Chapter 13

THE RIGHT TO EQUALITY AND NON-DISCRIMINATION IN THE ADMINISTRATION OF JUSTICE

Learning Objectives

- *To familiarize the participants with the notion of equality before the law and the principle of non-discrimination as understood by international human rights law.*
- *To illustrate how these principles are being applied in practice at the universal and regional levels.*
- *To identify some groups that may be particularly vulnerable to discriminatory treatment.*
- *To explain what legal steps, measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the notion of equality before the law and the principle of non-discrimination.*

Questions

- *How would you define "discrimination" and/or "inequality" of treatment?*
- *How is the notion of equality before the law and the principle of non-discrimination protected in the country in which you work?*
- *Have you ever been faced with cases of discrimination in your professional life?*
- *Are there any particularly vulnerable groups in the country in which you work?*
- *If so, who are they and how are they discriminated against?*
- *In the country in which you work, are there any particular problems of discrimination on the basis of gender?*
- *If so, what are they?*
- *What measures can you take as a legal professional to protect everybody's right to equality before the law and to ensure the right of individuals and groups not to be subjected to discrimination?*

Relevant Legal Instruments

Universal Instruments

- Charter of the United Nations, 1945
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- Statute of the International Tribunal for the Former Yugoslavia, 1993
- Statute of the International Tribunal for Rwanda, 1994
- Rome Statute of the International Criminal Court, 1998
- The Four Geneva Conventions of 12 August 1949
- The 1977 Protocols Additional to the Geneva Conventions of 12 August 1949[1]

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- Universal Declaration of Human Rights, 1948
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- African Charter on the Rights and Welfare of the Child, 1990
- American Convention on Human Rights, 1969
- Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
- Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999
- European Convention on Human Rights, 1950
- European Social Charter, 1961, and European Social Charter (Revised), 1996
- Framework Convention for the Protection of National Minorities, 1995

[1] For more legal instruments relating to discrimination, see *Trainers' Guide,* **Annex II – Handout No. 1**.

1. Introduction

1.1 Discrimination: A persistent serious human rights violation

In spite of unprecedented progress at the international level in enhancing the legal protection of individuals and groups of individuals against discrimination, reports from all parts of the world confirm the fact that discriminatory acts and practices are anything but a memory from the past. Discrimination is multifaceted and present not only in State or public structures but also in civil society in general. To a greater or lesser extent, discrimination may thus affect the way people are treated in all spheres of society such as politics, education, employment, social and medical services, housing, the penitentiary system, law enforcement and the administration of justice in general.

Discrimination may have many different causes and may affect people of different racial, ethnic, national or social origin such as communities of Asian or African origin, Roma, indigenous peoples, Aborigines and people belonging to different castes. It can also be aimed at people of different cultural, linguistic or religious origin, persons with disabilities or the elderly and, for instance, persons living with the HIV virus or with AIDS. Further, persons may be discriminated against because of their sexual orientation or preferences.

Discrimination based on gender is also commonplace in spite of the progress made in many countries. Laws still exist which, inter alia, deny women the right to represent matrimonial property, the right to inherit on an equal footing with men, and the right to work and travel without the permission of their husbands. Women are also particularly prone to violent and abusive practices, which continue unabated in many countries, and they thus often suffer double discrimination, both because of their race or origin and because they are women.

A major problem in today's world is also the discrimination to which numerous people, especially women and children, are subjected because they live in poverty or extreme poverty. These circumstances may force them to migrate and have contributed to an increase in trafficking in persons, particularly women and children, who are also frequently subjected to physical restraint, violence and intimidation.

Many European countries in particular have in recent years experienced a disturbing increase in racist and xenophobic attacks on asylum-seekers and foreigners in general by neo-Nazi and other groups composed mainly of young people. However, such attacks have been perpetrated not only on persons of foreign origin but also on those who dare to challenge the rightfulness of the acts committed by the groups concerned and the discriminatory or supremacist philosophy that they represent. Such philosophies and other grounds for discriminatory treatment are among the root causes of the tragic upsurge, during the last decade, in flows of refugees and internally displaced people.

As shown by the World Conference against Racism in Durban, South Africa, in 2001, the challenge facing Governments, non-governmental organizations and civil society in stemming the tide of discrimination is considerable and requires serious, effective and concerted efforts by all concerned.

1.2 The role of judges, prosecutors and lawyers in protecting persons against discrimination

Judges, prosecutors and lawyers naturally have an essential role to play in protecting persons against discrimination. Their task is to see to it that existing laws and regulations prohibiting discrimination are respected in legal practice. In some countries discrimination is forbidden de jure but the laws are not adequately enforced. Judges, prosecutors and lawyers play a crucial role in remedying these situations and ensuring that impunity for discriminatory acts is not tolerated, that such acts are duly investigated and punished, and that the victims have effective remedies at their disposal.

In situations in which the domestic law on discrimination is non-existent or lacking in clarity, the legal professions may turn to international legal instruments for guidance, including, in particular, the relatively rich existing case law, parts of which will be reviewed below.

1.3 Glimpses of international legal history

The right to equality and non-discrimination was not easily accepted by the international community. During the 1919 Paris Conference, held in the aftermath of the First World War, Japan worked intensively to have the principle of racial equality inserted in the Covenant of the League of Nations. Although a majority of eleven out of seventeen members of the Conference Commission voted in favour of the Japanese proposal, President Wilson of the United States "suddenly declared from the chair that the amendment had failed". In spite of vigorous protests by several delegates against this rejection of the amendment, President Wilson insisted – to the great disappointment of the Japanese delegation – that the amendment had not been adopted.[2] Logically, the League Covenant did not even contain any express reference to the principle of equality between States.[3]

Progress was made, however, during the elaboration of the Charter of the United Nations after yet another global war of unspeakable horror which had its origin in deliberate and carefully systematized discriminatory practices embracing entire State structures. The world could no longer close its eyes to such vile practices and the threat to peace that they represented.

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[2] Paul Gordon Lauren, *Power and Prejudice – The Politics and Diplomacy of Racial Discrimination,* 2nd edn. (Boulder/Oxford, Westview Press), pp. 99-100, and, in general on the issue of racial discrimination, Chapter 3 on "Racial Equality Requested – and Rejected".

[3] See Keba Mbaye, "ARTICLE 2, Paragraph 1", *La Charte des Nations Unies – Commentaire article par article,* 2nd edn, Jean-Pierre Cot and Alain Pellet, eds. (Paris, ECONOMICA, 1991), p. 83.

In the second preambular paragraph to the Charter of the United Nations, the peoples of the Organization express their determination

> "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

According to Articles 1(2) and (3) of the Charter, the purposes of the United Nations are, inter alia, "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and

> "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, ***and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion***" (emphasis added).

While Article 2(1) expressly confirms that the "Organization is based on the principle of the sovereign equality of all its Members", the principle of non-discrimination in the observance of human rights is reaffirmed in Articles 13(1)(b), 55(c) and 76(c). The Charter of the United Nations testifies to the fact that international peace and security depend to a large extent on "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 55(c)).

What can with some justification be called international constitutional law is thus today solidly based both on the principles of ***equality between States and the equal worth of all human beings***, although only the latter principle will be dealt with in this chapter.

1.4 The purpose and scope of the present chapter

The scope of the present chapter does not permit an in-depth analysis of the wide, complex and multifaceted subject of discrimination. The aim is rather to provide the legal professions with a brief description of the most important legal provisions on the right to equality and non-discrimination in general international human rights law, and then to focus on some of the most relevant aspects of the judgments, views and comments of the international monitoring bodies. ***The ultimate purpose is to sensitize judges, prosecutors and lawyers to some of the numerous aspects of existing unequal and discriminatory treatment of people and thereby also to provide a basic legal framework for their future work at the domestic level.***

2. Selected Universal Legal Provisions Guaranteeing the Right to Equality before the Law and the Right to Non-discrimination

2.1 Universal Declaration of Human Rights, 1948

Following the prohibition of discrimination based on ***race, sex, language and religion*** in the Charter of the United Nations, the adoption of the Universal Declaration of Human Rights together with the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 became the next important step in the legal consolidation of the principle of equality before the law and the resultant prohibition of discrimination.

Article 1 of the Universal Declaration proclaims that "All human beings are born free and equal in dignity and rights", while, according to 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."

With regard to the right to equality, article 7 of the Universal Declaration stipulates that:

> "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."

It is noteworthy that article 2 of the Universal Declaration prohibits "***distinction[s] of any kind***" (emphasis added), which could be read as meaning that no differences ***at all*** can be legally tolerated. However, as will be seen below, such a restrictive interpretation has not been adopted by the international monitoring bodies.

2.2 Convention on the Prevention and Punishment of the Crime of Genocide, 1948

In article I of the Convention on the Prevention and Punishment of the Crime of Genocide, "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish". Article II (a) – (e) enumerates acts considered as genocide, i.e. committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". These acts are:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

The following acts are punishable under article III (a) – (e) of the Genocide Convention:

- genocide;
- conspiracy to commit genocide;
- direct and public incitement to commit genocide;
- attempt to commit genocide; and
- complicity in genocide.

An identical definition of the term genocide is contained in article 6 of the Rome Statute of the International Criminal Court,[4] in article 4(2) of the Statute of the International Tribunal for the Former Yugoslavia and in article 2(2) of the Statute of the International Tribunal for Rwanda. Contrary to article 6 of the Rome Statute, article 4(3) and article 2(3) respectively of the Statutes of the two Tribunals contain the same list of punishable acts as the Genocide Convention.

Although genocide is the ultimate negation of the right to equality, it will not be further dealt with in this chapter, which considers the more everyday forms of discrimination that face most societies. Suffice it to add in this context that, on 2 August 2001, in the *Radislav Krstic* case, the International Tribunal for the Former Yugoslavia found the General guilty of committing genocide after the fall of Srebrenica in Bosnia and Herzegovina in July 1995.[5] He was also convicted of other serious crimes, such as murder, and received a sentence of 46 years' imprisonment. This verdict was significant, since it was the first time the Tribunal found someone guilty of genocide.

[4] See, for example, UN doc. A/CONF.183/9. The Statute entered into force on 1 July 2002.

[5] For the text of the judgment, see http://www.un.org/icty/krstic/TrialC1/judgement/

2.3 International Covenant on Civil and Political Rights, 1966

The right to equality and freedom from discrimination is protected by various provisions of the International Covenant on Civil and Political Rights.[6] First, in article 2(1) each State party:

> "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized 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".

Article 26 of the Covenant is the cornerstone of protection against discrimination under the Covenant. It reads:

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

Contrary to article 2(1), which is linked to the rights recognized in the Covenant, article 26 provides "an autonomous right" of equality and "prohibits discrimination in law or in fact in any field regulated and protected by public authorities".[7]

Article 20(2) obliges States parties to prohibit, by law, any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

Gender equality is emphasized in article 3, according to which States parties "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".[8]

Article 14(1) provides that "all persons shall be equal before the courts and tribunals", an important guarantee which may in certain cases oblige States to provide legal aid in order, for instance, to ensure fair court proceedings for indigent persons. In addition, article 14(3) stipulates that "in the determination of any criminal charge against him, everyone shall be entitled ... in full equality" to the minimum guarantees enumerated therein.

Article 25 guarantees the equal participation in public life of every citizen "without any of the distinctions mentioned in article 2 and without unreasonable restrictions".[9]

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[6] On the question of non-discrimination, see General Comment No. 18 of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, pp. 134-137 (hereinafter referred to as *United Nations Compilation of General Comments*)

[7] Ibid., p. 136, para. 12.

[8] Ibid., General Comment No. 28 (Equality of rights between men and women), pp. 168-174.

[9] Ibid., General Comment No. 25 (Article 25), pp. 157-162.

Lastly, article 27 of the Covenant provides express protection for ***ethnic, religious and linguistic minorities***. According to article 27,

> "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."[10]

2.4 International Covenant on Economic, Social and Cultural Rights, 1966

Under article 2(2) of the International Covenant on Economic, Social and Cultural Rights the States parties 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".

In line with the terms of the International Covenant on Civil and Political Rights, the States parties to the International Covenant on Economic, Social and Cultural Rights also undertake, by virtue of article 3,

> "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 principle of non-discrimination is also contained in article 7(a)(i), which guarantees "fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work". Lastly, article 7(c) of the Covenant secures the right to "equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence".[11]

2.5 International Convention on the Elimination of All Forms of Racial Discrimination, 1965

For the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination, "the term 'racial discrimination' shall mean", according to article 1(1),

[10] Ibid., see also General Comment No. 23 (Article 27), pp. 147-150.

[11] For the views of the Committee on Economic, Social and Cultural Rights relating to discrimination, see, inter alia, the following general comments in the *United Nations Compilation of General Comments*: General Comment No. 3 (The nature of States parties' obligations (art. 2(1)), pp. 18-21; General Comment No. 4 (The right to adequate housing (art. 11(1)), pp. 22-27; General Comment No. 5 (Persons with disabilities), pp. 28-38; General Comment No. 6 (The economic, social and cultural rights of older persons), pp. 38-48; General Comment No. 12 (The right to adequate food (art. 11)), pp. 66-74; General Comment No. 13 (The right to education (art. 13)), pp. 74-89; and General Comment No. 14 (The right to the highest attainable standard of health (art, 12)), pp. 90-109.

> "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***" (emphasis added).

The Convention does not, however, "apply to distinctions, exclusions, restrictions or preferences made by a State Party ... between citizens and non-citizens" (art. 2), and nothing in the Convention "may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, ***provided that such provisions do not discriminate against any particular nationality***" (art. 3; emphasis added). It is also noteworthy that the Convention is only applicable to discrimination that takes place in the "field of public life" and that it does not, in principle, extend to discrimination carried out in private.

The Convention regulates in some detail the obligations of States parties to eliminate racial discrimination and lists, in article 5, the major civil, political, economic, social and cultural rights that must be enjoyed "without distinction as to race, colour, or national or ethnic origin".[12]

2.6 Convention on the Rights of the Child, 1989

Article 2(1) of the Convention on the Rights if the Child provides that:

> "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."

The term "disability" has here been added to the grounds on which no discrimination is allowed.

Under article 2(2) of the Convention, States parties are required to take

> "all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinion, or beliefs of the child's parents, legal guardians, or family members".

With regard to the child's education, the States parties agree in article 29(d) that it shall be directed, inter alia, to:

[12]For further details on how the Committee on the Elimination of Racial Discrimination interprets the Convention, see, inter alia, the following recommendations in the *United Nations Compilation of General Comments*: General Recommendation XI (Non-citizens), p. 182; General Recommendation XIV (art. 1(1)), pp. 183-184; General Recommendation XV (art. 4), pp. 184-185; General Recommendation XIX (art. 3), p. 188; General Recommendation XX (art. 5), p. 188-189; General Recommendation XXI (The right of self-determination), pp. 189-191; General Recommendation XXIII (The rights of indigenous peoples), pp. 192-193; General Recommendation XXIV (art. 1), pp. 193-194; General Recommendation XXV (Gender-related dimensions of racial discrimination), pp. 194-195; General Recommendation XXVI (art. 6), p. 195; and General Recommendation XXVII (Discrimination against Roma), pp. 196-202.

> "(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin".

Lastly, article 30 of the Convention on the Rights of the Child protects minority rights in terms that are similar to, but not identical with, article 25 of the International Covenant on Civil and Political Rights. It reads as follows:

> "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."[13]

2.7 Convention on the Elimination of All Forms of Discrimination against Women, 1979

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women describes "discrimination against women" as meaning

> "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***" (emphasis added).

As noted in subsection 3.2 of Chapter 11, the field of applicability of this Convention is wider than that of the International Convention on the Elimination of All Forms of Racial Discrimination, in that it also covers acts falling within the private sphere.

Given the importance of the rights of women in the administration of justice and the role played by the Convention on the Elimination of All Forms of Discrimination against Women in furthering these rights, they were given particular attention in Chapter 11 of this Manual. However, several cases involving gender discrimination dealt with by the international monitoring bodies under the general human rights treaties will be covered in this chapter.[14]

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[13] For the views of the Committee on the Rights of the Child on the aims of education, see its General Comment No. 1, which deals, inter alia, with discrimination, in *United Nations Compilation of General Comments*, pp. 255-262.

[14] For details regarding the interpretation of the Convention on the Elimination of Discrimination against Women, see, inter alia, the following recommendations in the *United Nations Compilation of General Comments*: General Recommendation No. 12 (Violence against women), p. 209; General Recommendation No. 14 (Female circumcision), pp. 211-212; General Recommendation No. 15 (Avoidance of discrimination against women in national strategies for the prevention and control of acquired immuno-deficiency syndrome (AIDS)), pp. 212-213; General Recommendation No. 16 (Unpaid women workers in rural and urban family enterprises), pp. 213-214; General Recommendation No. 18 (Disabled women), pp. 215-216; General Recommendation No. 19 (Violence against women), pp. 216-222; General Recommendation No. 21 (Equality in marriage and family relations), pp. 222-231; General Recommendation No. 23 (Political and public life), pp. 233-244; and General Recommendation No. 24 (Women and health: article 12), pp. 244-251.

2.8 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981

Article 1(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief guarantees to everyone "the right to freedom of thought, conscience and religion", a right which "shall include freedom to have a religion or whatever beliefs 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". Article 1(2) provides that "no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice," while article 1(3) allows for limitations on the freedom "to manifest one's religion or belief" on condition that such limitations "are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

The right not to be subjected to discrimination "by any State, institution, group of persons, or persons on the grounds of religion or other belief" is laid down in article 2(1) of the Declaration. For the purposes of the Declaration, article 2(2) specifies that

> "the expression 'intolerance and discrimination based on religion or belief' means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis".

Since 1987, a Special Rapporteur appointed by the United Nations Commission on Human Rights has been examining acts in all parts of the world that are inconsistent with the provisions of the Declaration and has suggested remedial measures.[15]

It is noteworthy that the right to freedom of thought, conscience and religion is also protected by article 18 of the International Covenant on Civil and Political Rights, which, according to article 4(2), can never in any circumstances be derogated from. For the States parties to the Covenant the provisions on discrimination are, of course, fully applicable also with regard to this freedom.

2.9 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

In the sixth preambular paragraph to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the General Assembly of the United Nations emphasizes

[15] On the work of the Special Rapporteur, see, for example, the Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2000/33 (UN doc. E/CN.4/2001/63).

> "that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States".

The United Nations thus recognizes that a democratic constitutional order respectful of the rule of law and the rights of minorities plays a crucial role in furthering international peace and security.

Article 1(1) of the Declaration provides that "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity." To achieve these ends, they shall, according to article 1(2), "adopt appropriate legislative and other measures". Articles 2 and 3 give details of the rights of persons belonging to the protected minorities, while articles 4 to 7 identify the measures that States are required to take in order to fulfil the objectives of the Declaration, either alone or in cooperation with each other.

Suffice it to mention by way of example that, according to article 2(1) of the Declaration,

> "Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination."

3. Selected Regional Legal Provisions Guaranteeing the Right to Equality before the Law and the Right to Non-discrimination

3.1 African Charter on Human and Peoples' Rights, 1981

Article 2 of the African Charter on Human and Peoples' Rights reads as follows:

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

Article 3 expressly states that "every individual shall be equal before the law" and "shall be entitled to equal protection of the law" (art. 3(1) and (2)).

Under article 18(3) of the Charter, States parties further undertake to ensure "the elimination of every discrimination against women".

Considering that the African Charter also deals with the rights of peoples, it is logical that article 19 stipulates that "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."

3.2 African Charter on the Rights and Welfare of the Child, 1990

A general prohibition of discrimination is contained in article 3 of the African Charter on the Rights and Welfare of the Child, according to which:

> "Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status."

In addition, under article 21(1) of the Charter, the States parties are required to take "all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular ... those customs and practices discriminatory to the child on the grounds of sex or other status".

3.3 American Convention on Human Rights, 1969

Under article 1 of the American Convention on Human Rights, the States parties "undertake to respect the rights and freedoms recognized" in the treaty

> "and to 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".

Contrary to the International Covenants, the term "property" is not contained in article 1 of the American Convention. However, the term "economic status" would seem to cover a wider range of situations than "property".

The notion of "equality" is found in article 8(2) of the Convention, according to which every person accused of a criminal offence is entitled "with full equality" to certain minimum guarantees during the court proceedings against him or her.

Lastly, article 24 stipulates that "all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

3.4 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the "Protocol of San Salvador", adds a number of rights to the original Convention such as the right to work, social security, health, food and education, as well as the right to special protection of the elderly and the handicapped. The obligation of non-discrimination is contained in article 3, according to which the States parties "undertake to guarantee the exercise of the rights set forth" in the Protocol

> "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".

3.5 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women aims at the elimination of gender-based violence in both the public and private spheres, and specifies in article 6(a) and (b) that "the right of every women 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 behaviour and social and cultural practices based on concepts of inferiority or subordination."

Articles 7 and 8 of the Convention give details of the duties of the States parties to prevent, punish and eradicate all forms of violence against women. When adopting the required measures, the States parties shall, moreover, according to article 9,

> "take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar considerations shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom."

This Convention is of particular interest in that it is the only international treaty that explicitly and exclusively addresses the serious problem of violence against women.

3.6 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999[16]

The objectives of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities are, as stated in article II, "to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society". For the purpose of the Convention, 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" (art. I(2)(a)).

However,

> "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" (art. I (2)(b)).

3.7 European Convention on Human Rights, 1950

The European Convention on Human Rights differs from the other general human rights treaties in that it does not contain an independent prohibition on discrimination but only a prohibition that is linked to the enjoyment of the rights and freedoms guaranteed by the Convention and its Protocols. This means that allegations of discrimination that are not connected to the exercise of these rights and freedoms fall outside the competence of the European Court of Human Rights. Article 14 reads:

> "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."

It is interesting to note that the prohibition of discrimination in article 14 covers "association with a national minority", which is not to be found *expressis verbis* in articles 2(1) and 26 of the International Covenant on Civil and Political Rights, article 1 of the American Convention on Human Rights or article 2 of the African Charter on Human and Peoples' Rights. However, the latter provision, as seen above, uses the term "ethnic group", which is of more limited scope than "minority".

[16] As of 17 June 2002, nine States had ratified this Convention, which entered into force on 14 September 2001; see http://www.oas.org/Juridico/english/sigs/a-65.html

The member States of the Council of Europe have, however, taken important steps to remedy the abovementioned lacuna in the Convention: on 4 November 2000, the fiftieth anniversary of the adoption of the Convention itself, they adopted Protocol No. 12 to the European Convention, which contains the following general prohibition of discrimination:

> "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."

The Protocol requires ten ratifications before it enters into force (art. 5(1)). As of 17 June 2002, only Cyprus and Georgia had ratified it.[17]

3.8 European Social Charter, 1961, and European Social Charter (revised), 1996

The revised European Social Charter of 1996 only progressively replaces the 1961 Social Charter. The revised version adds, inter alia, new social rights to those existing in the 1961 treaty, such as the right to protection against poverty and exclusion (art. 30), a form of discrimination experienced by an increasing number of people in the industrialized countries towards the end of the last century.

As regards the 1961 Charter, none of the operative provisions contains a general prohibition of discrimination, but the signatory States agree in the third preambular paragraph

> "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" (emphasis added).

However, article E in Part V of the Charter, as revised, contains a non-discrimination provision, according to which

> "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 appendix to the revised Charter specifies that "differential treatment based on an objective and reasonable justification shall not be deemed discriminatory".

Compared with the legally non-binding reference to the principle of non-discrimination in the preamble to the 1961 Charter, the member States of the Council of Europe have at last, with the adoption of the revised Charter, fully embraced this principle in the field of social rights.

[17] For the status of ratifications, see the Council of Europe web site: http://www.coe.int/

3.9 Framework Convention for the Protection of National Minorities, 1994

The Framework Convention for the Protection of National Minorities is a unique instrument in that it is "the first ever legally binding multilateral instrument devoted to the protection of national minorities in general".[18] Article 1 of this Convention also makes it clear that "the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation." Moreover, as pointed out in the sixth preambular paragraph to the Convention,

> "a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity."

In other words, concrete, positive measures may be required to ensure due protection for national minorities. Although it is a legally binding international treaty, the term "Framework Convention" makes it clear that the principles it contains "are not directly applicable in the domestic orders of the member States, but will have to be implemented through national legislation and appropriate governmental policies".[19] Among the primarily programme-type provisions contained in Section II, article 4 deals with discrimination. It reads:

> "1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
>
> 2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
>
> 3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."

The right to equality before the law and by law, including the prohibition of discrimination, is an overarching principle:

- *that is essential to international peace and security;*
- *that conditions the enjoyment of all human rights, be they civil, political, economic, social or cultural;*
- *that States are obliged under international law to ensure and to respect.*

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[18] See "Introduction to the Framework Convention for the Protection of National Minorities" at: http://www.humanrights.coe.int/Minorities/Eng/Presentation/FCNMintro.htm, p. 1.

[19] Ibid., loc. cit.

4. The Prohibition of Discrimination and Public Emergencies

Four of the treaties dealt with in this chapter contain provisions authorizing States parties, on certain strictly specified conditions, to derogate from the international legal obligations incurred under the treaties concerned. The relevant provisions are:

- article 4 of the International Covenant on Civil and Political Rights
- article 27 of the American Convention on Human Rights
- article 15 of the European Convention on Human Rights
- article 30 of the 1961 European Social Charter and article F of the revised Charter of 1996

The subject of derogations from the first three of these treaties will be analysed in Chapter 16 of this Manual. At present it is sufficient to point out that, in order to be permissible under article 4(1) of the International Covenant, the derogatory measures must not involve "discrimination ***solely*** on the ground of race, colour, sex, language, religion or social origin" (emphasis added). The provision thus does not include the following grounds contained in articles 2(1) and 26 of the Covenant:

- political or other opinion
- national origin
- property
- birth or other status

During the elaboration of article 4(1), Chile suggested "the insertion of social origin and birth as two additional grounds on which discrimination should be prohibited even in time of emergency".[20] Lebanon for its part suggested deleting the word "solely", "as it implied that while discrimination was not permitted on any one ground given in the text, it would be permissible on any two grounds".[21]

The United Kingdom, which had submitted the draft proposal, accepted the reference to social origin "but not the mention of birth, as legitimate restrictions might in some cases be imposed on persons because of their birth in a foreign country, although they were no longer that country's nationals".[22] With regard to the word "solely", the United Kingdom considered that it "had a certain importance" since "it might easily happen that during an emergency a State would impose restrictions on a certain national group which at the same time happened to be a racial group" and "that word would make it impossible for the group to claim that it had been persecuted solely

[20] UN doc. E/CN.4/SR.330, p. 4. Moreover, Uruguay hoped that the United Kingdom "would agree to add a reference to social origin and birth in the commendable non-discrimination provision ... in order to ensure consistency with other articles of the covenant" (p. 5). Lebanon agreed with the Chilean proposal to insert the words "social origin"(p. 8). France agreed with Chile "especially in connexion with social origin" (p. 7).

[21] Ibid., p. 8.

[22] Ibid., p. 10.

on racial grounds".[23] In the light of the United Kingdom's comments, Chile and Uruguay accepted that it was not desirable to refer to "birth" in the article concerned.[24]

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To be consistent with article 27(1) of the American Convention, derogatory measures must not involve discrimination "on the ground of race, color, sex, language, religion, or social origin". The only difference from article 4(1) of the International Covenant in this regard is that the term "solely" is absent.

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Article 15(1) of the European Convention on Human Rights does not, however, contain any reference to the prohibition of discrimination. But this lacuna cannot be taken to mean that, faced with a true public emergency, the Contracting States would be allowed to derogate at will from the prohibition of discrimination. Other conditions, such as that of strict proportionality, would appear to make the lawfulness of such derogations highly unlikely. Moreover, as will be seen below, the interpretation of the term "discrimination" per se, in article 14 for instance, excludes any distinctions that are not reasonably justified for an objective purpose.

Lastly, neither article 30 of the 1961 European Social Charter nor article F of the revised Charter contains any reference to the principle of non-discrimination.

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With regard to the absence of a derogation provision in the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has held that the Charter "does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war ... cannot be used as an excuse by the state [for] violating or permitting violations of rights in the African Charter."[25] This means that the non-discrimination provisions in articles 2, 3 and 19 of the Charter must at all times be fully implemented.

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Although international humanitarian law *stricto sensu* falls outside the scope of this Manual, it is noteworthy that the principle of non-discrimination runs like a red thread through the four 1949 Geneva Conventions and their two Additional Protocols of 1977. It is contained, inter alia, in the following provisions:

- common article 3 of the four Geneva Conventions;
- article 16 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 1949;
- article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949;

[23] Ibid., loc. cit.

[24] Ibid., p. 11.

[25] *ACHPR, Commission Nationale des Droits de l'Homme et des Libertés v. Chad, Communication No. 74/92, decision adopted during the 18th Ordinary session, October 1995*, p. 50, para. 40 of the decision as published at: http://www.up.ac.za/chr/ahrdb/acomm_decisions.html

- articles 9(1) and 75(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I);
- articles 2(1), 4(1) and 7(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

What these provisions show is that even in the direst of circumstances, in the heat of an international or non-international armed conflict, the States involved are strictly bound to respect certain legal human standards, including the right to equal treatment and the principle of non-discrimination.

The right to equality before the law and to non-discrimination must, in principle, be respected in all circumstances, including in public emergencies and at times of international and non-international armed conflict.

5. The General Meaning of Equality and Non-Discrimination

As noted above, and as emphasized by the Human Rights Committee, "non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."[26] However, in discussing the question of equality and non-discrimination, it is essential to be aware of the fact that, despite what seems to be suggested by the wording of, in particular, article 2 of the Universal Declaration of Human Rights and article 2(1) of the International Covenant on Civil and Political Rights, not all distinctions between persons and groups of persons can be regarded as discrimination in the true sense of this term. This follows from the consistent case law of the international monitoring bodies, according to which distinctions made between people are justified provided that they are, in general terms, reasonable and imposed for an objective and legitimate purpose.

With regard to the term "discrimination" in the International Covenant on Civil and Political Rights, the Human Rights Committee has stated its belief

> "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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, ***and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms***".[27]

[26] See General Comment No. 18, in *United Nations Compilation of General Comments*, p. 134, para. 1.

[27] Ibid, p. 135, para. 7; emphasis added.

However, as noted by the Committee, "the enjoyment of rights and freedoms on an equal footing ... ***does not mean identical treatment in every instance***". In support of its statement, it points out that certain provisions of the Covenant itself contain distinctions between people, for example article 6(5) which prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women.[28]

Moreover, "the principle of equality sometimes requires States parties 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."[29]

When dealing with alleged violations of article 26 in communications submitted under the Optional Protocol, the Committee has confirmed that "the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on ***reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26***."[30] It is thus the Committee's task, in relevant cases brought before it, to examine whether the State party concerned has complied with these criteria.

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In the Americas, the right to equal protection of the law as guaranteed by article 24 of the American Convention on Human Rights was considered by the Inter-American Court of Human Rights in its advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. In this opinion, the Inter-American Court undertook an instructive and detailed examination of the concepts of discrimination and equality.

The Court pointed out, to begin with, that although article 24 of the American Convention is not conceptually identical to article 1(1), which contains a general prohibition of discrimination regarding the exercise of the rights and freedoms laid down in the Convention, "Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription."[31] The Court then gave the following explanation of the origin and meaning of the notion of equality:

[28] Ibid., pp. 135-136, para. 8; emphasis added.

[29] Ibid., p. 136, para. 10; emphasis added.

[30] Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. *GAOR*, A/42/40, p. 150, para. 13; emphasis added.

[31] *I-A Court HR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4*, p. 104, para. 54.

> "55. The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with the notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.
>
> 56. Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights, 'following the principles which may be extracted from the legal practice of a large number of democratic States,' has held that a difference in treatment is only discriminatory when it 'has no objective and reasonable justification.'... There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.
>
> 57. Accordingly, no discrimination exists 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 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***."[32]

However, the Court then made a concession to the realities that any given Government may face in specific situations:

> "58. Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them."[33]

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[32] Ibid., pp. 104-106, paras. 55-57; emphasis added.

[33] Ibid., p. 106, para. 58.

At the European level, the European Court of Human Rights first dealt with article 14 of the European Convention on Human Rights in the *Belgian Linguistic* case, holding that the guarantee contained in that article "has no independent existence in the sense that under the terms of Article 14 it relates solely to 'rights and freedoms set forth in the Convention'."[34] However, "a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may ... infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature ... It is as though [Article 14] formed an integral part of each of the articles laying down rights and freedoms."[35]

The European Court then made the following ruling on whether article 14 outlaws all differences in treatment:

> "10. In spite of the very general wording of the French version ('sans distinction aucune'), Article 14 does not forbid every difference in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ('without discrimination'). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.
>
> It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment ... contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, 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***.
>
> In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it

[34] *Eur. Court HR, Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits), judgment of 23 July 1968, Series A, No. 6*, p. 33, para. 9.

[35] Ibid., p. 34, para. 9.

> cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention."[36]

However, the European Court has had occasion to develop further its understanding of discrimination and, although it long considered that the right under article 14 was violated "when States treat differently persons in analogous situations without providing an objective and reasonable justification", it now also considers "that this is not the only facet of the prohibition of discrimination in Article 14" and that

> "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated ***when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different***."[37]

However, like the Inter-American Court of Human Rights, the European Court of Human Rights has accepted that "the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."[38] On the other hand, "very weighty reasons" would have to submitted by the respondent Government before the Court would regard a difference in treatment as a legitimate differentiation under article 14, particularly if it was based exclusively on gender[39] or birth out of wedlock.[40]

These are some of the most detailed and authoritative legal rulings on the notion of equality of treatment and non-discrimination in international human rights law. They form the basis of the examples chosen below from the jurisprudence of the Human Rights Committee and the Inter-American and European Courts of Human Rights. The common traits of the case law of these bodies may be summarized as follows:

The principle of equality and non-discrimination does not mean that all distinctions between people are illegal under international law.

Differentiations are legitimate and hence lawful provided that they:

- *pursue a legitimate aim such as affirmative action to deal with factual inequalities, and*
- *are reasonable in the light of their legitimate aim.*

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[36] Ibid., p. 34-35, para. 10; emphasis added.

[37] *Eur. Court HR, Case of Thlimmenos v. Greece, judgment of 6 April 2000,* (unedited version of the judgment), para. 44; emphasis added.

[38] *Eur. Court HR, Case of Karlheinz Schmidt v. Germany, judgment of 18 July 1994, Series A, No. 291-B*, pp. 32-33, para. 24.

[39] *Eur. Court HR, Case of Van Raalte v. the Netherlands, judgment of 21 February 1997*, p. 186, para. 39.

[40] *Eur. Court HR, Case of Inze v. Austria, judgment of 28 October 1987, Series A, No. 126*, p. 18, para. 41.

Alleged purposes for differential treatment that cannot be objectively justified and measures that are disproportionate to the attainment of a legitimate aim are unlawful and contrary to international human rights law.

To ensure the right to equality, States may have to treat differently persons whose situations are significantly different.

6. Selected International Case Law and Legal Comments on the Right to Equality and the Prohibition of Discrimination

This section will highlight some of the many cases concerning discrimination dealt with to date by the major international monitoring bodies. Prime attention has been given to bodies of a judicial or quasi-judicial nature.

Some of the cases chosen may seem to be of relatively minor importance, since many individuals and groups of individuals suffer infinitely greater discrimination than some of those whose cases have been considered by the international monitoring bodies. ***However, the case law clearly indicates the path that should be taken in other possibly far more serious situations, since it establishes universal legal criteria that can and must guide both lawmakers and the legal professions in the drafting of laws and the practical enforcement of the right to equality and the prohibition of discrimination.***

6.1 Race, colour or ethnic origin

6.1.1 Racial slurs

In the *Ahmad* case, Denmark was found to have violated article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The author, a Danish citizen of Pakistani origin, complained that he and his brother had been called "a bunch of monkeys" by the headmaster and another teacher at their school. The incident occurred in the school building after the two boys – who had allegedly been noisy – refused to comply with the teacher's request that they leave the place where they were waiting with a video camera for a friend who was taking an examination.[41]

[41] Communication No. 16/1999, *K. Ahmad v. Denmark* (Opinion adopted on 13 March 2000) in UN doc. *GAOR*, A/55/18, p. 110, para. 2.1.

The author filed a complaint with the police, who discontinued the case on concluding that the words used did not fall within the scope of Section 266b of the Danish Penal Code concerning insulting or degrading remarks.[42] The letter from the police also stated "that the expression used had to be seen in the context of a tense incident [and] should not be understood as insulting or degrading in terms of race, colour, national or ethnic origin, since it could also be used of persons of Danish origin who had behaved as the author had."[43] The State Attorney subsequently upheld the police decision.[44]

The Committee on the Elimination of Racial Discrimination concluded that "owing to the failure of the police to continue their investigations, and the final decision of the Public Prosecutor against which there was no right of appeal, the author was denied any opportunity to establish whether his rights under the Convention had been violated. From this it [followed] that the author [had] been denied effective protection against racial discrimination and remedies attendant thereupon by the State party."[45] The Committee recommended that the State party "ensure that the police and the public prosecutors properly investigate accusations and complaints relating to acts of racial discrimination, which should be punishable by law [according to] article 4 of the Convention".[46]

6.1.2 The right to freedom of movement and residence

In the case of *Koptova v. the Slovak Republic*, also brought under the International Convention on the Elimination of Racial Discrimination, the author complained of violations of the terms of the Convention as a result of resolutions adopted by two municipalities in Slovakia prohibiting citizens of Romani ethnicity from settling in their respective territories. One of the resolutions even forbade Roma citizens to enter the village.[47]

After examining the text of the resolutions, the Committee concluded that they represented a violation of article 5(d)(i) of the Convention, which guarantees the right to freedom of movement and residence to all "without distinction as to race, colour, or national or ethnic origin". It found that "although their wording refers explicitly to Romas previously domiciled in the concerned municipalities, the context in which they were adopted clearly indicates that other Romas would have been equally prohibited from settling."[48] The Committee noted, however, that the impugned resolutions were rescinded in April 1999 and that freedom of movement and residence is guaranteed under article 23 of the Constitution of the Slovak Republic. It recommended that the State party "take the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction are fully and promptly eliminated".[49]

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[42] Ibid., p. 110, paras. 2.2 and 2.4, read in conjunction with p. 116, para. 6.3.

[43] Ibid., p. 110, para. 2.4.

[44] Ibid., p. 110, para. 2.5.

[45] Ibid., p. 116, para. 6.4.

[46] Ibid., p. 116, para. 9.

[47] Communication No. 13/1998, *A. Koptova v. the Slovak Republic* (Opinion of 8 August 2000), in UN doc. *GAOR*, A/55/18, p. 137, paras. 2.1-2.3.

[48] Ibid., p. 149, para. 10.1.

[49] Ibid., p. 149, para. 10.3.

6.1.3 Racial and ethnic discrimination in law enforcement

In its concluding observations on the initial, second and third periodic reports of the United States, the Committee on the Elimination of Racial Discrimination noted with concern "the incidents of police violence and brutality, including cases of deaths as a result of excessive use of force by law enforcement officials, which particularly affects minority groups and foreigners". It therefore recommended that the State party "take immediate and effective measures to ensure the appropriate training of the police force with a view to combating prejudices which may lead to racial discrimination and ultimately to a violation of the right to security of person. The Committee further [recommended] that firm action is taken to punish racially motivated violence and ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such actions."[50]

The Committee also noted with concern "that the majority of federal, state and local prison and jail inmates in [the United States] are members of ethnic or national minorities, and that the incarceration rate is particularly high with regard to African-Americans and Hispanics". It recommended that the State party "take firm action to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equal treatment before the tribunals and all other organs administering justice". It further recommended that the State party "ensure that the high incarceration rate is not a result of the economically, socially and educationally disadvantaged position of these groups".[51]

Lastly, the Committee on the Elimination of Racial Discrimination noted with concern that, "according to the Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions, there is a disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi and Texas. It [urged] the State party to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted persons."[52]

6.1.4 Racial discrimination in ensuring economic, social and cultural rights

In its concluding observations on the fourteenth periodic report of Denmark, the Committee on the Elimination of Racial Discrimination stated: "The Committee is concerned that equal attention be paid to the economic, social and cultural rights listed in article 5 [of the Convention on the Elimination of Racial Discrimination]. It is particularly concerned by the level of unemployment among foreigners and the difficult access to employment of members of ethnic minorities." The Committee pointed out that, "although the State party is not obliged to provide work permits to foreign

[50] See the unedited version of the concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, in UN doc. CERD/C/59/Misc.17/Rev.3, para. 15.

[51] Ibid., para. 16.

[52] Ibid., para. 17.

residents, it has to guarantee that foreigners who have obtained a work permit are not discriminated against in their access to employment."[53]

The same Committee was particularly stern in its concluding observations on the tenth, eleventh and twelfth periodic reports of Australia, in which it expressed serious concern "at the extent of the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights. The Committee [remained] seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialized State. The Committee [recommended] that the State party ensure, within the shortest time possible, that sufficient resources are allocated to eradicate these disparities."[54]

6.2 Gender

6.2.1 The right to represent matrimonial property

The case of *Ato del Avellanal v. Peru* concerned a Peruvian women who owned two apartment buildings in Lima and who, by decision of the Supreme Court, was not allowed to sue the tenants in order to collect overdue rents because, under article 168 of the Peruvian Civil Code, when a women is married, only her husband is entitled to represent the matrimonial property before the courts.[55] According to the Human Rights Committee, this violated the following provisions of the International Covenant on Civil and Political Rights:

- article 14(1), which guarantees that "all persons shall be equal before the courts and tribunals", since "the wife was not equal to her husband for purposes of suing in Court";
- article 3, pursuant to which the States parties "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the ... Covenant", and article 26, which states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." The Committee found that the application of article 168 of the Peruvian Civil Code to the author "resulted in denying her equality before the courts and constituted discrimination on the ground of sex".[56]

6.2.2 Right to respect for family life

In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, the European Court of Human Rights had to decide whether the United Kingdom immigration laws violated the right to respect for family life as guaranteed by article 8 taken either alone or in conjunction with the non-discrimination provision contained in

[53] See UN doc. *GAOR*, A/55/18, p. 23, para. 67.

[54] See UN doc. *GAOR*, A/55/18, pp. 19-20, para. 41.

[55] Communication No. 202/1986, *G. Ato del Avellanal v. Peru* (Views adopted on 28 October 1988) in UN doc. *GAOR*, A/44/40, p. 196, paras. 1 and 2.1.

[56] Ibid., pp. 198-199, paras. 10.1-10.2.

article 14 of the European Convention on Human Rights. The case concerned three women who wanted to establish residence in the United Kingdom with their respective husbands. When lodging their complaints, the applicants, who were of Malawian, Philippine and Egyptian origin, were permanent and lawful residents of the United Kingdom. Their problems started after they married men of foreign origin who were either refused permission to join them in the United Kingdom or to remain there with them. The applicants' husbands were respectively from Portugal, the Philippines and Turkey.

With regard to the right to respect for family life as guaranteed by article 8 of the European Convention, the Court noted that "it was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage." In its view,

> "The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.
>
> In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them.
>
> [...]
>
> There was accordingly no 'lack of respect' for family life and, hence, no breach of Article 8 taken alone."[57]

The outcome was different, however, when the Court examined the case under article 14 in conjunction with article 8 of the Convention. The question arose whether, as alleged by the applicant women, these provisions had been violated "as a result of unjustified differences of treatment in securing the right to respect for their family life, based on sex, race and also – in the case of Mrs. Balkandali – birth".[58]

Invoking its well-established case law, the Court held that:

> "For the purposes of Article 14, a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'."[59]

However, the Contracting States "enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law".[60]

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[57] *Eur. Court HR, Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A, No. 94*, p. 34, paras. 68-69.

[58] Ibid., p. 35, para. 70.

[59] Ibid., p. 35, para. 72.

[60] Ibid., p. 36, para. 72.

It was not disputed that, under the relevant rules, "it was easier for a man settled in the United Kingdom than for a women so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement". The argument therefore centred on the question whether this difference had an objective and reasonable justification.[61] The Government argued that the difference in treatment was aimed at limiting "primary immigration" and that it was justified "by the need ***to protect the domestic labour market*** at a time of high unemployment".[62] While accepting that the aim of protecting the domestic labour market "was without doubt legitimate", the Court took the view that this did not in itself establish the legitimacy of the difference made in the rules in force.[63] Moreover, "the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."[64]

After examining the Government's arguments, the Court stated that it was "not convinced that the difference that may nevertheless exist between the respective impact of men and women on the domestic labour market [was] sufficiently important to justify the difference of treatment, complained of by the applicants, as to the possibility for a person settled in the United Kingdom to be joined by, as the case may be, his wife or her husband".[65] While accepting the Government's argument that the rules were also aimed at ***advancing public tranquillity***, the Court was "not persuaded that this aim was served by the distinction drawn in those rules between husband and wives".[66]

The Court therefore concluded that the applicants had been victims of discrimination on the ground of ***sex*** in violation of article 14 of the European Convention on Human Rights read in conjunction with article 8. It further concluded, however, that the applicants had ***not*** been discriminated against on the ground of either race or birth.[67]

6.2.3 Preferential pension rights

In the *Pauger v. Austria* case the author had been refused a pension following the death of his wife on the ground that he was gainfully employed. The author alleged that, contrary to article 26 of the International Covenant on Civil and Political Rights, the Austrian Pension Act of 1965 "granted preferential treatment to widows, as they would receive a pension, regardless of their income, whereas widowers could receive pensions only if they did not have any other form of income".[68]

[61] Ibid., p. 36, para. 74.

[62] Ibid., p. 36, para. 75; emphasis added.

[63] Ibid., p. 37, para. 78.

[64] Ibid., p. 38, para. 78.

[65] Ibid., p. 38, para. 79.

[66] Ibid., p. 39, para. 81.

[67] Ibid., p. 39, para. 83, and p. 41, paras. 86 and 89.

[68] Communication No. 415/1990, *D. Pauger v. Austria* (Views adopted on 26 March 1992), in UN doc. *GAOR*, A/47/40, p. 333, paras. 1.-2.1

The Human Rights Committee concluded that, contrary to article 26 of the Covenant, the author "as a widower, was denied full pension benefits on an equal footing with widows".[69] In determining whether application in this case of the Pension Act "entailed a differentiation based on unreasonable or unobjective criteria", the Committee observed that while Austrian family law imposed equal rights and duties on both spouses, with regard to their income and mutual maintenance, the Pension Act, as amended in 1985, provided for full pension benefits to widowers only if they had no other source of income, a requirement that did not apply to widows. Widowers would in fact only be treated on an equal footing with widows as from 1 January 1995.[70] In the Committee's view, this meant that "men and women whose social circumstances are similar are being treated differently, merely on the basis of sex." Such differentiation was not reasonable, as was also "implicitly acknowledged" by the State party when it pointed out that "the ultimate goal of the legislation [was] to achieve full equality between men and women in 1995".[71]

6.2.4 Social security benefits

Article 26 of the International Covenant of Civil and Political Rights was also violated in the case of *S W M. Broeks v. the Netherlands*, since Ms. Broeks had been the victim of discrimination based on sex in the application of the then valid Netherlands Unemployment Benefits Act.[72] In order to receive benefits under this law, a married woman "had to prove that she was a 'breadwinner' – a condition that did not apply to married men". According to the Human Rights Committee, this differentiation placed married women at a disadvantage compared with married men and was not reasonable.[73]

6.2.5 Contributions to general child-care benefit schemes

In the case of *Van Raalte v. the Netherlands*, the applicant complained that the levying of contributions under the Netherlands General Child Care Benefits Act from him, an unmarried childless man over 45 years of age, was a violation of article 14 of the European Convention on Human Rights taken in conjunction with article 1 of Protocol No. 1 to the Convention because of the fact that no similar contributions were exacted at that time from unmarried childless women of the same age.[74]

The Court had no problem examining this case in the light of article 1 of Protocol No. 1, since it concerned the right of the State "to secure the payment of taxes or other contributions".[75] It further considered that the situation complained of undoubtedly constituted a "difference in treatment" between persons in similar

[69] Ibid., p. 336, para. 8.

[70] Ibid., pp. 335-336, para. 7.4.

[71] Ibid., p. 336, para. 7.4.

[72] Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. *GAOR*, A/42/40, p. 150, paras. 14-15.

[73] Ibid., p. 150, para. 14. The same issue arose in Communication No. 182/1984, *F. H. Zwaan-de Vries v. the Netherlands* (Views adopted on 9 April 1987), pp. 160-169.

[74] *Eur. Court HR, Case of Van Raalte v. the Netherlands, judgment of 21 February 1997, Reports 1997-I*, p. 183, para. 32.

[75] Ibid., p. 184, paras. 34-35.

situations, based on gender. The factual difference between the two categories relied on by the Government, namely "their respective biological possibilities to procreate" did not lead the Court to a different conclusion because it was precisely that distinction which was "at the heart of the question whether the difference in treatment complained of [could] be justified".[76]

The Court noted that a "key feature" of the scheme was "that the obligation to pay contributions did not depend on any potential entitlement to benefits that the individual might have ... Accordingly the exemption in the present case ran counter to the underlying character of the scheme."[77]

However, the Court concluded that, while the Contracting States "enjoy a certain margin of appreciation under the Convention as regards the introduction of exemptions to such contributory obligations, Article 14 requires that any such measure, in principle, applies even-handedly to both men and women unless compelling reasons have been adduced to justify a difference in treatment." The Court was not persuaded that such reasons existed in the case before it and concluded that there had been a violation of article 14 taken together with article 1 of Protocol No. 1 to the Convention.[78]

6.2.6 Parental leave allowance

In the case of *Petrovic v. Austria*, the outcome was different in that the European Court of Human Rights concluded that the refusal of the Austrian authorities to grant parental leave allowance to a father – on the ground that such allowance was available only to mothers – did not exceed the margin of appreciation granted to the Government under article 14 in conjunction with article 8 of the Convention.[79]

The Court pointed out that "at the material time parental leave allowances were paid only to mothers, not fathers, once a period of eight weeks had elapsed after the birth and the right to a maternity allowance had been exhausted" and that it was not disputed that this was a differential treatment based on grounds of sex.[80]

The Court accepted that the two parents were "similarly placed" to take care of the child during the period concerned. Moreover, considering that

> "the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe ... very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention."[81]

[76] Ibid., p. 186, para. 40.

[77] Ibid., p. 187, para. 41.

[78] Ibid., p. 187, paras. 42-43.

[79] *Eur. Court HR, Case of Petrovic v. Austria, judgment of 27 March 1998, Reports 1998-II*, p. 588, para. 43.

[80] Ibid., p. 587, paras. 34-35.

[81] Ibid., p. 587, paras. 36-37.

The Court noted, however, that

> "the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."[82]

It was clear, according to the Court, that "at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers." Only gradually had the European States "moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children". "It therefore [appeared] difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe."[83] It followed that the Austrian authorities had not "exceeded the margin of appreciation allowed to them" so that "the difference in treatment complained of was not discriminatory within the meaning of Article 14."[84]

6.2.7 Acquisition of citizenship

In its advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, the Inter-American Court of Human Rights concluded that these amendments constituted discrimination incompatible with articles 17(4) (equality of rights between spouses during marriage) and 24 (right to equal protection) of the American Convention on Human Rights insofar as they favoured only one of the spouses. According to article 14(4) of the proposed amendment, "a foreign women who, by marriage to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on [that] nationality" would be Costa Rican by naturalization.[85] In the Court's view, it would have been be more consistent with the Convention for the text to refer to "any 'foreigner' who marries a Cost Rican national".[86]

[82] Ibid., p. 587, para. 38.

[83] Ibid., p. 588, paras. 40-41.

[84] Ibid., p. 588, para. 43.

[85] *I-A Court HR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4*, p. 111, para. 67 read in conjunction with p. 82, p. 109, para. 64, and p. 113, point 5.

[86] Ibid., pp. 111-112, para. 67. Nationality laws must not, of course, discriminate on other grounds either. In its concluding observations on the initial, second, third and fourth periodic reports of Estonia, the Committee on the Elimination of Racial Discrimination expressed "particular concern that the provisions for restricted immigration quotas established by the 1993 Aliens Act apply to citizens of most countries in the world, except those of the European Union, Norway, Iceland and Switzerland". It recommended "that the quota system be applied without discrimination based on race or ethnic or national origin", UN doc. *GAOR*, A/55/18, p. 25, para. 81.

6.3 Language

The use of language arose in the case of *Diergaardt et al. v. Namibia* in which the authors, all members of the Rehoboth Baster Community, claimed a violation of, inter alia, article 26 of the International Covenant on Civil and Political Rights, since they had been denied the use of their mother tongue – Afrikaans – in the fields of administration, justice, education and public life.[87] In this case, where "due weight" had to be given to the authors' allegations in the absence of a Government response, the Committee pointed out that the authors had shown that the State party had "instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so". These instructions barred the use of Afrikaans not only for the issuing of public documents but also for telephone conversations.[88] It followed that the authors, as Afrikaans speakers, were victims of a violation of article 26 of the Covenant.[89]

A person of Breton mother tongue who also spoke French complained of a violation of article 26 of the Covenant since he was not allowed to use the Breton language during court proceedings. The Human Rights Committee pointed out, however, that the author had "not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French".[90] In the Committee's view, the right to a fair trial in article 14(1) of the Covenant, read in conjunction with article 14(3)(f), "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 the court is certain, as the two courts were in this case, "that the accused is sufficiently proficient in the court's language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language".[91] According to French law, the author would have been entitled to the services of an interpreter had he needed it. As that was not the case, he was not a victim of a violation of article 26 or of any other provision of the Covenant.[92]

In the case of *Ballantyne et al. v. Canada*, the authors, who were of English mother tongue but living in Quebec, alleged that the prohibition on their using English for advertising purposes was a violation of article 26 of the Covenant. The Human Rights Committee concluded that the authors had not been victims of discrimination on the ground of their language, since the prohibition applied to both French and English speakers, so that "a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking" could not do so.[93]

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[87] Communication No. 760/1997, *J. G. A. Diergaardt et al. v. Namibia* (Views adopted on 25 July 2000), in UN doc. *GAOR*, A/55/40 (II), p. 147, para. 10.10.

[88] Ibid., loc. cit.

[89] Ibid.

[90] Communication No. 219/1986, *Dominique Guesdon v. France* (Views adopted on 25 July 1990), in UN doc. *GAOR*, A/45/40 (II), p. 67, para. 10.3.

[91] Ibid., loc. cit.

[92] Ibid., p. 68, paras. 10.4-11.

[93] Communications Nos. 359/1989 and 385/1989, *J. Ballantyne and E. Davidson, and G. McIntyre v. Canada*, in UN doc. *GAOR*, A/48/40 (II), p. 103, para. 11.5.

6.4 Religion or belief

6.4.1 Conscientious objection to military service

The Human Rights Committee has consistently held that, under article 8 of the International Covenant on Civil and Political Rights, States parties "may require service of a military character and, in case of conscientious objection, alternative national service, ***provided that such service is not discriminatory***".[94] In the case of *F. Foin v. France*, the author complained that French law, which required 24 months' national alternative service for conscientious objectors compared with 12 months for military service, was discriminatory and violated the principle of equality before the law and equal protection of the law as guaranteed by article 26 of the Covenant.[95] The Committee recognized

> "that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service".[96]

In the *Foin* case, however, the argument invoked by the Government was that "doubling the length of service was the only way to test the sincerity of an individual's conviction". In the Committee's view, such an argument did not satisfy the requirement "that the difference in treatment ... was based on reasonable and objective criteria." Article 26 of the Covenant had therefore been violated, "since the author was discriminated against on the basis of his conviction of conscience".[97]

In the case of *Järvinen v. Finland*, on the other hand, the Committee found no violation of article 26. The author alleged that he had been discriminated against since alternative service lasted for 16 months, compared with only 8 months for military service. The length of alternative service had been extended from 12 to 16 months when the law was changed so that applicants were assigned to civilian service solely on the basis of their own declarations without having to prove their convictions.[98] The legislator deemed such prolongation to be "the most appropriate indicator of a conscript's convictions".[99] Considering in particular this *ratio legis,* the Committee concluded that "the new arrangements were designed to facilitate the administration of alternative service." The legislation was therefore "based on practical considerations and had no discriminatory purpose".[100] The Committee was, however, aware

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[94] See, for example, Communication No. 666/1995, *F. Foin v. France* (Views adopted on 3 November 1999), in UN doc. *GAOR*, A/55/40 (II), p. 37, para. 10.3; emphasis added.

[95] Ibid., loc. cit.

[96] Ibid.

[97] Ibid. For identical reasoning see Communication No. 689/1996, R. *Maille v. France* (Views adopted on 10 July 2000), p. 72, para. 10.4.

[98] Communication No. 295/1988, *A. Järvinen v. Finland* (Views adopted on 25 July 1990), in UN doc. *GAOR*, A/45/40 (II), p. 101, para. 2.1, p. 102, para. 3.1, and p. 104, para. 6.1.

[99] Ibid., p. 102, para. 2.2.

[100] Ibid., p. 105, para. 6.4.

> "that the impact of the legislative differentiation works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service. At the same time, the new arrangements were not merely for the convenience of the State alone. They removed from conscientious objectors the often difficult task of convincing the examination board of the genuineness of their beliefs; and they allowed a broader range of individuals potentially to opt for the possibility of alternative service."[101]

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A different legal aspect arose in the case of *Thlimmenos v. Greece,* which had its origin in the conviction of the applicant – a Jehovah's Witness – by Athens Permanent Army Tribunal of insubordination for refusing to wear military uniform at a time of general mobilization. He was sentenced to four years' imprisonment but released on parole after two years and one day.[102] The applicant subsequently came second out of 60 candidates in a public examination for the appointment of 112 chartered accountants but the Executive Board of the Greek Institute of Chartered Accountants refused to appoint him because he had been convicted of a felony.[103] The applicant unsuccessfully seized the Supreme Administrative Court, invoking, inter alia, his right to freedom of religion and equality before the law. The Court decided that the Board had acted in accordance with the law when, for the purposes of applying article 22(1) of the Civil Servants Code, it had taken into consideration the applicant's conviction.[104] According to this provision, no person convicted of a felony could be appointed to the civil service and, on the basis of Legislative Decree No. 3329/1955, as amended, a person who did not qualify for appointment to the civil service could not be appointed a chartered accountant.[105]

Before the European Court, the applicant did not complain about his initial conviction for insubordination but only about the fact "that the law excluding persons convicted of a felony from appointment to a chartered accountant's post did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds".[106] The Court examined the complaint under article 9 (right to freedom of thought, conscience and religion) and article 14 of the Convention. Article 9 was relevant because the applicant was a member of the Jehovah's Witnesses, a religious group committed to pacifism.[107] As noted above, the Court observed in this case that "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[108] It thus had to examine

[101] Ibid., p. 105, para. 6.5.

[102] *Eur. Court HR, Case of Thlimmenos v. Greece, judgment of 6 April 2000,* para. 7 of the text of the decision as published at the Court's web site: http://www.echr.coe.int/

[103] Ibid., para. 8.

[104] Ibid., paras. 9-13.

[105] Ibid., paras. 15-16.

[106] Ibid., para. 33.

[107] Ibid., para. 42.

[108] Ibid., para. 44.

- "whether the failure to treat the applicant differently from other persons convicted of a felony pursued a legitimate aim" and, if it did,
- "whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[109]

The Court noted that "States have a legitimate interest to exclude some offenders from the profession of chartered accountant." However, it considered that

> "unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender's ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified."[110]

In reply to the Government's argument "that persons who refuse to serve their country must be appropriately punished", the Court pointed out that the applicant had already served a prison sentence for his refusal. In these circumstances, the Court considered that "imposing a further sanction on the applicant was disproportionate. It [followed] that the applicant's exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court [found] that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony."[111] There had therefore been a violation of article 14 of the European Convention taken in conjunction with article 9.

6.4.2 Duty to wear safety gear at work

A man of Sikh religion complained to the Human Rights Committee that his right to manifest his religion, as recognized by article 18 of the International Covenant on Civil and Political Rights, had been violated by the requirement under safety regulations to wear a hard hat instead of a turban during his work, which consisted of the nightly inspection of the undercarriage of trains from a pit located between the rails, as well as maintenance work inside and outside the train, such as on the engine. The Committee examined the complaint under article 18 of the Covenant and also ex officio under article 26, concluding that in both cases the outcome was the same: under article 18(3) the limitation on the author's right to manifest his religion was justified by reference to the grounds laid down in article 18(3), and under article 26 it was a reasonable measure directed towards objective purposes compatible with the Covenant.[112] It was, in other words, a reasonable and objective measure to require that workers in federal employment be protected from injury and electric shock by the wearing of hard hats.[113]

[109] Ibid., para. 46.

[110] Ibid., para. 47.

[111] Ibid., loc. cit.

[112] Communication No. 208/1986, *K. Singh Bhinder v. Canada* (Views adopted on 9 November 1989), in UN doc. *GAOR*, A/45/40 (II), p. 54, para. 6.2.

[113] Ibid., loc. cit.

6.4.3 Public funding of religious schools

The case of *A.H. Waldman v. Canada* concerned public funding of religious schools in the province of Ontario in Canada. Ontario Roman Catholic schools are the only non-secular schools to receive full and direct public funding, while the private Jewish school to which the author sent his two children received nothing, so that the author had to pay the entire tuition fee.[114] The question arose whether the public funding of Roman Catholic schools, to the exclusion of schools of the author's religion, constituted a violation of article 26 of the Convention.

The Committee rejected the Government's argument that the distinction was based on objective and reasonable criteria because the privileged treatment of Roman Catholic schools was enshrined in the Constitution. The Committee noted that this distinction dated from 1867 and that there was nothing to show "that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools".[115] It concluded "that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the authors' religion, which are private by necessity, cannot be considered reasonable and objective".[116]

Lastly, the Canadian Government submitted that the aims of its secular public education system were compatible with the principle of non-discrimination laid down in the Covenant, to which the Committee replied "that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools".[117] It observed, furthermore, that "the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria", which was not the case with regard to the author's school.[118]

6.4.4 Lack of public-law status for purposes of bringing court proceedings

The European Court of Human Rights concluded that article 14 taken together with article 6(1) of the European Convention of Human Rights had been violated in the case of *Canea Catholic Church v. Greece*. The Church in question had tried to bring legal proceedings against two persons living next to the cathedral of the Roman Catholic diocese of Crete who had demolished one of the walls surrounding the church. The purpose of the legal proceedings was to obtain a decision ordering the defendants

[114]Communication No. 694/1996, *A. H. Waldman v. Canada* (Views adopted on 3 November 1999*)*, in UN doc. *GAOR*, A/55/40 (II), p. 87, para. 1.2.

[115]Ibid., p. 97, paras. 10.3-10.4

[116]Ibid., p. 97, para. 10.5.

[117]Ibid., p. 97, para. 10.6.

[118]Ibid., pp. 97-98, para. 10.6.

to cease the nuisance and to restore the previously existing situation.[119] However, the Court of Cassation eventually ruled that the Church had no legal standing since it had failed to comply with the State's laws on the acquisition of legal personality.[120]

Before the European Court the applicant Church "maintained that it was the victim of discrimination incompatible with [article 14], since the removal of its right to bring or defend legal proceedings was based exclusively on the criterion of religion".[121] For the Court it was sufficient to note that "the applicant church, which [owned] its land and buildings, [had] been prevented from taking legal proceedings to protect them, whereas the Orthodox Church or the Jewish community [could] do so in order to protect their own property without any formality or required procedure." Article 14 taken in conjunction with article 6(1) of the Convention had been violated since the Government had submitted "no objective and reasonable justification for such a difference of treatment".[122]

6.5 Property

The case of *Chassagnou and Others v. France* considered by the European Court of Human Rights is a complex case concerning the use of property and hunting rights in France. In general, the applicants, who were all farmers and/or landholders living in France, maintained that, pursuant to French Law No. 64-696 of 1964, the so-called "Loi Verdeille", "they had been obliged, notwithstanding their opposition to hunting on ethical grounds, to transfer hunting rights over their land to approved municipal hunters' associations, had been made automatic members of those associations and could not prevent hunting on their properties." This violated, in their view, article 11 of the European Convention on Human Rights, article 1 of Protocol No. 1 thereto and 14 of the Convention "in that only the owners of landholdings exceeding a certain minimum area could escape the compulsory transfer of hunting rights over their land to an approved municipal hunters' association, thus preventing hunting there and avoiding becoming members of such an association".[123]

For reasons that go beyond the scope of this chapter, the European Court first concluded that both article 1 of Protocol No. 1 and article 11 had been violated.[124] It also found that there had been a violation of article 1 of Protocol No. 1 taken in conjunction with article 14 of the Convention, concluding that "since the result of the difference in treatment between large and small landowners is to give only the former the right to use their land in accordance with their conscience, it constitutes discrimination on the ground of property, within the meaning of Article 14 of the Convention."[125] Lastly, the Court found that there had been a violation of article 11 taken in conjunction with article 14, concluding that the Government had not put

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[119] *Eur. Court HR, Case of Canea Catholic Church v. Greece, judgment of 16 December 1997, Reports 1997-VIII*, pp. 2847-2848, paras. 6-8.

[120] Ibid., pp. 2849-2850, para. 13.

[121] Ibid., p. 2860, para. 44.

[122] Ibid., p. 2861, para. 47.

[123] *Eur. Court HR, Case of Chassagnou and Others v. France, judgment of 29 April 1999, Reports 1999-III*, p. 50, para. 66.

[124] Ibid., pp. 57-58, para. 85 (on article 1 of Protocol No. 1: there was a disproportionate burden on small landowners), and p. 67, para. 117 (art. 11: compulsion to join an association "fundamentally contrary" to one's convictions).

[125] Ibid., p. 60, para. 95.

forward "any objective and reasonable justification" for the difference in treatment, which obliged small landholders to become members of the municipal hunting associations but enabled large landholders to evade compulsory membership, "whether they exercise their exclusive right to hunt on their property or prefer, on account of their convictions, to use the land to establish a sanctuary or nature reserve".[126]

6.6 Birth or other status

6.6.1 Social security benefits for married/unmarried couples

The International Covenant on Civil and Political Rights does not require States parties to adopt social security legislation, but when they do so such legislation must comply with article 26 of the International Covenant on Civil and Political Rights and any distinctions made in the enjoyment of benefits "must be based on reasonable and objective criteria".[127] In the case of *M. Th. Sprenger v. the Netherlands*, the author, who cohabited with a man without being married to him, complained that her right under article 26 had been violated since she was "denied co-insurance under the Health Insurance Act, which distinguished between married and unmarried couples, whereas other social security legislation already recognized the equality of status between common law and official marriages".[128]

The Committee pointed out, however, that "social developments occur within the States parties and the Committee has in this context taken note of recent legislation reflecting these developments, including the amendments to the Health Insurance Act", which recognized the equality of common law and official marriages as of 1 January 1988.[129] The Committee also noted the explanation of the State party that there had been no general abolition of the distinction between married persons and cohabitants, and the reasons given for the continuation of this differential treatment. It found this differential treatment to be based on reasonable and objective grounds.[130] Lastly, the Committee observed that "the decision of a State's legislature to amend a law does not imply that the law was necessarily incompatible with the Covenant; States parties are free to amend laws that are compatible with the Covenant, and to go beyond Covenant obligations in providing additional rights and benefits not required under the Covenant."[131]

[126] Ibid., p. 68, para. 121. The law created "a difference in treatment between persons in comparable situations, namely the owners of land or hunting rights, since those who own 20 hectares or more of land in a single block may object to the inclusion of their land in the [municpal hunters' association's] hunting grounds, thus avoiding compulsory membership of the association, whereas those who, like the applicants, possess less than 20 or 60 hectares of land may not", p. 68, para. 120.

[127] Communication No. 395/1990, *M. Th. Sprenger v. the Netherlands* (Views adopted on 31 March 1992), in UN doc. *GAOR*, A/47/40, p. 321, para. 7.2.

[128] Ibid., p. 320, para. 3.

[129] Ibid., p. 322, para. 7.4, read in conjunction with p. 320, para. 2.5.

[130] Ibid., p. 322, para. 7.4.

[131] Ibid., p. 322, para. 7.5.

6.6.2 Inheritance rights

The case of *Mazurek v. France* concerned the provisions in French law limiting the applicant's inheritance rights over his mother's estate compared with those of his half-brother. According to the law, children born out of wedlock were entitled to receive only "half of the share to which they would have been entitled if all the children of the deceased, including themselves, had been legitimate" (art. 760 of the Civil Code).[132] The applicant was an adulterine child, while his brother, who was born out of wedlock, had been legitimized through his mother's marriage.

The Court examined the case in the light of an alleged infringement of the applicant's right to peaceful enjoyment of his possessions under article 1 of Protocol No. 1 to the European Convention on Human Rights, in conjunction with the principle of non-discrimination contained in article 14. Article 1 of Protocol No. 1 was relevant, since their deceased mother's estate was the joint property of the half-brothers.[133]

In examining whether this difference in treatment was discriminatory, the Court emphasized that "the Convention is a living instrument which must be interpreted in the light of present-day conditions" and that "today the member States of the Council of Europe attach great importance to the question of equality between children born in and children born out of wedlock as regards their civil rights."[134] "Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention."[135]

Although the Court accepted as legitimate the Government's argument that the French law was aimed at protecting the traditional family, the question remained "whether, regarding the means employed, the establishment of a difference of treatment between adulterine children and children born in wedlock or out of wedlock but not of an adulterous relationship, with regard to inheritance under their parent, appears proportionate and appropriate in relation to the aim pursued".[136]

The Court then pointed out "that the institution of the family is not fixed, be it historically, sociologically or even legally" and referred to the legal development both in France and at the universal level favouring increased equality between children of different descent. Contrary to the assertion of the French Government, the Court also noted with regard to the situation in other member States of the Council of Europe, that there was "a distinct tendency in favour of eradicating discrimination against adulterine children. It [could] not ignore such a tendency in its – necessarily dynamic – interpretation of the relevant provisions of the Convention".[137] The Court therefore concluded that there was no ground in the instant case on which to justify discrimination based on birth out of wedlock. In any event, "an adulterine child cannot be blamed for circumstances for which he or she is not responsible. It [was] an

[132] *Eur. Court HR, Case of Mazurek v. France, judgment of 1 February 2000,* paras. 17 and 23 of the text of the decision as published at the Court's web site: http://www.echr.coe.int/

[133] Ibid., paras. 41-43.

[134] Ibid., para. 49.

[135] Ibid., loc. cit.

[136] Ibid., paras. 50-51.

[137] Ibid., para. 52.

inescapable finding that the applicant was penalised, on account of his status as an adulterine child, in the division of the assets of the estate".[138] It followed "that there was not a reasonable relationship of proportionality between the means employed and the aim pursued" and article 14 of the Convention read in conjunction with article 1 of Protocol No. 1 to the Convention had therefore been violated.[139]

In the case of *Marckx v. Belgium*, the European Court of Human Rights also found, among several other violations, a violation of article 14 of the Convention read in conjunction with the right to respect for family life as guaranteed by article 8 insofar as there was a difference of treatment in Belgian law between "illegitimate" and "legitimate" children with regard to inheritance rights.[140] The second applicant, Alexandra, had enjoyed only limited rights to receive property from her biological mother prior to her adoption by the latter and had at no time, either before or after her adoption, had any entitlement on intestacy in the estates of members of her mother's family.[141] The Court concluded that such differences in treatment lacked "objective and reasonable justifications". There had thus been a violation of article 14 in conjunction with article 8 of the Convention.[142]

The limited capacity of Alexandra's mother, Paula, to make dispositions in her daughter's favour from the date of her recognition of her daughter until her adoption also constituted a violation of Paula's right not to be subjected to discrimination. In the view of the European Court, the distinction made in this respect between unmarried and married mothers lacked "objective and reasonable justification" and was therefore contrary to article 14 read in conjunction with article 8 of the Convention.[143] The limitation on the right of an unmarried mother, as compared with a married mother, to make gifts and legacies in favour of her child was also in breach of article 14 taken in conjunction with article 1 of Protocol No. 1 to the Convention, according to which everyone has the right to the peaceful enjoyment of his or her possessions.[144]

6.6.3. Conditions of birth or descent for presidential candidates

In the case brought by the *Legal Resources Foundation* against Zambia, the African Commission on Human and Peoples' Rights had to consider the Amendment Act 1996 to the Zambian Constitution, according to which anyone who wished to contest the office of President of the country had to prove that both parents were Zambian citizens by birth or decent. It was alleged that the amendment would disenfranchise about 35 per cent of the Zambian electorate from standing as presidential candidates.[145]

[138] Ibid., para. 54.

[139] Ibid., para. 55.

[140] *ECHR, Marckx Case v. Belgium, judgment of 13 June 1979, Series A, No. 31*, p. 22, para. 48.

[141] Ibid., pp. 24-25, paras. 55-56.

[142] Ibid., loc. cit. and p. 26, para. 59.

[143] Ibid., pp. 26-27, paras. 60-62.

[144] Ibid., pp. 27-28, paras. 63-65.

[145] *ACHPR, Legal Resources Foundation v. Zambia, Communication No. 211/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, para. 52 of the text of the decision as published at: http://www1.umn.edu/humanrts/africa/comcases/211-98.html

The African Commission pointed out that article 2 of the Charter "abjures discrimination on the basis of any of the grounds set out, among them 'language ... national and social origin ... birth or other status'. 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."[146] In the Commission's view, the right to equality is also important because it affects the capacity to enjoy other rights. For example, a person who is at a disadvantage because of his or her place of birth or social origin "may vote for others but has limitations when it comes to standing for office. In other words, the country may be deprived of the leadership and resourcefulness such a person may bring to national life." The Commission noted in this regard "that in a growing number of African States, these forms of discrimination have caused violence and social and economic instability which has benefited no one".[147]

The Commission examined this complaint closely not only under article 2 of the Charter but also under article 13 concerning the right of every citizen "to participate freely in the government of his country, either directly or through freely chosen representatives". Looking at the history of Zambia, it concluded that rights that had been enjoyed for 30 years could not be "lightly taken away", and the retrospective application of the impugned measure could not be justified under the African Charter. "The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin" but the right of the citizens of Zambia to freely choose their political representatives is violated.[148] Articles 2 and 13 of the Charter as well as the right to equality before the law as guaranteed by article 3(1) had therefore been violated.

6.7 National origin

The case of *Gueye et al v. France* was brought by 743 retired Senegalese members of the French Army who claimed that France had violated article 26 of the International Covenant on Civil and Political Rights because its law provided for "different treatment in the determination of pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960" in that they received pensions that were "inferior to those enjoyed by retired French soldiers of French nationality". In the authors' view, this constituted racial discrimination.[149]

While the Committee found no evidence to support the allegation of racial discrimination, it still had to determine whether the situation complained of fell within the purview of article 26 on any other ground.[150] Notwithstanding the fact that "nationality" as such does not figure among the prohibited grounds of discrimination enumerated in article 26 of the Covenant, the Committee accepted that a

[146]Ibid., para. 63.

[147]Ibid., loc. cit.

[148]Ibid., paras. 71 and 72.

[149]Communication No. 196/1985, *I. Gueye et al. v. France* (Views adopted on 3 April 1989), in UN doc. *GAOR*, A/44/40, p. 189, paras. 1.1-1.2.

[150]Ibid., pp. 193-195, para. 9.4.

differentiation based on nationality had been made upon the independence of Senegal and that this was an issue that fell within the reference to "other status". It therefore had to determine whether the differentiation was based on reasonable and objective criteria.[151]

In so doing, the Committee noted that "it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past ... A subsequent change in 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."[152] Considering that there were no other legitimate grounds to justify differential treatment, the Committee concluded that the difference was "not based on reasonable and objective criteria" and therefore constituted discrimination prohibited by article 26.[153]

In a case concerning the expulsion of West Africans from Angola, the African Commission on Human and Peoples' Rights pointed out that article 2 of the African Charter on Human and Peoples' Rights requires States parties to ensure that persons living in their territory enjoy the rights guaranteed in the Charter regardless of whether they are nationals or non-nationals. In the case before the Commission, the expelled persons' right to equality before the law under article 2 of the Charter had been violated because of their "origin".[154]

6.8 Sexual orientation

The right not to be discriminated against on the basis of one's sexual orientation is not expressly covered by the legal provisions considered in this chapter. However, the grounds enumerated in, for instance, article 26 of the International Covenant on Civil and Political Rights, article 2 of the African Charter on Human and Peoples' Rights and article 14 of the European Convention on Human Rights are not exhaustive. As is clear from the words "such as" in all these articles, the lists are illustrative only, a fact that was emphasized by the European Court of Human Rights in the case of *Salgueiro da Silva Mouta v. Portugal* with regard to article 14 of the European Convention, in which it ruled that a person's "sexual orientation" is a concept which is undoubtedly covered by that article.[155]

In this case, the applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter to his former wife rather than to himself exclusively on the ground of his sexual orientation. The court of first instance, the Lisbon Family Affairs Court, had earlier granted parental

[151] Ibid., p. 194, para. 9.4.

[152] Ibid., p. 194, para. 9.5.

[153] Ibid., loc. cit.

[154] *ACHPR, Union Inter-Africaine des Droits de l'Homme et al v. Angola, Communication No. 159/96, decision adopted on 11 November 1997*, para. 18 of the text of the decision as published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/159-96.html; this case also involved a violation of article 7(1)(a) of the Charter, since the expelled persons had no opportunity to challenge their expulsion before the competent legal authorities, paras. 19-20.

[155] See, for example, *Eur. Court HR, Case of Salgueiro da Silva Mouta v. Portugal, judgment of 21 December 1999,Reports 1999-IX*, p. 327, para. 28.

responsibility to the applicant.[156] The latter considered that his right to respect for his family life had been violated and that he had been discriminated against contrary to article 14 of the Convention.

In examining the alleged violation of article 8 taken in conjunction with article 14, the European Court accepted "that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other". However, in reversing the decision of the lower Court, "the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man".[157]

The European Court was "accordingly forced to conclude" that there was a difference of treatment between the applicant and his ex-wife that was based on the applicant's sexual orientation. It therefore had to consider whether this difference in treatment had an objective and reasonable justification, i.e. (1) whether it pursued a "legitimate aim" and, if so, (2) whether there was "a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[158]

The Court concluded that the aim "undeniably pursued" by the decision of the Lisbon Court of Appeal was legitimate, in that it was for the protection of the health and rights of the child.[159] But was it reasonably proportionate to this aim? The Court concluded that it was not.[160] It took the view that the relevant passages from the judgment of the Lisbon Court of Appeal "were not merely clumsy or unfortunate ... or mere *obiter dicta"*. They suggested, quite to the contrary, "that the applicant's homosexuality was a factor which was decisive in the final decision". Such a distinction based on considerations regarding the applicant's sexual orientation was "not acceptable under the Convention".[161] It followed that there had been a violation of article 8 of the European Convention taken in conjunction with article 14.[162]

6.9 Minorities

6.9.1 Right to one's own culture

The Human Rights Committee has established that article 27 of the International Covenant on Civil and Political Rights "requires that a member of a minority shall not be denied the right to enjoy his culture". Thus, "measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27". However, "measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27."[163]

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[156]Ibid., pp. 324-325, paras. 21-22.

[157]Ibid., p. 327, para. 28.

[158]Ibid., p. 327, paras. 28-29.

[159]Ibid., p. 327, para. 30.

[160]Ibid., p. 328, para. 36.

[161]Ibid., p. 328, paras. 35-36.

[162]Ibid., p. 329, para. 36.

[163]Communication No. 671/1995, *J. E. Länsman et al. v. Finland* (Views adopted on 30 October 1996), in UN doc. *GAOR*, A/52/40 (II), p. 203, para. 10.3.

The rights of minorities to their own culture was at issue in the case of *Länsman et al v. Finland*, which was submitted by reindeer breeders of Sami ethnic origin who complained about the decision to carry out logging in an area covering about 3,000 hectares situated within their rightful winter herding lands. In their view, this decision violated their rights under article 27 of the Covenant. The "crucial question" that the Committee had to decide was whether the logging that had already been carried out, as well as such logging as had been approved for the future, was "of such proportions as to deny the authors the right to enjoy their culture" as guaranteed by article 27.[164] The Committee recalled in this regard the terms of paragraph 7 of its General Comment on article 27, "according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry, and that measures must be taken 'to ensure the effective participation of members of minority communities in decisions which affect them'".[165]

However, after "careful consideration" of the case, the Committee was unable to conclude "that the activities carried out as well as approved [constituted] a denial of the authors' right to enjoy their own culture". It was uncontested that the Herdsmen's Committee, to which the authors belonged, had been consulted in the process of the drawing up of the logging plans and had not disavowed them. Furthermore, the domestic courts had considered whether the proposed logging would constitute a violation of article 27 of the Covenant, and there was nothing to suggest that those courts had "misinterpreted and/or misapplied" the article.[166]

The Committee added, however, that if logging were to be approved on a wider scale or if it could be shown that the effects of the planned logging were more serious than foreseen, "then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27."[167]

6.9.2 Right to reside in an Indian reserve

One of the early cases decided by the Human Rights Committee was that of *Lovelace v. Canada*, brought by a women who was born and registered as a Maliseet Indian but who, in accordance with the Canadian Indian Act, had lost her rights and status as an Indian after marrying a non-Indian. As a man who married a non-Indian woman did not lose his Indian status, the author claimed that the Indian Act was discriminatory and violated, inter alia, articles 26 and 27 of the Covenant. [168] Even after her divorce, the author was not allowed to move back to her tribe.

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[164] Ibid., p. 203, para. 10.4.

[165] Ibid., loc. cit. The relevant paragraph of General Comment No. 23 actually reads as follows: "With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them", *United Nations Compilation of General Comments*, p. 149, footnote omitted.

[166] Communication No. 671/1995, *J. E. Länsman et al.*, in UN doc. *GAOR*, A/52/40 (II), p. 203-4, para. 10.5.

[167] Ibid., p. 204, para. 10.7.

[168] Communication No. R.6/24, *S. Lovelace v. Canada* (Views adopted on 30 July 1981), in UN doc. *GAOR*, A/36/40, p. 166, para. 1.

Although the Committee was not competent to examine the original cause of the author's loss of Indian status in 1970, since the Covenant only entered into effect with regard to Canada on 19 August 1976, it could consider the ***continuing effects*** of that cause and examine their consistency with the terms of the Covenant.[169] The Committee actually considered the communication exclusively in the light of article 27, the relevant question being whether the author, because she was "denied the legal right to reside on the Tobique Reserve, [had] by that fact been denied the right guaranteed by article 27 to persons belonging to minorities, to enjoy their own culture and to use their own language in community with other members of their group.".[170]

Considering the case in the light of the fact that the author's marriage to a non-Indian had broken up, the Committee concluded that she had been denied the legal right to reside on the Tobique Reserve contrary to article 27 of the Covenant.[171]

Although article 27 does not guarantee as such the right to live on a reserve, the Committee held that

> "statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions ... such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be."[172]

It did not seem to the Committee "that to deny Sandra Lovelace the right to reside on the reserve [was] reasonable, or necessary to preserve the identity of the tribe. The Committee therefore [concluded] that to prevent her recognition as belonging to the band [was] an unjustifiable denial of her rights under article 27 ... read in the context of the other provisions referred to."[173]

7. Concluding Remarks

This chapter has undertaken a general survey of major legal provisions at the universal and regional levels that deal with the widespread and multidimensional phenomenon of discrimination. It has also provided examples from international case law of the varied situations that may – or may not – amount to unjustified differentiation, that is to say discrimination. Discriminatory incidents or practices always affect the victim or victims in a particularly negative way because they constitute more often than not a denial of their distinctive human characteristics and thus negate

[169] Ibid., p. 172, paras. 10-11.

[170] Ibid., p. 173, para. 13.2.

[171] Ibid., p. 174, paras. 17 and 19.

[172] Ibid., pp. 173-174, paras. 15-16.

[173] Ibid., p. 174, para. 17. For the response of the Government of Canada, dated 6 June 1983, to the Views adopted by the Committee in the *Lovelace* case, see UN doc. *GAOR*, A/38/40, pp. 249-253.

their intrinsic right to be different among human beings who all have equal value, independently of the colour of their skin or of their origin, gender, religion and so forth.

This chapter has shown that international legal provisions guaranteeing the right to equality and non-discrimination are plentiful. Thus, if discriminatory practices persist around the world, it is not for the lack of legal rules but rather for lack of implementation of these rules in the everyday life of our societies. Inevitably, this failure to implement some of the most fundamental principles of international human rights law at the domestic level also has a negative impact on both internal and international peace and security.

Domestic judges, prosecutors and lawyers have a professional duty to turn existing domestic legal provisions on the right to equality and non-discrimination into truly effective legal concepts and, whenever they are competent to do so, they must also apply, or at least be guided by, international legal rules on these matters. If this were done consistently and effectively, there would be a genuine possibility of slowly turning the world into a friendlier place for all.