In endorsing the approach, the Grand Chamber went on to state that:

Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment... (paragraph 145)

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 its 'best endeavours.'

- The case of *Moldovan and Others v Romania* (No. 2) (Nos. 41138/98 and 64320/01, 12 July 2005) concerned a dispute that broke out between three Roma men and a non-Roma villager, where the villager's son, who had tried to intervene, was stabbed in the chest by one of the Roma men. Two of them were pursued by the crowd and beaten to death. The third man was subsequently burnt to death and 13 Roma houses were completely destroyed. The applicants alleged that the police had encouraged the crowd to destroy Roma property in the village. They also alleged that they had been beaten by police officers and claimed violations of *inter alia* Article 3 and Article 14. Examining the applicants' claims under Article 3, the Court stated that the remarks concerning the applicants' honesty and way of life made by some authorities dealing with the case appeared to be purely discriminatory. As discrimination based on race could, of itself, amount to degrading treatment within the meaning of Article 3, such remarks should be taken into account as an aggravating factor in the examination of the applicants' complaint under that provision. In that case, the Court found that the living conditions of the applicants and the racial discrimination to which they had been publicly subjected when their grievances were being dealt with by the various authorities, constituted an interference with their human dignity under Article 3. As for the Article 14 complaint, the Court acknowledged that the attacks were directed against the applicants because of their Roma origin. Furthermore, it observed that the applicants' Roma ethnicity appeared to have been decisive in the length of time that the domestic proceedings took and the unsatisfactory result of those proceedings. It took particular note of the repeated discriminatory remarks made by the authorities throughout the whole case and their blanket refusal until 2004 to award non-pecuniary damages for the destruction of the family homes. Accordingly, the ECtHR found a violation of Article 8 on the right to respect for private and family life in conjunction with Article 14 of the Convention.
- In the case *Bekos and Koutropoulos v Greece* (No. 15250/02, 13 December 2005) the applicants, Greek nationals belonging to the Roma ethnic group, were arrested for an alleged attempt to break into a kiosk. During the interrogation, both were severely beaten by the police officers. A forensics report that was issued the following day indicated that both young men had sustained 'moderate bodily injuries caused in the past 24 hours by a blunt, heavy instrument.' An internal Sworn Administrative Inquiry also concluded that two police officers had treated the applicants 'with particular cruelty during their detention.' Although the Inquiry recommended that both officers be suspended from service, this was never done. In its assessment of the applicants' treatment at the hands of the police, the Court found that it amounted to inhuman and degrading treatment. With regard to the Article 14 discrimination claim, the Court followed a double approach. First, it considered whether Greece was liable for the degrading treatment on the basis of the victims' race or ethnic origin, and second, whether the respondent State complied with its obligation to investigate possible racist motives (see the above discussion of the Grand Chamber case in *Nachova v Bulgaria* (Nos. 43577/98 and 43579/98, Chamber judgment 26 February 2004 and Grand Chamber judgment 6 July 2005)). While the ECtHR rejected the applicants' claims on the substantive violation of Article 14 taken together with Article 3, it found a violation of the Convention with respect to the State's procedural obligations under Article 14 to properly investigate a claim that a crime was racially motivated (see paragraph 70).

Certain ethnic and minority groups in Europe have been identified as requiring special protection. For example, ECRI [General Policy Recommendation No. 3](#) recalls the obligations of the member States of the Council of Europe to combat racism targeted against Roma communities. Similarly, [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.

2.9.2 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 the 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, 11 October 1979), which concerned a criminal conviction for possession of leaflets advocating the removal of non-whites from the Netherlands and their disqualification from municipal elections. The defendants could not rely on Article 10 because Article 17 required the protection of the targeted minority. Also *Norwood v the United Kingdom* (No. 23131/03, 16 November 2004) where the ECtHR rejected the applicant's complaint of a violation of Article 10 following a conviction for inciting racial hatred as Article 17 was applicable.

- In *Lehideux and Isorni v France* (No. 24662/94, 23 September 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 could be considered a 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 member States, this line of reasoning has been followed. In *R (on the Application of Louis Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, the exclusion of the leader of the Nation of Islam from the UK was held to be justified because he presented 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](#) further recommends that the member States of the COE take specific measures to combat hate speech and incitement to racial hatred on the Internet.

2.9.3 Home, Privacy and Property

In a number of UK cases involving similar facts (*Beard v the United Kingdom* (No. 24882/94, 18 January 2001); *Chapman v the United Kingdom* (No. 27238/95, 18 January 2001); *Coster v the United Kingdom* (No. 24876/94, 18 January 2001); *Jane Smith v the United Kingdom* (No. 25154/94, 18 January 2001) and *Lee v the United Kingdom* (No. 25289/94, 18 January 2001)), 'travellers' alleged that planning and enforcement measures taken by local authorities in the UK against their occupation of land amounted to racial discrimination. Although the Court found that the planning laws had an obvious negative impact on travellers, it held that the interference with the applicants' rights was proportionate to the legitimate aim of preserving the environment and therefore, the measures did not constitute discrimination contrary to Article 14.

- The case of *Chapman v the United Kingdom* (No. 27238/95, 18 January 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. Then, they 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, was proportionate to that aim, and had a reasonable and objective justification. The Court did not find a violation of Article 14, on the basis that there were reasonable and objective justifications for the measures taken against the applicants. Contrast *Moseneke & Ors v Master of the High Court* [2000] ZACC 27, where a South African Act creating a different regime for administering the 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 case of *Connors v the United Kingdom* (No. 66746/01, 27 May 2004), the Court's proportionality analysis weighed in favour of the applicant, this time under Article 8. This case concerned a family evicted from the site where they had lawfully lived for almost thirteen 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 nuisance 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, particularly 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,' the absence of the requirement to establish the reasons for the eviction, Article 8 had been violated.

2.9.4 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 racial bias among jury members may amount to a violation of Article 6(1). In *M v France* (No. 16831/90, 09 November 1990), 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 May 2000), Article 6 was violated where there was an allegation of two members of the jury making racist jokes and remarks during the trial of two Asian defendants. Contrast *Gregory v the United Kingdom* (No. 22299/93, 25 February 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. Similar cases have been considered by the HRC under the ICCPR.

2.9.5 Freedom of Movement

In *Timishev v Russia* (Nos. 55762/00 and 55974/00, 13 December 2005), the applicant, a Russian national of Chechen ethnic origin, was travelling by car from one city in Russia to another. His car was stopped at the Uruk checkpoint on the administrative border between Ingushetia and Kabardino-Balkaria (both Russian territories). Officers from the Kabardino-Balkaria State Inspectorate for Road Safety refused him entry, referring to an oral instruction from the Ministry of the Interior of Kabardino-Balkaria not to admit anyone of Chechen ethnic origin. The ECtHR endorsed the finding of the Russian prosecutor that there had been a violation of the constitutional right to liberty of movement enshrined in Article 27 of the Russian Constitution. In finding that the restriction on the applicant's liberty of movement was not in accordance with the domestic law, the Court held, unanimously, that there had been a violation of Article 2 of Protocol No. 4 (freedom of movement). Discussing the Article 14 issue, the Court emphasised that a Kabardino-Balkarian senior police officer ordered traffic police officers not to admit 'Chechens.' In the Court's view,

this represented a clear inequality of treatment regarding the right to liberty of movement on account of one's ethnic origin and considering this was the sole reason for restricting his freedom of movement, the difference in treatment constituted racial discrimination within the meaning of Article 14.

2.10 The European Social Charter

Article E of the Revised European Social Charter prohibits discrimination on the grounds of 'race, colour, ...national extraction or social origin.' The Committee on Social Rights has considered cases involving racial discrimination, particularly in the sphere of housing.

- The case of *ERRC v Italy* (No. 27/2004, 07 December 2005) concerned denial of an effective right to housing to Roma because of their inadequate living conditions in camping sites with no access to alternative accommodation, the shortages in accommodation and the fact that they had been subjected to evictions. The Committee recalled that Article E includes both direct and indirect discrimination. In this regard, it considered that, by placing Roma in camps, the Government failed to take due and positive account of adequate steps to ensure that Roma were offered housing of sufficient quantity and quality to meet their needs. Thus, failure to take into consideration the different situation of Roma in order to introduce measures specifically aimed at improving their housing conditions, including the possibility for an effective access to social housing, was racial discrimination under Article E, together with a violation of their right to housing (Article 31).
- In the similar case of *ERRC v Bulgaria* (No. 31/2005, 18 October 2006), it was alleged that Roma were segregated into inadequate housing conditions and infrastructure, and were subject to forced evictions. However, since Bulgaria had not accepted Article 31 on the right to housing, the claim was made relying on Article 16 of the Revised Charter, which provides for the right of the family to social, legal and economic protection. Based on its jurisprudence in this area, the Committee recalled that Article 16 also protects the right to housing, including the sufficient supply of housing for families and housing policies of adequate standard, as well as the provision of a dwelling with essential amenities that take due consideration of the family size and composition. In addition, the Committee stressed that this obligation to promote and provide housing extends to protection from unlawful eviction. While the Bulgarian Government argued that the legislation in place provided adequate safeguards for the prevention of discrimination against Roma, the Committee emphasised that, in the case of Roma families, 'the simple guarantee of equal treatment as the means of protection against any discrimination does not suffice' (paragraph 42). Accordingly, it established the need for positive measures to integrate ethnic minorities, such as the Roma, into mainstream society. The Committee concluded that Bulgaria had discriminated against the Roma families by failing to take into account that they run a higher risk of eviction as a consequence of the precariousness of their tenancy.

2.11 The 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, such as selection criteria, 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).

To date, there has been very little case law in the ECJ on the EU Race Directive. In *Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Geryn NV*, the ECJ considered a complaint of direct racial discrimination against an employer who had placed a job advertisement explicitly excluding Moroccan immigrants because he said that his customers did not trust the immigrants. The complainant in this case was an equality body that was established in accordance with the EU Race Directive and so it was not claiming to be a victim of racial discrimination but rather enforcing the Directive just on the basis

of the statement made in the advertisement. First, the ECJ held that there did not have to be an identifiable victim for there to be a breach of the Directive, discriminatory acts in themselves could constitute a violation. Then, it held that the complainant did not need to prove that the discriminatory policy had been put into practice for there to be a violation. In other words, the complainant did not have to prove that a Moroccan immigrant who tried to apply for the vacancy had been rejected according to the employer's express policy to discriminate in order for a violation of the Race Directive to occur. Indeed, the Court highlighted that the advertisement itself 'is clearly likely to strongly dissuade certain candidates from submitting their candidature and accordingly, to hinder their access to the labour market,' so therefore it was directly discriminatory in violation of the Directive (paragraph 25).

2.12 The 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' and 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 v 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, which were 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 'the denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates Article 2.'
- In the case of *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) / Republic of Guinea* (No. 249/2002), the complainants contended that a speech made by the President of the Republic of Guinea over the national Radio contained discriminatory remarks against Sierra Leonean refugees who had fled the civil war in Sierra Leone. In particular, they alleged that the speech incited soldiers and civilians to engage in large scale discriminatory acts against Sierra-Leonean refugees including harassment, deportations, looting, stealing, beatings, rapes, arbitrary arrests, and assassinations. The African Commission reiterated (in paragraph 69) that 'the action of a State targeting specific national, racial, ethnic or religious groups is generally qualified as discriminatory' and found the Republic of Guinea in violation of Charter provisions for targeted harassment, violence and other discriminatory acts against the Sierra Leonean refugees.

2.13 The 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 *Simone Andre Diniz v Brazil* (Case 12.001, Report No. 66/06, 21 October 2006), the applicant, a black Brazilian woman, claimed to be subjected to racial discrimination when she was informed she did not meet the requirements for a job as a domestic employee because of her skin colour, after responding to

the ad in a newspaper. She also alleged a violation of her right to be treated equally before the law because her complaint of racism was not thoroughly and diligently investigated, prosecuted and punished, nor was she involved in the inquiry of the complaint or given recourse to the right to appeal (as foreseen by Brazilian Law 7716/89 prohibiting racial discrimination and act of racism). Although the case concerned relationships between private persons, the Commission firmly established that the State has a positive obligation with regard to preventing discrimination by third parties. In finding there was a widespread practice of discrimination in analysing complaints of racism and unequal treatment by the Brazilian authorities, the Commission held that the State violated the applicant's right to a remedy by failing to thoroughly investigate the complaint of racial discrimination and thus never initiating the relevant criminal action.

3 Segregation

Segregation is the maintenance of an entirely separate set of rights or access to separate facilities or services for different groups of people. As the result of segregation is the provision of different treatment, where it is intentionally implemented, it is automatically considered direct discrimination. In practice, it may not always be easy to prove that the acts of the employer or State directly caused the segregation complained of because it can result from a multitude of different factors that cause the social exclusion of a particular group of people.

By its nature, if segregation results in less favourable treatment, there is an arguable case of discrimination on normal principles. However, as seen from the case law of the ECtHR above, some human rights systems may permit segregation if there is an objective and reasonable justification for implementing it. For example, in many countries girls and boys are separated in different institutions throughout their education. In other national and international instruments, segregation is categorised as a particularly blatant form of direct discrimination. 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 more vulnerable segregated group are of an equal or better standard than the treatment given to the majority group.

3.1 International Human Rights Instruments

Segregation is generally not explicitly prohibited under international and regional human rights treaties. Therefore, Article 3 of the ICERD is distinctive in that it states: 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.' 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, 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 sometimes correspond to differences in race, colour, descent and national or ethnic origin. Thus, conditions of racial segregation can arise without any initiative or direct involvement by the public authorities. In its [General Comment No. 29](#), CERD dedicated a whole section to the prohibition and prevention of segregation of persons based on their descent (section 3). The prevalence of segregation of Roma in education and housing is evident from their explicit mention in CERD's General Comment No. 27 on discrimination against Roma under Articles 18 and 30 respectively.

3.2 The European Court of Human Rights

Despite not being explicitly prohibited, complaints against segregation have arisen in some human rights complaints mechanisms, largely concerning segregation on the basis of race. There have been a number of cases brought before the ECtHR challenging the segregation of Roma children in education.

- In *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007), discussed in Chapter III regarding indirect discrimination, the ECtHR found a violation of the right to education under Article 2 of Protocol No. 1 in conjunction with Article 14 of the Convention because the Czech Republic had developed a system where Roma children were systematically placed into schools for children with learning disabilities, which in turn limited their integration into society and their future job opportunities. The Court acknowledged that the State is entitled to establish a special-school system to provide specialist care for children with learning disabilities and that it did not intend to separate the Roma children on the basis of their race, but the ECtHR stated that ‘it shares the disquiet of the other Council of Europe institutions who have expressed concerns about...the segregation the system causes’ (paragraph 198).
- In contrast, the Court initially found no breach of Article 14 in conjunction with Protocol No. 1, Article 2 in the case of *Oršuš and Others v Croatia* (No. 15766/03, Chamber judgment 17 July 2008 and Grand Chamber judgment 06 March 2010), where Roma children were placed in different classes in regular primary schools on the basis that they were not sufficiently competent in the Croatian language. The Court had held that this was an objective and reasonable justification for the separation of the children. However, the Grand Chamber evaluated specific facts of the case, such as that the applicants were not tested for their language proficiency before they were placed in the segregated classes, a reduced curriculum was taught in the special classes but no extra language teaching was given in order to enhance the proficiency of the Roma children in the Croatian language, and there was no evaluation of their improvement in the language so that they could join mixed classes, a result of which was that many of the applicants spent a large proportion of their primary schooling in Roma-only classes. While acknowledging the difficulties that States face in providing education to national minorities while taking into account their linguistic and cultural needs, the Grand Chamber held that, in light of the facts of the case, Croatia did not take adequate safeguards to ensure the restriction on the right to education without discrimination was proportional to the legitimate aim sought to be achieved. See the [intervention](#) by INTERIGHTS in *Oršuš and Others v Croatia* before the Grand Chamber and the case of *Sampanis and Others v Greece* (No. 32526/05, 05 June 2008). It is evident from this case that the ECtHR did not consider the segregation of Roma children in different classes as discrimination per se, as long as there is an objective and reasonable justification for enforcing the policy and the State implements safeguards so the segregation only lasts as long as is necessary to achieve the legitimate justification.

3.3 European Union

Article 4(5) of the Gender Goods and Services Act permits the segregation of goods and services between men and women as long as it pursues a legitimate aim and the means used to achieve that aim are ‘appropriate and necessary.’

3.4 National Jurisdictions

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 *FTATU v Modgill*; *PEL v Modgill* [1980] IRLR 142. As a result, there have been no successful claims of direct discrimination resulting from segregation in the UK courts.

One of the most notorious modern examples of ‘legal’ racial segregation occurred in the southern States of the US from the late 19th century until the 1950s. The landmark case on racial segregation is the 1954 decision of the Supreme Court of the United States 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 US Constitution.

4 Caste and Descent

Useful links: Caste and Descent

- [A Report by Human Rights Watch for the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, September 2001](#)
- For NGOs dealing with caste-based discrimination, see [Minority Rights Group](#), [National Campaign on Dalits Human Rights](#), [International Dalit Solidarity Network](#), [Asian Legal Resource Centre](#) and [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 certain circumstances 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.

5 Slavery

Useful links: Slavery

- [Anti-Slavery International](#), the oldest anti-slavery NGO
- [Comite Contre L’Esclavage Moderne](#), a NGO combating modern slavery
- [Polaris Project](#), an organisation combating trafficking in women and children
- [International Human Rights Law Group](#)
- [The Council of Europe Convention on Action against Trafficking in Human Beings](#)
- [The Working Group of UN Sub-Commission on contemporary forms of slavery](#)
- [The 1927 Slavery Convention](#)

The references provided may be of assistance. While an in-depth discussion of slavery is beyond the scope of the Handbook, a decision of the Community Court of Justice of the Economic Community of West African States is worth noting.

In the case of *Hadijatou Mani v Niger* (Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008) before the Community Court of Justice of the Economic Community of West African States, the applicant claimed that slavery constituted discrimination on the basis of gender and social origin in contravention of the African Charter on Human and Peoples’ Rights. As a twelve year old girl, Hadijatou Mani had been sold to a local tribal chief and enslaved by him for ten years. During that period she was subjected to physical and psychological abuse, sexual exploitation, insults, threats, hard labour, humiliation and complete domination by the tribal chief over her life. The applicant claimed that the practice of selling a woman to a man to serve as his concubine was a practice that only affected women and therefore constituted a form of discrimination on the basis of gender. In addition, she claimed that she was discriminated on the basis of her social origin because she was not permitted to consent freely to marriage or divorce. Unfortunately, the Court did not address the question of discrimination on the basis of gender. However, it did

acknowledge that she was discriminated against on the basis of her social origin but attributed the responsibility for this to the tribunal chief personally and not the State.

The judgment reaffirms the long established prohibition of slavery in international law. It notes that the prohibition is absolute as a matter of international law. It cites the *erga omnes* nature of the obligations relating to slavery as being owed to the community of nations as a whole (at paragraph 81). As one of few slavery cases ever to be brought on the international level, it makes a significant contribution to the body of jurisprudence on this subject. For further details on the case, see <http://www.interights.org/niger-slavery>.

D NATIONALITY

Useful references: Nationality

- Regarding the UN position, see: *The rights of non-citizens*, Working Paper submitted by Mr 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: *Article 13 EC and Non-Discrimination on Grounds of Nationality: Missing or in Action?*, Dr Niamh Nic Shuibne at page 269 of *Equality in Diversity: The New Equality Directives* edited by Cathryn Costello and Eilis Barry, 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 the least of which is 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 it 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; whereas nationality has more of a '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 the various foreign nationalities or the provision of 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 United Kingdom (the Welsh, Scottish, 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 accounted for under 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 affect 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, which are reasonable under customary international law. For example, political rights have been traditionally withheld from non-citizens. Article 1(2) has been applied in this context by CERD in *Diop v France* (No. 2/1989, 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 ‘many 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* (No. 10/1997, ICERD) below.

The HRC has also followed this line of reasoning. In [General Comment No. 15](#), it 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 (art. 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 The 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.’ Article 26 explicitly prohibits discrimination on the basis of ‘national or social origin,’ but it has also been established in case law that discrimination on the basis of nationality is prohibited under the ‘other status’ ground (see *Gueye v France* (No. 196/1983, ICCPR), *Adam v Czech Republic* (No. 586/1994, ICCPR) and *Karakurt v Austria* (No. 965/2000, ICCPR)).

However, there are certain limitations on the prohibition of discrimination on the basis of nationality. First, Article 25 guarantees certain political rights, differentiating on grounds of citizenship. Second, HRC General Comment No. 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.

Article 13 of the Covenant lays down safeguards against the expulsion of aliens. The question of entry was directly at issue in *Aumeeruddy-Cziffra v Mauritius (the Mauritian Women case)* (No. 35/1978, ICCPR), where the HRC found that Mauritian immigration law discriminated on grounds of sex. Article 24 of the ICCPR also 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. These include discriminatory distinctions between citizens established by birth and those who are subsequently naturalised (Ireland, ICCPR, A/48/40) and requirements imposed on non-nationals that are not applicable to nationals (Japan, ICCPR, A/49/40). For instance, stringent criteria for citizenship, such as a language requirement that no foreigner can meet (e.g., Estonia, ICCPR, A/51/40), often discriminates against minority or foreign groups who are permanent residents (Latvia, ICCPR, A/50/40) and it raises issues under Articles 2 and 26 as well as Articles 13 and 17. 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

- In *Gueye v France* (No. 196/1983, ICCPR) the HRC found that differences in treatment of former members of the French Army in receiving pensions, on the basis of nationality, constituted discrimination and confirmed that discrimination based on nationality was prohibited under the ground of '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 a differentiation between the pensioners. The HRC found that only the individuals' service could determine the level of pensions received by the soldiers and not their 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, which limited the 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 confiscation and that the citizenship requirement 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), *Schlosser v Czech Republic* (No. 670/1995, ICCPR) and *Marik v Czech Republic* (No. 945/2000, 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 for election 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, which arose as a result of differences in bilateral treaties between the Netherlands and other States, discriminated against him. The HRC found no violation because the situation of the applicants could not be compared to that of Dutch nationals living in different foreign States.

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 the HRC 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 this could be the case if the country to which an individual has emigrated has placed unreasonable impediments on the ability of new immigrants to acquire the nationality of that country. In the present case, the applicant refrained from obtaining the Canadian nationality, even though the State facilitated the means to do so. As a result, his country of immigration did not become ‘his own country’ within the meaning of Article 12, paragraph 4, of the Covenant. The case of *Canepa v Canada* (No. 558/1993, ICCPR) confirmed the HRC decision in *Stewart*. Regarding Article 12(4), see also *Toala et al. v New Zealand* (No. 675/1995, ICCPR).

2.2 The 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. However, regarding discrimination on the basis of nationality, Article 2(3) of the ICESCR 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.’ As noted in Chapter II, at present, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. Currently, three States have ratified the Optional Protocol to the ICESCR, which does establish a system for lodging individual complaints under the Covenant. The Protocol will come into force when it has been ratified by ten States.

However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR), 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 and therefore the rights under the ICESCR are afforded some protection by a complaint mechanism. In addition, in its concluding observations to State reports, the CESCR has addressed the issue of discrimination on the basis of nationality, which may give an indication of the content of the prohibition under the Covenant. For instance, the CESCR 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 has also been an issue, 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 The 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 explicitly prohibits racial discrimination in the enjoyment of the right to nationality. Despite the exception of differentiations between citizens and non-citizens from the definition of racial discrimination under Article 1(2), discrimination on the ground of nationality is also under the purview of ICERD. In its General Recommendation No. 30 (Discrimination against non-citizens), CERD 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, in general, 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* (No. 1/1984, ICERD), *Diop v France* (No. 2/1989, ICERD), *L.K. v the Netherlands* (No. 4/1991, ICERD), *BMS v Australia* (No. 8/1996, ICERD) and *Habassi v Denmark* (No. 10/1997, ICERD). 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 nationality or a foreign nationality, does not provide an excuse for discrimination on other unjustified grounds.

- In *Yilmaz-Dogan v the Netherlands* (No. 1/1984, ICERD), 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 requirement for the applicant to be of Danish nationality in order to obtain a bank loan was not the most appropriate manner in which to assess 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 held to be more relevant.

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, 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 for refugees, caused by denial of citizenship) 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.

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

CEDAW is primarily concerned with discrimination against women, therefore discrimination on grounds of nationality will only concern CEDAW to the extent that it arises together with sex discrimination (or the two overlap), such as in the case of multiple discrimination.

There are 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.*

The Committee has addressed issues concerning the prohibition of discrimination on the basis of nationality in its concluding observations to State reports, such as the inability for women to pass on their nationality (Morocco, CEDAW, A/52/38/Rev.1) and the equality of rights between men and women to their nationality (Turkey, CEDAW, A/52/38/Rev.1).

2.5 The 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 of 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 the 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 The Convention on the Rights of Persons with Disabilities

Preamble paragraph (p) states that States parties are concerned about the difficult conditions faced by persons with disabilities, who are subject to multiple or aggravated forms of discrimination on the basis of several grounds, including nationality. Article 5 (2) therefore includes a reference to the prohibition of *all* discrimination on the basis of disability and to guarantee persons with disabilities equal and effective legal protection against such discrimination on *all grounds*.

2.7 The 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 person 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.

2.8 The European Convention on Human Rights

Article 14 of the ECHR prohibits discrimination on grounds of national or social origin or a person's 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 include: (i) tax and social security; (ii) criminal justice procedures; (iii) immigration and deportation; (iv) serious human rights abuses; and (v) freedom of expression.

2.8.1 Tax and Social Security

- In *Gaygusuz v Austria* (No. 17371/90, 16 September 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. The State did not argue that the applicant failed to meet any of the other conditions necessary to receive emergency assistance and therefore the ECtHR considered that he was in a like situation to an Austrian with regard to his entitlement to this particular benefit. Therefore, the differential treatment was not based on any reasonable or objective justification and the Court concluded that 'very weighty reasons' would have to be put forward before it would regard differential treatment on the basis of nationality as being in compliance with the ECHR.
- In *Koua Poirrez v France* (No. 40892/98, 30 September 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. As a result, the applicant complained of a violation of Article 14 combined with Article 1 of Protocol No. 1 (the protection of property). He also claimed that he was discriminated against on a basis of his disability, but the ECtHR held that his 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 nationals of those countries and other foreigners, such as the applicant. Accordingly, the ECtHR concluded that there was a violation of Article 14 combined with Article 1 of Protocol No. 1.

2.8.2 Criminal Justice Procedures

- In *Magee v the United Kingdom* (No. 28135/95, 06 June 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 terrorism prevention legislation, unlike suspects arrested and detained in England and

Wales under similar legislation. The ECtHR, however, held that the difference in treatment was due to the geographical location where the individual was arrested and detained, not the personal characteristics of the applicant, such as his national origin. The Court found that legislation, which creates differences in treatment by taking account of regional differences and other such characteristics of an objective and reasonable nature, does not amount to discriminatory treatment within the meaning of Article 14. See also *John Murray v the United Kingdom* (No. 18731/91, 08 February 1996).

2.8.3 Immigration / Deportation

- In *Moustaquim v Belgium* (No. 12313/86, 18 February 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) and argued that he received different treatment compared to juvenile delinquents of two other categories: those who possessed Belgian nationality, since they could not be deported; and those who were citizens of another member State of the EC, who were also not liable for deportation on the basis of just a criminal conviction. 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. Furthermore, the Court felt that there was an objective and reasonable justification for the preferential treatment given to nationals of the other member States of the EU because Belgium belongs to a special legal order together with those States. Accordingly, there was no breach of Article 14.

2.8.4 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 on 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, 04 May 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 indicated 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 related or that they disclosed any difference in treatment. It argued that 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 May 2001); *Shanaghan v the United Kingdom* (No. 37715/97, 04 May 2001); *Kelly and others v the United Kingdom* (No. 30054/96, 04 May 2001) and *McShane v the United Kingdom* (No. 43290/98, 28 May 2002).

- In *Kurt v Turkey* (No. 24276/94, 25 May 1998), the applicant contended that, because enforced disappearances primarily affected persons of Kurdish origin, the disappearance of her son was discriminatory in breach of Article 14. She 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 the allegation that her son was the deliberate target of an enforced disappearance on account of his ethnic origin. Accordingly, there was no violation of the Convention under Article 14.
- In *Tanli v Turkey* (No. 26129/95, 10 April 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 the 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, which were found to be unsubstantiated are: *Tanrikulu v Turkey* (No. 23763/94, 08 July 1999); *Bilgin v Turkey* (No. 23819/94, 16 November 2000); *Onen v Turkey* (14 May 2002); *Ergi v Turkey* (No. 23818/94, 28 July 1998); *Çakici v Turkey* (No. 23657/94, 08 July 1999); *Tekin v Turkey* (No. 22496/93, 09 June 1998); *Mahmut Kaya v Turkey* (No. 22535/93, 28 March 2000); *Akdivar and others v Turkey* (No. 21893/93, 16 September 1996); *Mentes and others v Turkey* (No. 23186/94, 28 November 1997); and *Selçuk and Asker v Turkey* (No. 23184/94, 24 April 1998).

2.8.5 Freedom of Expression

- *Özgür Gündem v Turkey* (No. 23144/93, 16 March 2000) concerned a Kurdish daily newspaper that was forced to close as a result of falling victim to a series of 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 a practice of discrimination that is prohibited under the Convention. 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 was no breach of Article 14.
- In *Arslan v Turkey* (No. 23462/94, 08 July 1999), *Okçuoglu v Turkey* (No. 24246/94, 08 July 1999) and *Ceylan v Turkey* (No. 23556/94, 08 July 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 that 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.

2.9 The 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 in EU law is much narrower than in international human rights instruments. It applies only to the member

States of the EU and their citizens, which means that an individual must be a national of an EU member State in order to avail of its protection and such States are free to discriminate against non-EU member State citizens on the basis of their nationality. In addition, the prohibition of discrimination on the basis of nationality applies only to the fields covered by the EC treaties (i.e. primarily economic activities) and it is therefore enforced for economic rather than human rights concerns.

Article 45 of the TFEU provides for the free movement of workers, which is a corollary to the prohibition of discrimination on grounds of nationality between workers of the member States in the context of employment, remuneration and other conditions of work and employment. However, paragraph 4 of Article 45 exempts the public service from having to adhere to the prohibition of discrimination on the basis of nationality under Article 45. Regulation 1612/68 was enacted to implement the principles laid down in Article 45 (former Article 39 of the TEC). Article 7(2) provides that EU migrant workers 'shall enjoy the same social and tax advantages as national workers.' As noted in Chapters II and III, Article 45 is directly applicable in the domestic courts of the member States. Furthermore, it applies to private persons as well as the member States, which was upheld by the ECJ in *Case C-281/98, Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139. In that case, 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 did not have a certificate from a particular State verifying that he was bilingual, even though it had been generally accepted that he was bilingual.

As also discussed in the first two chapters, Article 45 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 *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 their education in a State-recognised institution. This placed non-Belgians at a particular 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 3967. At the same time, the permissible grounds for justifying indirect discrimination are broad. In *Case 152/73, Sotgiu v Deutsche Bundespost* [1974] ECR 153, the ECJ held that indirect discrimination might be justified on the basis of 'objective differences.'

The EU Race and Framework Directives explicitly provide in their preambles and text that the prohibition of discrimination does not apply to discrimination on the basis of nationality (preamble paragraphs 13 and 12 respectively and Article 3(2) of both Directives). In particular, Article 3(2) of both Directives refers to the right of member States to establish conditions for entry to and residence in their country, and to treat nationals of third countries in a manner according to their legal status as non-nationals of EU member States. However, preamble paragraphs 12 and 13 of the Race and Framework Directives respectively, emphasise that the right to equality under each Directive (i.e. the right to be free from discrimination on the basis of racial or ethnic origin and religion or belief, disability, age or sexual orientation in the context of employment) should apply equally to nationals of third countries, irrespective of their nationality, as long as that discrimination is not on the basis of their nationality.

2.10 The 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, defined as expulsion 'which is aimed at national, ethnic or religious groups.'

Discrimination on the basis of nationality is a particular problem in Africa, as there are large numbers of migrant workers and refugees in each State. Therefore, there is more jurisprudence on this equality issue than on others.

2.10.1 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 but, 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* (No. 71/92) concerned the expulsion of 500 or more West Africans from Zambia on the basis that they were in Zambia illegally. As a result of the expulsion, they lost all of their material possessions and were separated from their families. The African Commission held that expelling the victims was not wrong in itself but the manner of the expulsions violated the AfCHPR. 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 v Zambia* (No. 211/98) concerned a proposed new constitution that required anyone who wanted to run for 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 AfCHPR 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.

2.11 The American Convention on Human Rights

[Article 1](#) of the AmCHR prohibits discrimination 'for reasons of national or social origin.' In *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* A No. 4 (1984) 5 HRLJ 161 (Advisory Opinion OC-4/84), the IACHR held that Costa Rica's proposed criteria for naturalisation, which provided for the different treatment of persons of Central-American, Ibero-Spanish or Spanish citizenship, than treatment given to those of another national origin, were permissible.

Advisory Opinion No. 4 – Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (IACHR)

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 origins (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 Court 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). It found that there was no 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 Court also noted that, though the equality provisions of the Convention under Articles 1(1) and 24 overlap, they have different conceptual origins. Article 1(1) is a parasitic provision in which the prohibition of discrimination only applies to provisions of the Convention, whereas Article 24 is a free-standing equality right that mandates equality in the application of any domestic legal norm. However, Article 24 must be interpreted with reference to the list of prohibited grounds under Article 1(1).

The IACtHR then held that 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.'

Finally, the Court found that the 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 was not justified.

- In *Ivcher Bronstein v Peru* (Case 11.762, Report No. 20/98, 3 March 1998), 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 behind removing his citizenship rights was seemingly to prevent him having editorial control over the television company. 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. In addition, the Court found a violation of the rights to a fair trial, judicial protection, property and freedom of expression.
- In *Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion OC-18/03)*, the IACtHR examined the issue of discrimination against migrant workers.

Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion OC-18/03) (AmCHR)

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 Court made a number of important points regarding the equality provisions of the Convention.

Regarding the principle of equality in general, it stated that 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 orders 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).

In reference to the nature of the State parties' obligations to prevent discrimination, the Court held that the obligation under the Convention 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). Applying this obligation to the equality provisions of the Convention, the Court 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.' (paragraph 104)

Furthermore, 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)

Finally, the Court held that the obligation to respect and ensure the labour human 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 allow the contractual relationship to violate minimum international standards.

The case *Dilcia Yean and Violeta Bosico v Dominican Republic* (Series C No. 130, 08 September 2005) concerned two girls of paternal Haitian origin who were born in the Dominican Republic but denied Dominican nationality despite the fact that the Constitution guarantees nationality to everyone born in the country. As a result of being denied Dominican nationality, the girls could not enrol in school and remained vulnerable to expulsion from the country. The IACtHR considered the case within the overall social context and vulnerable situation of Haitians and Dominicans of Haitian origin in the Dominican Republic. The issue in this case arose when a late application was made for a declaration of the birth of the children, as was the common practice of most Haitians in the Dominican Republic and Dominicans of Haitian origin. Under the legislation applicable at that time, late declarations could only be lodged before the child reached 13 years of age. While taking into account the existing situation of Haitians in the Dominican Republic, the Court noted that the circumstances of Yean and Bosico did not differ from other Dominican children and therefore the discriminatory burden of proof imposed was unjustified and disproportionate (paragraph 165). The Court went on to state (at paragraph 166) that:

by applying to the children requirements that differed from those requisite for children under 13 years of age in order to obtain nationality, the State acted arbitrarily, without using reasonable and objective criteria, and in a way that was contrary to the superior interest of the child, which constitutes

discriminatory treatment to the detriment of the children Dilcia Yean and Violeta Bosico. This situation placed them outside the State's juridical system and kept them stateless, which placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights.

The Court concluded that the Dominican Republic's discriminatory application of nationality and birth registration laws and regulations rendered children of Haitian descent stateless and unable to access other critical rights, such as the right to education, the right to recognition of juridical personality, the right to a name, and the right to equal protection before the law.

E LANGUAGE

Useful links: Language Rights

- [Links to instruments on language rights](#)
- See also www.ciemen.org/mercator/index-gb.htm
- [The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities](#)
- [The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#)
- [The European Charter for Regional or Minority Languages](#)

1 Introduction

Discrimination on grounds of language is prohibited by almost all of the main international human rights instruments. It can be distinguished from the language rights that are an aspect of minority rights because 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](#). As 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 prominent issue of linguistic rights. In the body of norms of international law, the concept of language rights is currently still at an embryonic stage. The main universally applicable norm of treaty law, [Article 27](#) of the ICCPR only foresees that individuals belonging to a minority 'shall not be denied the right to speak their language.' There are, however, a whole series of instruments that deal with the issue of linguistic rights in an ancillary way and many 'soft' law instruments that explicitly address language rights. In addition, like in the case of race, the 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 The 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 of the nature and cause of the charge against them in a language they understand 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 speaks 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* (Nos. 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 that an essential element of the concept of a fair trial under Article 14 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, in his meetings with the lawyer he had the assistance of an interpreter, and 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 ‘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 practise their own religion, or to use their own language.’ In [General Comment No. 28](#), 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.

The HRC has also 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, such as the lack of informational 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 requirement to use the French language applied to both groups, regardless of their use of language. A French-speaking entrepreneur wishing to appeal to the English-speaking population of the province in their language was equally prohibited from doing so. Therefore, the HRC held that there was no violation of Article 26. In doing so, the HRC ignored the disparate impact of the requirement on English speakers. In other words, it failed to take into account that the law’s apparent neutrality had a greater potential to adversely affect an English

advertiser with English clientele, rather than French advertisers. In addition, the HRC held 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. At the same time, the HRC 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) because they were disproportionate to achieve that aim. The HRC did find 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. indirectly discriminated against) 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 had 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, as required by law in order to stand for election. The HRC noted that Article 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any distinction made on the basis of grounds mentioned in Article 2, including language. It 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 had 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 The 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, at present, there is no individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. Currently, three States have ratified the Optional Protocol to the ICESCR, which does establish a system for lodging individual complaints under the Covenant. The Protocol will come into force when it has been ratified by ten States. 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 however 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 The 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 *Emir Sefic v Denmark* (No. 032/2003, CERD), the CERD considered a complaint of a failure by the State to protect the applicant against discrimination on the ground of language when an insurance company refused to give him motor insurance on the basis that he could not speak Danish. The Committee held that the reasons given by the insurance company for the requirement, namely the ability of the company to communicate

with the applicant and their lack of resources to hire people who could speak different languages, was reasonable and objective. Therefore, the different treatment was not in breach of the Convention.

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

As CEDAW primarily addresses discrimination against women, it does not explicitly prohibit language discrimination. However, language 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. See Chapter II [above](#) for more information.

2.5 The Convention on the Rights of the Child

There are a number of provisions of the CRC relevant to language discrimination. Articles 17 and 29 encourage the protection of language and linguistic minorities in a general sense, while Articles 30 and 40 provide individual rights to prevent and prohibit discrimination on the ground of language.

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.’ 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 The Convention on the Rights of Persons with Disabilities

Preamble paragraph (p) states that States parties are concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of several grounds, including language. Accordingly, Article 5(2) includes a reference to the prohibition of all discrimination on the basis of disability and to guarantee persons with disabilities equal and effective legal protection against such discrimination on all grounds.

To encompass the specific communication needs of disabled persons, the Convention provides a very inclusive definition of language. Article 2 states that it includes ‘spoken and signed languages and other forms of non-spoken languages.’ As regards accessibility to public buildings and services, Article 9(2)(e) places an obligation on States to provide a sign language interpreter. Article 21 guarantees the freedom of expression of disabled persons and in order to ensure this is effective, subparagraphs (b) and (e) require States parties to accept and facilitate the use of sign language, Braille and other forms of alternative communication used by disabled persons, as well as recognise and promote the use of sign language. Article 24 then guarantees the life and social development of disabled persons by obligating the State to facilitate the deaf to learn sign language and promote their linguistic identity, as well as ensure the

education of blind, deaf and deaf-blind disabled persons, particularly children, is delivered to them in the most appropriate language and mode of communication (Articles 24(3)(b) and (c)). In order to ensure this, the State is specifically required to take appropriate measures to employ teachers with sign language skills as well as provide for the training of professionals and staff in Braille and sign language. Finally, Article 30(4) provides for the right of disabled persons to recognition of their cultural and linguistic identity, including sign language and deaf culture.

2.7 The International Labour Organization

Article 1 of the [Discrimination \(Employment and Occupation Convention\) \(No. 111\)](#) only prohibits discrimination on the grounds of race, colour, national extraction or social origin in employment or occupation. However, 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.

2.8 The 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](#) (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968), 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 July 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, 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 in their freedom of expression on the basis of language or national origin, in breach of Article 14 taken in conjunction with Article 10. In assessing the compliance of the measure 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 violated Article 10. As a result, the Court did not consider it necessary to further examine the Article 14 complaint.
- *Kamasinski v Austria* (No. 9783/82, 19 December 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, 02 March 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 No. 1. The ECtHR held that, in the context of the overall structure of the Belgian State, there was no violation of Article 14.

- In the case of *Oršuš and Others v Croatia* (No. 15766/03, Chamber judgment 17 July 2008 and Grand Chamber judgment 06 March 2010) Roma children were placed in Roma-only classes, which the State claimed was due to their inadequate knowledge of the Croatian language. In the Chamber, the ECtHR accepted the State's justification for the difference in treatment and found that it was not only objective and reasonable but also a positive measure to place Roma children in separate classes in order to cater to their special linguistic needs. The Grand Chamber, however, highlighted that it was only Roma children that were segregated into different classes and there were protests by Croatian parents against the placing of Roma children in mixed classes with Croatian children, which indicated that the applicants were separated on the basis of their ethnic origin. The Grand Chamber reaffirmed that a distinction on the basis of language is not an automatic violation of Article 14 of the ECHR if there is an objective and reasonable justification for the difference. However, 'when such a measure disproportionately or even, as in the present case, exclusively, affects members of a specific ethnic group, then appropriate safeguards have to be put in place' (paragraph 157). Thus, the segregation of the applicants into different classes on the basis of their linguistic capabilities required a strict degree of scrutiny because it affected only members of a specific ethnic group. In the case, the Court found that the State failed to provide a number of safeguards to ensure the differentiating measures were proportional. Namely, there was no legal basis for the separation of the applicants into different classes, the applicants were not specifically tested to gauge their knowledge of the Croatian language, the curriculum provided in the Roma-only classes was reduced without a proper legal basis and there was no specific programme in place to address their insufficient knowledge of the national language. Finally, the State had not established a system to provide for the transfer of Roma children to mixed classes once their knowledge of the Croatian language reached an appropriate level. As a result of its failure to provide these safeguards, the ECtHR held that there was no 'reasonable relationship of proportionality' between the discriminatory measures taken and the legitimate aim that such measures sought to achieve. Accordingly, there was a violation of Article 14 in conjunction with the right to education under Article 2 of Protocol No. 1.

2.9 The European Union

The EU [Framework Directive](#) does not include language as one of its prohibited grounds of discrimination. The EU [Race Directive](#) on the other hand, 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 generally permitted recruitment conditions, 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 379/87, Groener v Minister for Education* [1989] ECR 3967.

2.10 The 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 v 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.'

2.11 The 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

- [The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief](#)
- [The International Convention on the Protection of the Rights of Migrant Workers](#)

1 Introduction

Freedom of religion is one of the most protected 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 faith 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.

More recently, difficulties have arisen with regard to the formation of new religious movements and faiths. This issue has sparked debates in many countries and led some States to enact special regulations (see the various reports issued by the UN Special Rapporteur on freedom of religion or belief). On 22 June 1999, the Council of Europe adopted Recommendation 1412 on the Illegal Activities of Sects (22 June 1999). The Council considered it ‘undesirable’ to enact major legislation on sects and reaffirmed its commitment to freedom of conscience and religion. This represents the general position under international human rights law, which is to protect 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 guarantees the cultural and religious needs of such migrants, including a prohibition of discrimination against such groups on the basis of religion (Article 1), as regards the provision of the rights under the Convention. 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 36/55 (1981).

2.1 The 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 and Article 24 provides guarantees against discrimination on grounds of religion for minors.

- In *Bhinder Singh v Canada* (No. 208/1986, ICCPR) the HRC found that although the Canadian law requiring workers to wear hard hats in certain jobs for safety reasons indirectly created differential treatment on the ground of religion, it did not discriminate against Sikhs, who are required by their religion to wear a turban. This was because the requirement to wear hard hats was reasonable and directed towards objective purposes (the workers' safety), which were 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. As a result, he was required to meet the full cost of his children's education in a school of a different religion. The HRC felt that neither the fact that the privileged treatment of Catholic schools is enshrined in the Ontario constitution nor the objectives of the system argued by the State, 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. See also *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka* (No. 1249/2004, ICCPR).

2.2 The 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 not yet an 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. Therefore, to the extent that a person is discriminated against in their economic, social and cultural rights, on the basis of their religion, the HRC would be competent under Article 26 of the ICCPR, to handle the individual complaint. In addition, an individual complaints mechanism for the ICESCR has been established in the Optional Protocol to the ICESCR. At present only three States have ratified the Protocol and it will not come into force until ten States have done so.

2.3 The 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 The 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. See Chapter II above for more information.

2.5 The 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 The Convention on the Rights of Persons with Disabilities

Preamble paragraph (p) states that States Parties are concerned about the difficult conditions faced by persons with disabilities that are subject to multiple or aggravated forms of discrimination on the basis of several grounds, including religion. Accordingly, Article 5(2) includes a reference to the prohibition of *all* discrimination on the basis of disability and to guarantee persons with disabilities equal and effective legal protection against such discrimination on *all* grounds.

2.7 The 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 have 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.

2.8 The 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.

2.8.1 Privacy and Family Life

- In *Hoffmann v Austria* (No. 12875/87, 23 June 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, for reasons related to the applicant's faith, the father would be better able to protect the children's interests. In accordance with her faith, the applicant would not authorise blood transfusions for the children and the Austrian Supreme Court considered that 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 'respect for his private and family life, his home and his correspondence.' In addition, 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 December 2003), a national court decision granted custody of the applicant's children to their father and only access and residence rights to the applicant, who was a Jehovah's Witness. The national court observed that the rules her religion imposed regarding the upbringing of 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 treated the parents differently on the ground of 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 without practical, direct evidence that the applicant's religion had influenced the children's upbringing or daily life. As a result, although its reasoning for interfering with the applicant's family life was relevant, it was ultimately insufficient. Therefore the ECtHR concluded that there had not been a reasonably proportionate relationship between the means employed and the aim pursued.

2.8.2 Employment

- In *Thlimmenos v Greece* (No. 34369/97, 06 April 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 so 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.

2.8.3 Proselytism

- In *Larissis and others v Greece* (Nos. 23372/94, 26377/94 and 26378/94, 24 February 1998), the three applicants were officers in a unit of the Greek air force and all of them were 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 of 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). It was not disputed that the applicants’ convictions amounted to an interference with their Article 9 rights and, therefore, the question to be determined by the Court 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 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). In the case of the civilians, because the State provided no evidence of improper pressure by the applicants, the convictions did breach Article 9.

2.8.4 Legal Personality

- In *Canea Catholic Church v Greece* (No. 25528/94, 16 December 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.

2.8.5 Property

- In *The Holy Monasteries v Greece* (Nos. 13092/87 and 13984/88, 09 December 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), they did not affect the celebration of divine worship and therefore did not interfere with the exercise of freedom of religion.

2.8.6 Education

- In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (Nos. 5095/71, 5920/72 and 5926/72, 07 December 1976), the applicants were parents who objected to their children receiving compulsory sex education at a 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 (right to education in conformity with religious beliefs). The ECtHR addressed at length the scope of the State obligations under Article 2 of Protocol No. 1. 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 alternative choice of placing their children in private schools or educating them at home. Nor did the ECtHR find any evidence to support a violation of Articles 8, 9 or 14.

2.8.7 Religious Activities

• The case of *Cha’are Shalom Ve Tsedek v France* (No. 27417/95, 27 June 2000) 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 is in accordance with the principles found in the Torah. The applicants alleged a violation of Article 9 alone and in conjunction with Article 14. They complained of a breach of the prohibition of discrimination on the ground of religion because the French authorities had granted such approval exclusively to the Jewish Consistorial Association of Paris. 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.’ In this case, it was accepted that the applicants could in fact obtain such meat elsewhere. The court found that the French authorities pursued the legitimate aim of ‘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.’

2.9 The 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 members States to introduce measures to eliminate discrimination on the grounds of religion or belief, disability, age or sexual orientation. The Framework Directive applies in the employment and occupation context and to vocational guidance and training, and membership of professional, workers’ and employers’ bodies. It does not apply to social security or social protection schemes. The broad definition of discrimination prohibits both direct and indirect forms of discrimination, as well as harassment. Member States are required to implement the Directive in national law.

The Framework Directive permits differential treatment to be justified 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.

2.10 The 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, as well as the profession and practice of religion.

- In *Free Legal Assistance Group, Les Temoins de Jehovah and others / Zaire* (Nos. 25/89, 47/90, 56/91 and 100/93), Jehovah's Witnesses alleged that they were being persecuted by the Zairian 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, however it did not further consider the case under Article 2.

2.11 The 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

- [The text of the CRPD and its Optional Protocol](#)
- [Information on the CRPD](#)
- [Status of ratification of the CRPD and its Optional Protocol](#)
- [The Handbook for Parliamentarians on the CRPD and its Optional Protocol](#)
- [The Center for an Accessible Society, The Definition of Disability \(a discussion of the medical model of disability\)](#)
- [Theresia Degener and Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform* \(a discussion of the social rights \(or human rights\) model\)](#)
- [The EU Disability Strategy](#)
- [The Inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities](#)

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).
- Bartlett, Lewis and Thorold, *Mental Disability and the European Convention on Human Rights* (2007).
- Gerard Quinn and Lisa Waddington, *European Yearbook of Disability Law*, Volume 1 (2009) / Volume 2 (2011).

1 Introduction

1.1 Recognition of Disability Discrimination

As previously discussed in Chapter II, it has only recently been acknowledged that disabled persons require protection against discrimination. Traditionally, disabled persons have been depicted as objects of welfare, health and charity programmes rather than subjects of legal rights.

- The *medical* model of disability assumes that the person with an impairment or condition is the problem and the remedy that is required 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 support.

1.2 Definition of Disability

There is no general agreement on the definition of disability. According to the *social model*, disability should be understood as the negative interaction between a person's environment and his/her impairment. It is considered to be the result of a process, which occurs when people with impairments experience barriers to their full participation in society and their recognition, enjoyment or exercise of human rights and fundamental freedoms in their civil, political, economic, social or cultural life, or in any other field of human endeavour. The social model emphasises the societal (i.e. environmental, institutional and attitudinal) barriers that result in the exclusion of people with disabilities.

In keeping with the social model of disability, in preambular paragraph (e), the CRPD recognises that disability is 'an evolving concept and that [it] results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.' Regarding the description of which individuals are considered to have a disability, the Convention introduced a very broad formulation. Article 1(2) states that 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

On the domestic level, the approach of States to defining disability is very diverse. Some 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, promoted by the CRPD, the most relevant evidence of disability is a measurement of 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 programs and services.

The medical model on the other hand, features in legislation such as the American with Disabilities Act (ADA) and the UK Disability Discrimination Act (DDA). The ADA defined a person with a disability as someone with a physical or mental impairment that *substantially limits one or more major life activities*, a person with a history or record of such impairment, or a person who is perceived by others as having such an impairment, although it does not specifically name all of the impairments that are envisaged. Similarly, according to the DDA, disability is understood as a physical or mental impairment which has a substantial and long-term adverse effect on the persons' ability to carry out normal day-to-day activities.

1.3 Developments in Disability Discrimination Law

While there have been recent significant developments in disability discrimination law on the international and regional level, with the introduction of the CRPD and the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, a number of key concepts that now permeate the broader level were first developed in domestic jurisdictions. For example, the concept of ‘reasonable accommodation’ or ‘reasonable adjustment’ discussed in Chapter III [above](#), which was developed in national jurisdictions such as the US, Canada and the United Kingdom and is now required by Article 5 of the EU Framework Directive and defined in [Article 2](#) of the CRPD. Other national law developments include the recognition that a comparator ought not to be used in disability cases. In particular, there is a wealth of significant Canadian jurisprudence 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

Gradually, there has been increased protection of the equal rights of persons with disabilities on the international and regional level. This has occurred through both the introduction of key instruments, such as the CRPD, and by the interpretation of existing provisions to provide broader protection against disability discrimination.

2.1 The 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 No. 5 on the ICESCR indicates that the ICESCR and ICCPR both prohibit discrimination on grounds of disability.

In the case of *Brough v Australia* (No. 1184/2003, ICCPR), however, the HRC considered the rights of disabled persons through the prism of Article 24, which concerns the specific rights of children. The author complained of being discriminated against on multiple grounds because he was an Aboriginal and suffered from a mild mental disability that caused significant impairments to his adaptive behaviour, communication skills and cognitive functioning. When he was convicted for burglary as a minor, he was transferred from a juvenile detention centre to an adult correctional facility because he participated in a riot. There, he was placed in solitary confinement, where his clothes and blanket were removed, he was exposed to artificial light for prolonged periods and he had no possibility of any communication. The HRC concluded that such treatment, although intended for the legitimate purpose of maintaining prison order or to protect the author from self-harm and harm to other prisoners, was incompatible with the requirements of Article 10, paragraphs 1 and 3 (humane treatment of persons deprived of their liberty), together with Article 24, in view of him being a ‘juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal’ (paragraph 9.4).

2.2 The 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, but the Covenant does not have an equivalent to the ICCPR’s Article 26. Under the Optional Protocol to the ICESCR, an individual complaints mechanism for the Covenant has been established but not enough State parties have yet ratified the Optional Protocol for it to come into force. As a result, there is no jurisprudence from the CESCR to guide the interpretation of the Covenant.

However, the Committee gave a definition for disability-based discrimination under the ICESCR in its [General Comment No. 5](#). They stated that it includes ‘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.’ In particular, the General Comment emphasised the positive obligations of states regarding disability discrimination. The CESCR stated that ‘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.’

It should also be noted that 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. Therefore, to the extent that the economic, social and cultural rights of disabled persons are affected, the HRC has the authority to consider such complaints.

2.3 The International Convention on the Rights of all Persons with Disabilities

The [UN Convention on the Rights of Persons with Disabilities](#), which came into force on 3 May 2008, is the first binding international instrument on disability. The CRPD provides comprehensive protection of all human rights and fundamental freedoms for persons with disabilities. International monitoring of the CRPD is implemented by the Committee on the Rights of Persons with Disabilities, comprised of a maximum of 18 independent experts. The Conference of States parties made up of signatories to the Convention will have the authority to consider any matter regarding the implementation of the Convention.

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity. It introduces a definition for discrimination on the basis of disability that includes both direct and indirect discrimination and establishes the novel concept that a denial of reasonable accommodation is classified as discrimination (under Article 2). Article 3 then provides that the principle of non-discrimination and equality of opportunities is a general principle permeating the Convention and Article 5 permits States to take positive action to remedy the disadvantage experienced by persons with disabilities.

The Optional Protocol to the CRPD is a separate treaty which establishes a complaints procedure and an inquiry procedure. The complaints procedure allows for individual complaints to be lodged with the Committee where there is an allegation that a State party has violated its obligations under the CRPD and where the complainant has exhausted all available domestic remedies. The inquiry procedure allows the Committee to initiate its own inquiries where there is information to suggest that a State party has engaged in grave or systematic violations of the CRPD.

2.4 The 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.

2.5 The 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 \(Women and Health\)](#)). See Chapter II above for more information on CEDAW.

2.6 The 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 parent's or legal guardians disability. See also Article 23. As noted in Chapter II, there is no individual complaint mechanism under the CRC.

2.7 The International Labour Organization

The ILO [Vocational Rehabilitation and Employment \(Disabled Persons\) Convention](#), 1983 (No. 159) 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.

2.8 The European Convention on Human Rights

Like the ICCPR, Article 14 of the ECHR does not explicitly prohibit disability discrimination. In the case of *Glor v Switzerland* (No. 13444/04, 30 April 2009), the ECtHR interpreted the 'other status' language of the provision as including a prohibition of discrimination against persons with disabilities for the first time. Prior to this, the ECHR had considered a number of cases concerning the rights of disabled persons but not under Article 14.

- In *Herzcegfalvy v Austria* (No. 10533/83, 24 September 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 July 2001), the ECtHR demonstrated the application of the protection against inhuman and degrading treatment to people with disabilities, under Article 3, which states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Ms Price, who had a physical disability that required her to use a wheelchair, was placed in jail for seven days in a cell that was not adapted for a person with disabilities. As a result, she was forced to sleep in her wheelchair, the toilet was not accessible and emergency buttons and light switches were out of her reach. In addition, 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 there was degrading treatment in violation of the Convention because, even though there was 'no evidence in this case of any positive intention to humiliate or debase the applicant', the failure to accommodate her needs caused her great suffering. See also the case of *Vincent v France* (No. 6253/03, 24 October 2006) and the section on degrading treatment in Chapter VI.
- In *Botta v Italy* (No. 21439/93, 24 February 1998), the applicant, a disabled man, was unable to gain access to the beach and the sea at a 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 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, namely access to the beach and the sea at a place distant from his normal place of residence during his holidays, fell within the scope of the concept of 'respect for private...life' set forth in Article 8 of the Convention. The Court found that the right asserted 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.' It therefore 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. 38621/97, 14 May 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 guaranteed 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 April 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 submitted that such legislation was discriminatory because it prevented the disabled, but not the able-bodied, exercising their right to commit suicide. She relied on the *Thlimmenos v Greece* (No. 34369/97, 06 April 2000) judgment (discussed above under 'indirect discrimination') and claimed that the State indirectly discriminated against her by treating her the same way as the ordinary person, without taking into account her particular circumstances. However, the ECtHR agreed with the domestic court and held that the relevant legislation did not create a right to commit suicide in domestic law. Therefore, there was no basis for her claim.

The case of *Glor v Switzerland* (No. 13444/04, 30 April 2009) represents an important development in the ECtHR's jurisprudence on disability in that it is the first time the Court found a violation of the right to non-discrimination on the basis of the applicant's disability, and it is the first time the Court referred to the CRPD, calling it the basis for the existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment.

***Glor v Switzerland* (ECHR)**

In this case, the applicant, who suffered from diabetes, complained that he was discriminated against on the ground of his disability because he was subjected to a tax for not undergoing his mandatory military service. Although the applicant indicated his willingness to participate, he was declared unfit for military service and discharged from the Civil Protection Service on the basis of his diabetes, which required him to take daily insulin injections.

The ECtHR held that the applicant was subjected to a difference of treatment in two respects – persons with more severe disabilities were exempt from the tax and the applicant could not undergo alternative civil service, which was reserved for conscientious objectors.

The Court held that the State provided no objective and reasonable justification for the exemption of persons with more severe disabilities from the tax while requiring the applicant to pay the tax. Furthermore, it was critical of the fact the State did not provide reasonable accommodation to the applicant so he could carry out his mandatory civil service in a manner compatible with his disability. As a result, there had been a violation of Article 14 of the ECHR in conjunction with Article 8.

On 29 January 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1592 (2003), entitled 'Towards Full Social Inclusion of Persons with Disabilities' (See Doc. 9632). The recommendation adopts a social rights model of disability:

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 then goes on to state that:

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.

2.9 The European Social Charter (Revised)

The case *International Association Autism-Europe (IAAE) v France* (No. 13/2002, ESC) relates to Article 15 (the right of persons with disabilities), Article 17 (the right of children and young persons to social, legal and economic protection) and Article E (non-discrimination) of the Revised European Social Charter. The complainants alleged that the insufficient provision of education for autistic persons constituted a violation of these provisions. In particular, Autism-Europe asked the Committee to rule that France was failing to satisfactorily fulfil its obligations under the above-mentioned Articles by not providing autistic children and adults an effective right to education, in sufficient numbers and to an adequate standard, in mainstream schooling or through adequately supported placements in specialised institutions that offer education and related services.

In relation to Article E, the Committee noted that ‘Although disability is not explicitly listed as a prohibited ground of discrimination under Article E, the Committee considers that it is adequately covered by the reference to ‘other status’.’ Furthermore, they stated:

Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all (paragraphs 51 and 52).

The Committee concluded that France violated Articles 15(1) and 17(1), alone or read in conjunction with Article E of the revised European Social Charter, because the State failed to take sufficient action to secure children and adults with autism a right to education as effective as that of all other children.

2.10 The 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 those grounds. The Framework Directive prohibits discrimination in employment, vocational guidance and training, as well as membership of professional, workers’ and employers’ bodies, but it does not apply to social security or social protection schemes. The broad definition of discrimination prohibits both direct and indirect forms of discrimination, as well as harassment. 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 for implementation of the provisions on disability discrimination. This is subject to the obligation to inform the European Commission of any such decision and to report annually.

- In the case of *Case C-13/05, Sonia Chacón Navas v Eurest Colectividades SA* (11 July 2006), which concerned a woman who was dismissed from her job on the ground that she had been declared unfit for work due to an illness, the ECJ defined the concept of disability under the Framework Directive. It held that ‘the concept of ‘disability’ must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life’ (paragraph 43). The Court thus endorsed a medical model for the definition of disability. In that case, the ECJ held that there is a distinction between disability and sickness and that accordingly, the Framework Directive does not protect persons who fall ill from discrimination in the employment context. The Court also clarified that the proviso in Recital 17, which does not require an employer to hire, promote or maintain an individual in employment ‘who is not competent, capable and available to perform the essential functions of the post concerned,’ may not be used by an employer to dismiss a disabled person if the employer has not provided reasonable accommodation that provides the disabled person with the opportunity to fulfil the essential functions of the position.
- In *Case C-303/06, S. Coleman v Attridge Law and Steve Law*, the ECJ held that the general prohibition of discrimination on the grounds of disability under the Framework Directive not only applies to persons who are disabled but also to persons who are discriminated against because of their relation to a person who is disabled. In that case, the applicant complained that she was subjected to unfavourable treatment and harassment by her employer on the basis that she was the primary carer of her disabled child. The ECJ adopted a broad definition of the prohibition of discrimination by stating that ‘The principle of equal treatment enshrined in the directive...applies not to a particular category of person but by reference to the grounds mentioned in Article 1’ (paragraph 38). Although the applicant who was directly discriminated against on the ground of disability, was not herself disabled, it was the fact of the disability that led to her being treated less favourably than other employees.

2.11 The African Charter on Human and Peoples’ Rights

The African Charter does not explicitly address discrimination on grounds of disability. Like in the case of the ECHR, discrimination on grounds of disability may be prohibited by the ‘or other status’ language in Article 2.

2.12 The American Convention on Human Rights

The AmCHR does not directly address discrimination on grounds of disability. However, there have been 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 v Ecuador (AmCHR)

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 apply 'special standards to the determination of whether the provisions of the Convention have been complied with in cases involving persons suffering from mental illnesses.' It was also the first time the IACHR relied 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, which was the first binding human rights treaty on disability. While it does not contain individual rights, it was the first regional treaty to define disability-based discrimination.

Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities

Article 1

For the purposes of this Convention, the following terms are defined:

1. Disability

The term "disability" means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.

2. Discrimination against persons with disabilities

a. The term "discrimination against persons with disabilities" means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of 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 right 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.

Article 2

The objectives of this Convention are to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.

Ximenes-Lopes v Brazil (AmCHR)

In August 2006, the IACtHR delivered the judgment in the ground-breaking case of *Ximenes Lopes v Brazil*. This is the first ever case to be considered by the Court in relation to human rights violations related to persons with disabilities. The alleged victim was hospitalised on 1 October 1999 as part of a psychiatric treatment in Casa de Reposo Guararapes, which is a private psychiatric clinic that operated in the public health system of Brazil, called the Uniform Health System. Ximenes-Lopes died on 4 October 1999 in Casa de Reposo Guararapes after three days of hospitalisation. A medical report was released the same day certifying the cause of his death as 'cardio-respiratory arrest.' However, hours before his death, his mother had visited him and found him completely naked with his hands tied and there was evidence that he had suffered bodily injuries. The IACtHR accordingly found Brazil in violation of the right to life and humane treatment, as well as the right to a fair trial and to judicial protection under Article 1(1) of the AmCHR.

In considering the case, the IACtHR first established the State's obligations to protect the rights of persons with mental disabilities. In relation to the outsourcing of public services provision to private entities, the Court noted that States are directly liable for acts performed by such entities and they are responsible for protecting the public interest concerned. In particular, it stated (at paragraph 96) that:

delegating the performance of such services to private institutions requires as an essential element the responsibility of the States to supervise their performance in order to guarantee the effective protection of the human rights of the individuals under the jurisdiction thereof and the rendering of such services to the population on the basis of non-discrimination and as effectively as possible.

The Court relied on the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities and reiterated the obligations of the State under Article 1 of the Convention to take measures to prevent discrimination associated with mental disabilities, to promote the full integration of such persons into society, and to investigate claims of a violation of the right to life and personal integrity made by Damiao Ximenes-Lopes. Ultimately, the IACtHR found that Brazil lacked in due diligence by failing to immediately commence the investigation of the events, which prevented, among other things, the timely preservation and gathering of evidence and the identification of eyewitnesses. It also found a violation of the right to a fair trial in that the six-year delay to the criminal proceedings was not justified and reasonable. The significance of this case is that the IACtHR dealt with the cruel and discriminatory treatment of people suffering from psychological disorders and acknowledged the vulnerable situation to which these people are subjected to.

Useful links: Age

- [The UN Principles for Older Persons](#)
- [The US Age Discrimination in Employment Act \(1967\)](#)

1 Introduction

In the past, age discrimination has received little attention in international human rights law. While there have been initiatives, such as the UN Principles for Older Persons adopted by the UN General Assembly in 1991, none of the most important international human rights instruments explicitly prohibits discrimination on the basis of age. As noted in CESCR [General Comment No. 6](#) (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 may result from making broad stereotypes about age rather than assessing a person’s capability. 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 this discrimination occurs, younger persons are routinely hired over older persons with limited or no comparative assessment of their respective abilities.

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. Indeed, 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.’ 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 prohibit discrimination on the basis of age. See, for example, the Age Discrimination in Employment Act (1967) in the United States. 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 the universities’ policies of mandatory retirement at age 65 violated, among other provisions, section 15 of the Canadian Charter of Rights and Freedoms, 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 on the right to equality. In particular, the 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. Accordingly, the pressing and substantial objectives of ensuring broad access to scarce university resources outweighed the negative impact on the applicants.

- In *Gosselin v Quebec (Attorney General)* [2002] 4 S.C.R. 429, the Canadian Supreme Court found that people under 30 years old 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 a 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 also 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 The International Covenant on Civil and Political Rights

Age discrimination is prohibited as an ‘other status’ under Articles 2 and 26 of the ICCPR. See the interpretation given by CESCR in its [General Comment No. 6](#) (at paragraph 12). This has also been subsequently confirmed by case law.

- 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 she did not fulfil the age requirement (60 years). She claimed that this constituted discrimination based on age and that the age limit was arbitrary. She argued that, although she was not yet sixty, she should be entitled to a partner pass because her partner had a pensioner’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.
- In *Solis v Peru* (No. 1016/2001, ICCPR), the author was dismissed because of his age from his position as a public servant at the National Customs Authority, when it was being reorganised. He complained of being discriminated against on the basis of his age. The HRC reaffirmed its finding that Article 26 covers age discrimination under the ‘other status’ ground and noted that the same reasoning applied to Article 25(c) on the right of access to public service, together with Article 2(1). Consequently, the Committee found that setting age as one criteria for the implementation of a general plan for restructuring the civil service was not unreasonable, thus there was no violation of Article 25(c).

2.2 The 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 not yet an individual complaint mechanism under the ICESCR and so there is no CDESCR jurisprudence to guide interpretation of the Covenant. However, in *Broeks v the Netherlands* (No. 172/1984, ICCPR) 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. Furthermore, CDESCR General Comment No. 6 suggests that the ‘other status’ language in Article 2(1) was intended to include a prohibition of age discrimination.

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

ICERD does not explicitly address discrimination on grounds of age.

2.4 The 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. However, age 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. See Chapter II [above](#) for more information.

In the context of employment, Article 11(1) of CEDAW also 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 The 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 the basis of the child’s, his or her parent’s or legal guardians ‘other status.’ Like in the case of the ICCPR and ICESCR, this may be interpreted to include age.

2.6 The Convention on the Rights of Persons with Disabilities

The CRPD incorporated the so-called ‘twin track approach’ to children’s issues, by not only establishing a specific Article on children with disabilities (Article 7) that can be read in conjunction with all the Articles in the Convention, but also by including specific references to children in several Articles.

Article 7 includes two key concepts taken from the CRC: the best interest of the child; and the right of children with disabilities, on an equal basis with other children, to express their views freely and have those views given due weight in accordance with their age and maturity.

Moreover, preamble paragraph (p) acknowledges that States parties are concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of several grounds, including age. Also, Article 5(2) guarantees persons with disabilities equal and effective legal protection against such discrimination on all grounds, which could include discrimination on the basis of age.

2.7 The 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) 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,' thereby member States can introduce legislation prohibiting age discrimination on their own initiative. Indeed, the ILO notes in the General Survey that many members have introduced age as a prohibited ground in domestic legislation.

2.8 The European Convention on Human Rights

The ECHR does not explicitly address discrimination on grounds of age. However, once again, 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 December 1999) and *T. v the United Kingdom* (No. 24724/94, 16 December 1999).

2.9 The 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 in employment and occupations on the grounds of religion or belief, disability, age or sexual orientation. This Directive applies to employment, vocational guidance and training, and membership of professional, workers' and employers' bodies, but does not apply to social security or social protection schemes. The broad definition of discrimination in the Directive includes a prohibition of both direct and indirect forms of discrimination, as well as harassment. Member States are required to implement the Directive in national law.

The Framework Directive contains a number of exemptions to differential treatment, which apply specifically to different treatment based on age. Article 3 provides that age discrimination provisions shall not apply to the armed forces. Article 6 provides a general exemption to age discrimination if the measures are 'objectively and reasonably justified,' such as certain minimum or maximum age requirements to receive social benefits. For a more complete description, see Chapter II on the EU Directives.

2.10 The 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](#).

2.11 The 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](#).

1 Introduction

The prohibition of discrimination on the basis of ‘political or other opinion’ suggests that protection will be given to activities expressing or demonstrating opposition to the established political principles, system or rulers, or simply the expression of a different opinion or ideology. However, 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 an ability to perform the 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) or 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 ‘requirements 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 The 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 range of cases in which discrimination on this ground has arisen.

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 held that the prolongation of the term for alternative civilian service was based on reasonable and objective criteria. Regarding military service, see also *Gueye v France* (No. 196/1983, ICCPR).
- 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 and 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 v France* (No. 196/1983, ICCPR) 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).
- In *Yoon and Choi v Republic of Korea* (Nos. 1321/2004 and 1322/2004, ICCPR), the authors were Jehovah's Witnesses and had refused to be drafted on the account of their religious beliefs and conscience. They complained that the absence of alternatives to compulsory military service resulting in their criminal prosecution and imprisonment was in breach of their rights to freedom of religion enshrined in Article 18(1) of the Covenant. The HRC did not accept the State party's argument that restrictions under Article 18 were necessary for preservation of national security and social cohesion. It observed that:

it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. (at paragraph 8.4)

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 observed that, under the Uruguayan military regime, the latter were victims of violations of the right to equal participation in public life of all citizens under Article 25 of the ICCPR and were therefore entitled to have an effective remedy under Article 2, paragraph 3(a) of ICCPR. The Committee held that the enactment of the law by the new democratic Government, which the author complained was discriminatory, should be looked upon as such a remedy. The HRC found neither a violation of Article 25(c), nor that there had been discrimination within the meaning of Articles 2 and 26 of the Covenant. The alleged discrimination was found to be permissible affirmative action, indeed 'a measure of redress' to persons who had previously suffered from discrimination.

2.2 The 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 not yet an individual complaint mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide interpretation of the Covenant. However, the Optional Protocol to the ICESCR does establish an individual complaint mechanism but the Protocol will not come into force until it has been ratified by ten States. In addition, 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. Therefore, to the extent that a person's economic, social and cultural rights are restricted on the ground of their political beliefs or opinions, the HRC is competent to consider the complaint under Article 26 of the ICCPR.

2.3 The 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 The 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. See Chapter II [above](#) for more information.

2.5 The 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' 'political or other opinion.'

2.6 The 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 The 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 July 2001), the applicant, a Czech national, distributed a statement that 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. In 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 it 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 January 1998); *Incal v Turkey* (No. 22678/93, 09 June 1998); and *Freedom and Democracy Party (ÖZDEP) v Turkey* (No. 23885/94, 08 December 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 September 1998) and *Baskaya and Okçuoglu v Turkey* (No. 23536/94 and 24408/94, 08 July 1999). The cases of *Avsar v Turkey* (No. 25657/94, 10 July 2001) and *Kiliç v Turkey* (No. 22492/93, 28 March 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 July 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 concerning challenges to 'security' measures taken against Republicans, such as internment, or restrictions on freedom of expression, were taken on the basis of discrimination due to 'association with a national minority,' rather than political opinion (see *McKerr v the United Kingdom* (No. 28883/95, 04 May 2001), *Shanaghan v the United Kingdom* (No. 37715/97, 04 May 2001), *Kelly and others v the United Kingdom* (No. 30054/96, 04 May 2001), *McShane v the United Kingdom* (No. 43290/98, 28 May 2002), etc.).

- In *Ireland v the United Kingdom* (No. 5310/71, 18 January 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 ECtHR 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 their 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 (i.e. to first address the problem of the organisation that was most formidable before countering the other violent forces) was legitimate and the means employed were not disproportionate. Furthermore, the Court concluded that, after February 1973, there was no significant difference of treatment. Although more Republican than Loyalist terrorists were still subject to internment during this period, 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., M.K. and B.K. v the United Kingdom* (No. 19085/91, 09 December 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 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 May 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 former 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 February 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 June 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 based on the prisoner's 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 other such 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.

The ECtHR has also considered a number of cases involving dismissal from jobs based on applicants' previous involvement in the USSR Security Services. Applicants in these cases claimed unjustified discrimination by the respondent State with respect to their former political status.

- In *Rainys and Gasparavičius v Lithuania* (Nos. 70665/01 and 74345/01, 07 April 2005), the applicants were former Soviet Security Service Workers (KGB). They complained that the loss of their jobs and the prohibition on them being employed in various private sector positions until 2009, breached Article 8 (right to respect for private life), Article 14 (prohibition of discrimination), and Article 10 (right to freedom of expression). The Court emphasised that:

State-imposed restrictions on a person's opportunity to find employment with a private company for reasons of lack of loyalty to the State cannot be justified from the Convention perspective in the same manner as restrictions on access to their employment in the public service. Moreover, the very belated nature of the Act, imposing the impugned employment restrictions on the applicants a decade after the Lithuanian independence had been re-established and the applicants' KGB employment had been terminated, counts strongly in favour of a finding that the application of the Act vis-à-vis the applicants amounted to a discriminatory measure. (paragraph 36)

See also the case of *Sidabras and Dziautas v Lithuania* (Nos. 55480/00 and 59330/00, 27 July 2004) and *Žičkus v Lithuania* (No. 26652/02, 07 April 2009).

2.8 The European Union

EU law does not address directly the issue of discrimination on the grounds of political or other opinion.

2.9 The 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* (No. 205/97), the applicant had been actively campaigning for the validation of elections annulled by the Nigerian military government. He alleged that he was arbitrarily arrested, detained and tortured by Nigerian security officials because of his political inclination. The African Commission held that this was a violation of Article 3(2) (equal protection of the law).
- In *Amnesty International / Zambia* (No. 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 paragraphs 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* (No. 71/92).
- In *Kenneth Good / Botswana* (No. 313/05) the applicant was expelled from the country because he expressed his opposition to the ruling political establishment and in particular, to the system for succession of the President. Regarding the prohibition of discrimination on the ground of political opinion under the

African Charter, the Commission emphasised that ‘difference in political opinion and to be able to express it openly without fear of any kind is one of the pillars of democracy’ (paragraph 223). Although the Commission accepted that national security may be a legitimate justification for different treatment, the State did not provide an explanation as to why the political opinions of the applicant posed a threat to national security. Accordingly, there was a violation of Article 2 of the African Charter.

2.10 The 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.

- In the case of *Oscar Elias Biscet et Al. v Cuba* (Case 12.476, Report No. 67/06, 21 October 2006), as a result of a crackdown against human rights activists and independent journalists, a number of dissidents and members of the opposition were arrested and detained. Among others, the petitioners alleged violation of Article 2 (right to equality before the law) of the American Declaration on the Rights and Duties of Man on the grounds of their political opinion, which was criminalised according to the provisions of the existing Criminal Code. While the American Declaration does not mention political opinion as a ground on which differential treatment is prohibited, Article 2 is open ended and prohibits discrimination ‘on any other factor,’ which the Commission considered to include political persuasion (at paragraph 229). The IACHR noted that the Criminal Code provisions themselves were discriminatory, as they criminalised expression of a political opinion. Thus, the Cuban State was found to have violated Article 2 of the American Declaration for both enacting discriminatory laws and for engaging in the discriminatory practices that resulted from the enforcement of such laws.
- In the case of *Tomas Eduardo Cirio v Uruguay* (Case 11.500, Report No. 124/06, 27 October 2006), the petitioner – a retired army major – was penalised for expressing his political views in a letter, which consisted of accusations of human rights violations in the struggle against subversion by the Uruguayan Armed Forces. As a consequence, he was prohibited from enjoying his military entitlements and honors, and from holding a position in the Ministry of National Defence. Among other complaints, he claimed a violation of his right to equal protection (Article 24) of the American Convention in that he was removed from his position and judged by a non-judicial court (Tribunal de Honor), during which he was denied his right to defence. The Commission found that the sanctions imposed were based exclusively on the State’s interest in punishing the petitioner for his political views, which is neither objective nor reasonable. It therefore concluded that the State had violated Mr Cirio’s right to equal protection by taking punitive measures based exclusively on one of the internationally prohibited grounds for discrimination.

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 they are 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 under this ground may also be direct or indirect.

Marital status discrimination is most common in housing accommodation and employment, including: recruitment; terms and conditions of employment; promotion and transfer opportunities; leave entitlements; redundancy; and dismissal and exiting arrangements, which may involve 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 The 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, such as liability for the other spouse's maintenance, which justified the different treatment. At any rate, the author had the choice of assuming the duties and benefits of marriage. Contrast *Zwaan de Vries v the Netherlands* (No. 182/1984, ICCPR) 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) concerning the differences in survivor's benefits between married and unmarried couples.

2.1.2 Foster Children

In *Oulajin and Kaiss v the Netherlands* (Nos. 406/1990 and 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 held that there are objective differences between natural and foster children, which can justify different treatment, and that the treatment in this case was not unreasonable.

2.2 The 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 but there is no equivalent of Article 26 of the ICCPR in the ICESCR. As noted in Chapter II, there is not yet an individual complaint

mechanism under the ICESCR and so there is no ICESCR jurisprudence to guide the 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 addition, the Optional Protocol to the ICESCR establishes an individual complaints mechanism for the Covenant, however the Protocol will not come into effect until ten States have ratified it. At present, only three States have ratified the Protocol.

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

ICERD does not explicitly address discrimination on grounds of marital status. However, such 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 The 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 has not yet considered such a case. See [Chapter II above](#) for more information.

2.5 The 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 parent's or legal guardians 'other status.' Like in the case of the ICCPR and ICESCR, this may include marital status. However, 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 The Convention on the Rights of Persons with Disabilities

[Article 23\(1\)](#) of the CRPD provides that States parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships. These measures must ensure the rights of all persons with disabilities to: marry and found a family on the basis of free and full consent; to decide freely and responsibly on the number and spacing of their children; and to have access to age-appropriate information and reproductive and family planning education. The Article also specifically provides for the right of persons with disabilities, including children, to retain their fertility on an equal basis with others.

2.7 The 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\(b\)](#) 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.' Therefore, member States of the ILO can provide for the prohibition of discrimination on the basis of marital or family status under their domestic legislation on its own initiative.

2.8 The 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 February 1995) concerned the natural father of a child who had been taken into care and subsequently adopted. He claimed that UK law, which provided that he had no legal right to custody or to participate in the care proceedings for the child prior to his 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 and accord parental rights to meritorious fathers, 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 the difference in treatment had a reasonable and objective justification. Accordingly, there was no violation of Article 14.
- In *Mizzi v Malta* (No. 26111/02, 12 January 2006), the applicant complained that Maltese law discriminated against him on the grounds of his status as a legally presumed father by imposing a time limit on husbands for bringing an action to disavow paternity, which did not apply to other interested parties, such as the child or mother. The Court again noted that Article 14 safeguards individuals who are ‘placed in analogous situations’ against discriminatory differences of treatment. In this case, the Court accepted that there may have been differences between the applicant and the other interested parties which would place them in situations that were not comparable. However, it considered that, just because there are some differences between two or more individuals, this does not exclude the fact that they might be in sufficiently comparable positions and have similar interests. Ultimately, the Court found that, with regard to the interest in contesting a paternity status, the applicant and the ‘other interested parties’ were in analogous situations within the meaning of Article 14 and upheld the alleged violations.
- In a similar case, *Paulik v Slovakia* (No. 10699/05, 10 October 2006), the applicant’s paternity was wrongfully determined and later disproved by a DNA report. However, the law did not allow the applicant to challenge the judicial declaration of his paternity. Such declarations were considered final in order to maintain secure family relationships and protect the interests of children. In contrast to fathers who obtained paternity by way of a judicial determination, under the relevant legislation, fathers whose paternity was presumed, and the mother, could contest the paternity if new evidence excluding the possibility of a biological paternity came to light. On this basis, the applicant complained that the legislation was discriminatory. Notwithstanding the Government’s protests that the interested parties in the two different situations were not sufficiently analogous to be compared, the ECtHR found that, regarding their interest in contesting a status relating to paternity, the applicant and the other parties in question were in an analogous situation for the purposes of Article 14. Accordingly, the Court found that the different treatment was contrary to Article 14 of the Convention.
- In *Burden and Burden v the United Kingdom* (No. 13378/05, 12 December 2006), the applicants were two sisters in their 80s cohabiting for the previous 30 years in a house built on the land inherited from their parents. By raising a violation of Article 1 Protocol No. 1 (protection of property) in conjunction with Article 14, the applicants complained that, when one of them died, the survivor would face a heavy inheritance tax bill, unlike the survivor of a marriage or a civil partnership. The ECtHR upheld the government’s position that there was no true analogy between the applicants and couples in marriage and in civil partnership because the applicants were connected by birth rather than by a decision to enter into a formal relationship recognised by law. It furthermore maintained that, even if they were considered to be in an analogous position for the purposes of inheritance tax, the difference in treatment was still consistent with Article 14. The Court also concurred with the State’s submission that the inheritance tax exemption for married and civil partnership couples pursues the legitimate aim of promoting stable,

committed, heterosexual and homosexual relationships by providing the survivor with a measure of financial security after the death of the spouse or the partner. In this case, the ECtHR saw its task as an assessment of whether the inheritance tax scheme chosen by the legislature was within the limits of the State's margin of appreciation, not to identify whether different criteria for tax exemption should have been applied. In the end, it found that there was no violation of Article 14, read in conjunction with Article 1, because the difference in treatment between those who were married or party to a civil partnership and other persons living together was justified under Article 14 and did not exceed the wide margin of appreciation afforded to the State. The Grand Chamber upheld the Chamber's decision that cohabiting siblings are not comparable to married couples or homosexual partners in accordance with the UK Civil Partnership Act, for the purpose of obtaining the tax exemption. In considering the essence of what would make the relationships comparable, the ECtHR stated that 'Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature' (paragraph 65).

- In *Sahin v Germany* (No. 30943/96, 11 October 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 such 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 an interest in contacting their children and might leave a non-marital relationship at any time. Therefore, the Court 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 July 2000); *Hoffmann v Germany* (No. 34045/96, 11 October 2001); and *Sommerfeld v Germany* (No. 3187/96, 08 July 2001).
- *Merger and Cros v France* (No. 68864/01, 22 December 2004) concerned the rights of an adulterine child (the first applicant) and a common-law wife (the second applicant). The applicants complained about the restrictions on the first applicant's inheritance rights and on their capacity to receive lifetime or testamentary gifts from her father. They submitted that they had been discriminated against on account of the first applicant's status as an 'adulterine' child and relied on Article 1 of Protocol No. 1 (protection of property) and Article 8 (right to respect for private and family life), both taken together with Article 14 of the ECHR. The ECtHR concluded that, in the division of an estate, no grounds could justify discrimination based on birth out of wedlock. Accordingly, it held that there had been a violation of both Articles, read in conjunction with Article 14.

2.9 The 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 Article 4 of the Social Security Directive, which is drafted in similar language. 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.

2.10 The 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](#).

2.11 The 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 are reflected in the development of principles of multiple or intersectional discrimination. This chapter 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 a person’s experience of discrimination may not be fully addressed by an approach that focuses on a single ground 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 intersecting grounds of discrimination is said to produce 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.

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.

In recent years, the concept of multiple discrimination has gained increased recognition in international legal instruments and in general comments issued by the UN treaty bodies. In the preamble to the CRPD, the vulnerability of disabled persons to multiple forms of discrimination based also on their sex, race, etc. is highlighted and in Article 6(1), the contracting States to the Convention explicitly undertake to recognise the multiple discrimination suffered by disabled women. Although it did not use the exact phrase, in its

[General Comment No. 25](#), the CERD highlighted the specific impact that racial discrimination has on women and the Committee undertook to take gender considerations into its evaluation of racial discrimination. Later, in its [General Comment No. 27](#) on discrimination against the Roma people, the Committee recommended that State parties to the ICERD particularly take into account ‘the situation of Roma women, who are often victims of double discrimination’ (paragraph 6). Then, in its [General Comment No. 32](#) on special measures needed to advance certain racial or ethnic groups, CERD stated that ‘The ‘grounds’ of discrimination are extended in practice by the notion of ‘intersectionality’ whereby the Committee addresses situations of double or multiple discrimination...when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention’ (paragraph 7). In [General Comment No. 20](#) of the CDESCR, which elaborated on the content of the right to non-discrimination under the ICESCR, the CDESCR cited multiple discrimination as a prohibited ground of discrimination under the phrase ‘other status’ in Article 2(2) of the Convention. Concern about multiple discrimination has also been raised by the CRC, CEDAW, CDESCR and CERD in their concluding observations to a number of contracting State party reports.

Despite the progress outlined above, in general terms international human rights tribunals have not yet adopted a multiple or intersectional approach to equality in their jurisprudence. 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. [Abdulaziz, Cabales and Balkandali v the United Kingdom](#) (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985) is a good example of the separate consideration of race and sex discrimination by the ECtHR. In the case of [Lovelace v Canada](#) (No. 24/1977, ICCPR), 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 this is supported by the evidence, has also contributed to the lack of jurisprudence.

Some domestic courts and tribunals, for example the Supreme Court of Canada, have started to acknowledge multiple discrimination and to recognise the social, economic and historical context in which it takes place. 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 \(Minister of Employment and Immigration\)](#) [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 April 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 v Italy* (No. 21439/93, 24 February 1998) 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.

EU Charter

Article 1 (Human dignity)

Human dignity is inviolable. It must be respected and protected.

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.

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

Section 9 (Equality)

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) 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.
- (3) 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.
- (4) 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.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 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 the 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 in the wake of the devastation 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).
- Human dignity is a legal notion frequently elaborated and discussed in Israeli case-law. This is enshrined in Israeli Basic Law: Human Dignity and Liberty (passed by the Knesset on 17 March 1992 and amended on 9 March 1994). In the case of *Fredrika Shavit v Rishon Lezion Jewish Burial Society* (CA 6024/97, 06 July 1999), the Israeli Supreme Court stated that 'The value of human dignity supersedes all other values with which it may come into conflict' (Justice M. Cheshin, p. 4). In *Jerusalem Community Jewish Burial Society v Kestenbaum* (CA 294/91) Justice Barak emphasised 'Human dignity in Israel is not a metaphor. It is the reality, and we draw operative conclusions from it' (cited in *Fredrika Shavit* at 16). In this regard see also *Sagi Tzemach v Minister of Defense* (HCJ 6055/95, 14 October 1999) and *Shefer v State of Israel* (CA 506/88, 24 November 1993).

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 for establishing comparator individuals or groups. According to the concept of dignity, a person is entitled to basic rights just by being human therefore, no qualifications or personal characteristics (i.e., grounds of discrimination) are necessary in order to claim a violation of equality rights. As a result of this approach, which does not require any comparison with other individuals or groups, the 'comparator' problem, discussed in Chapter III, is no longer an obstacle to establishing a discrimination case.

3.1 South Africa

The test to be applied in determining a violation of section 9 (equality) of the South African Constitution was confirmed and clarified in *Harksen v Lane NO & others* [1997] ZACC 12.

- 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. According to the two-stage test the Constitutional Court outlined to establish a case of discrimination:

(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.

Therefore, using this test, if a particular ground on which discrimination is claimed is not listed in section 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 a 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] ZACC 4, 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* [2002] ZACC 22 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. Justice O’Regan and Justice Sachs (for the minority) 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.

Section 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, the cases of *Jordan and others v the State* [2002] ZACC 22 (a challenge by commercial sex workers to laws effectively prohibiting prostitution) 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 Justice L’Heureux-Dubé 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 Chapter V on ‘Sexual Orientation’). 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.

Justice L’Heureux-Dubé (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. Justice L’Heureux-Dubé stated that ‘equality 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.

- In *R v Ewanchuk* [1999] 1 S.C.R. 330, the Supreme Court of Canada made a link between the right to dignity and the right to equality. The Court established that violence against women ‘is as much a matter of equality as it is an offence against human dignity and a violation of human rights’ (at paragraph 69). The Court further stated that sexual assault ‘is an assault upon human dignity and constitutes a denial of any concept of equality for women.’

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’

International Covenant on Civil and Political Rights

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

European Convention on Human Rights

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment

African Charter on Human and Peoples' Rights

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.

American Convention on Human Rights

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 The 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 January 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 former European Commission on Human Rights case of *East African Asians v the United Kingdom* (Nos. 4403/70, 14 December 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 v the United Kingdom* (Nos. 4403/70, 14 December 1973) 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 Commission 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 v the United Kingdom*, there have been a number of unsuccessful claims before the ECtHR on discrimination as ‘degrading treatment’

- In *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985) the applicants, who were lawfully settled in the United Kingdom, were unable to have their alien husbands join them in the United Kingdom due to the immigration legislation in force at that time. 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 in treatment 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. However, 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/ October 1998).
- In *Smith and Grady v the United Kingdom* (Nos. 33985/96 and 33986/96, 27 September 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 the *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 May 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 also lived, and were compelled to live, in conditions that were isolated, where their

movements were restricted, controlled and they had 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 ECtHR did not go on to consider whether there had been a violation of Article 14.

- *Moldovan and Others v Romania* (No. 2) (Nos. 41138/98 and 64320/01, 12 July 2005) concerned a dispute between Roma and non-Roma inhabitants of a small Romanian village, which resulted in a mob of non-Roma killing a number of Roma men, injuring others and destroying Roma homes and property. The applicants complained that, after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in very poor, cramped conditions, in violation of Articles 3 and 8 of the ECHR. They also claimed that State officials had been involved in the destruction of their homes and that the authorities not only failed to remedy their situation but actively hindered their efforts to obtain suitable housing. The ECtHR considered that the applicants' living conditions over ten years combined with the length of the period during which the applicants had to live in such conditions and the general attitude of the authorities must have caused them considerable mental suffering, thus 'diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.' In addition, the ECtHR noted that the remarks concerning the applicants' honesty and way of life made by some authorities dealing with the applicants' grievances appeared to be, in the absence of any substantiation on behalf of those authorities, 'purely discriminatory.' In this connection, the ECtHR reiterated that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the ECHR.

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. However, few other international tribunals have followed this line of cases.

- 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 the opportunity to consider the argument.
- In the Botswana case of *Attorney General (Botswana) v Unity Dow* (124/1990) (CA No. 4/1991), 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 Constitution. The respondent found support in the UN Declaration on the Elimination of Discrimination against Women (of 7 November 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, Cabales and Balkandali v the United Kingdom* (Nos. 9214/80, 9473/81 and 9474/81, 28 May 1985). 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, not the State. Another difficulty in preventing violence against women is that many national legal systems have regarded acts of violence between men and women, as family disputes rather than crimes, which should be resolved privately without State interference. To counter this, 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* (No. 39272/98, 04 December 2003) below).

2 The UN System

In its [General Recommendation No. 19](#) (at paragraph 6), the CEDAW Committee 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. It further notes that gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence. In *Vertido v the Philippines* (No. 18/2008, CEDAW) the CEDAW Committee made a number of recommendations to the

respondent State, including to ensure that ‘all legal procedures in cases involving crimes of rape and other sexual offences are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women.’ See also the [UN Declaration on the Elimination of Violence against Women \(1993\)](#).

General Recommendation No. 19 states that the duty of member States to not 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, ICERD), 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.

ICESCR has discussed gender-based violence as a form of discrimination in its General Comment No. 16 (at paragraph 27):

Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.

3 The 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 December 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 contracting 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 runs the risks that certain rapes will go unpunished and it jeopardises 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 obligations. 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 October 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 if 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 September 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).

- In *Opuz v Turkey* (No. 33401/02, 09 June 2009), the ECtHR for the first time recognised gender-based violence as a form of discrimination under Article 14. In that case, the applicant and her mother were subjected to increased abuse by the applicant’s husband over a number of years. Although the applicant and her mother lodged a number of criminal complaints, some of these were withdrawn as a result of further threats by the applicant’s husband. When the complaints were withdrawn, the State authorities did not pursue their investigation, despite strong evidence of systematic abuse by the husband. On one occasion, he attacked the applicant with a knife, requiring her to be hospitalised, but he was only required to pay a fine. The abuse culminated in the applicant’s husband murdering her mother. Although he was found guilty and sentenced to life imprisonment, his sentence was mitigated to 15 years because the national court found that he committed the crime to protect the honour of his family and he was released pending an appeal.

Drawing heavily on international human rights instruments and jurisprudence, the ECtHR held that violence against women constitutes gender discrimination and thus ‘the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional’ (paragraph 191). The ECtHR also held that there was ‘a climate that was conducive to domestic violence’ (paragraph 198) in the State, which was created by the fact that women were the most frequent victims of domestic violence, the police had a passive attitude towards domestic violence complaints by women and the courts handed down lenient sentences in such cases. Accordingly, the ECtHR held that the applicant and her mother were subjected to discriminatory gender-based violence and ‘the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors...indicated that there was insufficient commitment to take appropriate action to address domestic violence’ (paragraph 200). As a result, the State was found in breach of Article 14 of the Convention, in conjunction with the right to life and the right to freedom from torture under Articles 2 and 3 of the Convention respectively.

4 The African Charter on Human and Peoples’ Rights

The Protocol on the Rights of Women in Africa (discussed in Chapter II) explicitly provides for women’s rights to freedom from gender-based violence (Article 4), including female genital mutilation (Article 5).

The African Commission on Human and Peoples’ Rights has declared admissible its first case on sexual assault and violence against women in the case of *Egyptian Initiative for Personal Rights (EIPR) and INTERIGHTS (on behalf of Al-Kheir & Others) / Egypt* (No. 323/2006). The applicants are four women journalists who were attacked, assaulted and sexually abused in the presence of police, who failed to intervene to protect them. The applicants alleged that Egypt failed in its positive obligations to prevent the attacks and to effectively investigate and prosecute the perpetrators thus failing to act with due diligence. The case is still under consideration by the African Commission. If successful, it will establish a ground-breaking precedent in the further development of jurisprudence in cases of general discrimination against women and discrimination through the use of sexual violence.

5 The 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. 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* (Case 12.051, Report No. 54/01, 16 April 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 Ms 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. Furthermore, it represented a violation by the State of its commitments under Article 7 of the Convention of Belem do Para 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.
- In the case of *González et al. ('Cotton Field') v Mexico* (Preliminary Objection, Merits, Reparations and Costs, Judgment of 16 November 2009, Series C No. 205) the IACHR condemned the respondent State for violating the human rights of three women who were disappeared, tortured and murdered in Ciudad Juarez, Mexico, as well as for the violation of the human rights of their mothers and next of kin. The petition to investigate violations of human rights was presented to the IACHR by the mothers of three of a large number of girls and women whose bodies were found in the Campo Algodonero in Ciudad Juarez. They claimed violations against their daughters, themselves and their next of kin. The judgment of the IACHR was important in that it recognised that the violence against women in Ciudad Juarez since 1993 was a systemic violation of human rights for which the Mexican State is responsible. It also ordered reparations that included measures of non-repetition, in such a way that the onus falls on the State to take all necessary actions to ensure that similar crimes are not repeated.

The IACHR has produced a Report on [Access to Justice for Women Victims of Violence in the Americas](#) (OEA/Ser.L/V/II, Doc. 68, 20 January 2007). See also its report on [Violence and Discrimination against Women in the Armed Conflict in Colombia](#) (OEA/Ser.L/V/II., Doc. 67, 18 October 2006).

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 war crimes, breaches of the Geneva Conventions, crimes against humanity, torture and also genocide in their jurisprudence. 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. The ICTR 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.

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 transsexuals, but it has also been used to combat discrimination on grounds of disability, illegitimacy and paternity, and language (see again the *Belgian Linguistics case* (Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968)).

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

International Covenant on Civil and Political Rights

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.

Convention on the Rights of the Child

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.

European Convention on Human Rights

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.

American Convention on Human Rights

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 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 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 The 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 February 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* (No. 2346/02, 29 April 2002) (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 May 1976), *Passannante v Italy* (No. 32647/96, 01 July 1998), *Burghartz v Switzerland* (No. 16213/90, 22 February 1994), *Dudgeon v the United Kingdom* (No. 7525/76, 22 October 1981), *Laskey, Jaggard and Brown v the United Kingdom* (Nos. 21627/93, 21826/93 and 21974/93, 19 February 1997) and *Smith and Grady v the United Kingdom* (Nos. 33985/96 and 33986/96, 27 September 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 transsexual rights, as the following case illustrates:

- In *Van Kück v Germany* (No. 35968/97, 12 June 2003) it was held that the failure of a German court to give due regard to her transsexuality 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 transsexualism 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), as well as 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 December 1986) and *Kroon and others v the Netherlands* (No. 18535/91, 27 September 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 May 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 ECHR jurisprudence on Article 8 is the notion of the positive obligations of the contracting 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 March 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 October 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 October 1986) the applicant, a post-operative transsexual, 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. Due to the fact that the changes required by the applicant's claim were complex and there were other conflicting public 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.
- In the later case of *Christine Goodwin v the United Kingdom* (No. 28957/95, Grand Chamber judgment 11 July 2002), the ECtHR found that since the judgment in *Rees* there had been a growing trend in State parties to the ECHR to recognise the reassigned gender of transsexuals and therefore States no longer had a wide margin of appreciation in that area. As a result, the State in that case was found in violation of Article 8 of the Convention because it failed to respect the applicant's right to private life by officially recognising her reassigned gender.

3.4 The *Botta* Case and Subsequent Jurisprudence

The case of *Botta v Italy* (No. 21439/93, 24 February 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. According to the principles laid down in *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 v Italy* (No. 21439/93, 24 February 1998), 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. 38621/97, 14 May 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 July 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 February 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 June 1999).

See also the cases of *Pretty v the United Kingdom* (No. 2346/02, 29 April 2002) and *Marzari v Italy* (No. 36448/97, 04 May 1999).

4 Other Jurisdictions

In the US, 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 US Constitution. Their arguments were successful in the recent case of *Lawrence v Texas* 539 US 558 (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* 1991 (1) SA 6 (CC). There are also a number of UK cases in which *Botta v Italy* (No. 21439/93, 24 February 1998) 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](#)

Useful references

- For a general overview of minority rights, see: *International Law and the Rights of Minorities*, Patrick Thornberry, Oxford: Clarendon Press, 1993; *Minorities and Human Rights Law*, Patrick Thornberry, Minority Rights Group, 1991; *Minorities in international law*, Gaetano Pentassuglia, Council of Europe Publishing, November 2002 and *Minority groups and judicial discourse in international law: a comparative perspective*, Gaetano Pentassuglia, Martinus Nijhoff Publishers, 2009.
- For minority rights in Europe, see: *Minority Rights in Europe*, Patrick Thornberry and María Amor Martín Estébanez, Council of Europe Publishing, March 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 *Minority Schools in Albania* (Advisory Opinion, 1935 P.C.I.J.) at 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 are a broad area, much of which falls outside the scope of this Handbook. There is significant overlap between minority rights, linguistic rights and also discrimination on grounds of race, religion and language. Please refer to 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 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. Instead, 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 ECHR jurisprudence, particularly on Turkey and South Eastern Europe States, 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

International Covenant on Civil and Political Rights

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.

Convention on the Rights of the Child

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 The 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 the 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 the 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 The 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 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 The International Labour Organization

Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) provides protection for indigenous groups in the areas of 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 State 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, State 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 State 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 January 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 all human rights. The failure to accord ‘equality’ of rights, without sufficient reason, is a failure to guarantee human rights. The preamble to 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 the 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 between jurisdictions, 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 in both national and international jurisdictions. Discrimination cases help to develop an understanding of how discrimination is experienced and how its damaging effects may be remedied. Increasingly, efforts at combating discrimination have also highlighted the difficulties of proving more subtle forms of discrimination, such as indirect discrimination. Strategic litigation has helped to mould new rules of evidence and create new evidentiary tools to prove discrimination, 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 per cent 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 amicus briefs to the European Court of Human Rights in the cases of *D.H. and Others v the Czech Republic* (No. 57325/00, Chamber judgment 7 February 2006 and Grand Chamber judgment 13 November 2007) (concerning the education of Roma children in ‘special schools’ for the intellectually disabled) and *Kiyutin v Russia* (concerning discrimination against persons on account of their HIV status) and an expert opinion to the Israeli Supreme Court in the case of *Qablan and others v Commander of the Military Forces in the Occupied Territories* (concerning discrimination on the grounds of race/ethnicity). It has also recently provided legal advice to lawyers representing the applicant in the ECtHR cases of *Kaos GL v Turkey* (concerning discrimination on grounds of sexual orientation) and *Catan and others v Moldova and Russia* (concerning discrimination on grounds of nationality). 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
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 G.C. 18(7): 'purpose or effect'	Yes HRC G.C. 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
CRPD	Open-ended, but applies only to persons with disabilities and their families 2(1): All persons with disabilities, regardless of 'other status'	Freestanding 5(1) Equal before and under the law	Both	Yes	N/A
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
ECHR European Convention	Open-ended 14(1): 'or other status'	Dependent 14(1): 'set forth in this convention' (Compare Protocol No. 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

	Open-ended or Specified Group	Free-Standing or Dependent	Direct and Indirect	Positive Action	Group Rights
EU EC Treaty & EC Directives	Specified EC Treaty 141 & 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 Directive: sex/gender	Dependent EC Treaty 141(1); 39(2): work conditions, employment, and remuneration. Framework, Race, and Revised Equal Treatment Directives: employment and occupation, vocational training, etc.	Both Framework, and Race Directives, 2(2)(b): 'indirect discrimination' Revised Equal Treatment Directive, 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 Directive: 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 Advisory Opinion No. 4. 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.	

GLOSSARY

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 Organisation of Africa 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 of Human 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 Organisation 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 to hear inter-State and individual complaints of violations of the Convention.
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 State parties to treat women equally with men.
Convention on the Rights of Persons with Disabilities (CRPD)	A multilateral convention adopted by the United Nations General Assembly in 2006. It entered into force in 2008. It requires State parties to protect the rights of people with disabilities.
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 State 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 47 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 a 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 UN General Assembly on 18 December 1992, asserting that all States have an obligation to allow minority peoples to enjoy their culture, practice 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 UN. 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, 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 State parties to prohibit racial discrimination.
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC)	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 State 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.
Organisation 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 State 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 <i>amicus curiae</i> .
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 type 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, an intergovernmental organisation. 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.

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Non-Discrimination in International Law

A Handbook for Practitioners

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